DO ENVIRONMENTAL RIGHTS HAVE A ROLE IN THE BRITISH PLANNING SYSTEM?

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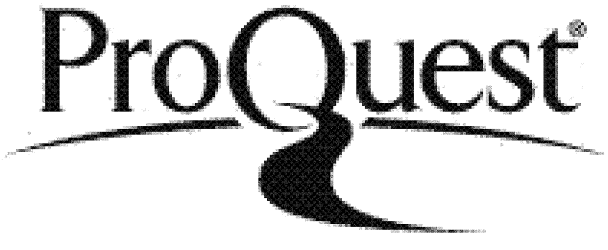

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For Trix, Naoise, Manon and Dáire

"The environment is man's first right"

Ken Saro-Wiwa

"Those who profess to favour freedom and yet depreciate agitation, are men who want crops without ploughing up the ground. They want rain without thunder and lighting… Power concedes nothing without a demand. It never did and it never will."

Frederick Douglas, freed slave and anti-slavery campaigner,
4th August 1857, *North Star*

Abstract

This thesis explores the role of environmental rights in British planning. It reviews the evolution of the concept of human rights and proposes a suitable definition of "rights" to be used in planning research. It discusses typologies and statutory entrenchment of environmental rights, showing that while rights have gained a privileged position in political discourse, the actual worth of rights to a specific realm of public policy has been left unexplored. Within planning, the concept of rights appears to be deployed in four different discourses covering: property; participation; ethics; and rights as a device. The concept of a "rights-frame" for planning is developed to provide a coherent framework for assessing the role of rights. This is used to develop an empirical investigation focusing on one environmental right, third party right of appeal (TPRA) and explores this by reviewing debate over its introduction in the UK and examining TPRA in Ireland.

A key finding is while the value of rights is assumed to rest on their strength as legal instruments, this tends to result in conservative outcomes and that much potential lies in their use as a tool for argumentation and political mobilisation through political discourse. This points to the importance of understanding the social-construction of rights and an appreciation of the context of rights-claims. The thesis proposes that environmental rights should rightly be seen as having four discrete roles in planning, functioning as:

i) A statement of the ethical principles of the planning system, standing as non-derogable objectives of land use regulation;

ii) A tool for promoting public participation by motivating engagement around issues of justice and citizenship;

iii) A heuristic tool for analyzing the outcomes of the planning process, by highlighting discrepancies between rhetorical values and actual outcomes of planning practice;

iv) In a more conventional sense, a tool for legal protection.

Acknowledgements

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Acronyms

ABP	An Bord Pleanála
CBI	Confederation of British Industry
CBIS	Confederation of British Industry in Scotland
CPA	Central Planning Authority
CPRE	Council for the Protection of Rural England
CROW	Countryside Rights of Way Act 2000
CSO	Central Statistical Office (RoI)
DC	Development Control
DED	Dublin Electoral District
DEFRA	Department of the Environment, Food and Rural Affairs (UK)
DIPS	Deliberative and inclusionary processes and procedures
DoE (NI)	Department of the Environment (Northern Ireland)
DoHELG	Department of Heritage, Environment and Local Government (RoI)
ECHR	European Convention of Human Rights
EIA	Environmental Impact Assessment
EJM	Environmental Justice Movement
ELF	Environmental Law Foundation
FoE	Friends of the Earth
FoES	Friends of the Earth Scotland
HRA	Human Rights Act 1998
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
IPPC	Integrated Pollution Prevention and Control
LPA	Local Planning Authority
MSP	Member of the Scottish Parliament
NGO	Non-Governmental Organisation
NI	Northern Ireland
NIO	Northern Ireland Office
NIRSA	National Institute for Regional and Spatial Analysis
ODPM	Office of the Deputy Prime Minister
PRs	Planning Rights
RCEP	Royal Commission on Environmental Pollution
RoI	Republic of Ireland
RSPB	Royal Society for the Protection of Birds
SRB	Single Regeneration Budget
TCPA	Town and Country Planning Association
TPRA	Third Party Rights of Appeal
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNEP	UN Environment Programme
WWF	World Wildlife Fund
WWII	World War Two

Note: The term UK is used to refer to all the planning jurisdictions within this nation state while the term "Britain" is used to refer to the planning jurisdictions of Wales, Scotland and England only.

CHAPTER 1: INTRODUCTION - RIGHTS, PLANNING AND ENVIRONMENTAL JUSTICE

1.1. Introduction

The concept of "human rights"[1] has an enduring influence on the philosophical and political evolution of the western world. "Rights" represent key ethical and organisational principles at the heart of liberal democracy and perform a critical dialectic function in managing the tension between having states powerful enough to protect the freedom, resources and welfare of all of their citizens, yet whose supremacy in turn can offer a lethal threat to life and well-being. As Tomuschat (2003) highlights, the state acts as a guarantor of "rights" and provides the institutions that safeguard property and liberty, yet historically, such authority has also been the source of the most devastating infringements of such "rights".

Land use planning[2], as a function of the modern state, sits within this institutional framework and as such reflects this dialectic tension. Thus the state seeks to regulate land use in a way that balances the long-term public interest with those of individual landowners and citizens, yet the planning system also has a "dark side" where it may act regressively causing inequalities and exerting domination (Yiftachel 1995; Flyvbjerg 1998; Allmendinger and Gunder 2005). There have also been circumstances where planning has been manipulated for short-term political gain, abused for corrupt financial benefit or dominated by particular economic interests, with detrimental consequences for both the environment and community (Huxley 1994; Marcuse 1997; Yiftachel and Huxley 2000).

Despite this, planning theory and practice has, until very recently, paid little attention to "rights" and there has been a tendency to regard them as a primordial feature in the legal/ethical landscape in which planning takes place, rather than exerting an active practical or theoretical influence. Yet the concept of "rights", the

[1] As explained in the forthcoming Chapters the definition of what constitutes "rights" and what the term signifies, is highly contested. Until a more precise definition is provided in Chapter 2, the terms will be used loosely and encased in inverted commas to acknowledge its disputed nature.

[2] "Land use planning" is here referred to the statutory system of regulating development, as facilitated in the UK by Town and Country Planning legislation. It is acknowledged that the term is often used to refer to a wider concept encompassing urban regeneration, rural resources management etc, but in the context of the thesis, the term, often shortened to just "planning", will refer to the narrower statutory process in the UK context.

legal/ethical context of western societies and the theory and practice of planning are all subject to dynamic processes and have changed substantially since the main elements of British planning governance were crystallised in the form of the post-war Planning Acts. Furthermore, recent developments in these areas make a review of the link between planning and "rights" particularly lively.

This thesis will explore these relationships by evaluating what role "rights" could have in planning in GB, particularly in terms of procedural fairness related to the regulation of environmental change. It will be claimed that planning offers an interesting medium to study "rights" because of its role in balancing public and private interests and because any external costs that accrue as a result of its outcomes (e.g. increased pollution or decrease in property value) are left uncompensated and thus can appear fundamentally unjust to those bearing such costs. Furthermore, there are increasing concerns regarding the legitimacy of planning and the image of the profession (Tewdwr-Jones 1999), with some viewing a steady decline from being an optimistic movement for social reform to one that has *"degenerated into a set of institutions for resolving back-fence territorial conflicts and for the design of spaces for circuses"* (Low and Gleeson 1997, p.39). It is therefore proposed that an increased understanding of "rights" issues in planning *may* have some redemptive value by helping to clarify and even influence the distributive effects of land use regulation.

There is also a need to appreciate and justify why such research should adopt a "rights" approach. Thus on moral grounds, "rights"-perspectives (e.g. Mackie 1984) should be distinguished from those based on duties (e.g. Paton 1948; O'Neill 2000), goals or outcomes (e.g. Bentham 1789) or virtue (e.g. Pence 1993). However, of these approaches, "rights" perspectives offer particularly interesting insights into the politics of planning as it appears to be particularly effective in stimulating political action on issues of injustice. Indeed, "rights" are capable of having greater levels of public support, visibility and understanding, certainly compared to political claims based on duties or virtue (Feinberg 1988). Furthermore, "rights" can articulate concerns through an established institutionalised discourse that relate issues of injustice in terms of humanity rather

than objective criteria and is able to link these directly with the responsibilities of the state and its planning function (Hayward 2001, p.119).

In order to further justify and focus this topic, the relationship between concepts of "rights" and planning will be viewed in relation to three evolving issues currently influencing the political and theoretical context for planning practice. First is that there has been renewed interest in "rights" in the UK and a subsequent increase in "rights-talk" (Glendon 1991). Second there has been a growth in ecological and social concerns, which in turn have influenced the moral dimensions of planning and given rise to an environmental justice "frame" for evaluating the outcomes of land use regulation. The final area relates to a renewed interest with the complexity of power relationships within land use planning, particularly related to the practice of public participation.

Each of these issues will be briefly described as a way of establishing the context for the main research question addressed in this thesis.

1.2. Bringing "rights" home.

Although the next Chapter will explore in detail the universal appeal and philosophic basis for the concept of "human rights", it is significant to note that there has been an increase in international law that seeks to protect the individual "rights" of citizens and a broadening of the concept of "rights" from the preoccupations with political "rights" (e.g. freedom of speech) to those related to social, cultural and economic issues (Weston 1984; Cook 2002). While "rights" formed a rallying cry for the demands for civil "rights" and the upsurge of radicalism in the 1960s, such discourses then went into decline (Mitchell 2003). Although out of favour in radical and progressive politics, the last decade has seen a growing number of international declarations and conventions[3] that articulate environmental standards and procedures in terms of "rights". One consequence of this has been that "rights" established at the international level have begun to have a more active influence on the British politico-legal system as the "rights" agenda has begun to encroach upon issues that have not traditionally been framed in such

[3] For example the *UN/ECE Aarhus Convention on Environmental Rights* (1998), and the *Declaration of Principles on Human Rights and the Environment (The Ksentini Report, 1994)*.

a way in the UK's moral and legal vocabulary. This has contributed to the fact that, often for the first time, those matters within the realm of planning, such as access to environmental information, have been increasingly viewed as "rights" issues, thus increasing their rhetorical appeal compared to when seen as just a policy or regulatory issue.

Further impetus to this trend has been generated by the *Human Rights Act 1998 (HRA)*. This has enabled cases under the *European Convention of Human Rights (ECHR)* to be heard in the UK courts and introduced a new model of "dialogue" between the executive, legislature and the judiciary concerning compatibility to the *ECHR* (Klug 1999). While the Home Office's claim that the HRA would "bring rights home" (the title to the Act's White Paper) is not wholly justified by the fact that UK law has been subject to the provisions of the ECHR since 1951, it has lowered the barriers to judicial access and stimulated a sharper focus on compatibility of domestic law. This has meant that fields as diverse as immigration, internal security, welfare of ethnic minorities, parental duties and even speeding fines have been subject to judicial challenge under "rights" claims.

Planning has witnessed a particularly high level of legal debate in the wake of the HRA, where a series of high profile cases (e.g. *Alconbury*, see Chapter 5) have begun to define the delicate balance between competing "rights" affected by the planning process (e.g. Corner and Brown 2002). Although it is slowly emerging that the impact of the HRA is not having the dramatic impact as was initially envisaged, it has succeeded in refocusing planning authorities on how they can manage the relationship between individual and collective interests (Grant 2000a; Crow 2001), particularly at the local level (Stockhall and Thomas 2001). Although the courts are increasingly becoming involved in the substantive effects of decisions (Stookes and Upton 2002), most legal judgement and academic debate have focussed on how "rights" are reflected in matters of procedural justice. Fairness in procedure is particularly important to the functioning of the British planning system[4], due to the discretionary approach to awarding development

[4] For example Grant (1982) notes that *"... it is the function of planning law not to prescribe the substance but to lay down the procedures though which conflicting views may be presented and assessed"* p.7.

rights, an emphasis on quasi-judicial process and the procedural focus of ethical concerns (Campbell and Marshall 1999).

A further consequence of the growth of political and judicial activity on "rights" issues has been increased "rights-talk" at many different levels of UK society. This is perceptible in Government discourse (e.g. Home Office 2004) and has a growing presence more generally throughout the mass media. The popularisation of "rights-talk" has tended to be polarised around two common responses; labelled as "*optimistic*" and "*pessimistic*" or "*sceptical*" views (Blomley 1994), thus:

> *"for optimists, rights acquire meaning and progressive potency when deployed in community settings as mobilizers and political yardsticks; for the pessimists, it is the circulation of rights within the juridicial domain that ensures that their meaning is counter –progressive"* (op cit, p.413).

These two views of "rights" are also reflected within planning literature with authors such as {Hugh} Ellis (2000) offering optimistic accounts of the benefits of an enhanced "rights" regime, while the discourses on NIMBYism and the ability of certain groups to dominate the planning process (e.g. Pennington 2000; Hillier 2003b; Davis 2004) tending to reflect the more sceptical view of "rights".

The fact that the "rights" debate has an increasing presence in many discourses related to British public life adds an important dimension to its impact on land use regulation, suggesting that those involved in the planning system will be increasingly framing their interests in a way that takes their "rights" as a reference point. Thus even if the legal impact of the HRA can be shown to be subdued, the broader increase in "rights-talk" may be having a significant impact on the way in which stakeholders construct their understanding of, and engagement with, the planning system. Although not explicitly addressed in these terms, a number of planning academics have expressed concern about how such issues may become entwined in issues of effective and fair public participation (e.g. Campbell and Marshall 2000; Davies 2001).

Recent years have therefore led to subtle shifts in the real and envisaged relationships between private and collective interests within planning. "Rights" are now used as a common rhetorical claim in the British planning system, yet are

employed in a diverse and seemingly incoherent set of contexts. The increased use of "rights-claims" in planning does not appear to have been subject to any critical analysis and its consequences left unexplored. This research gap therefore offers one of the motivating factors for the questions pursued in this thesis.

1.3. Sustainable development and the environmental justice paradigm

A second dimension to the changing relationship between the concept of "rights" and planning has arisen from increasing ecological concerns and the adoption of sustainable development as a societal goal. Over the last 10 years, environmental issues and the wider debate on sustainability have become profoundly influential in planning, with sustainable development now appearing as an operating principle or justification for almost every aspect of planning practice (Raemakers 2000; Layard, Davoudi et al. 2001; Naess 2001; Owens and Cowell 2002). This impact has been witnessed through a number of emergent policy areas (e.g. those related to renewable energy, pollution prevention and climate change issues) and methodological innovations (e.g. Strategic Environmental Assessment, Quality of Life indices and sustainability appraisals). While some of these tools may be encroaching on "rights" issues by legitimating otherwise marginal interests or by beginning to define minimal standards that could evolve into judicially-recognised environmental norms (Collins-Chobanian 2000), it is the implications for equity and morality that will be particularly highlighted in thesis.

Although it needs to be acknowledged that the concept of sustainable development remains contested (e.g. Redclift 1987; Beckerman 1994), the most widely accepted definition provided by the Bruntland Report (WCED 1987) explicitly and implicitly recommends new procedural and substantive social and economic "rights"[5]. It has thus been suggested that:

> "... *the discourse of sustainable development has enlarged the consideration of rights through its explicit attention to the rights of future generations and of present-day socially marginalized groups*

[5] For example, Annex 1 of the Bruntland recommends a set of legal principles for sustainable development, the first of which declares, "*All human beings have the fundamental right to an environment adequate for their health and well-being*".

and also to the need to consider other (non-human) dimensions of the natural world as having rights to continued existence"
(Haughton 1999, p.232)

Haughton also identifies five equity principles, which planning needs to encompass if it is to move towards sustainable development, namely: intra-generational equity; inter-generational equity; geographical equity; procedural equity; and inter-species equity. Each of these in turn opens up substantive issues when considered as operative or philosophical principles[6]. These also pose major practical and ethical difficulties for a field such as planning, which has largely relied on utilitarianism to guide the appropriateness of its outcomes (Alexander 2002; Campbell and Marshall 2002; Moroni 2004).

Not withstanding these outstanding theoretical questions, such issues are further contextualised by the renewed interest in questions of values, ethics and equality in land use planning (e.g. Beatley 1994; Thomas 1994; Merrifield and Swyngedouw 1997; Sayer and Storper 1997; Campbell and Marshall 1999) which have drawn in questions of "rights" and wider conceptions of justice emerging from postmodernism (e.g. Young 1990; Harvey 1992; Kymlica 1992). When related to the sustainability agenda, such justice questions have emphasised the inextricable links between human equality and environmental quality (Agyeman, Bullard et al. 2002). It has thus been shown that at all geographic scales, those areas with less equality of income, lower levels of literacy and fewer "rights" tend to have lower environmental quality (Torras and Boyce 1998; Boyce, Klemer et al. 1999). Furthermore, where there are acute environmental problems, it is the poor that are disproportionately affected (Williams 1998). The joining of environmental and social agendas has become associated with the paradigm of environmental justice (Taylor 2000), which demands that everyone should have the same protection from, and access to, decision-making and policy-formulating processes governing the environment (Faber 1998).

[6] For example, see Norton (1982) for the case of the rights of future generations and Regan (1983), Eckersley (1995) and Benton (1997) on the rights of non-human species. However new rights, in the context of sustainability are now articulated as part of the Government's vision for Sustainable Communities, see:
http://www.odpm.gov.uk/stellent/groups/odpm_control/documents/homepage/odpm_home_page.hcsp accessed 3/5/05.

The environmental justice movement (EJM) has evolved over the last 30 years in the US (Capek 1992; Bullard 1999; Taylor 2000; Morello-Frosch 2002), with increasing resonance and rhetorical uptake in other parts of the globe over the last decade, including the UK and particularly Scotland (e.g. Walker 1998; Agyeman 2000; Scandrett, Dunion et al. 2000). The nature of the EJM has been thoroughly debated (e.g. Capek 1992; Hofrichter 1993; Faber 1998; Sandweiss 1998; Bullard 2000; Taylor 2000), so does not need to be discussed here and is best understood as a conceptual construction or interpretative "frame" that has enabled a strong mobilisation for social change. This environmental justice "frame" is built around the very concept of "rights" (Agyeman 2000), and specifically the notion that "*the rights of toxic contamination victims have been systematically usurped by more powerful social actors and the "justice" resides in the return of these rights*" (Capek 1992, p.8). The specific rights demanded include those related to access to environmental information; rights to hearing; participative rights and rights of compensation (Capek 1992). Indeed one could claim that environmental *injustice* is ultimately a reflection of the absence of effective "rights" or the inability of certain groups to enforce existing "rights". Furthermore, while the concept of NIMBYism has been held up to illustrate how such "rights" could be used in a socially regressive way to distribute environmental costs, environmental justice seeks to utilise "rights" as a basis of collective action to prevent environmentally damaging activity in the first place (Faber 1998) and thus hasten the transition to a sustainable society.

The new ethical and justice agendas that arise from the sustainable development paradigm have thus contributed to a recognition that public and private institutions of regulation, accountability and goal-setting amount to the need for new forms of governance (Lafferty, 2004). Indeed, Redclift (2005) has noted that consideration of such governance issues has led to a shift in the original preoccupation of sustainability discourse with *needs* to those of *rights*. He also notes that this has brought with it a number of difficulties, not least a tendency to engage such debates at high levels of abstraction. This appears to be the case in the field of land use regulation – there is a recognition that planning governance should be reformed to reflect the demands on sustainability, rights and justice, but there is a lack of awareness of how these principles can be operationalised.

Therefore, the growth in environmental concern, the acceptance of sustainable development as a societal goal and the emergence of the environmental justice movement have provided a new ethical and governance context for planning, posing particular challenges for the utilitarian model of environmental decision-making (Hartley 1995). The implications of this evolving context for planning is still being evaluated and creates a further dynamic in the relationship between the concept of "rights" and the practice of planning under investigation here. This is further supported by the claim that "*There is a great (and under-researched) potential for the notions of environmental justice, human rights and sustainability to permeate environmental regimes*" (Agyeman, Bullard et al. 2002, p. 86-87).

1.4. Power, participation and planning theory

A further issue linking "rights" with planning relates to recent academic debates concerning power and participation. The main context for this has been shaped by the theoretical position established by Collaborative Planning (e.g. Forester 1989; Healey 1992b; Healey 1993; Healey 1996; Healey 1997; Forester 1999; Healey 2003). This has critically engaged issues of power, agency and discursive democracy in an attempt to map out a normative vision for planning based on the ideas of Habermas (1984). Healey's (1997) proposals for Collaborative Planning have included the development of an institutional design for planning that identifies a specific role for "rights" and notes that the ways in which they are formally specified, distributed and redeemed can have a significant effect on structuring power relations and governance practices. In her view, "rights" may support or distort what specific stakeholders seek to achieve through policy processes and she uses the absence of constitutional third party "rights" as an example of how the balance of power in planning can be tipped in favour of property interests (op cit, p.286).

While the paradigm of Collaborative Planning has become a dominant rhetoric in planning practice (e.g. Malbert 1998; Tewdwr-Jones and Thomas 1998; Harris 2002) and subject to much theoretical elaboration (e.g. Sager 1994; McQuirk 2001), it has also attracted much critical comment, particularly on how it has dealt

with issues of power and consensus. Tewdwr-Jones and Allmendinger (1998) and Richardson (1996), amongst others, have suggested that the notion that consensus can be achieved in the planning process is something of an utopian project, leading to calls for a more Foucauldian analysis of planning practice (Flyvbjerg 1998; Fischler 2000; Richardson 2002). In turn, this has led to the suggestion that, however desirable consensus may be, a more appropriate description of reality would be one of agonistic pluralism, where conflict is never resolved (Hillier 2003a; Pløger 2004).

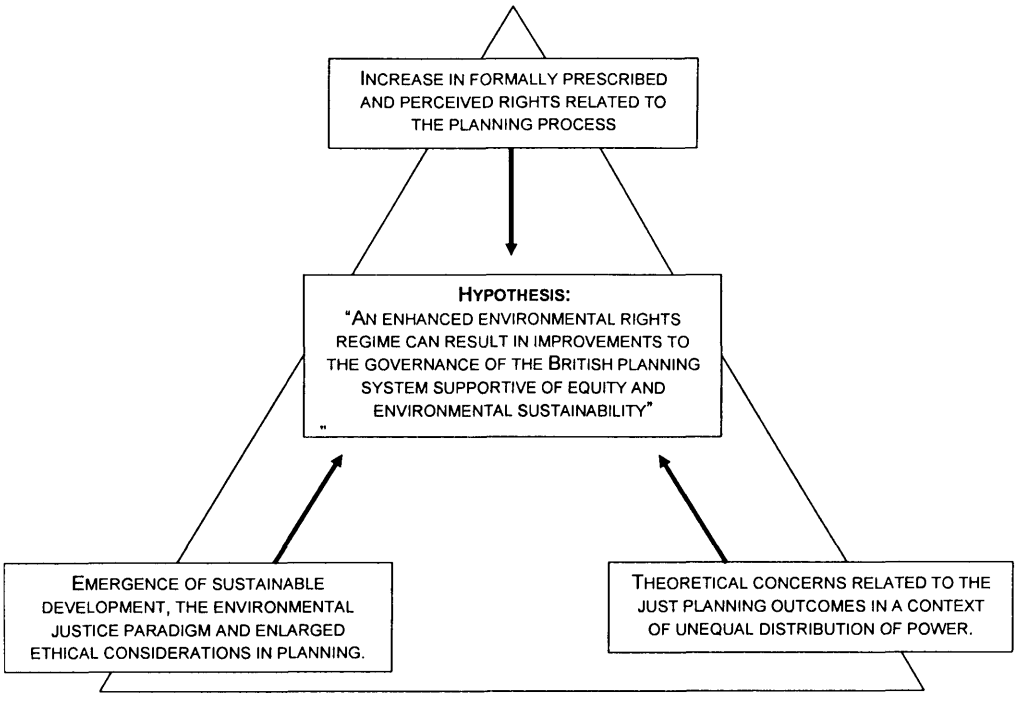
These observations have led to a more general critique of planning theory that focuses on how power is *actually* used in planning, rather than how we would *normatively* wish to see it being used (Friedmann 1998; Yiftachel and Huxley 2000). This point is key to understanding the role of "rights" in planning. On the one hand there is the persuasive (normative) belief that "rights" are liberating and central to the fair operation of western democracies. On the other, the claim that "rights" may have the effect of supporting existing exploitative social relations (e.g. Tushnet 1984; Benton 1993) and that the promise of formally prescribed, equal "rights" may be delusory in societies racked with deep inequalities of political power and economic wealth.

A number of planning academics have suggested that an enhanced "rights" regime may therefore differentially benefit those already having disproportionate power in the planning system, by making public participation increasingly reliant on knowledge and the skills of the more highly educated (Benveniste 1989; Campbell and Marshall 2000; Davies 2001; Hillier 2003b). This point is central to the investigation in this thesis and draws on the need to place the wider debate on the worth of rights in the context of whether they sustain or challenge existing power structures (Stammers 1993). There are, however, no substantive case studies that have specifically examined how and why "rights" are claimed in particular instances of planning activity, which would begin to throw some light on this question. It is argued here that such studies are necessary to provide a robust evaluation of the impact of "rights" on the planning process and in turn assess what roles if any, "rights" may play in planning practice. Therefore, these broader theoretical debates over power and the contribution of participation in achieving

just planning outcomes offers a final dimension to the issues of "rights" in planning, as it is being addressed in this thesis.

The three perspectives highlight the current relevancy of examining environmental "rights" in a planning context and will be retuned to throughout the thesis. It will also be shown that while there is a slow awakening to the possibility of "rights" in planning research (e.g. Healey 1997; Ellis 2000; Grant 2000a Crow 2001; Alexander 2002a), existing work has tended to take either a strictly normative view of "rights" or drawn on legal debate to explain the impact on planning practice. Therefore at a time when rights have growing currency, there appears little research that provides any empirical examination of how they are used and impact on everyday practice. Indeed, without such research we can only guess at the types of roles "rights" may play in planning. This therefore identifies the contribution of the thesis as exploring the nexus between the increase in "rights-talk", environmental justice and issues of power in planning by taking examples of real-life instances of claims-making of "environmental rights" in order to provide a more generalisable conclusions on the likely role of "rights" in the British planning system, as shown diagrammatically in Figure 1.1.

Figure 1.1: Summary of research context and hypothesis



1.5. Hypothesis and research objectives

The approach to this research is an optimistic one, as it is initially suggested that "rights" could offer a progressive influence on the outcomes of planning. This is specifically prompted by the papers by Torras and Boyce (1998), Boyce, Klemer et al. (1999) and Boyce (1994), which take a macro/statistical perspective on "rights" to suggest that there is a strong link between "environmental rights" and equity at a national scale. Torras and Boyce (1998) discuss the existence of an environmental Kuznets curve, where environmental quality initially worsens and then improves as income increases. This suggests that this is the result of an induced policy response with higher environmental standards being demanded as prosperity rises. The outcomes of such policies are shown to be heavily reliant on the distribution of power within each country – those nations with more equitable distribution of power have higher environmental standards and vice versa for those with a less equitable distribution. In measuring "power" they take a number of variables, including per capita income, literacy and *"political rights"*. They suggest that "rights" provide a particularly significant variable in determining environmental standards, especially in lower income countries. This analysis has been extended to a state level analysis in the US by Boyce, Klemer et al. (1999), who suggest that where there are greater inequalities in the distribution of power (with "rights" as a key variable), more powerful interests are able to avoid environmental costs at the expense of those with less power. Where power is more equally distributed they suggest that environmental costs are more difficult to avoid at the expense of other parties, resulting in stronger environmental policies and less pollution. This therefore suggests that:

> *"..democracy–strengthening measures - including public participation, right-to-know laws, and accountability to local communities - are important elements of environmental policy. Such measures can entail short-term costs. Public engagement can complicate the lives of decision-makers, and it sometimes produces slower results that a top-down approach. Efforts to strengthen democracy can yield long-run environmental benefits however, by redressing inequalities of power that invite pollution beyond socially desirable levels."*
>
> (Boyce, Klemer et al. 1999, p.139).

Although this work does not consider the way in which "rights" actually foster equity and sustainability, the findings appear to contradict claims that enhanced "rights" and participation may disproportionately benefit the wealthy and articulate (Benveniste 1989; Campbell and Marshall 2000). This clearly has direct relevance to the research being pursued here, by supporting the position that "environmental rights" could be a mechanism for promoting engagement and accountability (Healey 1997; Ellis 2000). As such it has been claimed that by their very nature "environmental rights" would redress inequalities of power by the fact that such "rights" are universally given and, subject to the issues over access to justice, can be universally claimed. Indeed, Stammers (1993) suggests those "rights" that protect from existing power relations should be seen as justifiable "human rights" and those that sustain existing power relations should not. This suggests that if the links between power inequality and environmental protection uncovered by Boyce, Klemer et al. (1999) and Torras and Boyce (1998) can be assumed to be true *and* if "environmental rights" can be universally claimed, such "rights" could be shown to have an impact on both environmental justice and hasten the transition to sustainable development. There is however little empirical evidence to currently back such claims.

Following from this, as noted in Figure 1.1., the objective of the thesis can be summarised in as being to test the following hypothesis:

"An enhanced environmental rights regime can result in improvements to the governance of the British planning system supportive of equity and environmental sustainability"

In seeking to test this, the thesis will also address the following specific research questions:

i. How has the concept of "environmental rights" emerged from the panoply of "human rights" thought and is there a specific definition of "rights" that can be used in planning research?
ii. What theoretical, ethical and ideological perspectives on "rights" have been articulated in planning literature?
iii. What "rights" currently exist in British planning, can any of these be regarded as "environmental rights" and what values do they seek to protect?
iv. Taking a case study of an enhanced environmental rights regime, what impact can this be seen to have on the outcomes and governance aspects of planning practice?

v. What are the governance implications of this for British planning and how is an enhanced environmental rights regime likely to affect equity and sustainability aspects of the British planning system?

In tackling these questions it is suggested that a contribution to knowledge will be made in a number of areas including;

- An improved understanding of the role and position of "environmental rights" in planning theory;
- An enhanced understanding of the links between abstract political theory and the operation of "environmental rights" in the real world;
- A better understanding of the role of "environmental rights" in overcoming issues of environmental injustice and inequality in the planning process;
- The development of a "rights" approach as an analytical tool in planning research and an understanding of the methodological approaches to investigating "rights" and their "worth" in everyday life.

1.6. Research assumptions

In establishing these objectives, it is acknowledged that the thesis aims to address a number of very broad theoretical questions and that these can be better defined by clarifying the assumptions that will underlie the research approach. The articulation of such assumptions also assist in defining the specific scope of the research and, for reasons of focus, acknowledge some important related questions that cannot be fully debated in the thesis.

The first key assumption is that at this historical juncture the key political struggles that will inform planning will be debates concerning reform within a framework of liberal/social democracy and capitalism. Therefore more radical philosophies, such as Marxism or Deep Ecology, do not have normative prominence in the thesis, but may be discussed where they offer an apposite critique of particular issues. Furthermore, even under these political constraints, it will be assumed that "rights" are an area worthy of legal, political and moral support and *may* offer (under certain conditions) a way of extending justice within the arena of planning. Indeed, it has been claimed that the strict enforcement of existing human "rights" provisions "*would entail massive and in some ways, revolutionary transformations in the political-economy of capitalism*" (Harvey 2000, p.90). This is supported by the fact that "rights-talk" has strong rhetoric appeal, which although often presented as a confused blend of moral and legal issues, can become an

important "framing" concept that can be empowering in itself. This has prompted Redgwell (1996) to suggest that, should the "rights" perspective be abandoned, there are few other alternative vocabularies through which similar motivations can be sparked. Yet while, "rights" may offer some potential to open up paths for more progressive politics, it should be acknowledged that it is unlikely that "rights" can deliver social and environmental justice on their own and must be seen as part of a broader approach to social and ecological transformation in the context of liberal/social democracy.

A further assumption is that this thesis is not aimed at contributing to the voluminous philosophy of "rights", rather than attempting to understand their functioning as political and social constructs in the real-world. While Chapter 2 acknowledges the presence of competing ethical categories (e.g. consequentialist and duty-based ethics) that have a critical bearing on how we define and judge the utility of "rights", the thesis will not offer a prolonged engagement with such issues (see Waldron 1984). Following from this, "rights" will not be seen in a metaphysical sense (for example as is implicit in Kant 1948), but it will be assumed to have no independent meaning outside specific socio-political and cultural contexts (e.g. Harrison 1987). It is also acknowledged that while both substantive and procedural "rights" have some bearing on the role of planning, the empirical research will be focused primarily on instances of procedural "rights" claims and the reasons for this is discussed in later Chapters, with some conclusions also being applicable to substantive "rights".

While institutionalised "rights" exist at a variety of geographic scales, given that the focus of this research is land use regulation, which primarily operates at a national and sub-national level, the international dimension of these issues (e.g. those related to global environmental injustice, see Low and Gleeson 1999) will not be explicitly considered. Therefore the main rights-obligation relationship under consideration will be that of the broadly-defined citizenry as holders of "rights" and planning authorities (local and central) as the holders of any correlative obligation. The consideration of the impact on "rights" on the broader apparatus of the state such as law enforcement and other forms of environmental regulation will therefore be minimal. Furthermore, while "rights" may have universal and third

party effects (i.e. *Drittwirkung*[7]), it will be the "special relationship" between the planning authority and citizenry that will be of prime focus.

As has been made clear above, the "rights" that will be considered will be those related to environmental issues. The source and scope of such "rights" will be explored in detail in Chapter 2, but it should be made clear here that the thesis will take into account only anthropocentric "environmental rights" rather than those related to non-human species, although these are discussed very briefly. This therefore avoids what O'Neill (1997, p.140) calls the "*Sisyphean metaphysical labours*" of showing there are environmental values embedded in the natural world, implied by eco-centric approaches. Furthermore, while it has been acknowledged above that inter-generational "rights" provide an important consideration within the sustainable development paradigm (see Norton 1982) such "rights" will not be considered directly in any detail in this thesis.

A detailed discussion of the overall research design is given in Chapter 4. It should be acknowledged that a study into the role of "rights" faces specific methodological difficulties derived from the fact that "rights" have agency both as legal instruments and framing concepts. This suggests that very different techniques have to be adopted to measure these two effects and for this reason the thesis is purposefully methodologically pluralistic and encompasses both social constructionist and quantitative statistical analysis. However, both forms of analysis are nested within the case study approach – where the example of third party right of appeal (TPRA) in the Republic of Ireland (RoI) is taken as a heuristic instrument (see Eckstein 1970) from which broader observations on the role of "rights" in planning will be derived. A key methodological assumption therefore rests on the validity of the case study as a basis for making generalizable theoretical conclusions (see Chapter 4).

1.7. Outline of the research approach

In order to appreciate how the thesis builds up its argument, an outline and summary of overall structure is given here and summarised in Figure 1.2.

[7] *Drittwirkung*, or third party effect, refers to where an obligation to respect fundamental rights that is initially imposed on the state, is applied to certain private relationships.

This Chapter has established the objectives of the study, justified it as a research topic and outlined the research approach. Chapter 2 will seek to explain and define the concept of "rights", offering a working definition of this concept, which will be used throughout this study. The second Chapter will also discuss the links between "human rights" and the environment, particularly by evaluating the legitimacy and coherence of the term "environmental rights".

The third Chapter relates this discussion to the realm of land use regulation by reviewing how the concept of "rights" has been used in planning. It then explores the potential for adopting a "rights-frame" as a heuristic model for understanding the role of "rights" in planning and defines an appropriate epistemological approach for the study. Chapter 4 describes the research design for the thesis and distinguishes a "rights" approach from other measures for evaluating interests in planning.

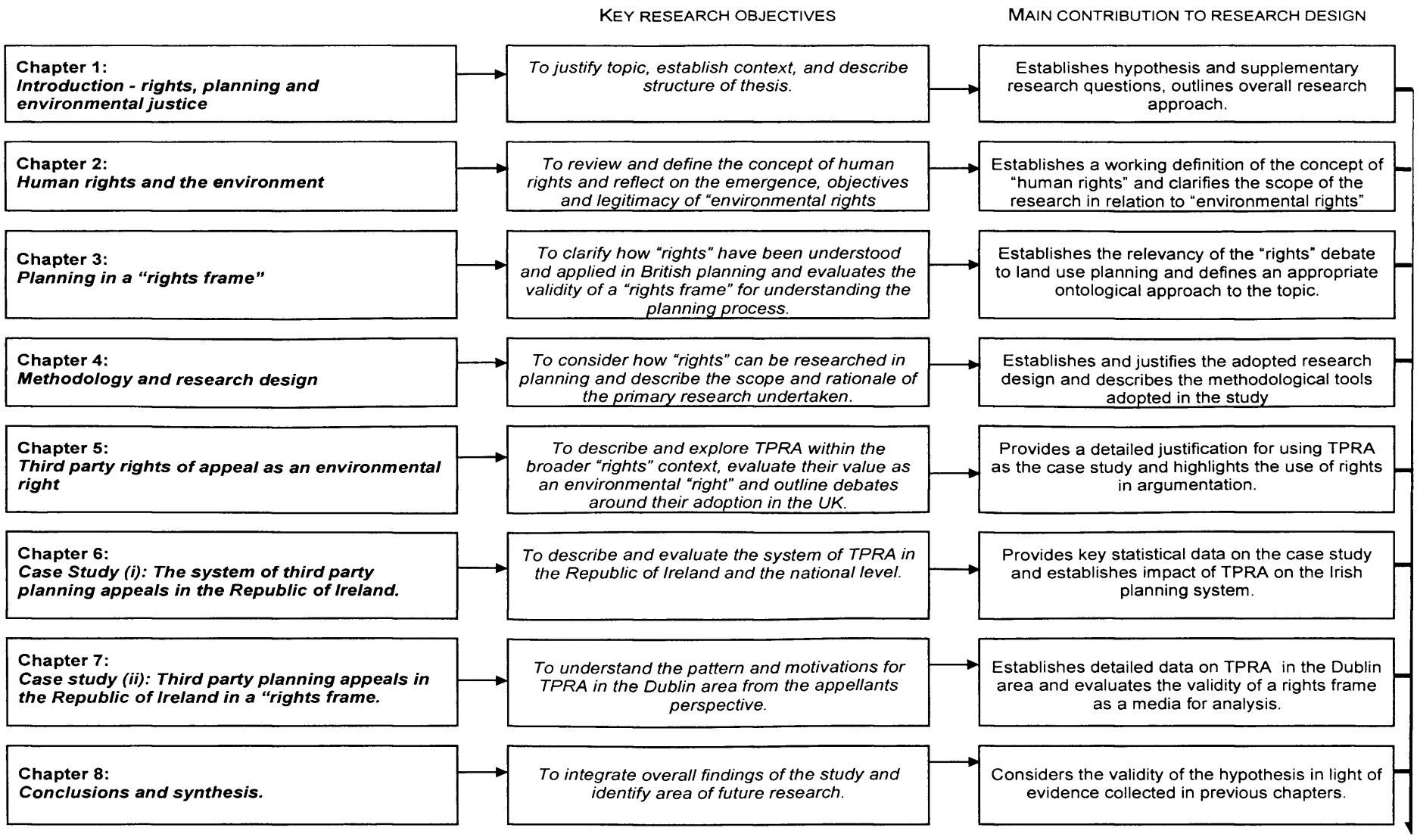
Chapter 5 establishes the context for the main case study by describing why TPRA should be considered as "environmental rights" and discusses the symbolic and procedural value of such "rights". The Chapter also reflects on the value of a "rights-frame" by assessing the discourses of third party "rights" adopted by analysing a range of discourses that engage with procedural environmental rights, thus facilitating an understanding of how such issues are handled in the context of British planning.

Chapters 6 and 7 represent the main empirical section of the thesis and evaluate the system of TPRA in RoI. Chapter 6 describes the procedures and scope of third party appeals in RoI and presents a statistical profile of the level, outcomes and other features of these appeals. Chapter 7 goes on to elaborate the detail of the Irish system of TPRA by assessing the system from the point of view of the appellants. It thus reviews the socio-economic profile of appellants and presents a detailed picture of all the TPRA made in Dublin County during 2002. This is complemented by a detailed examination of the attitudes and motivations of appellants in the Dublin area during that year.

The final Chapter attempts to integrate the findings of the previous Chapters in order to evaluate the hypothesis described in section 1.4. An emphasis is placed on clarifying any conclusions of more general nature and considers whether "rights" have a coherent, practically viable and worthwhile role in the British planning system. The thesis concludes by outlining an agenda for future research on the role of "rights" in planning.

The thesis also includes a number of Appendices, including a more detailed description of the methodology deployed and source material for the discourse analysis.

Figure 1.2.: Summary of thesis structure and research design



CHAPTER 2: HUMAN RIGHTS AND THE ENVIRONMENT

2.1. Introduction

"Human rights" have provided persuasive moral backing for some of the most important political movements of the last century and continue to be a powerful shaping force in western liberal democracies. Through the process of globalisation (and indeed, western political imperialism) "human rights" have become virtually universally accepted as a fundamental regulative principle for state organisation, leading Weissbrodt (1988) to suggest that international "human rights" are the first universal ideology. It has even be claimed that "human rights" represent a victory in the ideological battles of modernity, with Douzinas (1996) suggesting that:

> *"Human rights are the ideology after the end, the defeat of ideologies, or to adopt a voguish term the ideology at the 'end of history'"* (p.115.)

Although it pays to be cynical about such claims and the rhetoric surrounding "rights-talk" (Glendon 1991), particularly in the context of sustained failures to enforce accepted notions of "rights" (for example in Guantanamo Bay, the former Yugoslavia or Rwanda), its world-wide hegemony is undeniable. Yet this presumed universalism obscures the fact that the concept of "human rights" is racked with tensions and ambiguity related to their worth, meaning and moral legitimacy. For example, key distinctions that will be discussed below are the competing categories of legally established rights, moral (or natural) rights and ideological rights, the latter being primarily political constructs (Freeden 1991). It is thus relatively easy to explain what "human rights" are intended to achieve in a teleological sense, but somewhat more difficult to pinpoint a definitive meaning or moral justification for their existence. As "environmental rights" are generally accepted as being derivative of "human rights" *per se*, they suffer from similar ontological difficulties.

Such ambiguity is not conducive to a focussed analysis of the role of "environmental rights" in planning, and while this Chapter will not offer solutions to these wider

philosophical questions, it does aim to clarify in what sense "rights" will be taken forward in the thesis[8]. The Chapter will therefore begin with a brief review of the origins of the concept of "rights" and discuss how this has evolved into the "rights" regime we have today. From this rudimentary review of the history of "human rights" an attempt will be made to identify a working definition of "rights" that can be used in the rest of the thesis. This Chapter will then move on to the more specific issue of "environmental rights" and will review their emergence, scope and the extent to which they now exist in national and international law.

2.2. The origins and philosophical basis of "human rights"

Just as there are infinite meanings inferred by the term "human rights", so there are there are a multitude of historical interpretations of their origin. The foundations of such "rights" have thus been traced in terms of their relationship to the modern state (Tomuschat 2003), the ideas of key thinkers (Freeden 1991), philosophical traditions (Shestack 1998), legal developments (Weissbrodt 1988) or a chronological link to political events (Weston 1984; Shorts and De Than 1998).

There is however some consensus that the specific term "*human* rights" has only become established in the last 60 years and many historical accounts begin in the post-war era (e.g. Buergenthal 1997). Yet the concept has its roots in ideas such as "natural rights" or the "rights of man", which have been used for centuries to describe similar values. According to Weston (1984) the genealogy of these ideas can be traced to Greek Stoicism, which held that human conduct should be brought into harmony with the law of nature. This then established a tradition of natural law[9] that was handed down via Plato, Aristotle and Socrates, through Roman law to the Middle Ages. Until then natural law had been primarily defined in the form of *duties* and thus recognised the legitimacy of slavery and excluded today's key ideas of liberty and equality. However the late Middle Ages saw a shift from natural law as *obligation* to

[8] Once this has been achieved, the inverted commas surrounding the term "rights" will be dropped, indicating the transition from its use as an ambiguous term to one with a more precise meaning.

[9] This can be briefly defined as being law that is *"...normative as well as natural, that is to some principle or principles of objectively right conduct, the rightness of which is immanent in human nature or the nature of things"* Miller (1987).

natural law as *"rights"*, as witnessed in the writings of St. Thomas Aquinas, Hugo Grotius and events such as the Magna Carta (1215), the Peace of Westphalia (1648) and the English Bill of Rights (1689). These all claimed that human beings were endowed with eternal and inalienable "rights".

The Age of Enlightenment saw the elaboration of a modernist conception of natural law, particularly the idea of the "social contract" developed by John Locke where, to avoid the hazards of nature, men and women would mutually agree to form a community under which they would retain the natural "rights" of life, liberty and property, protected by the body politic. Natural law was further elaborated by the French Philosophes, such as Montesquieu, Voltaire and Rousseau, who influenced the American and French Revolutions and which in turn prompted claims for "rights" by the very fact that political absolutism has previously denied them (Cranston 1973). The natural law basis of "rights" had many 19th century detractors, among them Bentham[10], Burke, Hume and Marx so that by the early 20th century there were few theorists that would defend "the rights of man" on the basis of moral law, yet nevertheless there was diverse philosophical support for the general idea of protecting the individual against the tyrannies of the state. Indeed, Shestack (1998) has traced the contribution of diverse philosophical traditions to the discourse on "human rights"[11]. These traditions have helped shape the modern notion of what should be accorded the status of "human rights" and added to the richness and contested nature of the concept. As a result there has been a constant re-evaluation of the moral and/or legal basis of "human rights", which has given rise to a multitude of "rights" theories (e.g. see Waldron 1989). Shestack (1998) has also attempted to classify these into six types of modern "human rights" theories, some echoing the philosophic origins of the concept:

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[10] Jeremy Bentham (1824) famously said *"Right is with me the child of law; from real laws come real rights, but from imaginary law, from "laws of nature" come imaginary rights .... Natural rights is simple nonsense; natural and imprescriptible rights, rhetorical nonsense – nonsense upon stilts"*.

[11] In addition to natural law, these include *Religion*, (i.e. a common humanity under a deity); *Classical positivism (i.e.* where all authority is seen as stemming form the state); *Marxism (*despite criticisms of the concept of "rights" this recognises the value in economic and social "rights", at least prior to the formation of a communist state); a *Sociological Approach,(e.g. attempts to* reconcile the law with the facts of human life in society); *Utilitarianism (i.e.* notions of "rights" as a basis of their outcomes, see section 3.6.2).

- *Rights based on natural rights,* in a post-war revival of natural "rights" theory (e.g. Macdonald 1984) it has been suggested that the key element of morality is the capacity for the individual to take responsibility as a free and rational agent. It follows from this that some values define a minimum basis for human treatment and that these values should be central to the very notion of human kind, rather than being an artificial convention. As such these values should be upheld as "human rights". This theory can also be used to make claims for environmental "rights", in that "rights" that preserve the integrity of the person (such as protection against harmful pollution) flow logically from fundamental freedoms and autonomy (Shestack 1998; Westra 1998).
- *Rights based on justice.* Rawls' (1971) theory based on the premise that "*Justice is the first virtue of social institutions*" (p.3) has been used to develop a theory of rights, for which human "rights" will be an end. His theorising produces an abstract notion of liberty and equality not easily applied to the non-metaphorical world, but which has provided a strong and comforting moral justification for "rights"-based system of government under a participatory structure.
- *Rights based on a reaction to injustice.* This approach is based on the work of Cahn (1949) who developed the premise that while there may be universal truths about justice, it is often issues of injustice that arouse citizens into action and hence can form a more robust basis for "rights"[12].
- *Rights based on dignity.* This has both secular (e.g. McDougal, Lasswell et al. 1980), and religious dimensions, which share the belief that a system of "rights" can be built from the paramount value to protect human dignity, although this does face criticisms in that its practical application offers no priority between issues such as health, respect, enlightenment of other factors that contribute to "dignity".
- *Rights based on equality of respect and concern.* Dworkin (1977) has attempted to reconcile natural "rights" theory with utilitarianism by suggesting that preferred status should be given to protecting every citizen's liberties from some of the "external preferences" that may be used in the utilitarian calculation and which

[12] A similar perspective has been taken by Low and Gleeson (1999) in their consideration of environmental "rights", suggesting that "*Rights are not transcendental universal norms for behaviour handed down from on high but human discoveries about our human condition made in the course of human conflict*" (p.30).

may reflect prejudice and discrimination. He suggests once this is established, a utilitarian outcome would be fair and would protect both equality and liberty. Dworkin therefore sees "rights" as political trumps held by individuals to be played when a policy aimed at promoting welfare is some how injurious to them.

- *Theory based on Cultural Relativism.* Proponents of cultural relativism suggest that any principles used for judging behaviour are relative to the society in which they are raised and as all cultures are morally equal, there are difficulties in identifying any principles of universal human "rights" (e.g. Howard 1993). An important criticism to this view is that most human rights abuses are not legitimately associated with an authentic culture, but with authoritarian rulers.

This brief review of the historical origins and philosophical diversity of "rights" theory has been included in order to portray the complexity and competing intellectual traditions that have contributed to the modern idea of "human rights", before moving to a narrower concept of "rights" in section 2.4. However, in discussing the broad sources of support for the "human rights" discourse, it is wrong to assume that it is without its critics. As suggested above, foremost amongst these are commentators from the Left, taking their lead from Marx's comment that "*Between equal rights... force decides*" Marx (1973, p.344). Amongst contemporary critics are Benton (1993), who has suggested "rights" represents a "liberal illusion" and warns that:

> *"In societies governed by deep inequalities of political power, economic wealth, social standing and cultural accomplishments, 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 taken 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"*
>
> (p.144).

Indeed both Rawls (1971) and Nozick (1974) have also highlighted that "rights" do not imply social or economic equity, while Tushnet (1984) suggests that they offer a distraction from what really needs to be done in the interests of social justice. Other

critiques have highlighted that "rights" suggest an individual rather than communal conception of humanity (MacIntrye 1985) and that they emphasise the male virtue of individual autonomy rather than the female value of caring (Gilligan 1982). Indeed it has also been noted that when embedded in law, "rights" become an instrument of hegemonic power, so that there may be a difference between the values inherent in "rights" and the implementation thereof (Hancock 2003, p.1), with the power relations of capitalism preventing the realisation of many values embedded in "human rights". However, while there may be substantial differences of opinion on the justification and effect of "rights", there is an undeniable intellectual consensus that certain actions against the person are wrong, that all human beings are entitled to respect and that certain human attributes should be prioritised above all other societal values. Indeed, it can also be rightly claimed that there is agreement, or rather hegemony (in the West at least) that "rights" themselves are an appropriate mechanism for guaranteeing such priority status.

Furthermore, while there are a number of criticisms of "rights" from a progressive or radical perspective, it is undeniable that their appeal has endured and evolved over the centuries to give impetus to such major political events as the abolition of slavery, protection of minorities, universal suffrage, trade unionism and popular education (Weston 1984; Weissbrodt 1988). Conscious of the powerful potential of rights discourses, there have been calls to reclaim "rights" for the Left (Blomley 1994; Laclau and Mouffe 1995) and to utilise them for the same purposes for environmental causes in the same way that they have supported liberalism (Eckersley 1995). Indeed, so powerful is the "rights" discourse that they were put forward as a fundamental response to the horrors witnessed during WWII.

2.3. Post 1945: From human "rights" to good governance[13]

The atrocities inflicted on certain peoples and groups during WWII, led directly to the creation of the United Nations (UN), with the intent of establishing an international commitment to protect "human rights" on a global scale. In 1948 one of the first acts

[13] This title is taken from Tomuschat (2003, p.24).

of the UN was to adopt the *Universal Declaration of Human Rights* (UDHR), which then stimulated a process of the "*internationalisation of human rights and humanization of international law*" (Buergenthal 1997). This initiated a dynamic, ongoing process, which has led to a vast body of international law and agreements[14] (Brownlie and Goodwin-Gill 2002), the establishment of numerous competent institutions under these instruments[15] and mechanisms designed to promote and implement "human rights"[16]. The second half of the 20th century also saw the emergence of a regional system of "human rights" law that supplements those agreed at a global level, with agreements existing in Europe[17], Africa[18] and the Americas[19]. These developments have reaffirmed the view that "human rights" cannot be seen in isolation, but should be embedded in the institutions and broader governance of society.

In addition to the blooming of supportive legal and institutional infrastructure there have also been significant shifts in the nature and scope of what are considered to be "human rights". Kamenka (1978, p.5) highlights the historical shift in the objectives of claimed "human rights", characterising them as being made as demands *against* the existing despotic state during the 17th and 18th century, while in the 20th century demands for rights have become claims *upon* the state, to provide and guarantee means for achieving individuals' happiness, well-being and welfare. The evolution of the scope and intent of "human rights" has commonly been referred to as entailing at least three generations of "rights", each one putting forward claims over a different sphere of life. Although there are differing descriptions of these generations[20], there is a general consensus on their trajectory, poetically labelled by Vasak (1977) after the values of the French Revolution:

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[14] For example, International Covenant on Economic, Social and Cultural Rights (ICESCR,1976) and International Covenant on Civil and Political Rights (ICCPR,1976).
[15] For example, UN Human Rights Commission and UNESCO.
[16] For example, UN reports on human rights compliance and direct UN Security Council action in respect to the former Yugoslavia, Kurdish Iraqis and in Somalia and even in international finance institutions such as the World Bank and the International Monetary Fund, who have adopted a policy of "good governance" related to their lending requirements, see Tomuschat, (2003, p.54-55).
[17] The European Convention on Human Rights and Fundamental Freedoms (ECHR, 1950).
[18] The African Charter on Human and People's Rights (1981).
[19] American Convention on Human Rights (or Pact of San Jose) (1969).
[20] For example Marshall (1950) conceived them in terms of the civil, political and social generations.

- *Liberté.* First generation "rights" (or core "rights") associated with civil "rights", initially associated with the political revolutions of the 18th century and with freedom as a central value. These are mostly of a negative kind, favouring the abstention of the state and covering "rights" such as those related to life, liberty and the security of the person, freedom from torture etc. Weston (1984) notes that this also includes the "right" to own property and not to be arbitrarily deprived of it, which was fundamental to the rise of capitalism. Davidson (1993) suggests that four of these "rights"[21] can be regarded as being the most fundamental, because they are regarded as being non-derogable, making them "*binding on States, even in the absence of any conventional obligation or of any express acceptance or comment*" (Van Boven 1982).

- *Égalité.* Second generation "rights", covering economic, social and cultural matters, associated with the socialist revolutions of the early 20th century and the more general recognition that states should assume some responsibility for the "social question". These are mostly a reaction to the excesses of capitalism and are seen as positive rights requiring the intervention of the state such as those related to social security, education and standard of living adequate for the health and well-being of self and family.

- *Fraternité.* Third generation or solidarity "rights", initially associated with the anti-colonial struggles of the 20th century. Weston (1984) suggests these have backing from Article 28 of the UNDR which states that "*everyone is entitled to social and international order in which the rights set forth in this Declaration can be fully realized*", although Tomuschat (2003, p.48) notes none yet have solid legal foundation in instruments of worldwide applicability. Key "rights" seen as part of this category include the "right" to peace, "right" to development (Sengupta 2004) and those related to political, economic, social and cultural determination and humanitarian relief. Also prominent are "rights" related to a clean or healthy environment, which some believe should even be highlighted as a further, fourth

[21] Freedom from torture, inhuman and degrading treatment; Freedom from slavery and servitude; Freedom from ex post facto law; Freedom of thought, conscience and religion.

generation in their own right (Eckersley 1996; Waks 1996). This issue is returned to below.

The broadening of "human rights" has given rise to much debate over what should legitimately be given the status of "human rights" and whether this expansion will cause a "watering down" of the importance of the some of the "core" rights (Marks 1980-1). There clearly is not any consensus on this matter, with Cranston (1973) claiming first generation rights are the only ones that can properly be called "human rights" and the others are merely claims against the state, are "derivative" and therefore seen as less significant. Other sceptics suggest they cannot be "full human rights" because of their strong collective dimension, aspirational nature and questionable judicial status and should at least be subject to a number of tests or substantive requirements before they should be treated as "human rights" (Altson 1984). Conversely, Tunkin (1974) believes that economic and social "rights" have real meaning, while others view civil and political rights as reinforcing the unequal distribution of social and material goods, echoed in the views of Marxists such as Benton (1993).

There is however, no doubt that all three generations of "rights" are necessary for a life of full dignity (Tomuschat 2003, p.46) and as the UN General Assembly[22] has repeatedly confirmed, all "human rights" have an interrelatedness and form an indivisible whole. Indeed it is generally accepted that a "right" to free speech is irrelevant if you are close to death by starvation, or that it is difficult to engage key political "rights" if you are denied the most basic access to education. As such, the generations of "rights" should be seen as a self-supporting package that establish conditions in which each individual can realise their full potential. Indeed, the whole vocabulary of "generations" can be questioned as being misleading (Wellman 2000) as it suggests that earlier "rights" may become obsolete as new generations come into ascendance. It is thus more appropriate to see previous generations as having sustained influence, with the theoretical and institutional milieu being constantly

[22] For example, this is reiterated in the UDHR itself, the 1993 Vienna Declaration and Programme of Action on Human Rights and General Assembly resolutions such as 39/145 of 1984, 41/117 of 1986.

enriched by later generations guided by contemporary concerns related to continued improvement of human existence. Nevertheless, it is true that there are substantive differences between the first and later generations of "rights", particularly in terms of the extent of their implementation. In some ways, realisation of the first generation of "rights" has been more straightforward, relying more than anything on states abstaining from violations (e.g. torture, censorship), rather than the positive action required by later generations. Indeed second and third generation "rights" pose significant questions of justiciablity and require a state to be more active in implementation.

This discussion has therefore established the dynamic nature of "human rights" and highlighted how, as a concept, it has changed in parallel with the ideological evolution of the post-war period and is thus as much a creature of its political context as it is of moral philosophy. Given the trajectory of "human rights" development, there also appears an inevitability about the growing acceptance of the concept of "environmental rights", in line with normative principles for environmental or sustainability governance (Jordan, Wurzel et al. 2003; Lafferty 2004). Before the specific consequences of this can be related to planning practice, it is necessary to narrow the intellectual morass of "rights" theory towards a more focussed definition that can be deployed in this research.

2.4. Defining "rights"

It is clear that the notion of "human rights" is interpreted from a myriad of perspectives and that it is challenging to translate a concept that is embedded in abstract political thought and distant international law to the minutiae of the planning system. However, if a more precise working definition of "rights" cannot be proposed, it will be impossible to effectively engage in such an analysis. This section therefore reviews the various typologies that have been applied to the concept of rights and proposes a suitable defintion that will provide an appropriate framework for this research. A starting point for this is an appreciation of the variety of categories applied to the concept of "rights", summarised in Table 2.1.

Table 2.1: Key typologies of "rights"

Basis of typology	Main type of right	Key characteristics
Key basis of legitimacy	Natural/Moral	Suggests that rights are innate, inalienable and indefeasible. Rights are pre-social and absolute.
	Political	Rights are primarily ideologically and socially defined.
	Legal	Origin of rights located in established rules.
Required action	Positive	Rights that demand action and are interventionist.
	Negative	Rights as liberties, implying non-intervention by others.
Type of rights-holder	Individual	Rights belong to individual, sentient beings only.
	Collective	Rights that recognise community interests may not be the same as the sum of constituent individuals' interests
Issues of determination	Choice	Rights that can be waived or that have an option to be exercised.
	Welfare	Claims for action to provide rights-holder with resources.
Ends or means?	Procedural	Rights related to process
	Substantive	Rights related to outcomes

This hints at the range of roles that "rights" may be called upon to play in planning and highlights the different ontological bases of various conceptions of "rights". In particular, the first row in this table highlights the distinction of "rights" as philosophical, legal or political-economic constructs. While the *meanings* attributed to "rights" by individuals may draw on all three perspectives, the differences between them are critical to clarifying the basis of the discussion that follows.

Philosophical engagement with "rights" has included hundreds of articles and books that discuss particular "rights" or the general idea of "rights" in a metaphysical or moral sense, or how they can be related to the good life or the concept of the person. The extensive body of philosophical work (e.g. Waldron 1984) has generated many insights into the formal properties of "rights", including the distinction between liberties and claims and the connections between utilitarianism and rights theory (Freeden 1991). A common strand to the philosophical perspective on "rights" tends to focus on the logical derivation of a "right" from human attributes or *a priori* principles, in order to stress deontological and axiological characteristics. While this has done much to deepen the theoretical understanding of "rights" and the roles they may play in belief systems, they say little about their actual application within society, let alone their role in the planning system.

Legal definitions of "rights" are highly positivist in character, recognising only those sanctioned by the authority of the state and regarding these as the only form of "rights" that have purchase on the real world (see for example, Hart 1973). Indeed, the implications of the legal ontology is that the meaning of rights are essentially collapsed into the institutional requirements for their enforcement – a fact that becomes clear when considering the dominant discourses of rights in planning (see Chapter 3). When questions of the morality of this position are put aside[23], this offers the most tangible conception of "rights", as the key aim is to establish enforceable codes that will uphold certain values and therefore require precise tests. Such tests include justiciability and the exact identification of those individuals to whom rights apply and those whose actions are necessary for compliance. Legal scholars have therefore considered the characteristics "rights" must illustrate if they are to be fully embedded in law (e.g. see Campbell 1983, p.31), with Stone (1974), suggesting that a legal "right" will have four components:

- There must be a public authoritative body that is prepared to review actions colourably inconsistent with the "right";
- The thing or person that holds the "right" must be able to institute legal actions on their own behest;
- In granting relief the court must take account of injury to the right holder;
- The relief granted by the courts must run to the benefit of the right holder (not some other person or body).

The preciseness demanded for applicability in law has also led to a number of typological studies of legal "rights" themselves, which further assist in understanding the various forms that a "right" may take. The most well know legal analyst is Hohfeld (1919), who identified four types of legal "rights", based on the relationship between "right"-holders (x) and the obligation-holder (y), as summarised in Table 2.2:

[23] For example in crude terms this enables the justification of obedience to unjust laws.

Table 2.2 : Hohfeld's typology of legal rights

Type of right	Correlative	Description of the right
Privilege or Liberty	Duty	*x* has a liberty to do *A*, when *x* has no duty towards *y* not to do *A* and y has "no-right" towards *x*.
Claim	No-claim	*x* claims *A* from *y* – and y has a duty towards *x* to do *A*
Power	Liability	*x* has a power to bring about a certain consequence for *y*.
Immunity	Disability	*x* has immunity – when *y* lacks the authority to bring about a certain consequence for *x* and is thus under a disability.

Thus, even within the legal sphere, "rights" may be used as a *privilege* to do something, giving someone an *entitlement* to something and a correlative duty on another to provide it, a *power* to create a legal relationship or an *immunity* from having a legal status altered. Each of these notions will invoke a different form of protection and claim.

The political economy perspective on rights is more diffuse and has involved politicians (academic and practising), activists and reformers, examining the role of "rights" in the political system (e.g. Hayward 2001), the promotion of certain "rights" for particular ideological purposes[24] (e.g. Lazreg 1980), or the securing of wider societal outcomes. While those from the positivist tradition may see the promotion of "rights" through political debate as engaging in rhetoric or "manifesto rights" (Feinberg 1980, p.143), it does force the recognition that rights should not be viewed in an abstract or legal sense, but having meaning grounded in specific socio-political and cultural contexts (e.g. Harrison 1987). This can be illustrated by the fact that Americans tend to accord primacy to civil and political "rights", while those in the UK apparently give primacy to social "rights" (Conover, Crewe et al. 1991). This view therefore suggests "rights" are innately bound with issues of ideology, power and political capacity for their protection.

From this perspective it is therefore possible to distinguish between *de jure* rights, which can be claimed through the formal legal process and *de facto*, or informal rights, which describe the reality of the situation, where rights-claims may be limited by the capacity of the state of the courts to enforce them, or different groups to make

[24] i.e. From a moral point of view these may therefore be seen to be contrived "artificially", see White (1984).

such claims (Vira 2001). Vira also offers a useful perspective that binds the philosophical, legal and political economy perspectives of "rights" by relating them to the process of legitimation of certain claims in the environment policy process. He suggests that a philosophical perspective can provide insights into how "rights" gain social acceptance by highlighting issues such as justice, fairness and equity, a legal perspective helps address how "rights" can be protected by addressing law-making and legislation, while political economy can contribute to the understanding of their effectiveness. Vira (2001) therefore suggests that to have a full understanding of this process, one must be concerned with moral, legal *and* political perspectives.

This suggests that in addition to the difference in ontological perspective there also appears to be an assumed hierarchy of types of "right". Thus it is clear that one can claim that one has the "right" to cross the road or pick your nose but that such trivial use of the term is clearly not the same as asserting a "*human* right" to freedom from torture or slavery. In this latter context, the term "human rights" becomes a sacred one, signifying what is core to the sense of being an autonomous, dignified human being. While some scholars have suggested that "*human* rights" are a sub set of "rights" in general (e.g. Nickel 1987, p.13), a more common claim is the reverse - that the term "*human* rights" denotes a pre-eminent category which identifies the most basic values related to what is essentially human, so that other categories, including "environmental rights" are seen as being hierarchically derivative and more specific or limited (Freeden 1991, p.6). "*Human* rights" should therefore represent the foundational norms of society and, as such, need to be inviolable because if they are violated, the society disintegrates (Sengupta 2004). The tests for "*human* rights" therefore need to be vigorous and universally accepted and if appropriately constructed will provide adequate support for those "rights" that are required to realise these preminent values[25].

The high level of contestation around the concept of "rights" inevitably acts as an obstacle to developing a coherent framework for assessing their worth and points to

[25] In establishing the fundamental nature of "human rights", from this point forward the thesis will concern itself only with such pre-eminent "rights" or their derivatives, which will be simply referred to as "rights".

the need to adopt a rigourous and appropriate definition of "rights". There is no shortage of definitions to choose from, with a number of authors offering defintions based on the foundational characterisitcs of rights, for example Cranston (1973), taking a lead from natural law suggests they are "*rights which belong to a man* {sic} *simply because he is a man"* (p.7), while Gewirth (1982) notes that they are "*rights to the necessary condition of fully human action*"[26].

These defintions rely on a high level of abstraction which does not help in applying an analysis to land use planning. Instead, it is suggested that a more informative approach is to consider the function that "rights" take on, once elevated to "*human* right" status. Altson (1988), suggests that achieving such status provides standing that is "*above the rank and file of competing social goals, gives it a degree of immunity from challenge and generally endows it with an aura of timelessness, absoluteness and validity*" (p.3). When embedded in law a "right" can therefore become "*a super-statute at the apex of legal norms*" (Gravelle 1997, p.635)

The special status of such "rights" has also been expressed by Dworkin (1977), who asserts that "rights" should "trump" other obligations, so that:

> *"Individual rights are political trumps held by individuals. Individuals have rights when, for some reason, a collective goal is not a sufficient justification for denying them what they wish, as individuals, to have or to do, or not a sufficient justification for imposing some loss or injury upon them"* (p. xi)

While Dworkin highlights the potential effect of elevating certain issues to "rights" in a political context, it does not adequately provide the diagnostic clarity of "rights" capable of encompassing both the formal, legally-entrenched view of "rights" and their existence as socially-defined concepts. One particular defintion, provided by Freeden (1991) does appear to meet the tests of rigour and flexibility, thus:

> *"a human right is a conceptual device, expressed in linguistic form, that assigns priority to certain human or social attributes regarded as essential to the adequate functioning of a human being; that is*

[26] Quoted in Waks (1996, p.135).

intended to serve as a protective capsule for those attributes; and that appeals for deliberate action to ensure such protection"

(p.7).

This provides a critical pillar upon which the rest of the thesis is founded. It reflects the special status of rights[27] highlighted above and facilities a number of other important features that can be applied to the analysis of the role of rights in planning. In elaborating his conceptual understanding of rights, Freeden (1991, p.2-11) highlights a number of distinct characteritics of his definition, briefly discussed below.

The idea that rights are best understood as a capsule, suggests that it is not the "wrapping" of being a right (whether legally or politically-defined) that has protection, but the attributes it encapsulates. A right may therefore accord special protection to an interest, but is not identical to it.

As a concept, it suggests that the exclusiveness of a right is because it simultaneously "*prioritises, protects and demands action*" (Freeden 1991, p.10) the encapsulated values and is therefore distinguished by a combination of these structural properties rather than any specific content. Following from this, it is important to note that the distinctive nature of rights lies in their significance in *"ordering ideas, conveying knowledge and promoting comprehension*" (Freeden 1991, p.10), rather than any necessary status in front of the law. This suggests therefore that rights, as a package, are unlikely to challenge fundamental principles of society (e.g. property ownership, economic growth, social justice), unless such a challenge was implicit in the values encapsulated. The transformative value of applying such concepts within, for example, planning, will therefore depend largely on identifying and understanding the potential of the values protected by environmental rights.

"*Deliberate action*" as noted in the definition also includes "*deliberate non-action*", such as self-restraint or forbearance, which may be cemented through either legal or

[27] This will be adopted as the definition of rights from this point onwards and this preciseness is reflected in the dropping of the inverted commas.

moral obligations, and protection of the rights may therefore be coercive and formal, or through harnessing public opinion or internalised through socialisation processes.

Unlike legal conceptions of rights, which tend to be limited by strict rules of enforceability, Freeden's definition recognises that rights are underpinned by a range of other related terms, such as equality or individuality, that act critically to establish their meaning, as "adjacent concepts" and he notes that in this respect two rules should govern the understanding of rights:

> *"First our understanding of rights depends on the conceptual environment in which competing ideologies situate them. Second, the concept of rights may be stretched or contracted to include or to oppose other basic political concepts. Likewise, other concepts may be expanded to coincide with rights or constricted to include them"*
>
> (Freeden 1991, p.97)

Therefore, it can be expected that the meaning of environmental rights can only be understood in relation to the concepts around it, such as the competing discourses of "the environment" and environmental politics (Dryzek 2005) and how these evolve over history and cultural change (White 1967; Hinchcliffe and Belshaw 2003).

The fact that Freeden's definition can encompass rights justified on a legal, moral and ideological basis, means that there can be a logical difference between what is "a right" and the notion of what is right, correct or virtuous, so that no objective moral position is implied by a right. Indeed, under this definition rights are not strictly the basis of an ethical system, but the enshrinement of it, ultimately based on an infrastructure of other concepts, such as liberty, self-determination and welfare.

Although some authors (e.g. Cranston 1973) see as problematic the fact that some rights can only be justified as being derivative from more fundamental rights (i.e. third generation rights depending on first generation rights for legitimacy), Freeden's definition avoids such essentialist arguments, seeing "younger" rights as limited expressions of how "deeper" values (i.e. "core" rights), can be protected in the context of modern society (see Waldron 1993b, p.21). As such the values encapsulated by a right to a healthy environment can be seen as being a combination of the deeper first

generation values ("foundational principles"), such as those aimed at protecting the integrity of the person and concerns that have merged from recent history, such as destruction of environmental quality.

Because Freeden's definition emphasises rights that are "*expressed in linguistic form*", it facilitates their understanding in a political context, rather than in the courts. Furthermore, the linguistic emphasis suggests that valid analysis can be derived not just from the forensic study of legal judgements, but also through discourse analysis. The evaluative value of this approach for planning research has already been established (e.g. Rydin 2003) particularly in relation to explanatory investigations of power in the planning process (Richardson 1996).

Freeden's definition may therefore provide a useful theoretical basis to explore the role of environmental rights in the British planning system – particularly in that it allows the exploration of whether the presence or absence of certain existing rights and/or their mode of implementation, infers something about the values and power relations embedded in the current planning system. Furthermore as the definition facilitates consideration of claims of new rights (i.e. manifesto rights) one can also review the discourse surrounding emergent rights and assess how the values that they encapsulated are facilitated in the planning system.

The way a rights perspective will be applied in this research will be further elaborated in the coming Chapters, with Chapter 3 exploring how rights have been specifically conceptualised in planning and will suggest how Freeden's concept of rights can be applied to view planning and land use regulation in a different "frame". However, before the discussion is narrowed to the field of planning, the remaining part of this Chapter will consider the scope and basis of environmental rights.

2.5. The idea of environmental rights

As noted above, the emergence of different rights has been interpreted as successive generations, leading Eckersley (1996) to ask:

> *"Would an environmental rights discourse provide perhaps a fourth generation of human rights that might also serve to recontextualise and qualify existing human rights in ways that reflect the late twentieth century political revolution and politics of environmentalism?"*
>
> (p.220).

This idea has attracted a wide range of support on legal (e.g. Kirchick 1975; Nickel 1993; Douglas-Scott 1996; Rest 1997; Cook 2002), moral (e.g. Norton 1982; Merrills 1996; Westra 1998), justice (e.g. Muldoon 1988; Singer 1988; Almond 1995; Waks 1996) and ideological grounds (e.g. Eckersley 1995; Johnson 1995; Hancock 2003).

The justification for specific rights related to environmental issues is generally based on two key premises. First is that a healthy and secure environment is an essential prerequisite to the enjoyment of all other human rights (e.g. WCED 1987; Shelton 1991) and second that by articulating environmental values within a rights discourse, it is thought they will gain greater legitimacy. Each of these premises will be briefly reviewed.

The need for effective environmental protection to fulfil other human rights, largely depends on the epistemological basis for rights in the first place (Hancock 2003, p.15) and has been justified as a component of human rights by noting that any enjoyment of rights requires the conditions for biological survival (Shue 1980; Vincent 1986; Galtung 1994). This has been articulated in terms of natural law by Pathak (1992):

> *"... the protection and improvement of man's environment arise directly out of a vital need to protect human life to assure its quality and condition, to ensure the prerequisites indispensable to safeguarding human dignity and human worth and the development of the human personality, and to create an ethos promoting individual and collective welfare in all the dimensions of human existence".* (p.209).

Westra (1998), has also provided further moral justification by arguing that ecological harms such as pollution are rarely subject to "free and informed consent"; either because consent is never requested or because the full impacts of pollution are not fully understood. From a Kantian perspective, as human life is seen as has having infinite value, there is doubt over whether consent to environmental harm can *ever* be given on moral grounds and therefore questions the justification of pollution on the basis of social progress, economic benefits and utilitarian arguments.

It has also been recognised that existing (first generation) human rights instruments can provide a strong basis for environmental protection purposes because if full respect was given to "core" civil and political rights[28], it would critically enhance effective opposition to environmental damage. For example, Waks (1996, p.138) suggests that Article 28 of the UDHR asserts a right to *"social and international order"*, which in the context of the global threat of climate change, mass species destruction and natural resource depletion, justifies strong environmental rights-claims. Churchill (1996) also notes that the right to life enshrined in international treaties[29] provides positive obligations to take all appropriate measures to protect against cumulative health damage. This can also lead to derivative rights such as those to a healthy environment or for securing compensation for environmental victims (Williams 1998). It should also be noted that a range of international environmental instruments[30] stress a concern for human rights protection, while the Rio Declaration makes express reference to both UDHR and the ICESCR and places human beings at the centre of sustainable development (Cancado Trindade 1998).

The second premise noted above, that the environment can be better protected through a human rights framework is strongly supported by Eckersley (1996), who believes it radically alters decision-making in favour of the environment by

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[28] For example, rights to life, association, expression, political participation, personal liberty, equality and legal address.

[29] For example at the global level is the International Covenant on Civil and Political Rights (1966), and at the regional level, the ECHR (1950) and the American Convention on Human Rights (1969).

[30] For example, Preamble and Principle 1 of the 1972 Stockholm Declaration on the Human Environment; Preamble and principles 6 and 23 of the 1982 World Charter for Nature; Principles 1 and 20 proposed by the Bruntland Commission.

overcoming the drawbacks of the prevalent utilitarian framework. She suggests that environmental rights can highlight the need for a minimal degree of environmental integrity as one of the preconditions for democracy, as suggested by so called "ecological rationality" (Bartlett 1986; Dryzek 1987) and therefore seen as a challenge to the dominance of economic rationality (Hancock 2003). This suggests that environmental, social and political rights are co-determining and should be seen as formulating a bundle of citizenship rights.

The case for constituted environmental rights is further made by Hayward (2001), who suggests that because environmental goods are not just commodities to be traded, but important generalizable interests, they force an upward ratchetting of political expectations and foster a publicly-recognisable environmental ethic. He notes how pursuing environmental ends by constitutional means, allows support to be drawn from the established discourse of human rights, which already has a position of hegemony in the western world (see also Douglas-Scott 1996). Stevenson (1983) also notes that environmental rights would have a legal and extra-legal impact, fostering a more environmentally appreciative perspective from the courts and having a broad educational role.

Anderson (1996) has attempted to weigh up the pros and cons in placing environmental protection within a rights context. He sees the advantages as being an increase in environmental activism (e.g. in the case of India, see Anderson 1996), that rights discourses provide conceptual links between local, regional, national and international environmental issues and that a general expression of right can be interpreted creatively as issues and contexts change. He notes that disadvantages may include that environmental rights may add to the complex and often technical issues of environmental management, that they may displace other forms of legal remedy (e.g. tort) or that they may be seen as just symbolic gestures. He also suggests that rights discourses may politicise and draw attention to environmental issues in a way that attracts additional opposition from would-be polluters or exacerbate government repression. However, on balance Anderson (1996) suggests

a rights approach could play a key role in fostering equitable and sustainable human communities.

There are also strongly implied procedural dimensions to environmental protection by the adoption of a rights discourse. Indeed, once established as rights, environmental values become much stronger claims that are (theoretically at least) immune from lobbying and short-term trade-offs (Mackay 1994). Indeed the idea of "rights as trumps" is noted by Sax (1970):

> *"The citizen who comes to an administrative agency comes essentially as a supplicant, requesting that somehow the public interest be interpreted to protect the environmental values from which he benefits. The citizen who comes to court has quite a different status – he stands as a claimant of rights to which he is entitled*".
>
> (p.58)

However, rather than see the issue of environmental rights from *either* a human rights *or* environmental protection perspective, Hancock (2003, p.2) notes that bringing the two discourses together can result in alternative conceptualisation of both subjects, thus facilitating new ways of questioning existing political terms of reference.

In addition to this moral and practice-based support, environmental rights also have a strong normative function, particularly when seen alongside the tradition of utopian thinking, upon which many of the intellectual roots of planning have grown (Hall 1988). Indeed, Harvey (2000) has noted that *"... without a vision of Utopia there is no way to define that port to which we may wish to sail*" and he suggests that rights, including those related to the environment, form an important set of universals upon which we should let our imaginations roam. He notes however, that these rights are of no value on their own, and that they will remain aspirational unless brought to bear in a tangible way on holders and mediators of power.

There are, of course, also critical voices on the idea and detail of environmental rights. A number of these reflect the broader scepticism of rights and relate to power differentials in capitalist society (see Benton 1993 above) thus accentuating current

patterns of environmental injustice (Pulido 1994; Low and Gleeson 1999). Hancock (2003) suggests environmental rights may also be used by states to enhance their credibility and legitimacy whilst still prioritising corporate interests by neglecting their implementation. Other authors have highlighted the practical problems of applying environmental rights, such as their indeterminacy (Douglas-Scott 1996) or how they threaten to swamp the legal system (Ruhl 1997). A further criticism raised by Hayward (2000) and Waldron (1993b), particularly relevant to planning, is the danger that rights transfer power from the legislature to the judiciary. This is rebuked by Eckersley (1996), who notes that many key policy decisions are in any case made by the executive on the basis of unaccountable bureaucratic discretion and in such situations it may be preferable to have decision made on legal principle in the open courtroom.

Despite the growing body of literature on environmental rights, assertions are made by Bryden (1978) and more recently Cancado Trindade (1998) that too little is understood about environmental rights in order to judge their worth is still valid. Indeed the latter writer, notes that:

> *"... considerable in-depth reflection and research are required to clarify the issues surrounding the implementation of the right to a healthy environment and the very conceptual universe in which it rests."*
>
> (p.137)

It is therefore possible to assert that environmental rights now exist at least as strong rhetorical claims, but the consequences are not yet fully understood. The thesis will go on to examine how this may effect the specific system of land use regulation, but before doing this it is worthwhile considering the different types of rights that may fall under the environmental rubric.

2.6. A typology of environmental rights

It is possible to distinguish three key conceptions of environmental rights, which are not entirely mutually exclusive: rights of the environment or nature; procedural *human*

environmental rights; and substantive *human* environmental rights. While some rights falling into the second category are in advanced stages of becoming institutionalised in Britain and those representing the last category already reflected in national constitutions and international declarations, the first type of right remains largely an issue of philosophical debate. All three are reviewed below, with the first given only a very brief examination as this will not be being considered later in the thesis.

2.6.1. Rights of nature

Rights of nature, or ecocentric rights, encompass passionate areas of conviction – vivisection, hunting and vegetarianism - and are often bound up with a consideration of whether nature has any intrinsic value and whether non-humans should be attributed with any moral worth. Rights to nature have been argued for from an animal liberation perspective by Singer (1975) and Regan (1983) who both state, from different standpoints, the need to recognise the intrinsic value of all sentient beings, not just those exhibiting human traits. If these arguments are accepted, it becomes logical to also protect what is of instrumental value to these sentient beings, such as their habitats and food sources, thus leading to the philosophy of Deep Ecology (Naess 1989), which claims nature has value irrespective of shifting human values. From this perspective the benefit of nature to humanity is an irrelevant consideration and *human* rights *to* the environment are seen as illogical and dangerous.

However, there are also debates over whether it is possible to conceive of ecocentric rights, given that a natural resource, such as a forest, cannot articulate that right and relies on human mediation and discourse to act upon them. This leaves a "deep structural anthropocentrism" (Anderson 1996) that is difficult to avoid, with Low and Gleeson (1997) arguing that "*Nature does not know justice*" (p. 33). This suggests that rather than dehumanising nature, we should include it in our decisions, but can only do so on the basis of human values so that any operationisation of rights of nature results in a weak anthropocentricism. Eckersley (1992; 1995) has also sought to integrate human and non-human considerations through the adoption of a three-tiered framework of nested moral communities: the human community; the "mixed

community" (comprising of humans and their dependent animals); and the biotic community, each having a different set of rights and duties. Redgwell (1996) and Stone (1974), have also suggested ways in which the value of nature can be taken into account within current institutional arrangements by recommending procedural rights *for* the environment rather than the substantive rights *of* the environment called for by deep ecologists.

The issue of ecocentric rights raises a number of important questions about what environmental rights aim to achieve, the boundaries to our moral community and the justification of putting humans aside from other elements of the environment. These issues are all worthy of fuller consideration and while the discussion of the ecocentric perspective is a critical element in the wider concept of environmental rights, it has only marginal bearing on the research question under consideration here and will not therefore be pursued further.

2.6.2. Substantive environmental rights

Substantive environmental rights are anthropocentric rights that seek to protect environmental standards *as an end.* The expression of a right to certain environmental outcomes, enshrined in international instruments or national constitutions, is a hugely symbolic event, elevating and protecting such values, allowing them to be better balanced against other social objectives, rather than being just a partisan cause (Hayward 2000). The values protected by an environmental right then no longer depend on narrow majorities in legislative bodies and becomes firmly rooted in the legal order. A universally applied right to a clean environment theoretically prevents the redistribution of environmental costs as such action would violate others' environment rights (Aiken 1993) thus promoting sustainable development. They may then act not just for arbitrating individual grievances, but also as an overarching policy for environmental protection and guide for public action and discourse (Sax 1990; Brandl and Bungert 1992). Establishing environmental protection as a substantive right not only strengthens environmental protection before the law, but also opens up political opportunities for environmentalists, as rights offer

a "*familiar, potent and efficacious*" (Aiken 1993, p.199) tool that can act as a goal for institutionalising environmental values and a campaigning instrument for challenging hegemonic values (Hancock 2003). There is therefore, "... *reason to believe that once a basic right is established, practical jurisprudence and wider social norms will develop progressively to support more ambitious aims"* (Hayward 2000, p.560). This may take the form of further environmental protection legislation, a more ecological appreciative position from the judiciary (Stevenson 1983) or the development of enhanced environmental awareness amongst the public (Douglas-Scott 1996). Indeed Brandl and Bungert (1992), go so far to suggest that through such a process, an environmental right can eventually merge with the national identity.

A prevailing view of the inadequacy of existing environmental protection provisions and a desire to bring environmental values into a rights discourse has lead to a number of attempts over the last thirty years to formulate and implement a substantive human right to the environment. The result of these attempts is ambiguous with Birnie and Boyle (1992) and Kiss and Shelton (1991) suggesting that no such right is yet in place, Gormely (1990) arguing that it is and Douglas-Scott (1996) stating that "*even if it does exist, there are still considerable problems regarding its actual nature and application which lead one to believe that it is not the panacea it may seem*" (p.428).

A detailed review of the history of these attempts is not required here (see Earthjustice 2003), but it is worthwhile noting that the UDHR avoided dealing with the relationship between humans and the environment (Aiken 1993) and it was not until the UN Stockholm Declaration on the Human Environment (1972), that such a principle was introduced, stating that "*Man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being*". This was then endorsed by the UN General Assembly[31], but as the declaration is not binding, it is not considered to be a legal right (Altson 1984, p.612). Although a number of other international instruments refer to

[31] In its resolution 45/94 (1990) the General Assembly also stated "*all individuals are entitled to live in an environment adequate for their health and well-being"* and although this called on governments to enhance their efforts, it also has no legal status.

environmental rights[32], Churchill (1996) suggests these all pose problems with application, because of their wording or application. Environmental rights have been recommended by the Brundtland Report (WCED 1987, p.348)[33], although the Rio Declaration avoids adopting an overt human rights vocabulary (Boyle 1996). Churchill (1996) has also reviewed the main treaties covering economic, social and cultural rights (i.e. second generation rights instruments)[34] noting that these contain only one express environmental right (the right to a decent working environment), although there are a number of derivative rights, such as the right to decent living conditions and the protection of health, which have strong environmental dimensions. A further strand of human rights law that offers some environmental cover is the special arrangements related to indigenous peoples[35], with international agreements increasingly acknowledging their special relationship with the environment, recognised in the Convention on Biological Diversity (1993) and the regional conventions of the Americas (Shutkin 1991; Fabra 1996).

The most ambitious attempt at codifying international environmental rights has been *Final Report of the Sub-Commission on the Prevention of Discrimination and Protection of Minorities* (The Ksentini Report 1994, see Popovic 1996a). Based on a survey of national and international human rights law and environmental law, it claims that rights to the environment are already part of existing international law and therefore capable of immediate implementation. The report is primarily concerned with greening existing environmental law and includes *Draft Principles on Human Rights and the Environment* (see Figure 2.1.) covering a wide arrange of substantive

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[32] The 1981 African Charter on Human and People's Rights (1981), Article 24 states: "*All peoples shall have the right to a general satisfactory environment favourable to their development*" and Article 11 of the 1988 Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (1988), Article 11 states that "*Everyone shall have the right to live in a healthy environment and have access to basic public services. The State parties shall promote the protection, preservation and improvement of the environment*". The Convention on Rights of the Child (1989), Article 24 requires states to take appropriate measures to implement the child's right to health "*taking into consideration the dangers and risks of environmental pollution*".

[33] "*All human beings have the fundamental right to an environment adequate for their health and well-being*". p.348.

[34] For example at the global level the International Covenant on Economic, Social and Cultural Rights (1966), and at the regional level, the European Social Charter (1961) and the 1988 Protocol to the American Convention on Human Rights.

[35] Such as a specific UN Sub-Commission on Prevention of Discrimination and the Protection of Minorities and its Working Group on Indigenous Peoples.

rights. Although the UN has not adopted these Draft Principles, they do make a significant contribution to protecting human rights and the environment by advancing a standard-setting process, offering a guide to the current terrain and facilitating mobilisation of public pressure on this issue (Popovic 1996a). Hancock (2003) however notes that the radical tone of the Ksentini report offers too much of a challenge to the global hegemony and as a result, it has been marginalized within UN meetings and stands little prospect of being realised.

At the European level, the EHCR stands as the most prominent human rights instrument, and is capable (under some circumstances) of providing substantive redress against environmental harms (e.g. under Article 8, the right to privacy and home life[36]). However, while explicit substantive environmental rights can be found in some of the national constitutions of the member states (see below), none of the constitutive treaties of the EU expressly contains any such provisions (Douglas-Scott 1996) - although there is some recognition of procedural rights in environmental matters (see section 2.11). The ill-fated *Charter of Fundamental Rights of the European Union* (European Union 2000) did contain an environmental "right"[37], but its wording and placements made it considerably weaker than what one would expect of a substantive environmental right (Hayward 2004). There is also some debate on whether substantive environmental rights exist as a result of EU Directives that specify environmental standards[38], although Hayward (2004) suggests these suffer from limits on their application and leave an outstanding need for an explicit constitutional right.

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[36] For example, *Lopez-Ostra v. Spain* A 303-C (1994) 20 EHRR, 277, see Desgagne (1995), Thornton and Tromans (1999).

[37] Article 37: Environmental protection, "*A high level of environmental protection and the improvement of the quality of the environment must be integrated into the policies of the Union and ensured in accordance with the principle of sustainable development*".

[38] A key case here relates to the definition of direct effect and state liability, e.g. *Frankovich v Italian Republic* (1992) ECR I-5357, see Miller (1995) and Hayward (2004) for a discussion of how this relates to the concept of environmental rights.

Figure 2.1.: Substantive environment rights proposed to the UN

SUBSTANTIVE ENVIRONMENTAL RIGHTS PROPOSED IN THE *DRAFT PRINCIPLES ON HUMAN RIGHTS AND THE ENVIRONMENT* (Ksentini 1994)
• the right to a secure, healthy and ecologically sound environment. • the right to an environment adequate to meet equitably the needs of present generations and that does not impair the rights of future generations to meet equitably their needs. • the right to freedom from pollution, environmental degradation and activities that adversely affect the environment, threaten life, health, livelihood, well-being or sustainable development within, across or outside national boundaries. • the right to protection and preservation of the air, soil, water, sea-ice, flora and fauna, and the essential processes and areas necessary to maintain biological diversity and ecosystems. • the right to the highest attainable standard of health. • the right to safe and healthy food and water adequate to their well-being. • the right to a safe and healthy working environment. • the right to adequate housing, land tenure and living conditions in a secure, healthy and ecologically sound environment. • the right to benefit equitably from the conservation and sustainable use of nature and natural resources for cultural, ecological, educational, health, livelihood, recreational, spiritual or other purposes. This includes ecologically sound access to nature. • the right to preservation of unique sites, consistent with the fundamental rights of persons or groups living in the area. • Indigenous peoples have the right to control their lands, territories and natural resources and to maintain their traditional way of life.

At the national level, more than 70 nations have some sort of constitutional substantive environmental right, particularly those who have adopted new constitutions in the last fifteen years, such as Brazil, South Africa and nations in post-Communist East Europe, as well as at least eleven current EU members and 31 US states (Ksentini 1994; Popovic 1996b; Earthjustice 2003). These vary enormously and include the obligations to conservation of natural resources (Paraguay), duties on citizens to protect and improve the environment (India) and providing for the right to a healthy environment (Hungary, Peru et al). Indeed, environmental rights seem to becoming a standard feature of national constitutions, although there has been extensive debate over the most appropriate constitutional formulation (e.g. Sax 1990; Shelton 1991).

There is no substantive environmental right within the UK and (1995; 1998a) has reviewed domestic law in relation to the provisions for clean air and water and notes that it cannot be established that these have the full status of an enforceable right.

It appears therefore that there is both significant potential (or rather hope) and growing rhetorical agreement that substantive environmental rights offer some scope for the protection of environmental values. However, as with other aspects of the rights debate, questions remain over how they have been conceptualised and whether they can actually deliver what they promise (Aiken 1993). Hayward (2004) suggests there may be three reasons why they may not live up to expectations. First there may be a more appropriate way of securing better environmental outcomes, second that existing provision may already provide adequate protection and finally, the rights may not be realisable. It is the last of these that will be considered here.

Substantive environmental rights take variety of forms because the precise qualitative and quantitative dimensions of environmental protection are extremely difficult to convey in legal terms (Boyle 1996). As such, where adopted in national constitutions, environmental rights have attempted to encapsulate a range of values and made an array of references to protecting a "healthy", "satisfactory", "natural", "balanced", "decent" or "viable" environment, or environments that are "not detrimental to health or well-being" or "free from contamination". This is further illustrated by the range of environmental rights promoted at UN level (see Figure 2.2.).

While the diversity of substantive environmental rights is not a particular problem and the general intent of these rights appears fairly clear, there has been extensive discussion on how they can be formulated to best protect the intended environmental values. For example if a "right to a healthy environment" was established, when does it become an "unhealthy" environment and hence violated? This is particularly true when the main risk to the environment may come from the culmination of thousands of different actions, such as pollution from road traffic or where detrimental effects may emerge very slowly, as is the case with many cancers. Perceptions of the environment are also clearly culturally specific and different ecological contexts will

give rise to very different claims and acceptable thresholds. One suggestion to ease implementation and avoid some of the difficulties of interpretation has been offered by Shelton (1991) who suggests that a right should be given to an ideal environment, in abstract terms, and allows the courts to define their own interpretations, as they have done for many other human rights. This view is supported by Anderson (1996) in his review of environmental rights in India, where substantive rights have been used relatively effectively and where their ambiguity appears to have been a distinctive advantage in providing a general remedy with enough flexibility to fill gaps in statutory regulations. Alternatively, Eckersley (1996) suggests that it may be more appropriate to state that citizens have a right to ensure that environmental quality is maintained in accordance with the standards set by current environmental laws. This may then ensure enforceability, but also then loses the ratchetting and aspirational value of such rights.

The potential difficulties in implementation and interpretation do have a bearing on how robust and effective they may be when subject to judicial scrutiny and as such substantive environmental rights have attracted much critical comment. One of the difficult questions relates to temporal factors, as many of the suggested substantive environmental rights accept that future generations should have rights to a decent or healthy environment. This raises significant problems of how rights can be assigned tc people that are not even born or may never exist, leaving the moral community poorly defined (Norton 1982). Although this opens up very substantial philosophical questions about the nature of rights (which will be by-passed here), in legal terms at least such an issue could be resolved through the use of mechanisms such as trusts, which exist for the benefit of heirs and successors in perpetuity (Miller 1998a) or alternatively embedding the right with a patrimonial duty not to impoverish or narrow the possibilities for the future (Sax 1990).

A further intrinsic difficulty with substantive environmental rights is the fact that they relate to communal values, while rights instruments are generally focussed on protection of the individual. Thus it is implied that environmental rights require cooperation from all parts of society to secure implementation, thus displacing the

importance of individuals with notions of community. Indeed, Douglas-Scott (1996) points out that one of the aims of human rights is to place limits on the pursuit of community goals, so communal rights are in danger of being the very thing that human rights should have the power to override, while the people possessing the right are the same as those who hold the reciprocal obligation. Similarly Miller (1998a, p.92) notes that because these rights deal with common property resources (such as clean air), they imply the extinction, rather than the extension of individual rights. This suggests difficulties of application because any consideration of who may hold the obligation to uphold such rights necessitates the identification of those responsible for any violations. This not only highlights technical difficulties in identifying specific environmental infringements (individual sources of pollution, fly tipping etc.), but also demands a general consideration of obligations related to the environment. Furthermore obligations arising from a substantive right such as that to a healthy environment, clearly relate not just to the activities of the state (as is the case with first generation rights), but imply duties on everyone (i.e. *Drittwirkung)*, thus raising fundamental questions over how violations are enforced against. Although significant, these difficulties are not unique to substantive environmental rights but shared with other "solidarity" rights (e.g. the right to development), nor are they fatal in undermining their ability to protect environmental values but do establish the need for competent regulative institutions for enforcement, while the role of NGOs and public interest litigation may be important in ensuring these are put into place (Owens and Cowell 2002; Lane 2003).

The worth of substantive environmental rights will also be heavily dependent on how they are weighted against other rights and whether they can be subject to reasonable restrictions. At the international level, only "core rights" of personal liberty are generally made non-derogable, with second and third generation rights capable of being restricted in certain circumstances. It would indeed seem reasonable that in some situations, such as in national emergencies, environmental rights should be subject to limitations, a position adopted by the South African constitution (Glazewski 1996), which allows for restrictions which are reasonable, justifiable in an open and democratic society and which do not negate the essential content of the right.

These issues question the ability to enforce such rights in court, but it should be noted that this does not reflect the full potential worth of such rights. Indeed, as suggested above, it can be envisaged that such rights would have a much wider influence on the values of society and ensure policy-makers balance new and appropriate interests. Furthermore Cancado Trindade (1998) suggests that human rights law usually relies on mechanisms other than the judiciary for their implementation, such as friendly settlement, conciliation or fact-finding. His view is that there is no need to get obsessed with the enforceablity of rights:

> *"Formal justiciability is by no means a definitive criterion for ascertaining the existence of a right under international human rights law. The fact that many recognised human rights have not yet achieved a level of elaboration such as to render them justiciable does not mean that those rights simply do not exist: enforceability is not to be confounded with the existence itself of a right"*
>
> (Cancado Trindade 1998, p.135)

This underlines the fact that rights may have agency prior to formal legal institutionalisation, if socially-accepted and in some cases legal entrenchment can even limit their effectiveness as a catalyst for political mobilisation (Blomley 1994; Hancock 2003).

Many of the issues outlined above are primary hypothetical in nature and there remains a relatively narrow body of literature that has examined actual experiences of adopted substantive environmental rights. Of these accounts, the majority offer descriptive or historical accounts of the legal provisions in a variety of jurisdictions including Hong Kong (Hsu 2004), Eastern European nations (Gravelle 1997), South Africa (Devenish 1996; Glazewski 1996) and Pakistan (Lau 1996). A number of other accounts do provide a more evaluative analysis of different countries' experiences of substantive environmental rights such as India (Dias 1994; Anderson 1996), Ecuador (Fabra 1996) and Brazil (Fernandes 1996), most of which suggest that where constitutional rights have been established they have been poorly utilised and transgressors left without sanction.

The US offers particular insights into the impact of substantive environmental rights, for a number of reasons. First is the embedded nature of rights rhetoric in political discourse (Glendon 1991), second is because the federal nature of government has encouraged a variety of stances on the legal entitlements to the environment and third the issue has been subject to greater research than in other jurisdictions. Substantive environmental rights in one form or another have existed in the US since the 1970 amendment of the Clean Air Act, which declared that every citizen had a statutory right to be protected from *"any known or anticipated adverse effects"* (see Miller 1998a), although this has often been subordinated to economic objectives and seen to be insuffciently robust (Mackay 1994). This was followed throughout the 1970s by constitutional amendments in at least eleven states (Banner 1976; Mackay 1994) but whose effectiveness was hampered by narrow judicial interpretation and inter-state development strategies (Kirchick 1975; Beatley 1994). More specific assessments of the impact of substantive environmental rights at the state level have been undertaken by Popovic (1996b) and in respect to California (Pulido 1994) and Minnestoa (Bryden 1978) – all providing a rather pessimistic account. Pulido (1994) notes how environmental rights in South West USA have been hampered by procedural justice and capital flight over the Mexico border. Bryden (1978) examines the earliest cases brought under the Minnesota Environmental Rights Act and suggests that its practical benefits should be treated with "tentative scepticism", as cost has been a major constraint to legal remedy, so that wealthy landowners wishing to protect their property have instigated most cases. He therefore concludes that his research *"reveals a danger... that the Rights Act will serve to fortify entrenched wealth at the expense of the less affluent"* (p.212). Interestingly however, all these commentators on the US experience do not depreciate the value of environmental rights per se, but criticise their mode of implementation and call for a strengthening of such provisions combining substantive and procedural aspects (see below).

A number of observations can be made on the basis of these national experiences. First is that while theories of rights are essentially about universal principles, their worth and effectiveness of implementation appears heavily dependent on a wide range of contingent cultural, political; legal and institutional factors (Cancado Trindade

1998; Hayward 2004), with the availability of other mechanisms for environmental protection, degree of political support and the judicial capacity appearing to be critical factors. Second is the fact that there is an absence of rigorous comparative analyses, with no accounts based on empirically-based, systematic analysis, thus making it difficult to draw any generalisation concerning the range and impact of each of the factors that may determine the worth of substantive environmental rights. Finally, it is clear that the gift of substantive rights *on their own*, will have only limited effect, leading Hayward (2004) to note that there is not necessarily a positive correlation between the constitutional provision of environmental rights by a state and its actual protection of the environment. Hayward does not however, use this as an argument against the further development of environmental rights, but notes what is required is to enhance the factors that will allow citizens to more effectively claim such rights. Indeed it has been suggested that substantive environmental rights actually presuppose the existence of a wide range of procedural rights (Eckersley 1996, p.230), so it is these that will be discussed next.

2.6.3. Procedural environmental rights

While substantive rights attempt to protect certain values that define environmental outcomes, others have suggested that these remain empty vessels unless civil society has the means to challenge the decision-making processes that result in environmental injustice. This has led Douglas-Scott (1996) to note that while substantive rights may introduce feelings of safety and strength, the promises they offer may be unachievable and that an emphasis on rights that guarantee involvement in decision-making processes may be preferential. First, by approaching environmental protection by way of democratic rights, this avoids the pitfalls of trying to define a universal substantive right that is applicable to all temporal and geographic contexts. Second, procedural rights may better ensure that those who have to live with the consequences of environmental change will be able to have their say on how, if and when it should occur. Furthermore procedural rights can, in some instances, incorporate the intrinsic value of nature (e.g. Stone 1974; Redgwell 1996), thus better accommodating the accusations of anthropocentricity inherent in

substantive environmental rights. While substantive rights can also have governance impacts through their *ex ante* and *post facto* effects on decision making, procedural rights have a more direct impact on environmental governance, as noted by Healey (1997, see section3.7 of this thesis). It was noted in section 1.3. that reforms to the governance of planning and environmental decision-making more generally can play an important role in supporting a transition to sustainable development and it is suggested here that procedural rights have a key role to play in this respect.

The tension between the relative priority of substantive and procedural environmental rights taps into deeper debates concerning the environmental credentials of democracies and other forms of political organisation (see Dobson and Lucardie 1993; Doherty and de Geus 1996). The sides of the debate are characterised by those who believe participative democracy and informed debate are the most powerful instruments in delivering environmentally sensitive decision-making and those who claim "*democracy is not enough*" (Westra 1998). Indeed, in an echo of the Marxist critique of rights, Homer-Dixon (quoted in Westra 1998, p.532) notes:

> *"If you only have procedural democracy in a society that's exhibiting internal environmental stress and already has cleavages ... then procedural democracy will tend to aggravate these problems and produce societal discord, rather than social concord."*

The debate between the appropriateness of substantive and procedural rights is not however necessarily polarised, with many commentators seeing the need to take forward both forms of rights in tandem (Eckersley 1996; Hayward 2001) or even to reconcile them by defining substantive rights on the basis of securing rights to protect and improve the environment rather an intangible notion of a "healthy environment" (Kiss 1988, quoted in Cancado Trindade 1998).

There has however been strong support for a specific emphasis on procedural rights. This has included an argument based on social justice, drawing on the principles and goals of the environmental justice movement outlined in Chapter 1 and on the need to improve governance for sustainable development. This has recognised that environmental protection is never purely a technical affair, but operates in the context

of power and social relations, with participation offering the greatest opportunities of fairness and the "wisest" decisions (Hunold and Young 1998). Despite the fact that the legal system can be biased towards the wealthy, powerful and educated (Yeager 1991), there is still a powerful argument for not abandoning procedural rights as an imperfect means of legal protection in favour of a system that has none (Young 1990). Indeed, while there has been a tendency to reduce social justice to issues of distributive justice, Young (1990) has argued for the need to place procedural justice at the heart of attempts to tackle inequality in multicultural societies. Much emphasis has been placed on the advantages that derive from the openness and effective participation that procedural rights promise, with benefits seen to be: the enhancement of social cohesion and public acceptance; increased quality of decision making (i.e. an *efficiency* function); raising of consciousness of environmental matters (i.e. an *education* function); better realisation of environmental goals through pressure from public opinion and enforcement (i.e. an *effectiveness* function, McCracken and Jones 2003). The functions of access to justice or environmental information may also have a wide range of specific benefits (e.g. Rowan-Robinson, Ross et al. 1996; Winter 1996a; Kimber 1998, see Figure 2.4), but are largely supporting of these key functions.

Further support for procedural environmental rights has been voiced by Eckersley (1996), who highlights that liberal democracy tends to under-represent ecological concerns in the trade–offs inherent in the utilitarian framework adopted for environmental policy. Instead, she suggests a rights discourse can be enlisted "*as a means of connecting democratic concerns and ecological concerns at the level of principle*" (p.214) and through the "trumping" effect (Dworkin 1984) of environmental rights, they have the potential to "*alter radically the established framework of decision-making in favour of 'the environment'*" (p.216). She also suggests that this may have wider implications for governance by enabling a more systematic consideration of the interests of marginalized groups and classes, ensuring the state is more responsive to environmental welfare of its citizens. Eckersley (1996) therefore

suggests that an institutional design based on environmental rights should include the following (p.230)[39]:

- Rights to know (i.e. a right to environmental information, rights to be informed of development proposals);
- Rights to participate in the determination of environmental standards;
- Rights to object to state environmental decisions; and
- Rights to bring actions against departments, agencies, firms and individuals that fail to carry out their duties according to law.

Eckersley (1996) is not alone in suggesting the procedural aspects which should be protected by environmental rights, which have also been defined in the *Draft Principles on Human Rights and the Environment* (see Figure 2.2. and Cameron and Mackenzie 1996; Popovic 1996a).

Figure 2.2: Procedural Environmental Rights proposed to the UN

PROCEDURAL ENVIRONMENTAL RIGHTS PROPOSED IN THE *DRAFT PRINCIPLES ON HUMAN RIGHTS AND THE ENVIRONMENT* (Ksentini 1994)
• the right to information concerning the environment; • the right to receive and disseminate ideas and information; • the right to participation in planning and decision-making process, including prior environmental impact assessment; • the right to freedom of association for the purpose of protecting the environment or the rights of persons affected by environmental harm; • the right to effective remedies and redress for environmental harm in administrative or judicial proceedings

This is also reflected in many of the main international "core" rights treaties, which contain procedural rights capable of being applied in a way that enhances environmental protection – such as the right to a fair trial and freedom of expression, freedom to information and right to legal redress (see Shelton 1991; Kane 1993; Cameron and Mackenzie 1996; Churchill 1996; Douglas-Scott 1996). Similarly, the need for participation and procedural justice is being reflected in international environmental governance, with the Rio Declaration recognising that specific

[39]These resemble the rights related to planning suggested by Healey (1997, p.297) and see Chapter 3.

measures are needed to promote the participation of marginalized groups, while promoting the more general principle that;

> "... *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... and the opportunity to participate in the decision making process... Effective access to judicial and administrative proceedings, including redress and remedy shall be provided"*
>
> (Principle 10).

Similarly at the national level, it could be said that almost every nation has general rights to legal and administrative procedures, but only a few of these specifically relate to the environment[40] – thus where explicit *environmental* rights have been adopted, these are predominantly substantive in nature (see above). There has also been much progress in at the national level in establishing legal precedents over environmental decision-making, particularly on issues such as access to environmental information and widening legal standing in environmental cases (Führ and Roller 1991; Deimann and Dyssli 1995; Du Bois 1996). In the case of the UK, a key driver to the reform of environmental governance has been European law and policy as values embedded in EU law are often protected as if they were contained in a right, in the sense that it can be used to "trump" national legislation and cannot be amended by a simple vote in the national Parliament. Example of this influence include the implementation of the ECHR in relation to environmental issues, procedural rights embedded in EU Directives and the new standards being established by the application of the Aarhus Charter.

Although the ECHR does not contain any express environmental rights, there has been a stream of cases that has successfully applied its provisions to procedural aspects related to the environment. It is not intended to review the detailed case law developed under the Convention here, as some of the cases relevant to British planning are discussed in Chapter 5 (see Shelton 1993; Desgagne 1995; Upton 1998;

[40] One example of constituted procedural rights is the Ontario Environmental Bill of Rights, adopted in 1994, which has a key objective to enhance participation in environmental decision-making (Walker 1995).

Cook 2002). However, it is important to note that Article 6 (Right to a Fair Trial) and Article 10 (Freedom of Information) have been used effectively to derive procedural environmental rights, especially in the areas of participation and challenge of government decisions (Desgagne 1995). This view is particularly strengthened when the wider provisions of European law are taken into account, as there has been a considerable amount of legislation that also serves the ends that explicit procedural environmental rights seek to serve. Hayward (2004) has noted how the EU has adopted the Polluter Pays Principle and the Precautionary Principle as key policy tenets and which have significant rights implications, with additional rights implied by the Francovich[41] principle for areas such as Environmental Impact Assessment (Somsen 1996). The Directives of the EU have also a range of "embedded rights" which have included the right to information, the rights to participation and rights of access to remedies (Douglas-Scott 1996). This is an area that is constantly subject to progressive evolution in recent years[42] with the most recent package of procedural issues on environmental matters being driven by the Aarhus Convention (see Chapter 3), which has adopted a strong assertion of environmental rights and duties. The monitoring of specifically environmental rights in the UK is problematic because it can be difficult to distinguish environmental provisions from those introduced by more general initiatives, such as the Freedom to Information Act 2000, while the general nature of UK environmental law is that:

> *"... a pragmatic mixture of chiefly judge-made private law and statutory systems of regulation carried out by public bodies. In this the subject is by no means unique but more important is the lack of a coherent set of principles and rights"*
>
> (Purdue 1991b, p.534)

[41] This refers to state liability for ensuring real and effective protection for an individual's rights established in EC Directives, as developed from European case law, particularly *Francovich vs Italian Republic* (1992) ECR I-5357.

[42] Particularly significant Directives have been introduced concerning *Public Access to Environmental Information* (2003/4/EC) and *Public Participation in Environmental Decisions* (2003/35/EC) *Environmental Liability* while there is also a current proposal for a Directive on *Access to Justice in Environmental Matters.*

Miller (1995) notes that if one is searching for a recognisable environmental right in England, one has to scan the wide array of UK statutory and common law provisions relating to the environment covering fields such as planning, property, consumer protection and public health and contends that "the English tradition" does not confer any quintessential environmental rights.

While section 2.6.2 noted that there was a lack of evaluative research on the actual impacts of adopting substantive environmental rights, there are a few studies of the impact of procedural environmental rights, mostly focussed on the experience in the US, where the rise of the Environmental Justice Movement (EJM) has drawn attention to procedural inadequacies. Foremost amongst these is Pulido's (1994) analysis of environmental rights in California and Mexico, which shows how procedural rights have encouraged participation but raise concerns over equity of access to the regulatory process, apparently contradicting the evidence produced by the research of Boyce et al discussed in Chapter 1.

This suggests that while substantive environmental rights share problematic issues with social and cultural rights in general (e.g. their status as "derived" rights and difficulties in definition and implementation), procedural environmental rights are vulnerable to the criticisms aimed at "core" civil and political rights. The consequence of this is that there tends to be higher levels of consensus over procedural environmental rights and their ability to infleunce broader patterns of governance. However, as with other liberal rights, one of the key tests of the validity of procedural rights is whether they make any difference in the context of unequal societies, or as Stammers (1993) notes, whether they challenge or sustain existing power structures.

This discussion on the dimensions and scope of a range of environmental rights has assumed an application of the definition of rights, as given in section 2.4, but has offered no direct appreciation of how this could be applied to environmental values. Having sketched the overall dimensions to environmental rights, they will now be specifically considered in the light of Freeden's concept of rights.

2.7. Environmental values in Freeden's concept of rights

It was suggested in section 2.4. that the definition of rights provided by Freeden (1991) offered a number of advantages for the analysis being pursued in this thesis. It was noted that Freeden suggests that rights are best viewed as conceptual devices that offer special protection to those values or attributes that are recognised as having priority status and that they should be seen as a "wrapper", or capsule, that encompasses the values that are to be protected.

This concept can be used to further explore the nature of substantive and environmental rights and to do so Figures 2.3 and 2.4 take an example of these types of rights to illustrate the following characteristics:

- *Foundational Principles:* the "deeper" values that contribute to the validity of the right, which typically may be "core" or first generation rights or other attributes accepted as being inviolable and which the right can be seen to be protecting in the context of the challenges of modern society (Waldron 1993b, p.21). This recognises that the analysis of any right cannot be separated from the values it contains and *their* conceptualisation.
- *Values Explicitly Protected:* The values expressly noted in the right.
- *Values Implicitly Protected*: Other values that may be intrinsically related to, or inferred by the expressed values, including "adjacent concepts".
- *Examples of Action Demanded:* The types of deliberate action (or non-action) required by the existence of the right.

It has been noted that rights should be seen as being social constructs, so that the interpretation of the values noted in Figures 2.3.and 2.4. should not be seen as an objective or comprehensive deconstruction of such rights, but an illustration of the types of values individuals may infer such rights protect, as expressed through discourse (see Chapter 4).

Figure 2.3. indicates some of the values and attributes that are embedded in, and implied by, the substantive right: "*All human beings have the fundamental right to an environment adequate for their health and well-being*", as recommended by the WCED (1987, p.348.) If we put aside the problems of semantics and definition (of "healthy", "environment", "well-being" etc.), as well as those related to the implementation of such a right, the Figure can be seen to illustrate how such a right may be justified in terms of being a derivative of "core" rights such as those to life and dignity and could be argued as being necessary to the enjoyment of those rights. Furthermore, while the right offers a relatively succinct expression of the value that it seeks to protect, by implication it also encompasses a range of other attributes - such as limitations on a range of public and private actions and revised approaches to environmental decision-making. The Figure also indicates some of the actions that may be demanded from such a right, which may involve further protection of health and the environment via regulation and proactive government action in fields such as public health, planning and even foreign affairs.

Figure 2.4. provides a similar analysis for a procedural right to "*information regarding the environment*", as suggested in the *Draft Principles on Human Rights and the Environment* (Ksentini 1994) and inferred in EU Directives and the Aarhus Convention (Weber 1991). This is taken as an illustrative case from a range of potential procedural rights to highlight a number of key points - again this does not dwell on difficulties of interpretation or implementation (such as expense, time limits for releasing information etc, see (ELF 2002), but on the values that such a right protects and infers. Firstly it can be seen that a right to environmental information derives some validity from "core" rights such as political participation and freedom of expression, as well as broader notions of citizen involvement in democracy. The specific need for *environmental* information derives from similar values to those shown in Figure 2.3. in that a seriously degraded environment can compromise the enjoyment of other human rights.

Although the right includes a relatively simple assertion to environmental information, it implies that certain environmental objectives can be promoted through the provision

of such information. This includes the promotion of stewardship (Rowan-Robinson, Ross et al. 1996) and the expression of environmental citizenship (Barry 2005), suggesting that state apparatus on their own cannot be trusted to deliver an adequate level of environmental protection. Like the substantive right discussed above, the right to environmental information also demands certain actions and these are listed in Figure 2.4. It is noticeable that the actions are significantly narrower than those listed for the substantive right and as such offer a far more focussed opportunity for effective enforcement. This underlines the efficacy of the two sets of rights and highlights the fact that the procedural right only defines a means to an end, but that the desired ends are similar to those specified be the substantive right shown in Figure 2.3.

Figure 2.3.: The "capsule" of a substantive environmental right

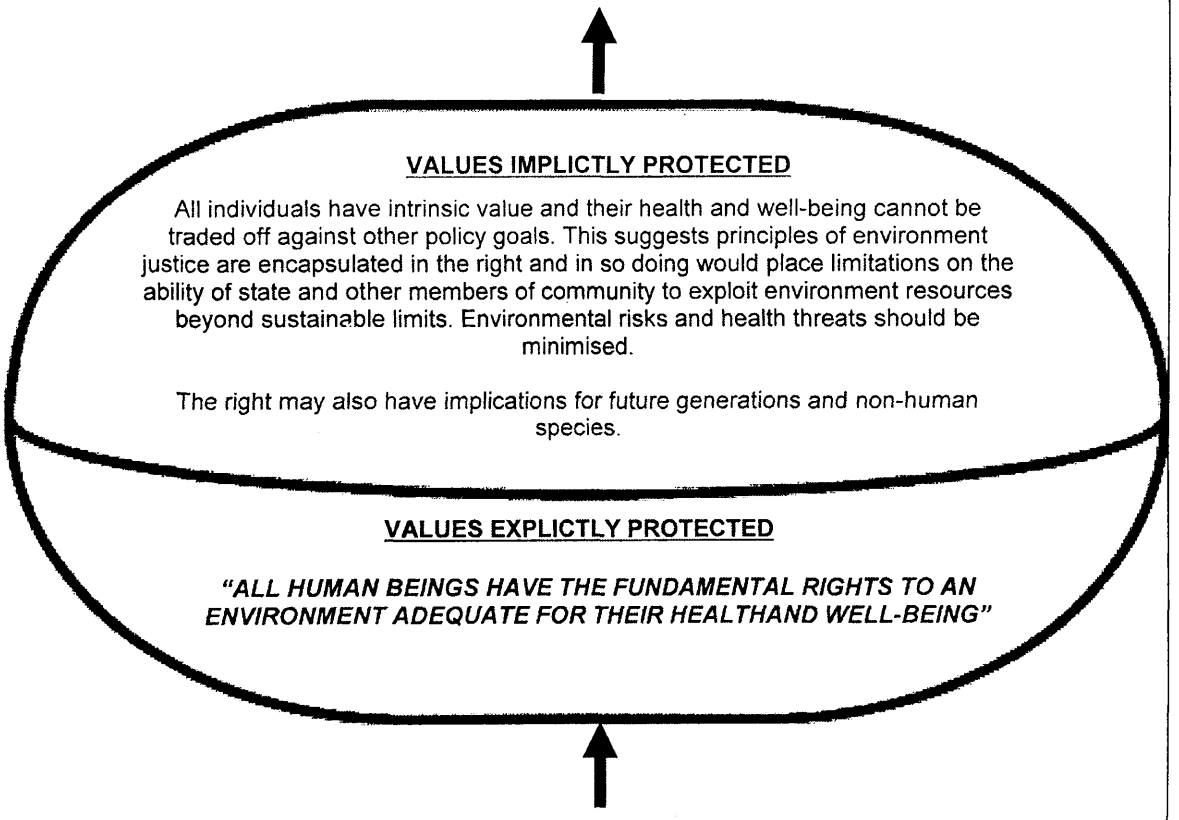
EXAMPLES OF ACTION DEMANDED

The right grants entitlements to the citizenry in terms of environmental quality of their homes, communities and work-places and imposes a duty of care for health and environmental matters on the state, private sector and civil society. This would include minimising risks to the environment by adherence to the precautionary approach.

This may involve action in defining and protecting minimum standards of air, water and food quality and more stringent regulation of pollution and hazardous materials. It would involve more rigorous action on public health and preventative care both in the health sector, activities effecting local amenity (e.g. planning) and housing quality (e.g. building standards) and the global environment, such as climate change.

It may also demand action on issues related not just to physical health, but also those related to spiritual and cultural well-being of citizens, such as access to open space, stress and perceived threats to well-being.

The right implies access to procedural justice and capacity for rights claims. It may also demand action from parties other than the state and result in stimulating debate and political action, judicial activism, raising public awareness and education.



FOUNDATIONAL PRINCIPLES

Health and well-being can be seen as being an essential prerequisite to the enjoyment of all other human rights as a poor environment may limit an individual's autonomy and dignity and threaten core rights such as those to life and property. A healthy environment may also be seen as a welfare benefit and thus demands affirmative action by the state as part of its duty of care for its citizens, The right is based on and draws much support from deep notions of the person, morality, justice, equity, the role of government and all the conceptualisations contained therein.

Figure 2.4.: The capsule of a procedural right to environmental information

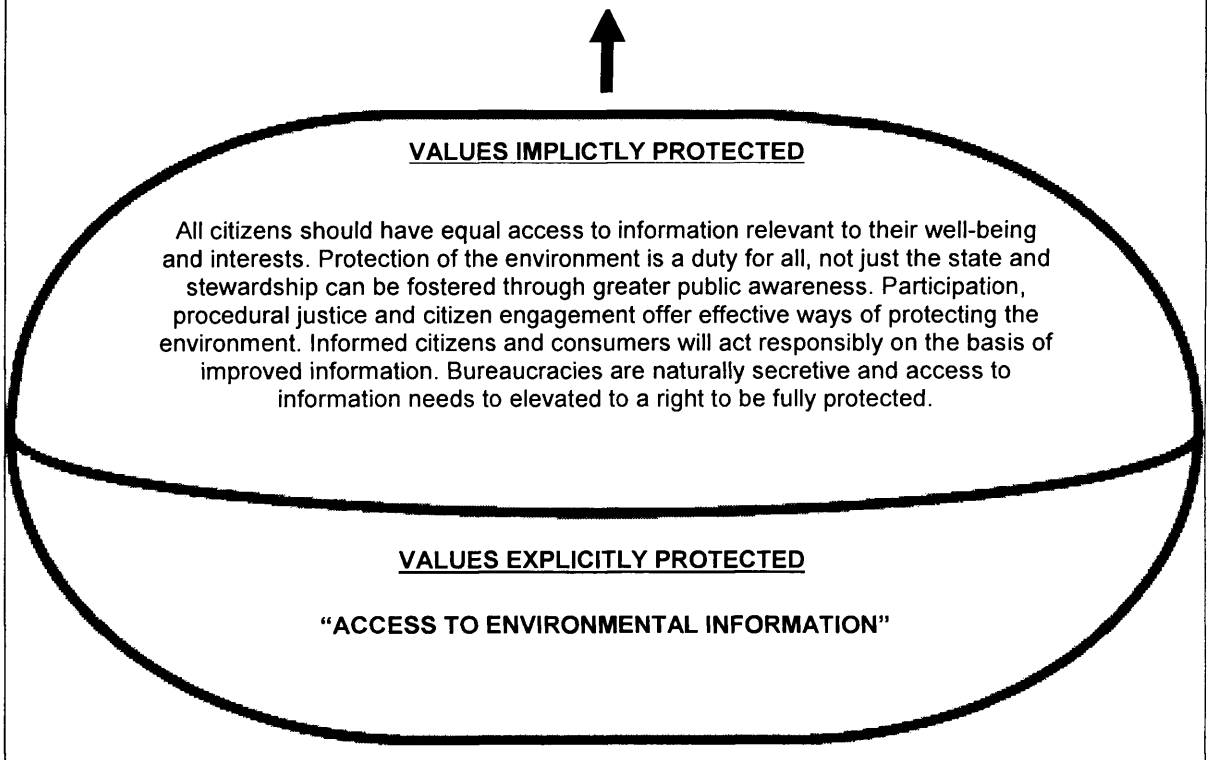
EXAMPLES OF ACTION DEMANDED

The right grants entitlements to the citizenry in terms of information concerning the environment and imposes a duty of information collection, monitoring and dissemination on the state, private sector and civil society.

The right ensures that public authorities make primary and secondary information available on request and supply it within certain time limits and at reasonable cost. "Environmental information" may include, data related to air and water quality, procedures and briefing papers for public decision-making, independent research on the environment and health, environmental impact of goods and services. The right may therefore impose duties on the private sector and promote greater environmental disclosure, reporting, detailed monitoring by public bodies.

The right could cover prior-knowledge of key environmental decisions, thus having implications for neighbourhood notification and public consultation in planning.

The right may also result in more indirect action from parties other than the state and result in stimulating debate and political action, judicial and regulatory activism, raising public awareness and education.



FOUNDATIONAL PRINCIPLES

Effective democratic representation requires continual engagement between government and it's citizens. Liberty demands that there has to be safeguards and scrutiny of elected leaders and the bureaucracies that support them, as well as the protection of core rights, such as freedom of expression. Political debate should be based on the full facts available and any action under taken in the name of the public interest should be open to all. An adequate environment is a prerequisite to the enjoyment of other human rights (see Figure 2.3.)

This last comment illustrates one of the features of applying Freeden's concept to an assessment of environmental rights in planning; it helps focus on the values being protected by such rights. The examples above shows that although these two rights have very different "wrappers", the effect of them tends to be complementary, supporting the need for both substantive and procedural rights. This discussion also illustrates how rights can protect a range of important values but as a right their importance is explained by their deeper connection to other, more abstract interests that may be justified in moral or political theory (Waldron 1993b p.22 and Raz 1986, p.168-170).

2.8. Conclusion

This Chapter has established the scope, meaning and value of the concept of human rights and explored the notion of defining and implementing environmental rights. It has been shown that the idea of human rights has powerful rhetoric appeal, supported by a range of and philosophical positions and compatible with conservative, liberal and socialist perspectives (Freeden 1991). Although not without its critics, human rights have achieved a position of hegemony, so that any values elevated to rights status gain "paramount importance" (Cranston 1973, p.67) and have special protection from political and legal abuse.

The concept of rights is however heavily contested and intrinsically dynamic. Some observers suggest that rights should represent *a priori* values, based on natural law and therefore be primarily moral ideals, while other believe they are essentially social constructs, reflecting the social and political context from which they emerge. This Chapter has suggested the latter perspective offers a more accurate position of conception of rights in relation to the topic under consideration here. This implies that rights have no utility or meaning in themselves, but depend on the institutional and political context in which they are situated. This is illustrated by evolving generations of rights that reflect the major concerns of their time; rights emerged during the Enlightenment as a reaction to despotism while over the last 50 years rights they have sought to protect issues, such as access to education or humanitarian relief. As

the extent and unequal distribution of environmental degradation has emerged, so has the idea that environmental values should be protected by rights mechanisms.

Environmental rights can be seen to take ecocentric, substantive and procedural forms – the latter two have been the main focus for discussion in this Chapter. They can also can be seen as being derivative of recognised "core" rights that seek to maintain the autonomy of the person - from this perspective it is seen as being important to protect individuals from excessive environmental stress so that they may enjoy a wide range of other human rights. Environmental rights draw on a range of ideological and moral support and are becoming embedded, or at least implied, in a spectrum of international human rights instruments and environmental law. Over 70 national constitutions contain environment rights, mostly in their substantive form, although the enjoyment of such rights presupposes the existence of full procedural rights.

Despite this, the actual effect or "worth" of environmental rights is largely unproven. A large body of normative theory suggests that strong environmental rights have value as part of a institutional design for delivering environmental justice, but there is an absence of systematic empirical analyses of their actual impact on outcomes or procedures in any specific field of public policy. There are a few isolated studies that offer contradictory evidence of the impact of rights (e.g. Pulido 1994; Boyce, Klemer et al. 1999), and a wider range of observations largely based on anecdotal evidence and not tested against evaluative criteria such as whether they sustain or challenge existing power structures (Stammers 1993; Hancock 2003).

It is clear that the realisation of substantive environmental rights faces a range of definitional and implementation problems that are characteristic of other second and third generation rights. Procedural rights offer a more direct process of implementation, sharing the characteristics of first generation "core " rights and currently offer the greatest prospect of adoption in UK jurisdictions. Procedural rights also have greatest resonance within the tradition of British planning and it has been

argued, offer a more productive focus for assessing the role of environmental rights on this realm of public policy.

Rights theory offers a morass of contestation that has hampered coherent thinking on how rights may function in relation to specific areas of policy. This Chapter has suggested that the definition of rights offers a robust means of conceptualising rights for this purpose. By envisaging a rights as a protective capsule, it is possible to; focus on the specific values any right purports to protect; assess the foundational principles of that rights; and identify actions demanded by the right. This powerful tool will be further elaborated in later sections of the thesis.

Although apparently offering potential, but unproven, benefits for realigning environmental protection towards equity and sustainable development objectives, it is clear that rights on their own do not offer a panacea for this and need to be seen as part of a more elaborate system of discursive or ecological democracy if these higher aspirations are to be achieved. This thesis does not however focus on these larger structural issues, but on the specific worth of environmental rights in the British planning system. Having established a theoretical understanding of rights and their implications for environmental protection, the next Chapter will review the relationship between rights-based approaches and established theory and practice in the British planning system.

CHAPTER 3: PLANNING THROUGH A "RIGHTS FRAME"

3.1. Introduction

Having explored the theoretical and historical basis of environmental rights, this Chapter relates this to land use regulation by reviewing how the concept of rights has been deployed in the field of planning. This immediately faces a number of difficulties because of the contested nature of rights and the variety in the way the term is used in planning, ranging from discussion in the courtroom to calls for greater rights on the streets. However, as noted by Blomley (1994, p.413) these meanings have very different implications and one has to be careful to clarify the location in which rights are put to work. One way of contextualising the differing meanings of rights in planning is to appreciate them as a constituent of discourse[43], which facilitates an understanding of their social-construction and the ambiguity of how the term is used (Rydin 2005). Discourse analysis can also provide insights into the rhetorical value of rights and as such can be linked to the use of power – a point succinctly highlighted by Mitchell's observation that "*a claim of right, no matter how contested, establishes a framework within which power operates*" (Mitchell 2003, p.27).

This Chapter attempts to identify the main rights discourses related to land use regulation to establish what (Myerson and Rydin 1996, p.11) have termed the *'rightsnet'* or '*net of topicality'* encompassing the voices that invoke "rights" in the field of planning. This covers a potentially huge variety of standpoints which can be imagined as a "textual carnival" (Miller 1991, quoted in Myerson and Rydin (1996, p.7) representing a dynamic mêlée of voices, meanings, arguments and connections, that add up to what the term "rights" means in the field of planning. It is no easy task to discern theoretical coherence from this, so an emphasis (but not an exclusive one) has been placed on academic texts rather than sifting the millions of media clippings of where rights may be invoked in local and national planning discourse.

[43] See Chapter 4 for a fuller appreciation of term and how it can be used in planning research.

The Chapter first reviews the way in which environmental rights have appeared in planning and goes on to broaden the review to cover rights in general, identifying a variety of distinct rights discourses, each having different ideological and theoretical basis. It is argued that a more coherent understanding of the concept of rights in planning is necessary if the role of environmental rights is to be effectively evaluated. Following the review of this '*rightsnet*', the Chapter concludes with the consideration of how all these perspectives could potentially be synthesised through the adoption of a "rights-frame" as an interpretative tool for evaluating the outcomes of the planning process and which will be further explored in the empirical research.

3.2. Planning and environmental rights

As noted in section 1.3., the last decade has seen sustainable development emerge as a core value of the planning system, reflecting the role it plays in regulating environmental quality, through the protection of "amenity", location of hazardous activity, transport provision etc. Despite this, the specific topic of environmental rights has been largely neglected within planning, with only Beatley (1994, see section 3.5.2) and Miller (1995; 1998a) directly addressing this relationship, and then from very specific viewpoints. A range of other authors have, however, raised important issues of relevance to this debate either through consideration of different aspects of planning practice and theory or by academics outside the planning field making more general observations on environmental rights.

The wider context for this has been set out in Chapter 2, which described the supra-national debate on environmental rights through initiatives such as the Ksentini Report and Aarhus Convention. It was noted that it has proved difficult to identify tangible impacts of these at the level of national planning systems. This is not true, however, in the case of the ECHR, which has had a number of direct impacts on the UK's planning system, particularly following the HRA in 1998.

The HRA established a new framework for protecting individual rights in the UK by ensuring that all legislation and actions of public authorities comply with the ECHR.

As previously discussed, a number of authors have debated the extent to which the ECHR establishes substantive environmental rights (e.g. Weber 1991; Shelton 1993; Douglas-Scott 1996; Hayward 2005) and while there is some division of opinion on this, the general consensus is that it does not.

Despite not providing substantive environmental rights, the ECHR establishes rights protection on a number of procedural matters and led to speculation that a number of provisions of the UK planning system could be questioned under the Convention. This has included contravention notices (Beloff and Brown 1999) compulsory purchase orders (Redman 1999), call-in procedures (Casely-Hayford and Leigh 2001), policy-making (Kitson 1998) and a range of other impacts on planning and environmental law (e.g. Corner 1998; Hart 2000; Purchas and Clayton 2001). While many of these concerns have been ameliorated as the courts have decided cases brought on the basis of human rights claims, there are enduring questions over the compatibility of the appeals process, for example in relation to Article 14, which prohibits discrimination in the enjoyment of rights and freedoms (Singh 2001) and Article 6, the right to a fair trial[44]. It is not intended here to repeat the lengthy legal discussion on the procedural rights provided under the ECHR and a detailed consideration of how this has framed the debate on TPRA is provided in Chapter 5.

However, it is very important to note that the HRA stimulated a much wider take up of rights discourse in planning, perpetuated by the Aarhus Convention (UN/ECE 1998), which, as noted earlier, is now beginning to have a direct impact on planning in the UK. The Convention was signed on 25th June 1998, with the aim of elaborating Principle 10 of the Rio Declaration in a European context through a series of procedural rights covering three main issues of: access to environmental information; public participation; and access to justice. Although there is currently no formal requirement for compliance with the Convention in the UK, there is a broad consensus that this is only a matter of time (Stookes and Razzaque 2002). Indeed there are developments that have begun to translate its provisions into both European

[44] "*In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law*", Article 6(1) of the ECHR.

law[45] and within the UK, with an example of the latter being the revision of DEFRA's regulations on access to environmental information (DoE 2002).

The effect of protecting such values in EU law is that they are isolated from challenge within the UK legal and political system thus potentially giving them the effective status of a right, they tend not to be articulated with rights discourse, rather than as a more bureaucratic policy mechanism. In such a context, these values are protected by law but do not take on the rhetorical value associated with rights[46], leading Mackay (1994) to suggest that environmental standards are not enough since, *"without any recognition of true environmental rights it will always be possible for pro-development interests to reduce the obligations and effects of environmental protection legislation upon industry"* (p.1761).

In contrast both {Hugh} Ellis (2000) and Miller (1995; 1998a), have suggested that it is indeed possible to identify established environmental rights of direct relevance to planning at the UK level. Thus Ellis (2000) proposes that procedural rights in planning (e.g. right to object to development) are used to protect the environment and as such, should be regarded as environmental rights. A more precise attempt to define the environmental rights embedded in UK law has been made by Miller (1998a) who has identified the procedural rights granted to third parties under the (now superseded) Town and Country Act 1990. Interestingly, he notes that there are no rights associated with development plans, but almost all arise from development control, suggesting that they have ultimately evolved from rights to property (see section 3.4). Miller's overall assessment is that the planning system is driven by calculation of aggregate utility and as such, environmental interests tend only to be upheld if they can be translated into tangible reasons for under-mining the presumption in favour of development, thus negating their consideration in a rights framework.

Indeed, any debate concerning environmental rights and land use regulation has tended to emphasise procedural rather than substantive rights, primarily because

[45] i.e. Directives rather than the ECHR or Aarhus Convention.
[46] i.e. and as such do not view rights as a "linguistic device" (Freeden, 1991).

planning is so focused on process (Grant 2000a). This is underlined by the action of the British courts who have repeatedly asserted that they have only a limited role to play in commenting on the substantive basis of planning (Herling and Purdue 2000) and when they have had to consider the fairness of the outcome of a planning decision, they have done so by applying the test of Wednesbury reasonableness, rather than following more deontic reasoning. Nevertheless, the influence of sustainable development on planning has led to a growing recognition of the need for rule-based environmental standards (Winter 1996b) such as EIA, air and water quality standards, transport assessments, sustainability indicators and quality of life capital. These tend to be rule-based in that they seek to identify critical local thresholds and in so doing introduce the need to protect certain vital environmental assets and the new set of moral obligations demanded by sustainable development (Haughton 1999). Although this lends itself to a more sensitive appreciation of the role of environmental rights, to date the environmental objectives of the planning system seem to be rarely articulated within a rights framework. It has also been noted that procedural rights also have a role to play in realigning the governance of environmental decision making in favour of sustainable development.

This brief review of how environmental rights have been accommodated within land use regulation offers a number of insights. First that it is very much a neglected topic at a time when broader developments in planning thought, particularly the transition towards sustainable development, suggest a context that may be increasingly adapted to a discussion on their merits. The narrow range of work that has been undertaken on environmental rights in planning tends to be focussed on whether they actually exist or not, rather than their impact or worth. This has focussed entirely on procedural rights. Finally, discussion has almost entirely been in terms of formal institutionalised rights, rather than a wider appreciation of their worth in rhetorical or socially-defined terms. Further insights can potentially be gained from considering how other types of rights have been used in planning discourse and this is undertaken in the next section.

3.3. The 'rightsnet' of planning

While a large number of authors have invoked the concept of rights in relation to different aspects of the planning process only one previous attempt has been made to appreciate the varied ways in this has been applied. Thus {Hugh} Ellis (2000), has suggested that rights have been expressed in the British planning process in five distinct forms (see Table 3.1.). Although there is some question over the differentiation between these rights[47] and the basis on which they are defined, the validity of this typology is not fundamentally disputed here. However, it is argued that this typology does not provide an appropriate framework for an appreciation of the nature of rights in the context of this research because it applies an overly positivist and statutory categorisation which does not encompass, for example, the possibility of socially-defined rights and the impact they may have on the planning system (see Chapter 2).

Table 3.1.: One typology of rights in British planning (from Ellis 2000)

Rights as expressed in the British planning process	
Human Rights	Exemplified by the UNDHR 1948, HRA 1998 and Aarhus Convention 1998 as well as granting broad rights to life, liberty, freedom of religious observance, these broad frameworks have increasingly been interpreted as providing enforceable environmental rights.
Political Rights	The right to representation, freedom of political expression and the right to vote. Expressed in planning by the democratic control of decision making at the local level.
Administrative Rights	Unlike other European nations such as France, administrative rights in the UK are vaguely defined. They include the rights to information and consultation on some matters and offer non-judicial opportunities for redress such as Local Government Ombudsman. Rights also exist to challenge the conduct of a local or national state authority if it can be shown to have been, for example, 'unreasonable' and therefore been *ultra vires*.
Property Rights	The right to enjoy the use and value of private property without undue hindrance from the state or third parties.
Rights of Legal Redress	The opportunity, when any of the above rights are infringed, to seek legal redress at law. Expressed in planning by the opportunities for judicial review.

[47] For example, "Human Rights" can conceivably encompass the other four types of rights, while the difference between "Administrative Rights" and "Rights of Legal Redress" seem somewhat blurred.

There does not therefore appear to be a single framework that can foster a common understanding of how the concept of rights has been applied in planning. A first stage in developing such a framework is to identify the "*net of topicality*" (Myerson and Rydin 1996, p.11) for rights in planning. To do this, the research will continue to apply Freeden's (1991) definition of rights where they are seen as conceptual devices expressed linguistically, rather than being purely legal constructs. This suggests that it is appropriate to consider rights in the context of discourse (see Chapter 4) where an emphasis is placed on the meanings attributed to rights, rather than attempting to apply a legal or moral test on the validity of their definition.

The implied meanings attached to terms such as 'planning' and 'rights' immediately touch on a number of core ideological assumptions governing the purpose and nature of land use regulation, including *inter alia* the dialectic tensions between: public and private interests; notions of the individual and the community; and teleological and deontological ideas of morality. Together these represent some of the most fundamental principles that shape the nature of the planning process, suggesting that an exploration of the concept of rights goes to the very core of planning thought. In finding a path through these issues it is proposed to initially take a loosely defined chronological perspective that is cognisant of the evolving concept of rights and the changing nature of planning regulation. This informs an understanding of the contemporary discourse of rights in planning and highlights the critical concepts that are central to understanding the role of rights in planning today.

3.3.1. Planning and rights: an evolving discourse

From the eighteenth century onwards, landownership has been an enduring determinant of individual rights within society (Gordon 1996). This has obvious significance for land use regulation, so that the dominant concept of rights in the emergent British planning were primarily in relation to property (McMahon 1985), albeit in an evolving and complex context (see Booth 2003). Indeed, the development of town planning from the 1860s onwards is often characterised by the progressive extension of public control over private property rights (e.g. Ashworth 1954), with the

Development Control (DC) process becoming the ultimate arena for balancing rights in land (Booth 2002b). Indeed, it was the early Planning Acts that established many of the key principles over individual rights that exist today - for example the Housing, Town Planning etc Act 1909, established that public regulation of private interests should dominate over expropriation and that losses suffered by landowners as a result of development restrictions should not be compensated (McMahon 1985; Crow 1996; Booth 1999). The Act also provided formal recognition that rights in land went beyond those of the individual landowner (Sutcliffe 1978) and established a concept of "community rights" (Millichap 1995). In making this claim, Millichap highlights a 1920 case[48], from which a legally-based discourse of community-rights appears to have emerged. Responding to the claims of the landowner, disgruntled about the costs imposed by the 1909 Act, the judge ruled that property owners were duty-bound by the Act to protect the "community" from impacts that were contrary to "amenity" and "planning"[49]. Millichap notes that of most significance here is the acknowledgement that the community had "rights" of amenity, for which landowners must meet the cost. Furthermore, Millichap suggests that the "community rights" perspective encapsulates the fundamental objectives of early planning legislation which was the dominant legal doctrine until at least the 1947 Act, after which the notion of the "public interest" emerged as the key justification for planning intervention[50] (see section 3.6.3.). Millichap suggests that the concept of "community rights" is a more illuminating concept than the concept of the "public interest" as it places planning authorities in the role of being guardian of such rights rather than having more negative task of arbitrating between public and private interests and is more capable of acknowledging the heterogeneous nature of society. As a result of his historical review, Millichap makes an argument for a return to a "community rights" perspective and in so doing makes a number of highly significant observations both in terms of the evolution and the value of rights discourses in planning.

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[48] Re: *Ellis and the Ruislip-Northwood Urban Council* (1920) 1 KB 343.

[49] As quoted in Crow (2001), the judge in this case noted that *"Parliament appears to have sacrificed the individual to the welfare of the area..."*

[50] Millichap (1995) notes that in *Basildon v. Minister of Housing* (1960) 23 All EIR 408, the concept of "community rights" had evolved into the notion of "public rights", a halfway house to the "public interest", which remains the key justification for planning today (e.g. PPG1).

Even if Millichap is correct in identifying community rights as an key influence in pre-war planning, the subsequent decades saw a rapid evolution of the British planning including the increasing discretionary powers given to local authorities to determine planning matters, reflecting a reluctance to further challenge the individual rights enshrined in property ownership (Booth 1999). This became formally incorporated in the British planning system when the Town Planning (Interim Development) Order of 1922 instituted the right of appeal for aggrieved landowners (Crow 1996; Booth 1999), but not objectors. This was further entrenched in government guidance in the inter-war years, which urged a policy presumption in favour of development (Booth 1999), thus directing how planning authorities should apply issues of proportionality on a case-by-case basis and underlining the special protection accorded to private rights of ownership. This appears to have created an enduring context for how rights-claims are perceived in planning in Britain, with the case-by–case adjudication of development rights contrasting sharply with more prescriptive European or US planning systems (Cullingworth 1993; Booth 2002a), through which such rights-claims are more clearly enshrined in planning policy and ordnances.

The legislative developments prior to WWII created the context for the emergence of the comprehensive planning system in the form of the 1947 Town and Country Planning Act, which crystallised the legal basis of rights-claims and established the balance between public and private interests that endured into the 21st century. Indeed, despite the many precedents of public control of land use, the Act was still strongly perceived as taking *away* rights from landowners[51], rather than giving them *to* the community (Cullingworth 1975; Reade 1987), illustrating the deep hegemony of private rights in landownership (see section 3.4 below) and perpetuating the pro-development bias at the heart of the planning system. This is far from being a novel observation, but until now has not been explicitly viewed in terms of its implications for contextualising subsequent rights discourses by explicitly prioritising rights of private property ownership.

[51] It should also be recognised that as initially formulated, the post-war planning system also included a system of compensation for the development rights that were nationalised, to be paid out of a national fund generated by development tax. These financial provisions were abolished in 1953 and despite attempted resurrections in 1967 and 1976, there is no longer a direct link between taxation and the increase in value brought about by a granting of planning permission.

While it can been shown that debate over the balance between public and private interests in planning was initially focussed around issues of public intervention in landownership, over the post-war period a more populist discourse of rights has gradually emerged, focussing not on the substantive rights in property, but in procedural aspects of public involvement in planning decisions. This discourse has been expressed in a myriad of discourse "themes", including the demand for increased public participation in planning, environmental justice (see Chapter 1) and more recent concern over due process based on the impact of the HRA (e.g. Grant 2000b). The latter two of these themes are instantly recognisable as rights discourses, but it is also important to acknowledge that the principle of public participation, in having a much longer pedigree and being an established central tenet of "good" planning, has also been critical in establishing the context from which the current rights discourses have emerged.

The increasing pressures for enhanced opportunities for public participation over the last three decades is well documented (e.g. Thomas 1996). It is possible to interpret the growing demands for participation as evolving from a property rights perspective[52], but since the 1960s onwards, increased legitimacy for participation has emerged from sources such as the Skeffington Report, the 1980s' experiments in "radical" planning and the emergence of the Collaborative Planning paradigm (Deakin 1985; Montgomery and Thornley 1990; Healey 1992b; Thomas 1996; Lowndes, Pratchett et al. 2001; Lowndes, Pratchett et al. 2001; Healey 2003). Skeffington envisaged participation primarily in terms of communication to improve public relations and in the context of restricted resources and tightly defined statutory requirements, public involvement continued at a largely tokenistic level through the 1980s (Thomas 1996). However, the 1990s saw resurgence in interest in participation, to the degree that it has become the dominant value in the practice and theory of planning (e.g. Healey 2003). As such the planning process once seen as a

[52] For example *"... the ideology that the courts usually bring to bear on questions of land use planning that come before them is the ideology of private property and it is this ideology that has helped define the issue of locus standi"* McAuslan (1980, p.52) see also the discussion on the wider bundles of rights of ownership associated with land, as discussed in section 3.4.

modernist, state-directed activity (Faludi 1973) is now perceived amongst practitioners, academics and the state alike as being one where community involvement and stakeholder engagement are fundamental to the very concept of planning. It could therefore be argued that the increased importance placed on public engagement should be recognised as a central value in planning and as such afforded special protection. This has thus primed the context for the acceptance of participation issues to be discussed within a rights framework (see section 3.5.) that has been consolidated in recent years by legal debates emerging from the HRA which has arguably shifted the balance between private and public interests in land use regulation established by the 1947 Act (Crow 2001).

From a historical perspective, the dominant concept of rights has been related to property, increasingly accompanied by rights discourses related to participation. Both of these can be seen as being a symptom of a dialectic struggle between competing notions of rights of property and the appropriate level of intervention of the state. This suggests a number of observations to be taken forward in the thesis. First is that while wide ranging and somewhat incoherent, there are a number of potentially distinctive rights discourses within planning. Second is that the notion of rights has changed as planning has evolved to become increasingly diverse and thus opening up the potential for the emergence of additional rights discourses in the future. Thirdly, rights perspectives (in particular community rights, Millichap 1995) may be seen as a founding concepts of the planning system with a suggestion that there may be distinct ethical and procedural benefits in reviving them as a central concept in planning practice.

In order to make more sense of these insights, a more detailed review will be made of how rights are currently constituted in contemporary planning discourse.

3.3.2. Contemporary rights discourses in planning

A systematic review of planning literature of the last two decades appears to justify a threefold typology of rights discourses. Table 3.2 shows the results of a bibliographic

search of the key peer-reviewed planning journals using a number of bibliographic databases. Although this may underplay some forms of planning literature[53], it does effectively provide a sample of the recent work on rights in planning and highlights a number of interesting patterns. For example it shows the escalation in interest in the concept of rights over the last ten years, not necessarily implying that rights were ignored in former years, but that they have been moving to a position of higher visibility and now being justified as a main focus of research. The Table also highlights that while there has been a long standing and enduring discourse on property rights primarily in Anglo-American context, it is only in the last ten years that issues such as due process and participation have really begun to be considered in rights terms. This may be explained by factors such as a negative impact of US property-rights approach on the more progressive potential of rights research (see section 3.4) and which has been counteracted by academic interest in the impacts of the HRA. It is also noticeable that legal debate is now subsiding as the implications of the HRA are resolved through court rulings (Maurici 2002; Maurici 2003) and it becomes firmly embedded in the UK planning system[54]. It is also suggested that the high profile of this legal debate has stimulated a more general lifting of the rights-talk in planning, represented in the final column of "Other perspectives". A final observation is that the work noted as being concerned with participation falls into two main strands of literature - the first evolving from the environmental justice perspectives initiated in the US (e.g. Pulido 1994) and then emanating across the globe (e.g. Berke, Erickson et al. 2002), the second being UK-based and interpreted as evolving from the legal debates on the HRA (e.g. Ellis 2000).

[53] For example, the review does not include influential work undertaken in the fields closely related to planning, represented in journals dealing with mainstream and environmental law, geography, sociology, politics etc, relevant books (e.g. Fenster 1999), book reviews nor journals dedicated to professional practice (e.g. Planning).

[54] For example the OPDM's statement of general principles on the planning system (ODPM 2005b) now acknowledges that articles of the ECHR are relevant to planning.

Table 3.2.: Rights and planning: a sample of published work[55]

Year	Property rights	Legal perspectives of rights	Public participation and rights	Other perspectives
1980-1985	(Pearce 1981) (UK) (Carpenter and Heffley 1981)(US) (Buckland 1987) (US)			
1986-1990				(Mandelbaum 1989) (US)
1991-1995	(Daniels 1991) (US) (Wright 1993) (US) (Leaf 1994)(US)		(Mackay 1994) (US) (Pulido 1994) (US)	
1995-2000	(Strong, Mandelker et al. 1996) (US) (Baer 1997) (US) (Johnston and Madison 1997) (US) (Lai 1997) (A) (Corkindale 1999) (UK)	(Corner 1998) (UK) (Holligan 1988) (UK) (Kitson 1998) (UK) (Miller 1998a) (UK) (Redman 1999) (UK) (Upton 1998)(UK) (Beloff and Brown 1999)(UK) (Grant 2000a) (UK) (Hart 2000) (UK)	(Darke 1999) (UK) (Eccles 1999) (NZ/A) (Ricketts and Rogers 1999) (NZ/A) (Ellis 2000) (UK)	(Ravenscroft 1998) (UK) (Parker 1999a) (UK) (Pearlman 1999) (UK) (Miller 2000) (UK) (Raco and Imrie 2000) (UK)
2001-2005	(Pendall 2001) (US) (Webster 2002) (UK) (Booth 2002a)(UK) (Booth 2002b)(UK) (Booth 2002c)(UK) (Deng 2003) (UK) (Jacobs 2003) (US)	(Brock 2001) (UK) (Brown 2001) (UK) (Crow 2001) (UK) (Maurici 2001) (US) (Stockhall and Thomas 2001) (UK) (Lindblom 2001) (UK) (Casely-Hayford and Leigh 2001) (UK) (Loveland 2001) (UK) (Purchas and Clayton 2001) (UK) (Fairlie 2001) (UK) (Murdoch 2002) (UK) (Collar 2003) (UK) (Crow 2003) (UK)	(Ellis 2001b) (UK) (Ryall 2001) (RoI) (Quinn 2001) (RoI) (Illsley 2001) (Berke, Erickson et al. 2002) (NZ/A) (Ellis 2002) (UK) (Townsend 2002) (UK) (Lane 2003) (US) (Illsley and Ellis 2003) (UK) (Watchman 2004a) (UK) (Watchman 2004b) (UK)	(Parker 2001) (UK) (Alexander 2002) (O) (March 2003) (NZ/A) (Ellis 2004) (UK) (Willey 2005) (NZ/A)

Note: UK= United Kingdom, US=United States, NZ/A= New Zealand and Australia, A=Asia, RoI= Republic of Ireland, O=Other

.

[55] This indicates the peer reviewed articles that include the term "rights" in their title that have appeared in key English language planning journals, as listed on Accompline, Web of Science, Zetoc and Articlefirst databases. There is no pretence that this represents a comprehensive list of all rights-related work, but gives an impression of the chronology and scope of such work. Articles that are patently about rights in planning but do not include the term in the title (e.g. Corner and Brown 2002) are excluded, as are those articles that do include the word "rights" in the title, yet are not about land use regulation per se (e.g. Seager 2003). The review also does not cover reports of legal cases. Where there are multiple authors of different geographic origins, the majority of authors, principle author or nature of content has been used to determine geographic origin.

It is significant that first three columns in Table 3.2 echo the three ideologies of planning law[56] identified in the seminal work of McAuslan (1980). McAuslan's work has provided an enduring analysis of the ideological underpinnings of planning's statutory framework but, inevitably, has not been able to reflect the dynamic of legal and political change since his book was published twenty-five years ago. During that time, the landscape of planning has undergone a number of profound changes and has become far more explicitly influenced by a culture of rights, arising from both the legal influence of European law and the populism of rights-talk as a political discourse (see section 1. 2). It will be argued here that these trends may be giving rise to a fourth area of discourse, listed as "other perspectives" in Table 3.2. These authors tend to focus on rights as a conceptual device (e.g. Alexander, 2002a), rather than focussing on the values encapsulated (i.e. participation, property etc). Indeed, given that McAuslan (1980) recognised that ideologies and practices of planning law mirror social practices, it is arguable that if he were to review his treatise today, he would explicitly include rights as an ideology of planning law, either as a distinct fourth ideology, or as a strong strand running through the public participation and private property ideologies.

An analysis of how rights are discussed in planning therefore suggests that it is possible to identify four key discourses, with three distinct sub-themes for the participatory rights discourse. Each of these are examined in more detail in subsequent Chapters and are summaries in Table 3.3.

[56] These are: a traditional common law approach that seeks to protect private property; an ideology of participation that promotes public engagement based on the principles of democracy and justice; and a public interest ideology that promotes the public interest from the point of view of the public administrator.

Table 3.3.: The key rights discourses in planning[57]

Key characteristic	Property Rights	Rights in participation			Rights as Ethics	Rights as a conceptual device
		Populist	Radical-campaigning	Official (state)		
Main type of right utilised	Legal/moral	Political	Political and legal	Political and legal	Moral	Rights as a linguistic device
Key basis of legitimacy	Natural Law and legislation	Socially defined	Political claims on the basis of higher law (EU etc)	Notion of the active citizen	Personal and professional morality	Political, moral and legal perspectives
Examples of "adjacent concepts"	Libertarianism Negative liberty Economic efficiency	Individualism	Environmental and social justice	Communitarianism	Liberalism	Recognises ideological promiscuity of rights
Inferred types of right holder	Landowner	Individual Citizen	Community and environmental victims	Responsible citizen	Community and planning's "clients"	Individual, community
Implications for planning practice	State intervention only to correct market failures	Planning to further protect private interest	Enhances community empowerment	New rights to be created only when responsibility proven. New forms of "governmentality"	Increased ethical reflection	Rights as a heuristic tool

[57] Many of the listed features, mostly drawing on the discussion of rights in Chapter 2, including Freeden's (1991) suggestion that rights themselves are not necessarily associated with any specific ideological approach, but that this is implied in different uses of rights by the "adjacent concepts" apparent from particular contexts of their use. Each of these main discourses is discussed in more detail in the following sections and it is from the subsequent discussion that some of the values shown in the table are derived.

This highlights the diversity in the concept of rights and suggests that there is little prospect of achieving a consensus on the key attributes and purpose of what rights mean for planning practice. Table 3.3. does however begin to develop a framework in which to understand these different perspectives. It is therefore useful to consider the detailed parameters of each of these discourses, from which it is hoped a more sophisticated understanding of the relationship between rights and planning can be developed.

3.4. Property rights and planning

It was noted above that an ideology of private property rights has had a dominant influence on the evolution of the British planning system and it can be argued that it is the strong legal recognition of such rights that has necessitated the existence of land use planning itself. Indeed, the balance between the regulation of land use for the public interest and the individual rights of property owners is the *raison d'etre* of the planning system, giving rise to major issues of theoretical and political debate, with Krueckeberg (1995) suggesting that the central concept of planning should in fact be property, rather than land use. This is not that surprising given that private property rights are both a foundational concept in the evolution of liberal democracy and a key organisational principle in the hegemony of capitalism. The dominance of the ideology of private property within planning has been eloquently discussed by McAuslan (1980) among others and the intention here is not to repeat these previous observations, but to attempt to represent this work in a way that helps to understand the nature of the ideology when expressed within a discourse of rights.

3.4.1. Understanding property rights

Property rights are justly acknowledged as being a core human right, enabling civil stability, wealth accumulation and as Hegel argued, even a realisation of liberty[58].

[58] "*If emphasis is placed on my needs, then the possession of property is a means to their satisfaction, but the true position is that, from the standpoint of freedom, property is the first embodiment of freedom and so is in itself a substantive need*", Hegel, quoted in Knox (1952, p. 45).

Property rights do not exist without the sanction of the state and reflect the social relations pertaining to their socio-economic and cultural context, with the distribution of social power determining how such rights are shared out and sanctioned (Sagoff 1998a; O'Neill 2001). This implies that the pattern and concept of property rights will depend on a shifting political and ideological landscape. Such rights apply to all property and can therefore refer to many things – tangible assets such as land, buildings, money and household commodities, as well as less tangible items such as ideas or reputation. For the purposes of the discussion here, we shall specifically concern ourselves with property rights associated with land (i.e. real property), which have specific characteristics. However, despite isolating the discussion to landed property, we still confront a variety of notions of ownership, which in turn gives rise to competing notions of property rights. This opens an expansive body of theory (e.g. Reeve 1986; Waldron 1988) that will only be briefly dealt with here.

There are initially two key perspectives to be considered. First is the philosophical idea of property and its relationship to the "natural rights" of man, the second a more tangible perspective sketching the slow evolution of law that has shaped the form of property rights currently in practice and which is fairly specific to individual jurisdictions.

The idea that the ownership of property can be derived from "natural law" and thus having rights-status has developed from the Greeks onwards, with major contributions from the philosophy of Locke, Hegel, Rosseau, Hume, Burke, Bentham and J.S. Mill (Christman 1994; Reeve 1986). This intellectual pluralism[59] has had an enduring impact on modern notions of rights in property, providing a strong moral basis for their defence and portraying a great naturalness over their existence, even when this may belie violence (Blomley 2000). Indeed, this may be so even when perceptions of property rights do not accurately reflect the appropriate legal basis for the state's intervention in land use regulation. A key factor here is that a dominant

[59] The fact that the justification for property ownership has origins in the both utilitarianism and natural rights traditions does not seem overly problematic as "*The beginnings of the two theories are poles apart, but their conclusion is the same: blessed are those that have wealth because everyone is better off for not disturbing them in their enjoyment of it*". Plamentatz (1963), quoted in Newby, Bell, et al. (1978, p.311).

popular conception of ownership remains that of "full liberal ownership", defined by Honoré (1961) as a set of "standard incidents"[60]. The "owner" therefore refers to *"the person who has the greatest interest in a thing which a mature system of law recognises"* (Honoré 1961, p.107). Although this does not confer absolute ownership and by its nature, this form of ownership will be subject to limitations, the concept of "full liberal ownership" does express the most unrestricted notion of ownership based on a set of rights (Harrison 1987). Specifically in relation to real property, these rights can be translated into those listed in Table 3.4., with Christman (1994) making a distinction between property rights of control or use, fundamental to individual and social well-being and rights to income[61], which should be subject to reasonable constraints for the benefits of the entire community and usually restricted by taxation and/or planning and environmental regulation. Indeed Krueckeberg (1995) notes that use rights can be seen to be constitutive to human identity, but that unconstrained income rights have no basis in morality and cannot be justified in terms of social utility, liberty or just deserts.

Table 3.4.: Property rights associated with land

Rights in real property (from Pearce 1981, p.52)
1. Rights which concern the use, occupation/custody and development of all or part of a land parcel (the boundaries of which can be visualised. As all or part of an inverted pyramid, starting the centre of the earth and extending upwards through the surface into space). 2. Rights which concern the transfer and mortgageability of those rights contained in 1 above. 3. Rights which concern the stipulation or direction of another's rights as described by 1 and 2 above. 4. Rights which concern the exaction of dues from the use or ownership by others of those rights contained in 1 and 2 above. 5. Rights which concern the restriction or regulation of those rights contained in 1 and 2 above. 6. Rights which concern the transfer of those rights contained in 3 to 5 above.

Thus the notion of land "ownership" as applied today does not imply ownership of the land itself[62], but involves ownership of one or more rights from a larger bundle. In the UK this bundle of rights and the differentiation between public and private interests in

[60] This includes: the right to possess; the right to use; the right to manage; the right to the income of the thing; the right to the capital; the right to security; the right or incidents of transmissibility and absence of term; the prohibition of harmful use; liability to execution; and the incident of residuarity.
[61] These two forms of property rights have also been referred to as being "personal" and "fungible" Radin (1982) and more familiarly by Marx as "use" and "exchange" value.
[62] Indeed, all real property in the UK remains the absolute property of the sovereign.

land has evolved from feudal system and the reaction to it in later centuries (Booth 2002c). This enshrined the notion of different interests in land (e.g. freeholder, leaseholder) allowing each to be defendable in law, which in turn facilitated the use of land as both a source of security for the borrowing money and a target for investment itself, thus playing a key role in the development of capitalism.

This has established the context for two key competing notions of property rights as they relate to the planning system. The first acknowledges the complex pattern of interests in land (e.g. to use and income or public and private) that has evolved from long-standing legal traditions and defined in modern property law. This facilitates and justifies state intervention for the wider community interest by acknowledging that there are tiers of right-holders with subsidiary legal claims, such as neighbours or the broader community, exemplified by rights of participation in DC (Harrison 1987) or the community rights concept as applied in the inter-war years (Millichap 1995, see section 3.3.1.). The second notion represents an enduring abstract concept of "full liberal ownership" that implies that one person owns most or all rights in an ownership bundle and by implication, that this should be defended against state interference. This exists more as a socially-defined concept rather than a legally-defined reality. This notion fails to acknowledge the rights landscape that includes a much wider range of customary obligations, community rights, and claims over common resources, leading Waldron (1988) to suggest that that the understanding of ownership as a unified and monolithic set of sovereign powers is one of the central elements in the resistance to equality and which will have profound implications for how stakeholders will view the planning process. The implications of this view can be highlighted by two examples that emphasise the way in which rights are socially-constructed by different stakeholders and how this can influence agency in any given situation.

The first example is taken from Parker (1999a, p.1219) who describes the anxiousness most people feel when crossing a field when they are unsure of whether there is a right of way, despite the relatively innocuous threat of trespass. This clearly illustrates the deep inculcated notion that ownership of land implies some power-

laden right of exclusion (see also Ravenscroft 1998). The second example is from Newby, Bell et al. (1978) in their study of farmers and landowners in East Anglia. They illustrate how landowners engage in different discourses, or ideologies, of property rights at different times, highlighting how "*these ideologies are the servants of those who use them, not vice versa, and the occasion of their use will most likely reflect the demands of any given situation*" (p.335). Furthermore it was shown that landowners justify the current distribution of property by recourse to a range of discourses that should "*not be seen as the creations of those who hold the land today, but rather as contemporary manifestations of particular ideological themes that were generated in one historical context and have been expropriated and adapted to another*" (Newby, Bell et al. 1978, p.326). The key point here is notions of property rights are so deeply held that they often are "*in arrears*" or "*archaic*" (Veblen 1923). Thus, while property rights as defined in law accommodate a range of public and private interests in land, a commonly held perception of such rights are that they exist as a virtual exclusive entity with the capsule of property rights offering an almost impenetrable protection to outside intervention. Thus certain actions of the landowners appear logical and "natural", to the extent that competing arguments may seem extreme and eccentric. This provides a clear example of why legally-defined rights on their own cannot be relied upon to explain the engagement of landowners, or any other stakeholder, in the planning process and indeed highlights the potential for major friction when deeply held beliefs are exposed to competing discourses of rights.

3.4.2. Property rights and land use regulation

Discourses of property rights and their implications for distinguishing between public and private interests are, of course, central to the nature of land use regulation. This appears self-evident but is often unappreciated within the field of planning, much to the detriment of its own intellectual underpinning (Booth 2002b; Harrison 1987). While there are a number of planning academics who have critically engaged with the implications of property rights in terms of the evolution of planning (e.g. Crow 1996; Booth 2003), law (e.g. McAuslan 1980; Crow 2001) and the nature of planning control

(e.g. Harrison 1987; Krueckeberg 1995), there is a larger and more unified body of theory that has promoted the institution of property rights and used this as a basis of a critique of planning intervention (e.g. Pearce 1981; Lai 1997; Webster and Lai 2003). This section will briefly review the main ways in which the relationship of planning and property rights has been expressed in academic discourse and it will be argued that, in progressive terms, this has tended to give "rights" a bad name.

At an initial level of analysis, the relationship between planning and property rights is relatively simple in that DC can be seen as a nationalisation of the part of the bundle of ownership rights that govern the use and development of land (i.e. the first of the rights listed in Table 3.4). The nationalisation of future development rights[63] was introduced with the 1947 Act, which made it mandatory that planning permission be obtained before development could be legally sanctioned. However as explained by Corkindale (1999), the 1947 Act left legal title (i.e. what is commonly understood as ownership) unchanged, but gave local planning authorities power to re-privatise development rights on a partial and discretionary basis. The partial nature of these powers are worth emphasising and are limited in that landowners have the right to continue existing use, significant permitted development rights and extended procedural rights (Corkindale 1999), in effect leaving rather modest scope for planning authorities to pursue social, economic and environmental objectives. The extent of local planning authority control over future uses of a parcel of land is further limited by the legitimate factors it can take into account when deciding a planning application, with the legal scope of "material considerations" defining the boundaries of public intervention (McLoughlin 1980).

Apart from its role in ushering this "comprehensive" land use control and crystallising the pattern of development rights, the significance of the 1947 Act is apposite here for another reason, that is it highlights how fundamental social relations enshrined as legal rights can be restructured through political action[64]. While the social understanding of this restructuring may continue to be "*in arrears*", and it may be

[63] As noted in Pennington (2000), Booth, P. (2002b), the 1947 Act distinguished between rights of current enjoyment and those related to future development.
[64] c.f. Parker and Ravenscroft's (2001) observations on CROW, see section 3.7.

seen as interference with owners' "natural" rights, it also underlines how all rights are symptomatic of their social and cultural setting and can be influenced by overt political action.

The fact that some private property rights are regulated in the public interest gives rise to the struggle between private property and public interest ideologies of planning law (McAuslan 1980), with the ideology of private property being seen as the most dominant. This has found explicit support in expressed planning principles[65] and the fact that much guidance in DC is based on the idea that the chief owners of property rights must be allowed maximum freedom in land use (e.g. retaining control of tenure), subject only to restraints to protect other people from adverse activity or protect heritage or landscape. As noted in section 3.3.1., the discretionary nature of British planning can also be interpreted as a reflection of the strength of the property right ethic, shifting the critical process of adjudicating competing rights from the plan formulation stages (as it is in most binding plans, European style) to the determination of a planning application. This has also meant that, historically, the main discussion of rights in planning has focussed on DC and related particularly to the rights of prospective developers against the regulatory state, thus exaggerating issues of procedure and managerial efficiency (Booth 2002c, p.138).

This therefore highlights not only the impact of the dominant ethic of property rights on the practice and political debate of the planning system, but also shows that it has a distorting effect on how other rights are conceived in the planning system. Harrison (1987) offers an interesting alternative view of property rights and planning, by highlighting the myth of "full liberal ownership" and the existence of a wide variety of other legal interests in land. While emphasising that community rights over real property inevitably exist[66] he notes that community struggles over land are rarely articulated from a rights perspective, but more commonly seen as interference in the institution of liberal ownership. He thus suggests using the enlarged conception of

[65] For example PPG1 (1997) paragraph 36 began "*The Government recognises and upholds the rights or property and the privileges of ownership...*".

[66] This is recognised, for example in traditional property law, see Booth (2002c), public participation rights (see section 3.5), as well through tort, where an individual has a right to take action against those who unlawfully interfere with the use and enjoyment of their land (e.g. Miller 1998a).

property rights to inform different forms of planning intervention, such as community control of development or regulating land under the concept of stewardship for future generations. While his alternatives remain undeveloped, he does make the key point that *"Extensive land use planning powers may be justified by reference to property rights claims just as easily as they may be challenged from a property rights perspective*" (p.51) – thus the opportunities for planning to contribute to wider policy objectives partly depends on a alternative framing of the concept of property rights. Furthermore, this opens up an alternative way of justifying environmental rights in a planning context, which could be seen as extended community rights over property.

Harrison is something of a minority voice in planning thought as the concept of property rights has mostly inspired academics with very different ideological outlooks. Thus, following a tradition of writers that includes Hayek (e.g. 1960), Coase (e.g. 1960) and Pigou (1920), a wide body of work[67], mostly emanating from the US, has sought to apply economic theory to land use regulation, based on the principle notion that property rights are one of the defining principles of a free market[68] (see Alchain and Demsetz 1973). This is associated with "adjacent concepts" of the conservativism of libertarian theorists such as Nozick and Friedman whose emphasis on property, the individual and negative liberty have been seen as amounting to an 'anti-democratic' perspective that attempts to recover earlier visions of rights (Blomley 1994, p.412). There is no need to offer a detailed analysis of this intellectual tradition, with Webster (1998) and Lai (1994) providing succinct summaries amongst the many other major UK contributions[69]. Although a generalisation, this tradition places primacy on free-market solutions to planning problems based on relieving the constraints imposed on the market by political intervention, with the aim being to:

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[67] This encompasses "property-rights approaches", "public choice theory", "market environmentalism", "the economics of zoning" and even "anti-collectivist"! Harrison (1987). While the literature does distinguish between different schools within this tradition (e.g. between Coasian and Pigouvian approaches), here it will be generalised in terms of an overall paradigm.

[68] This perspective has also been specifically applied to a wider range of environmental resources and public goods (e.g. Anderson and Leal 1991; Brubaker, 1995,) through mechanisms such as contingent valuation and cost-benefit analysis, thus providing a quantitative and "objective" basis for utilitarianism see section 3.6) and which itself has been heavily critiqued (e.g. Cicetti and Peck 1989; Vadnjal and O'Connor 1994, Clark, Burgess et al 2000 and Sagoff 1998a).

[69] For example, Pearce (1981), Sorensen and Day (1981), Sorensen (1982), Sorensen (1983), Pearce, (1984), Evans (1988), Evans (1991), Corkindale (1999) and Pennington (2000).

> *"... privatise what are currently state-held real property rights, to expand the bundle of private rights and obligations associated with land and thus capable of "ownership" so that landholders would have recourse to more direct legal remedies against any external harms or environmental damage that might arise"*
>
> (Pearce 1984, p.9).

In essence, this means strengthening the institution of "full liberal ownership" of land to facilitate a trading in property rights that could, theoretically, result in a more efficient and socially-optimal (i.e. in Pareto terms) land use distribution. The approach suggests a minimisation of state intervention, reducing it to providing a legal system that upholds the institution of secure property rights and enforces contractual arrangements between private individuals, for example through strengthened laws of nuisance.

There is voluminous literature that has presented extensive critiques of the property rights discourse (e.g. Sagoff 1998a; O'Neill 2001) and there is no need to attempt to cover all the counter–arguments here. There is a need to acknowledge that property rights could imply the ownership of various environmental benefit streams (Bromley, 1991), while specifically *real estate property rights* may also protect some environmental assets and services through the way in which the property market capitalises issues such as local amenity. However, these perspectives do not encompass the more holistic concept of the environment which sustainable development seeks to promote, with more liberal property right approaches yielding very different concepts of the desirable economic and ecological outcomes (e.g. Pearce, 1976). Indeed, while the property rights tradition could logically be seen to reside within a "rights-stable" of theory, it is suggested here that its foundational principles and associated ideological concepts contradict the objectives pursued in this research to such a degree that it is important to clearly distinguish it from environmental rights as envisaged in this thesis. While it is theoretically possible to develop a model of environment rights that shares the same ideological basis as this property rights approach discussed above (e.g. Anderson and Leal 1991; Brubaker 1995), this presumes that environmental rights could be traded via voluntary (market) agreements as an alternative to government intervention in order to provide Pareto

efficiency. This establishes some fundamental difficulties for the concept of rights being explored here and the overall objectives of this research, which, it needs to be reminded, is aimed at exploring whether environmental rights can contribute to more equitable and environmentally sustainable outcomes for the planning process. As noted in Chapter 2, this envisages a range of environmental rights that seek to protect values which are derived from "core" human rights, the recognition that all individuals have intrinsic value and that health and well-being cannot be traded off against other policy goals (e.g. see Figure 2.3). A more free market approach to environmental rights would have to presuppose that the state has competency to redistribute environmental rights and would have to acknowledge the deeper philosophical debates of whether even individuals would also be in a position to trade such rights[70], further complicated if these were to be regarded as communal, rather than individual rights. This also presumes a faith in the market and is based on economic indicators of utility and social welfare, which is not regarded here as being compatible with dominant notions of equity and sustainability – indeed Hancock (2003) has suggested that power relations of capitalism actually prevents the realisation of key environmental rights. Furthermore, where the property rights approach has gained their most tangible expression, such as in the no-zoning of Houston (e.g Fischer 1989), the US land-rights movement (Brick and McGreggor Cawley 1996; Jacobs 2003), or trading in natural resource permits in New Zealand (Gleeson 1995), it becomes quite clear that the approach offers little prospect for more equitable and sustainable outcomes of planning, indeed the opposite may be true.

This brief review of the discourse of property rights within planning leads to a number of insights for the research being pursued here. First while there are acknowledged inter-linkages between property rights and the valuing of environmental assets, the large body of libertarian-based property rights literature in planning may have, needlessly obscured the potential exploration of rights perspectives for socially and environmentally progressive ends. This highlights the fact that any discussion of environmental rights in planning has to contend with deeply embedded ideological

[70] For example, the work of Kant has been used to justify environmental rights, as rights that preserve the integrity of the person (such as protection against harmful pollution) flow logically from the fundamental freedom and autonomy for the person (Hartley 1995; Shestack 1998).

and values related to property rights. This section provided the example of how political debate on planning often becomes focussed on delay in the DC system precisely because of the power of the private property rights discourse, rather than on, for example, the environmental outcomes of the system.

As with other rights perspectives, those related to property have competing interpretations, and the various social-constructed discourses of property have an important influence on agency and governance within the planning system. In the example of property rights, it was suggested that there may be examples of where the social-construction of rights may be in arrears compared to the current legal and social context. Furthermore, even rights claiming deep metaphysical and moral legitimacy, such as those relating to landownership are capable of fundamental adjustment, should there be a political motivation to do so – as witnessed by the establishment of the British planning system during the first half of the 20th century[71]. This therefore opens some scope for more positive engagement with the issue of property rights and a number of critical perspectives have been developed that rely on the fact that the relationship between private property rights and planning intervention is best understood, not in terms of who owns land, but the way in which something is owned. Indeed, rather than property rights being simply an obstacle to increased (or better) planning intervention, it is possible to develop an argument, most forcefully put by Harrison (1987) that the current construction of property rights in the UK justify further planning intervention on the basis of strengthening community rights (see discussion of Millichap 1995, above).

Despite this, it is clear that the ideology of private property remains an important and accepted influence within planning debate and that this is certainly strengthened by its continual expression as a rights discourse, which buttresses its legitimacy and implies its grounding in moral theory.

[71] Indeed this adjustment was undertaken with surprisingly little controversy, see Heap (1997).

3.5. Rights and public engagement in the planning system

While concerns over public involvement in the planning system date back to at least the 1940s (Cullingworth 1975), for most of the post-war years these have been rarely expressed within a rights framework. Although the 1960's, did see some association of participation with a rights discourse as social movements attempted to reassert notions of social justice and emancipation, Mitchell (2003, p. 21) suggests this soon declined in the face of post-modern critiques of the enlightenment project and its associated meta-narratives, including universal rights. While rights discourses had a more enduring presence in the US due to the legacy of the civil rights movement, a more accepted tradition in the UK has been to see community engagement with the planning process (i.e. those other than landowners) not as part of the broader patterns of governance, or even in terms of rights, but as an administrative-legal procedure[72] that stresses the need for a "fair hearing" (Clayton and Tomlinson 2000, Chapter 11). However, as public involvement has emerged as a stronger theme in planning over the last decades, it is possible to discern a gradual resurgence in the notion of participation in planning *as a right*, as opportunities for involvement have become normalised and indeed, expected, as part of a broader revival of citizenship in political discourse (Searing, Johnston-Conover et al. 2003). Although there is some debate over the degree to which participation has been institutionally acknowledged as a right (e.g. Burke 1979), its articulation within a rights framework does provide a powerful vehicle for expressing key democratic goals and through which a rejection of opportunities for community involvement are seen as a denial of the liberal democratic tradition itself (Fagence 1977). The value of a rights discourse of participation has not gone unexploited and as such, has been applied in a variety of contexts, noted in Table 3.3. and reviewed below.

A relatively simple categorisation identifies three separate areas of participatory rights in planning (from Crow 1995, p.378):

[72] For example, McAuslan (1980, p.52) notes that *"Statutory rules...provide a gateway for public participation, they do not provide statutory rights".*

- Rights of landowners and others having an interest in real property against the intervention of government;
- Rights of members of the public at large to have a voice in influencing the affairs of their local community; and
- Rights of all citizens to have well ordered government and their right, perhaps duty, to ensure by all legitimate means that government proceeds in an orderly manner, and according to law.

This once again echoes McAuslan's categorisation of the ideologies of planning law (1980) and while there may be some question concerning the degree to which each of these are formally expressed as rights within the planning system, they have been accorded formal rights status within the ECHR. It can also be argued that these are commonly recognised as rights by most stakeholders in the planning system and as such establish a discourse that interprets how power is deployed and the degree to which planning decisions are perceived as being legitimate. Each of these identified rights protects a different set of values and are associated with different ideological concepts. The first of the rights identified by Crow essentially refers to matters of due process in relation to rights of private property. This priorities land ownership as a basis of *locus standi* and has traditionally had some dominance within planning governance, as discussed in the previous section.

The second right relates to the most debated issue in relation to rights and participation as the degree, purpose, process and motivation for community engagement are all contested, giving rise to a myriad of claims and counter-claims (see below). It can also be seen as generating tension with the first of these rights, where there is struggle over reconciling rights of ownership with those of the broader community. This second right is strongly associated with the principles of participatory democracy (and its foundational beliefs) and as such demands certain actions in terms of planning governance. Furthermore, as this right relates to the process environmental change, as mediated by the planning system, it should be regarded as a *procedural environmental right*. Compared to the other two rights highlighted by Crow (1995), this is unique to the planning system and as such, will be subject to specific attention below. Interestingly, such a right is also usually primarily associated with the local community, as expressed by Crow himself, essentially a scalar construct that is not always helpful to sustainability and justice concerns.

The third right identified by Crow protects the rule of law, impartiality and due process. While this is essential to the legitimacy of the planning process from the view of the courts and society as a whole, its seeks to uphold values that are not confined to planning, but protect fundamental principles related to overall state structures and constitutional legitimacy. This therefore has significance well beyond the realm of planning and as such will not be directly discussed in this thesis and the main focus here will therefore be on the second of these rights. To do this, the three different discourses relating to rights of participation noted in Table 3.3. will be addressed in turn.

3.5.1. Populist discourses of participation

The first of the two rights identified by Crow are often articulated in populist rights discourses in planning, based on an assumption that the planning system will uphold citizens' substantive and procedural rights (noted in Table 3.3). Examples of this in local planning debate are legion and often based on the assumption that that planning procedure will allow a greater expression of individuals rights than it actually does (Crow 2001)[73]. Thus in making a case for or against a planning application, it is often (wrongly) assumed that an individual may address the local planning authority in person as of right (Darke 1999), while a very common discourse is one where unfavourable planning decisions are seen to usurp citizen's rights in favour of other groups, be they Gypsies[74], telecommunication companies[75] or developers in general[76]. These populist discourses may take many different forms, both supportive and critical of rights of participation, but all exemplify the growing "rights-talk" with the UK where issues formerly viewed in other frames (e.g. development seen in terms of class conflict or economy vs. environment) are increasingly understood within a rights

[73] One example here is the often erroneous perception that a householder has a formalised right to a view (March 2003).
[74] For example, the Conservative party have tapped into what they see as public concern over the use of the HRA to support planning permission for Traveller sites, noting that *" ... if you are a traveller you can use the so-called Human Rights Act to bend planning law – building where you like. That's just not fair. There shouldn't be one rule for travellers and another for everyone else."* Howard (2005a).
[75] See for example, http://web.ukonline.co.uk/faderuk/Planning/planning.html Accessed 29-03-05.
[76] See for example http://www.planningsanity.co.uk/forums/hr/hrforum.htm. Accessed 29-03-05

context and indeed some issues even being blamed on the existence of rights themselves (e.g. see Howard 2005b).

3.5.2. Radical discourses of participatory rights

While the populist discourse may be associated with a variety of ideological concepts, the second of Crow's rights is also invoked in progressive and radical contexts to demand reform to planning, environmental protection and urban development policy. This can be highlighted as a specific form of discourse (see Table 3.3), and a detailed case study of how such a discourse of rights has been applied in contemporary policy debate is discussed in Chapter 5 (see FoES, 2004b).

The value and ideological antecedent of this discourse was expressed in the work of Henri Lefebrve, specifically his relatively little known *La Droit á La Ville* (*The Right to the City*) (Lefebrve 1996). This was issued "*like a cry and a demand*" (p.158) in an attempt to outline a post-bourgeois urban philosophy. Although the text does little more than outline some of the key ideas taken up in Lefebrve's major work, *The Production of Space* (Lefebrve 1974), it does attempt to encompass the essence of alienation of urban life in a single claim. Thus in seeing the city as an *oeuvre* which celebrates difference and collectivity, he suggests that:

> *"The right to the city manifests itself as a superior form of rights; right to freedom, to individualisation in socialisation, to habitat and to inhabit. The right to the oeuvre, to participation and appropriation (clearly distinct from the right to property), are implied in the right to the city"*
>
> (Lefebrve 1996, p.174-175).

This amounts to a call for the reassertion of use value as the key to urban life, rather than the continuing dominance of exchange value[77]. This had immediate resonance within the radical political environment in France in the late 1960s and while Lefebrve's work has had significant influence on urban geography (e.g. Harvey 1973; Merrifield 2000), the specific demand for a *Right to the City* was somewhat neglected

[77] This therefore has direct correlation to the critique of how property rights are conceived within planning as discussed n section 3.4.1.

until it was reawakened by more recent interest in citizenship. Lefebrve's *Right to the City* was then taken up in academia by Mitchell (2003), in an analysis of the struggles over the public realm and suggests that a *Right to the City* is at the heart of any vision of a progressive, democratic and just world. More generally, Mitchell draws on the Left's reengagement with rights (e.g. Laclau and Mouffe 1995), to argue that they remain a critical mechanism for the advancement of social justice (see Chapter 2). This has been taken up as a focal point for mobilising around a range number of urban issues in *the World Charter on the Right to the City*[78]. Coinciding with the globalisation of political struggles and the internationalisation of human rights activism over the last decade (Ishay 2004), this Charter has been developed by a range of social movements, municipalities, national governments, universities and NGOs and discussed at the *Second World Urban Forum* (Barcelona, September 2004) and Americas Social Forum (Quito, July 2004). *The Right to the City Charter* aims to promote *"sustainable and equitable urban development"* through democratic planning, participatory management, prohibition of discrimination and fulfilment of the social function of property. It calls for recognition of the *Right to the City* as part of the international human rights system and while primarily procedurally focussed, encompasses calls for other contributory rights, including those to education, housing, culture and leisure, health and the environment. This pays testament to the potential of the rhetoric of rights to mobilise and promote action by framing issues in terms of justice and other values associated with the broader human rights agenda, in this case applied to issues over which planning has some competency.

Another example of where participatory rights have been commonly evoked in planning is in relation to indigenous peoples. This obviously draws on non-European experience, but does have clear parallels with the impact of planning regulation on those ethnic minorities with distinct land use needs, such as Travellers and Gypsies (Sibley 1981; Morris 1998; Thomas 2000). The case of indigenous peoples is perhaps special one for applying a rights-approach because they have already been granted specific protection in a variety of national and international rights instruments (Shutkin 1991; Fabra 1996), most of which have spatial and environmental implications, thus

[78] Available at http://www.env-health.org/a/1486 (accessed 22/3/05).

obviating the need to argue the case for special consideration at a local level. Examples of the planning literature that have considered this issues include Berke, Erickson et al. (2002), in the case of the Maori people and Lane (2003) in respect to Australian indigenous peoples. These offer evaluations of the ability of formal mechanisms to uphold the established rights of indigenous peoples and highlight key factors that negate a full appreciation of institutionalised minority rights. The findings of these underline the fact that the existence of formalised rights does not guarantee positive outcomes and that a range of other issues need to be taken into account, most important of which is the capacity of minority groups capacity to fully engage in the planning process and the sceptical nature of rights as applied in the courts (Blomley 1994). It also highlights that despite being strongly institutionalised, there may still be a need for struggles around their realisation due to broader patterns of governance (Healey 1997, p.220), the structure of power relations and the tension between the rule-based decision making implied by rights and the more general consequentialist reasoning that tends to govern the policy process.

Concern for the impacts of planning on indigenous peoples can viewed as a specific aspect of the wider Environmental Justice Movement (EJM), which, as noted in section 1.3., takes a rights perspective to highlight differential costs of development falling on disadvantaged sections of a community. Chapter 1 outlined the main dimensions of the EJM which will not be further rehearsed here but it is worth stressing how the environmental justice "frame" (Capek 1992) represents a discourse constructed upon the rhetoric and actions of the civil rights movement and as such, is built around the very concept of "rights" (Agyeman 2000). This has included substantive environmental rights such as a right to a healthy environment, but the EJM has been particularly effective in campaigns around procedural rights related to participation, information and compensation. The environmental justice "frame" has been constructed around the concepts of environment, labour and social justice, thus transforming the broader environmental discourse to great effect. A critical factor here has been the ability to bridge the interests of individual actors with those of the collective society to use the "master frame" of justice, centred on the notion of rights (Taylor 2000), to increase mobilisation around environmental issues. The EJM thus

offers a very strong indication of the empowering effect of rights in relation to planning and the environment and as such, stands as a testament to the ability of rights discourses to transform relations of subordination into those of oppression or domination (Laclau and Mouffe 1995).

In addition to the work of Mitchell (2003) noted above, other academics have expressed arguments for planning reform within a radical-campaigning rights discourse. Examples include {Hugh} Ellis (2000) and Reade (1997), who have developed rights-based arguments for extending opportunities for public participation, with Ellis calling for TPRA on the basis of equity and community empowerment (see also Chapter 5) and Reade suggesting that democratisation of the planning system requires "*the considerable strengthening of the relatively few statutory rights that we do have*" (p.94)[79]. He also calls for an expansion of some of these rights, for example establishing a statutory right to speak at a committee, a right to freedom of information and significantly in terms of environmental rights; *"a statutory public right to demand a public inquiry wherever any factors including proposed development seem to threaten the quality of our local environment*" (p.101).

3.5.3. 'Official' discourse on participatory rights

In addition to the populist and radical-campaigning discourses the idea of participatory rights is also invoked within official (state) discourse. At one level this can be seen to have legal dimensions and thus include the debate in the courts, where the ECHR has long been seen to protect public participation through the planning system on account of being constituent of "*civil rights and obligations*" for the purposes of Article 6, the right to a fair trial (e.g. see Loveland 2001). This has allowed public engagement to be seen as legally-protected rights (subject to certain conditions and qualifications) - a fact that is likely to gain further force in the coming years with the growing influence of the Aarhus Convention (see section 3.2). The legal dimension to the participatory rights discourse is discussed in more detail in

[79] These are noted as being: the right to inspect and copy documents; the right to have our written representations to be placed before the planning committee, and the right to demand that the planning officer clearly explains his/her position in relation to objections (Reade 1997, p.94).

sections 5.6.2 so will not be elaborated here. However, it is worth noting two key issues. First is the rather conservative outcomes from the rights-claims pursued in the courts, especially when compared to the power of rights to stimulate mobilisation around issues such as environmental justice (Blomley 1994). The second is the fact that the association between rights and planning law over the last five years has increased rights-talk throughout the governance of planning and has included its uptake by a range of stakeholders in the planning process, including within local authorities (e.g. Darke 1999; Stockhall and Thomas 2001; Manns and Wood 2002) and central government. Thus, the ODPM's definition of a sustainable community includes a recognition of individual rights (and responsibilities) and the *"rights and aspirations of others (both neighbouring communities, and across the wider world) also to be sustainable"*[80]. Furthermore PPS1 now notes that:

> "*Local communities, business, the voluntary sector and individuals have a right to a high quality service that is fast, fair, open, transparent and consistent and respects the cost, effort and commitment that has gone into engagement in plan-making and in preparing and submitting applications*"
> (ODPM 2005a, para.9, p.6)

Indeed, unlike the previous Conservative administration, which promoted the idea of the public as consumers (Fyffe 1993; Parker 1999b), New Labour have been far more forthright in pursuing policy initiatives based on the notion of the active citizen[81]. This critically engages a particular discourse of rights and rests on the pivotal notion that there should be "*no rights without responsibilities*" (Giddens 1998, p.65, see also Etzioni 1995). While this slogan simplifies a more complex political position, it has become an oft-repeated mantra that has seen recent expression in a range of fields of public policy (Dean and Ellis 2002). The New Labour position on rights has been examined by Dean (2004), who shows the strong presence of "*responsibility*" running through much of New Labour's discourse, including the reform of Clause 4 of its

[80] http://www.odpm.gov.uk/stellent/groups/odpm_communities/documents/page/odpm_comm_035991.hcsp *What is a sustainable community?* Accessed 15/05/05

[81] For Example Tony Blair notes that *"... the basis of ... a modern civic society is an ethic of mutual responsibility or duty. It is something for something. A society where we play by the rules. You only take out what you put in. That's the bargain*" Blair (1997) quoted in Raco and Imrie (2000, p.2187).

Constitution[82]. This has had a real impact by attaching conditionality to the enjoyment of some rights, such as welfare-to–work requirements for the receipt of certain state benefits (Levitas 1998). Although the Government has pushed the rights agenda by incorporating the ECHR, Dean (2004) notes that there has been some reluctance to promote social rights, illustrated by the fact that the sister document of the ECHR, the Social Charter has not been incorporated and the insistence that the EU's Charter of Fundamental Rights will not be given legal force. Thus Dean (2004) suggests that New Labour's concern with rights lies not with "*solidaristic rights to public provision, but with procedural rights of 'heroic citizens' as the self-seeking consumers of public services"* (p.76). The concept of *"heroic citizens*" is taken from Doheny (2004) to represent those who recognise that one's interests can be met without unfairly prejudicing the interests of others and reflect an entrepreneurial moral repertoire. Dean (2004) contrasts heroic citizens with a number of other typologies, including the "*recalcitrant citizen*" who requires incentives to induce responsibility, the "*passive citizen*" whose notions of responsibly are defined by custom and collective loyalties and the "*good citizen"* who sees responsibility as an ethical issue informed by universalism, social justice and a redistributive welfare state. Dean suggests that these concepts of citizenship have tangible effects on policy and it will be argued below that the current government's position on procedural environmental rights can be interpreted as prioritising the idea that society is dominated by "*recalcitrant citizens*". Indeed, Raco and Imrie (2000) have interpreted the use of the "*rights and responsibility*" agenda in urban regeneration policy as part of a broader change in the rationalities and techniques of government and used as a way of promoting individual and institutional conduct that is consistent with government objectives. They interpret this in the context of Foucault's concept of *governmentality* to suggest that: "*the frameworks within which initiatives are developed are related as much to discourses of control and monitoring as they are to the development of individual (self) actualisation and/or community mobilisation*" (Raco and Imrie 2000, p.2202). As such, they suggest that a discourse of "*rights and responsibilities*" has been invoked by New Labour as a replacement for previous models of policy response, with under-

[82] This replaced the party's commitment to redistribution and common ownership with "*a community in which power, wealth and opportunity are in the hands of the many not the few, where the rights we enjoy reflect the duties that we owe*".

researched implications, particularly in the field of planning[83]. This has reflected the evolution of debates on governance for sustainabilty that has come to stress the role of *rights* over *needs* (Redclift, 2005) and it could be argued that it is through this model that New Labour have sort to reform local environemntal governance.

Although the coupling of rights with responsibility may have come to the fore under the New Labour administration, it does echo earlier debates in planning. For example, the Dobry report into development control (Dobry 1975) distinguished between "responsible" participation, which deserved support and "irresponsible" participation which needed to be discouraged. McAuslan (1980, p.30-51) suggests that the different ideologies of planning law interpret legitimacy according to the concept of responsibility. Thus the dominant ideology of private property sees legitimate participation as coming from neighbours who want to secure their property rights from any detrimental effects of development; the ideology of the public interest welcomes participation that produces any information that is helpful to public authorities; the ideology of public participation sees participation as contributing to democracy and justice and therefore needs to be enhanced for its own sake, independent of any impact on planning outcomes and even when it embarrasses or frustrates the public planning authority. He goes on to suggest that the rules that govern participation in planning are essentially a reflection of the ideology of private property – hence the unequal distribution of rights of appeal between applicants and objectors. An exception to this is where individual property owners act "irresponsibly" by offering "unhelpful" objections to development that are seen as being in accordance with the public interest. This implies that sceptical perspectives of procedural environmental rights tend to support property and public interest ideologies of planning law, with the ideology of public participation reflecting more optimistic views. The dichotomy between responsible and irresponsible citizens can have very real impacts on planning outcomes when reified in the policy decisions concerning public involvement in the planning system.

[83]Parker and Ravenscroft (2001) have also analysed this discourse in relation to rural policy and this is discussed in section 3.7.

Thus while public participation in planning goes under the relatively simple objective as being "*about acting on the belief that everyone should know they can influence the shape of their community*" (Bedford, Clark et al. 2002, p.312), a review of these three discourses of rights and participation highlight it as an tapping into much broader debates on governance and reflecting much deeper issues of complexity and contestation (Day 1997). The use of discourse in this context also facilitates an appreciation of the effect of power differentials between stakeholders and as such highlights that conceptions of participation are, in fact, a reflection of different theories of democracy (Thomas 1996). Indeed, both the concepts of rights and participation are separately associated with empowerment and emancipation, yet when brought together in the context of planning they can be portrayed as being radical and progressive on the one hand and when linked to property rights, accused of being "anti-democratic" (Blomley 1994), linked to the sustenance of existing power structures, rather than promoting equity or environmental justice. This concern appears to have a strong and growing foothold in wider discourse and stands as a key counter-argument to the use of environmental rights in the delivery of sustainable development and as such, needs to be considered in some detail.

3.5.4. The dark side of participatory rights?

The idea that an enhanced rights-regime would allow some groups to dominate the planning process is reflected in a growing body of literature that challenges the orthodoxy that enhancing of the role of civil society will lead to more democratic and equitable outcomes. Lane (2003, p.363) notes that these "heretics" have shown how the operation of power relations at the local level can exclude some interests, quoting that even Putnam, a central advocate of a greater role for civil society, notes that there may be a "*dark side of social capital*" (Putnam 2000, p.351) - arising from the dominance of certain interests, an emphasis on short term demands and use of power against the collective good. While Lane (2003) suggests that the potential of participation to deliver fairness and democracy needs to be considered within the broader context of prevalent styles of governance (Healey 1997), other authors have more directly associated this "dark-side" with enhanced rights-regimes. Thus

Campbell and Marshall (2000), Bedford, Clark et al. (2002) and Hillier (2003b) have contributed to an implicit assumption, readily supported by property interests and government, that any enhanced rights-regime primarily benefits the more powerful and is likely to result in administrative chaos.

The theoretical basis for this argument can be explored through Campbell and Marshall's (2000) identification of five main rationales for participation:

- *Instrumental Participation*; an emphasis on individuals expressing self-interest.
- *Communitarian Participation*; priority placed on collective well-being.
- *Politics of the Consumer*; stressing freedom of choice and individual preferences.
- *Politics of Presence*; an emphasis on promoting the needs of excluded groups.
- *Deliberative Democracy*; priority placed on inclusiveness and open dialogue.

Campbell and Marshall (2000) emphasise the nature of the interests served by each rationale, noting that all but the last place a strong emphasis on the articulation of a set of rights, although the nature of these varies for each perspective. For example, *Instrumental Participation* stresses basic rights to express and pursue self-interest while *Communitarian Participation* emphasises collective rights. They suggest that only the fifth approach, *Deliberative Democracy* does not readily identify with a rights agenda, but emphasises the process of decision-making rather than the interests served[84].

These five rationales provide a useful context for highlighting the tensions between concepts of rights and participation – exemplified on the one hand by the normative demand for increased public engagement and on the other by the "heretical" research suggesting participatory practice often fails to live up to its theoretical ideals. Thus the collaborative ideal has been criticised for overlooking the subtleties of "real life politics" (Flyvbjerg 1998; Pløger 2001) and for not taking into account the differentials of power in the planning process (Richardson 1996). Indeed, it has been suggested that examples of participation in practice can be supportive of the status quo rather

[84] However, as noted in section 3.7, Healey (1997) has specified strengthened rights of challenge as being an important institutional element for more collaborative forms of planning, a fact under-appreciated in most subsequent consideration of her work.

than truly consensus-building (Campbell and Marshall 2000; Davies 2001;Lowndes, Pratchett et al. 2001;Bedford, Clark et al. 2002; Hillier 2003b). Such evidence provides depressing reading for those with collaborative aspirations and appears to be linked to an emerging antagonism to the idea that enhanced procedural rights have potential to empower. This appears particularly true of Campbell and Marshall's (2000) analysis of a participation exercise in the USA, from which they conclude that "*Greater public involvement based on an agenda of rights has a tendency to privilege self-interest and potentially lead to the paralysis of decision-making*" (p.341). A number of commentators have been fearful of extended citizen engagement because of the tendency to focus on short-term needs, giving rise to a "*perversity problem*" of more participation resulting in poorer environmental decisions (Vigar and Healey 2002, p.523). or that where better resourced groups can offer more effective opposition so that LULUs[85] become concentrated in areas without 'voice' (Rabe 1994; Petts 1995). As a result, Campbell and Marshall (2000) warn that "*Participation must avoid becoming entrapped by a rights-based agenda*" (p.341).

However, this negative view of procedural rights may be built on a number of questionable assumptions related to both the motivations for rights-claims and the ideological basis of such procedural rights. Campbell and Marshall's (2000) views appear to be based on their experience in the US, where citizenship appears to be expressed through individualistic tendencies and prioritisation of political and civil rights, while in Britain a more common form of citizen identify is where individuals are more socially embedded, with greater priority on social and economic rights and community duties (Searing, Johnston-Conover et al. 2003). Second is the point made by Pløger (2001) that procedural rights do not automatically secure rights for citizens, but are only "*rights to voice*" (or "*challenge*", "*information*" etc.). That is to say that the outcomes of any rights-claims ultimately depend on whether those on power accept them (and by default, their associated concepts) or whether there are more influential competing interests (such as economic growth, protection of property interests etc). Therefore if enhanced rights result in short term or parochial outcomes, it is the

[85] Locally Unwanted Land Uses, for example those that have major environmental impacts (e.g. Heiman 1990), substantial perceived risk (e.g. Kemp 1990) or invoke prejudicial reaction (Dear and Gleeson, 1991, Solomon, 1983).

holders of power that are as much to blame for their regressive application as the actual existence of such rights in the first place thus part explaining the sceptical view of legal rights. The third debatable assumption inherent in this view is that right-claims will predominantly and inevitably motivated by narrow self-interest. This is true to a certain respect, in that most people only become involved in the planning system when it begins to infringe on their personal interests (Rydin and Pennington 2000; Bedford, Clark et al. 2002) and is true of rights-claims as any other participation opportunity. However, to claim that the predominant motivation for rights-claims will be based on highly instrumental possessive individualism, as implied by Campbell and Marshall (2000) appears to be based on anecdotal evidence, rather than systematic empirical research.

While it is suggested that such a view may not bear up to empirical scrutiny, it has nevertheless been deeply influential in suppressing wider acceptance of the potential progressive contribution of rights in British planning. For example, in a much-quoted work on the nature of participation in planning (Thomas 1996), the only consideration of rights is in the context of New Right perspectives, where participation is viewed primarily as a function of property rights (i.e. the first of the participation rights identified by Crow 1995). This reflects a wider, and mistaken, acceptance that the use of rights *as a conceptual device* infers an ideological role for rights largely because of its dominant use in discourses of property rights. Therefore on the one hand it has been suggested that the greatest potential role for environmental rights lies with the type of procedural rights examined by Campbell and Marshall (2000), yet it is these very rights that have been accused of resulting in socially-regressive outcomes, a fact that appears to have been influential on current state policy towards environmental rights. Therefore if these assertions can be verified or discarded via empirical investigation, the thesis would have made a useful contribution to knowledge.

A starting point for this is to understand some of the contributing concepts to this "dark-side", of which NIMBYism is particularly prominent and which is briefly reviewed below.

3.5.5. The NIMBY literature

Of all perspectives that can be adopted to understand local planning disputes[86], the last 15 years has seen as increasingly polarization around the concepts of "NIMBYs"[87] and environmental justice. Although a range of more, and less, sophisticated analyses have been focused on these concepts, the fact that disputes tend to be articulated in terms of one or other, parallels the dichotomy between optimistic and sceptical views of environmental rights. Thus on the one hand local objection is seen as part of the fight for equality (c.f. environmental justice), while on the other being individualising and socially-regressive (c.f. NIMBYism). In crude terms, the discourse that invokes "NIMBYs" portrays oppositional activism in planning disputes as dysfunctional "*syndrome*" or "*development blockage*" (O'Hare, Bacow et al. 1983; Deng 2003) based on selfish parochialism and thus contrary to notions of responsibility, public interest and altruism, while discourses of environmental justice sees opposition, including the use of rights-claims, in terms of collective struggles where the marginalized become empowered and thus tend to be acclaimed as being redistributive, progressive and just.

The literature dealing with "NIMBYs" and environmental justice is vast and largely separate. Although both perspectives have value in explaining the dynamic of planning conflict, the environmental justice literature has been touched on elsewhere in the thesis so will largely be side stepped here, in order to concentrate on the "NIMBY" literature, which appears to be a strong contributory concept for the sceptical view of rights in planning. Three relevant issues emerge from a review of "NIMBY" literature, namely; explanations of why individuals object to development; structural interpretations linking objectors with the wider political social system; and finally the

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[86] A number of approaches have been applied to this issue, such as that of externality effects in economics and property right perspectives (e.g. Webster, 1998, Pearce, 1984) or political economy such as the "*politics of turf*" (Cox and McCarthy 1982) and locational struggles over the costs and conditions of existence in the living place (Harvey 1978, Cox 1981).

[87] This probably needs no explanation, but for the uninitiated it refers to "Not In My Backyard" and has come to represent *"the protectionist attitudes of and oppositional tactics adopted by community groups facing and unwelcome development in their neighbourhood*" (Dear 1992, p.288.), *"Tory localism... allowed to control decision-making to the detriment of the wider community*" Klosterman (1980).

relationship between self-interest and legitimacy of protest. Each of these has relevance to the empirical investigation described in later Chapters.

3.5.5.1. NIMBYs and the propensity for objection

A key aim of academic research has been to understand the factors that invoke a "NIMBY" response. Dear (1992) has proposed criteria that influence "NIMBYism", including the nature of the proposed development (e.g. development type, size, appearance and reputation) and identifies a continuum of acceptance amongst LULU development with schools and medical clinics being "*most welcome*" to landfill and prisons being "*absolutely unwelcome*". He has also considered the social profile of the location, noting that neighbourhood homogeneity is a key determinant of levels of objection. He thus suggests that the inner city, with its mix of land uses and social groups tends to be more accepting of new development compared to more homogenous suburbs. He also quotes evidence from US surveys that indicate that the single best predictor for "NIMBY" activity is income - with the more affluent being less tolerant to invasive development. Dear's findings are broadly compatible with the view of Cox and McCarthy (1982), who attempted to correlate "*neighbourhood activism*" rates with other characteristics, finding that homeownership and having children are the greatest determinants of rates of objection. They found that this is not simply a function of the need to protect the investment value of housing (as is the view of Myers and Brides (1995), but is a reflection of neighbourhood attachment and the desire to protect the *use* value of the living space rather than protecting its *exchange* value. This suggests that to simply portray such objectors, as "*possessive individualists*" is inaccurate, a point elaborated by Lake (1993) who claims that communities place the greatest priority on stability – which may be both economic, such as the protection property rights and non-economic, involving the protection of aesthetic values, sanctity of the home and the expectation of "minimized uncertainty". Needless to say, such communities will look to the planning system to deliver this stability. There is also a need to question whether there is anything inherently amiss if it can be shown that the affluent are more likely to invoke environmental rights, as such claims may have wider support and do not necessarily result in regressive outcomes for more marginal sections of society.

Morrell (1987) has taken a social-psychological approach to this issue, suggesting a number of factors of perception that motivate individuals to object to development, such as fear of health risks, distrust of government, nuisance and locational equity. Similarly Lee (1989) notes that people may be more motivated in opposing development if they believe there is a strong moral backing for such a position.

3.5.5.2. Third party objection in a wider context

A number of authors have analysed "NIMBY" activity by highlighting the institutional, social and cultural context of objection, pointing not to the characteristics of objectors, but to the wider system that creates such conflicts in the first place (Freudenberg and Pastor 1992; Wolsink 2002). In this vein, Brion (1992) perceives "NIMBY" objection as a rational approach for protecting assets in a free-market system of property rights where both the political market and the law of nuisance fail as a result of excessive transaction costs. Others, such as Wolsink (1994) and Rabe (1994) have suggested that NIMBYism is a communication problem arising from political or administrative failures in participation, while O'Hare (1977) and Armour (1991) see such objection as a symptom of difficulties in the planning process and suggest more mediated solutions of compensation or community auctions could be used to overcome opposition. Indeed, Fischer (2000) suggests that NIMBYism is often as much about the decision-making process as the characteristics of the disputed development. He therefore suggests that one way of overcoming local objection is to achieve more equitable and environmental outcomes through what he calls "The Participatory Alternative" (a view supported by a range of others, (e.g. Kann 1986; Paehlke 1988; Paehlke 1990). Similarly, Kemp (1990) notes that the level of objection in any development will partly be determined by the level of confidence in the trustworthiness of those making regulatory decisions. This focuses on the different perceptions of a proposed development between the public and the planners involved in the technical assessment of whether the proposal should go ahead (Burgess, Limb et al. 1988; Burningham and Thrush 2001). These portray conflict between objectors and regulators as a struggle between technocracy and democracy, suggested from both pluralist McAvoy (1999) and neo-Marxist (Kemp 1990) perspectives. The latter

involves the application of Habermas' (1970) distinction between "*technical rationality*" and "*practical rationality*" that suggests that decisions arrived at through the technical rationality and "objectivity" of the planners will be received in terms of practical rationality of the public, who may consider it more in terms of value judgment and political choices. This not only emphasises why so many decisions may be inherently conflictual, but also points to the need for planners to better understand community perspectives. Furthermore, it suggests that a history of mistrust between public and bureaucracy may have an enduring influence on the type of practical rationality applied by an individual or community, in turn affecting the way they perceive and invoke rights-claims. In other words, acts of development bias, corruption or other acts of misconduct may come back to haunt planners and the institutions in which they work.

Lake (1993) has also assessed this issue from a structural point of view, but concludes that the relationship between state and capital is crucial to understanding. He notes that some of the so-called "LULUs" are in fact needed primarily for capital, rather than society as a whole, so that hazardous waste incinerators represent a locational solution to an industrial production problem and a homeless shelter is an alternative to finding a solution to unemployment and poverty. As such, to articulate such problems in terms of "NIMBYism" *"obfuscates the interests of capital and deflects attention away from the fundamental causes of societal problems*" (Lake, 1993, p.88). The adoption of a discourse of "LULUs" and "NIMBYs" therefore tends to constitute a state political-administrative response to an economic crisis that minimizes the costs to capital and concentrates costs on communities. Lake thus proposes that "NIMBY" objections represent conflict between communities and capital/state, rather than between individuals or single communities and the wider society. Furthermore he suggests that "NIMBY" objection is an inevitable component of the land development process that is driven by commodification of land and property, so that to challenge the reasons why people object to unwelcome development is to challenge the basis of the consumption driven development process itself. Indeed local opposition often does embrace wider questions of why a particualr type of development is needed in any case and as such can prompt deeper

consideration of environmental capacities (Cowell and Owens 1998; Owens and Cowell 2002).

3.5.5.3. Self-interest and the legitimacy of protest

The final point that is drawn out of this literature is to note how the use of "NIMBY" has been used in a derogatory way to depreciate the validity of others' arguments. Burningham (2000) has suggested that some authors (e.g. Bullard 1993) portray activism by affluent communities as selfish and deviant, while celebrating opposition from marginalised sections of society and linked "NIMBY" activity with the causes of environmental racism. Thus Warburton (2005), Kemp (1990) and Lake (1993) all suggest that the "NIMBY" label can be used to undermine empowerment by portraying community concerns as irrational and reactionary. This issue can have very real effects; more altruistic concerns tend to be more successful for the very reason that they can better avoid the damaging tag of "NIMBYism". Walsh, Warland et al. (1993), Heiman (1990) and Wolsink (1994) suggest that the public are offended when treated as being selfish and irrational. Furthermore, the whole tone of the NIMBY discourse and the depreciation of the motives of those that object to local development reflect the deep inculcation of the rights of property, in that developers are seen as having natural and legitimate motives while those of local objectors may be seen as invalid.

Therefore the entrenchment of objection into a discourse of NMBYism is unhelpful, with Kemp (1990) going so far to suggest that it is *"an oversimplification of strongly held environmental, political, and moral views of deceptively fecund breadth and depth*", (p.1247). Kemp suggests that at best, the concept of "NIMBY" reduces legitimate public concerns to selfish parochialism and at worst, disguises the power structures of policy-making that sets the boundaries and rules of "acceptable" political debate. Nevertheless, it will be shown in Chapter 5 that it appears to be a key concept upon which much of the official discourse of procedural environmental rights is constructed.

This consideration of the discourses of participatory rights leads to a number of insights for this research. First, while three different types of participatory right can be identified (i.e. from Crow 1995), it is the second of the rights (i.e. those relating to community influence) that is of most relevance to the debate on environmental rights. This can be expressed through three different discourses; a populist discourse that emphasises the importance of private interests over wider community interests; a radical-campaigning discourse that exploits the rhetorical value of rights to make a variety of political claims; and the current official discourse that derives from the New Labour the mantra of "rights and responsibility". Each of these has a different ideological basis, depending on the concepts that they are associated with. This reflects the contested nature of participation and the attractiveness of placing political claims into a rights discourse, where they can be readily associated with democracy, freedom of speech, rule of law etc. The last two of the discourses discussed here (i.e. radical-campaigning and official) are particularly useful in setting the context of how power is used in the planning system – the first makes claims for reform on the basis of justice and equality, representing an optimistic use of rights, while the second is far more sceptical portraying them as something of an empty vessel and emphasising potentially regressive use of rights. This clearly highlights the plasticity of rights and the importance of the location of where rights are put to work (Blomley 1994). Furthermore, the dialectic tension between these two views encapsulate the broader debates on planning and rights, with a critical issue being how such rights are used in reality and how they relate to Stammers' (1993) test of either supporting or challenging existing power structures.

It is also noted that more sceptical views of procedural rights tends to invoke the concept of NIMBYism as an associated concept. Unpacking NIMBYism contributes to understanding to the official discourse of rights and suggests that rights-claims can only be fully understood in their wider context, including issues of culture, political power and socio-political relations. This helps clarify the way in which the broader pattern of governance for sustainable development influences the propensity of individuals to make right-claims – with the public's respect of, and trust in, the planning profession being a critical factor. This warns against dismissing the views of

those that object to development because they appear to be at odds with other concepts of the collective good or hegemonic ideas of progress. This is clearly a paternalistic view of participation, contrary to democratic and discursive needs and may even exacerbate conflict. Indeed, it suggests that there is a need for greater understanding of why individuals may feel a need to invoke procedural rights and that this may say as much about their value positions on democracy, governance, technocracy and the environment, as it does about their desire to protect narrow property interests. Collectively these issues suggest that a consideration of the role of rights in British planning must include an understanding of the way people may be motivated to invoke rights of challenge and in so doing, may provide insights into the value of rights in terms of their contribution to improving governance for sustainable development and its impact on equity and sustainable outcomes. The way in which this will be tackled through empirical research is described in the next Chapter.

3.6. Rights and ethical discourse in planning

While the discourses of property and participatory rights provide powerful expressions of various ideological positions concerning the purpose and outcomes of the planning process, it is possible to discern a further, less expansive discourse that expresses rights in a moral context. A starting point for this is the suggestion that utilitarianism is the dominant ethical influence on planning (Campbell and Marshall 2002), epitomised in the notion that planning should be justified in terms of a single definable "public interest". If this assertion holds, it suggests that a teleological perspective such as utilitarianism may obstruct an appreciation of the deontological approaches associated with rights and lead to the assertion that "*planning by its very nature is inimical to individual rights*" (Miller 2000, p.1899). This raises a number of significant issues related to the main research questions that deserve to be explored in some detail. To do this, a brief review will be given of work which considers rights as part of the ethical basis of planning, followed by a more detailed exploration of the issues of utilitarianism and the public interest.

3.6.1. Rights and the morality of planning

In her empirical exploration of morality in US planning practice, Howe (1994) constructs a framework for understanding the ethical principles that planners apply when undertaking their professional role. This is seen to include honesty (e.g. conflicts of interest, political favours); duties of justice (e.g. responding to the public, providing independent professional advice); accountability (e.g. loyalty, keeping confidences); and serving the public interest (e.g. equity, process). In applying a philosophical convention, Howe distinguishes the ethical approaches taken by planners as being between teleological (i.e. goodness of the consequences of an action) and deontological (i.e. the rightness of an act itself). This reflects the enduring and irreducible tension between rights and utility that forms a major conflict in political and philosophical theory (e.g. Frey 1985; Freeden 1991, see section 3.6.2 and below) and has important implications for the relationship of planning and rights. In the view of Howe and most other authors, a deontological view tends implicitly to acknowledge the existence of rights either as instituted legal rules or in terms of individual moral rights, which are respected for their own sake not because of some benefit they create (Held 1984). Teleological approaches on the other hand focus on the goodness of the consequences of actions and neglect rights-claims, on the basis that such considerations are overridden by the outcome. Howe suggests that in her sample, 66% of planners could be classed as being "deontologists", broadly taking rights as their goal and 21% as "consequentialists"[88], who worked towards a goal of the public interest. Howe further distinguishes a group of "substantive deontologists" (17% of all planners sampled) who were defined by their central concern with rights and seeing their protection as a matter of binding duty. Furthermore, a significant proportion of planners falling under this category were committed to the idea of social justice (tenants' rights, affordable housing etc.) and the environment, both in terms of eco-centric rights (e.g. preservation of nature), protection of environmental quality and environmental justice. Although Howe's fieldwork was undertaken in 1982 in the US and notwithstanding the evidence that morality will vary over space (Searing,

[88] The remaining planners were described as being either "aethical" or expressing a mix of consequentialist and deontological ethical approaches.

Johnston-Conover et al. 2003) and time, it highlights how concepts of rights contributes to the ethical frameworks of planners.

Whilst Howe provides a good empirical basis for understanding rights as planning morality, others have considered the ethical implications of planning theory in more abstract terms. A number of authors have attempted to develop a planning theory using philosophical traditions (such as Rawlsian theory) built around the recognition of individual rights (Low 1994; McConnell 1995), although these have had a fairly minor impact on wider planning discourse. Of more value here is Campbell and Marshall's (1999) analysis, which assesses the ethical basis of a range of planning theories, using the dichotomy between teleological and deontological approaches as one of the key distinguishing criteria. They also apply other criteria that includes application of universal or relative/subjective perspectives and suggest that much current post-modern theory, in stressing the subjective nature of morality, become aligned with liberalism in stressing the importance of individual rights and freedoms (Merrifield and Swyngedouw 1997; Sayer and Storper 1997). Their final ethical criteria is the scale from which ethical actions are judged, with some ethical reasoning prioritising the individual as the critical unit, while others reflect the prior importance of community. Using these criteria, Campbell and Marshall (1999) review the main schools of planning theory, highlighting how they relate to these key ethical criteria, as summarised in Table 3.5.

Table 3.5.: Summary of key ethical principles underlying theories of planning (from Campbell and Marshall 1999)

Ethical principles	Theories of planning				
	Technocratic Rationalism	Professionalism/ Procedural Planning	Incrementalism/ Pragmatism	Communicative Planning	Advocacy planning
Ethical reasoning					
- Teleological	✓				✓
- Deontological		✓	✓	✓	✓
Focus of concern					
- Universal	✓				
- Subjective		✓	✓	✓	✓
Interests served					
- Individual	✓		✓		
- Community				✓	✓
- Common		✓			

While there is no need to review each of these theoretical perspectives in detail, it is worth highlighting a number of implications for the consideration of the concept of rights in planning. First it highlights that despite the dominance of utilitarianism, planning theory, like planning practice, tends to be dominated by procedural questions[89]. Campbell and Marshall (1999) also suggest that planning theory tends to focus on individual interests rather than a more general concern with the common good – an issue that tends to be reflected in rights-perspectives. This also identifies three main ethical options for evaluating goals and outcomes of planning practice: a utilitarian position based on cost-benefit analysis (i.e. technocratic rationalism); an independent professional view of the public interest (i.e. procedural planning theory and incrementalism); and planners as referees ensuring due process and empowerment (i.e. collaborative and advocacy planning). Although this may be a generalisation, it would appear that the first two of these offer little room for a rights-perspective and given that they have traditionally dominated planning thought, it is not therefore surprising that rights have only recently begun to have a presence in wider planning discourse. However, the third option above, derived largely from the paradigm of Collaborative Planning, appears to more readily accept a role for rights in planning governance. This is particularly true of procedural rights, where Collaborative Theory is built around Habermas' "*ideal speech situation*", which has three pre-conditions (Ashenden and Owen 1999, p.5):

- That all beings capable of speech and action are entitled to participate in the process of argumentation (the principle of universal moral respect);
- That participants have an equal right to introduce and question claims, to put forward reasons etc. (the principle of egalitarian reciprocity); and
- That no participants be prevented from exercising these rights to, and of, participation (the principle of non-coercion).

This therefore suggests that the notion of procedural rights will have a role in the context of communicative rationality and which has been further developed by Healey (1997) and discussed in more detail in section 3.7.

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[89] In this context, Mandelbaum (1989) highlights the clash between rights and politically driven policy change in that if we "*expand the domain of rights in order to constrain what we consider immoral collective choices, then consequences matter less and less in the resolution of public choices*" (p. 194).

The concept of rights *as morality* therefore appears to have two main expressions within planning – first, some planners apply deontological forms of morality in undertaking daily professional tasks (Howe 1994) and second, rights have been shown to shape the ethical basis of some (but not all) theories of planning. This tends to offer qualified support to Miller's claim that land use planning is "*unquestionably utilitarian in character*" (Miller 1998a, p.50). Indeed, there are few commentators that contradict the generality of this claim, with evidence of the influence of utilitarianism seen through the extensive use of cost-benefit analysis, multi-objective evaluation and the construction of the "public interest" in the rational-comprehensive approach (Alexander 1992, p.129). The dominance of such teleological reasoning in practice makes it worth examining the relationship of utilitarian thinking with rights-perspectives in a little more detail.

3.6.2. Rights and utility

It is clear to see why utilitarianism is regarded as being contrary to a rights approach – it is based on aggregating individual preferences to maximise a hedonic value which can be used to justify an overall outcome. In this raw form, it casts aside any consideration of the distributional impacts of an action, thus neglecting potential serious or even fatal consequences on any one person or group[90] and denying the protection of intrinsic value of the individual held so important from a rights perspective. Conversely, it can be suggested that a common view is that rights should be respected for their own sake and not for any benefit they may bring about (Held 1984, p.15), clearly conflicting with the strict view of utility forwarded by Bentham and his followers. The difference of opinion between utilitarians and those sympathetic to a rights approach is captured by Waldron (1993b):

> *"To believe in rights is to believe that certain key interests of individuals, in liberty and well-being, deserve special protection and that they should not be sacrificed for the sake of greater efficiency or prosperity or for any aggregate of lesser interests under the heading of the public good."*
>
> (p.30).

[90] For example, Frey (1985) suggests that "*there is no person who in principle is beyond is the scope of utilitarian sacrifice*" (p.9).

Although utilitarianism has been criticised for issues that range well beyond rights-concerns[91], rights-theorists have taken particular issue with many of its implications. For example Dworkin (1977) has suggested utilitarianism neglects individual independence by pursuing human welfare only in a collective sense and that the aggregation of preferences can lead to discrimination or domination of certain groups, thus prejudicing utilitarian claims to neutrality and egalitarianism (Dworkin 1984, p.158). However, Freeden, (1991, p.86) and Frey (1985, p.3) note that most rights-based critiques of utilitarianism take on the relatively easy target of unconstrained classical utilitarianism, without taking account of more contemporary developments of utilitarian theory nor the modified way it is applied in society.

Indeed there have been a number of attempts to accommodate rights-theory with utilitarianism. Thus Dworkin (1977) has overcome his concerns with utilitarianism by ensuring that individuals can be granted a right to moral independence as a "trump" over unrestricted utilitarianism by defining a right as a claim that it would be wrong for a government to deny an individual even if it would be in the general interest to do so (p.269). Other approaches have included the adoption of a rights-supportive definition of utilitarianism, for example one that regards human rights as being conducive to human welfare or even the potential of a "*utilitarianism of rights*" (Mackie 1985, p.89) which could maximise members of a society's rights fulfilment and limit their rights-infringement. Thus it may be possible to achieve convergence between rights theories and utilitarianism through both a softened understanding of the latter and a more considered understanding of the nature of rights themselves. Of relevance here is the definition of rights discussed in Chapter 2, which suggested that a critical feature of rights was that they facilitated a prioritisation of the values that a society should seek to protect. As such, rights can be seen as a "*discriminating idea, sorting out interests that merit special attention from those for which utilitarian calculation seems inappropriate*" (Waldron 1989, p.304). This implies that a combination of utilitarian and rights approaches could be applied if those key values protected by

[91] For example it is suggested that utilitarianism is reductionist, supportive of the status quo, has a unitary scale of valuation, obfuscates power structures and can lead to repugnant conclusions Smart and Williams 1973).

rights can be identified and then insulated from utilitarian calculation – i.e. applying an ethical filter prior to a more objective evaluation using, for example, cost-benefit analysis. This suggests that there will be a pecking order of societal values, even amongst those deemed as being worthy of rights status, for example the difference between "core" and derivative rights (see Chapter 2), where the most important are entrenched as being inalienable (e.g. the right to life) while others may be traded off.

Debates relating utilitarianism to land use and environmental regulation have tended to mirror this philosophical discussion in that most have aimed criticisms at the strawman of a classic, unconstrained form of utilitarianism, rather than the modified form expressed in most welfare economics (Alexander 2002b), while the concept of rights has been similarly invoked in a rather inflexible way. Thus criticism from a variety of environmental, social and economic perspectives (Hunold and Young 1998; Sagoff 1998b; Clark, Burgess et al. 2000) have lead directly to the proposing of an environmental rights approach as an alternative to unconstrained utilitarian policy-making (e.g. Eckersley 1996). This has been most deeply developed in relation to planning by Beatley (1994), who has attempted to develop an alternative ethical framework for land use decisions. This involves a wide ranging discussion of duties, obligations, risk, justice and the relationships between market, state, community and the individual. While the broader aspects of his work will not be discussed in detail here, it is pertinent to note that he establishes a set of twelve ethical principles, one of which identifies a role for what he calls *land use rights*:

> *"Ethical land use must protect minimum social and environmental rights due to every individual irrespective of income or social position. These rights may be legal or constitutional, or they may be moral. Land-use rights may be viewed as moral entitlements to basic minimum social goods, such as affordable housing, access to transportation and mobility, health care, recreation, and natural resources such as beaches and mountains. Individuals are entitled to be free from certain excessive levels of environmental risk; for example, from air and water pollution, or from hazardous waste disposal. The concept of individual and public rights places parameters on the extent to which government can enact land-use policies designed to maximise social utility or welfare*" (p. 265).

The parallels to the discussion of environmental rights discussed in the previous Chapter are immediately clear, but Beatley envisages *land use rights* that encompass a much wider range of issues (see Table 3.7.). His intention here is not to give a final word on *land use rights* but to *"survey the landscape, to identify the primary potential components of such a set of rights"* (p.70) and in so doing makes the argument that any ethical land use decision must acknowledge that individuals are entitled to a minimum level of protection from harms and that this must act as a constraint on public policy that seeks to maximise social welfare[92].

Although drawing exclusively on a US context, Beatley discusses each of these rights in terms of its justification (i.e. based on law or morality) and provides useful examples of how they can relate to planning practice. This is primarily an exercise in gathering potential sources of rights, rather than producing a definitive theoretical statement on the nature of land use rights and is less relevant to a UK context with its more ambiguous constitutional status, it nevertheless offers a useful contribution to this debate in a number of respects. First is that Beatley identifies both procedural and substantive rights relevant to the field of planning and offers an initial exploration of the implications for planning practice, in so doing raising many of the key ethical questions that need to be addressed when considering rights in a planning context[93].

[92] A similar approach in this respect has been developed by Alexander (2002a), which is further discussed in section 3.7.

[93] For example, the relationship between rights and utility, how such rights can be justified and whether they are universal and absolute (see Chapter 2).

Table 3.6: Beatley's "*land use rights*"

Land Use Rights (from Beatley, 1994)
Rights to Due Process and Equal Protection: protected in the US by the Constitution and can be seen as being composed of both procedural (i.e. fair treatment in decision-making) and substantive (i.e. institutions acting within their competence) elements.
Rights to Free Speech: protected in the US by the Constitution and having relevance to land use via the regulation of adult entertainment establishments and advertising via the planning system.
Rights to Freedom of Religion: protected in the US by the Constitution and having relevance to land use via the impact of zoning on places of worship.
Rights to Privacy: implied by US court decisions and assumed as a moral right, this has been confronted in the US by attempts to control who may occupy single-family homes, raising issues over life-style choices.
The Right to Decent Shelter and Housing: Noted in the UNDHR and often voiced as a moral claim, with support in US legislation and may be reflected through planning by overcoming regulatory obstacles such as limits to density or tenure mix.
Rights to Health Care and Education: these are strong moral claims with some basis in international rights instruments, having implications for land use in terms of the location of relevant facilities.
The Right to Productive Employment: an implied right, having relevance over decisions that govern the location of commercial and industrial uses.
The Right to Physical Access: reflecting concerns over barriers to mobility for the disabled and therefore having relevance for the design of the built environment.
Rights to Environmental Goods and a Liveable Environment: the basis for this right has been discussed in Chapter 2, where it was shown that a number of US states have established such rights and having implications for accessing natural resources such as coastlines, light and aesthetic assets.
The Right to be Free of Environmental Harms: regarded as an implied moral right, having relevance for land use in the siting and location of polluting uses such as smokestacks and sewage treatment and considerations of risks attached to certain development.
Rights of Nature and Other Life Forms: the moral basis of this right is discussed briefly in Chapter 2, with Beatley noting that there are US statutes protecting certain species, which land use decisions should take into account.

The work also rightly identifies that the relationships created by rights in planning may be claimed by individuals, landowners and the general public and many demand action, not just by the state, but also civil society and the private sector. Furthermore, while it rehearses many of the issues found in the literature on environmental rights (see Chapter 2) it highlights that this is not the sole concern of planning and that a

robust consideration of these rights must acknowledge the legitimacy of rights derived from alternative moralities. The inevitable conflict between different land use rights raises a rack of moral dilemmas, which Beatley acknowledges face particular difficulties in overcoming. However, with an implicit nod to Collaborative Planning, he notes that such conflicts can be ameliorated through decisions based on complete understanding of the specific circumstances and alternatives involved and cooperation amongst all concerned parties. This inadvertently identifies what may be a key value of a rights-perspective; that once placed in a rights-frame, a planning decision is more likely to acknowledge and deliberate with all relevant interests (i.e. those holding a claim strong enough to be encompassed in a right) thus encouraging a more detailed consideration of the distribution and impact of the decision (see section 3.8). This relates directly to the concept of "the public interest", which has underpinned much utilitarian thinking within planning and therefore worth a more detailed examination.

3.6.3. Planning and the public interest

Although there has been an enduring debate over the viability of planning for a single, identifiable public interest (e.g. Meyerson and Banfield 1955; Friedmann 1973; Simmie 1974), it remains both a key concept[94] and enduring challenge for planning (Campbell and Fainstein 1996). In recent years there has been revived interest in the concept both from the point of view of challenging it's legitimacy in the context of contemporary heterogeneous societies (Young 1990; Sandercock 1998) and in terms of the ethical basis of planning practice (Howe 1992; Alexander 2002; Campbell and Marshall 2002; Moroni 2004). This highlights that there are a range of competing moral interpretations of the public interest, some of which may better accommodate rights-claims than others (see Table 3.7).

[94] Para.2 of PPS1 notes that "*Good planning is a positive and proactive process, operating in the pubic interest through a system of plan preparation and control over the development and use of land.*" ODPM (2005a).

Table 3.7: Concepts and applications of the public interest (from Alexander 2002b, p.229)

Focus	Approach	Interest base	Theory	Perspective	Application
Substantive	aggregative	individual values/preferences	utilitarianism	objective	social welfare function; cost-benefit analysis
	aggregative	individuals and/or groups	modified utilitarianism	subjective	multi-objective evaluation
	unitary	collective community	communitarian	value-based cultural ideological	political/administrative compatibility with values, norms
	unitary	polity, state	étatism, constitution, law	objective	legal/adjudication compatibility with state interest
	deontic	individual rights	liberal-democracy; constitution, law	objective	administrative/legal review; compatibility with planning rights
Procedural	deontic	individual rights	liberal individualism	objective	legal/adjudication compatibility with individual procedural rights
	dialogical	stakeholder groups	Madisonian liberalism, communicative practice	inter-subjective	political discourse

Indeed, Alexander (2002b) suggests that the wider discourse around public interest has faced difficulties primarily because of issues of operationalisation rather than its validity, with utilitarianism clearly failing to articulate a public interest that is more fully recognised by the wider public. As discussed in section 3.7., he goes on to propose that the public interest could be better considered via the notion of *Planning Rights*, thus making connections with Millichap's concept of "*community rights*" (Millichap 1995).

A final point to be made here is that both Campbell and Marshall (2002) and Alexander (2002a) tend associate rights-based concepts of the public interest with liberal (e.g. Rawls 1971) or libertarian (e.g. Nozick, 1974) individualism. The logic of this view is clear in that in philosophical terms it is these traditions that offer the most coherent arguments for rights-based morality, yet, as noted by (Freeden 1991) rights have been associated with a much wider range of ideologies. This opens the fascinating prospect of further developing Alexander's (2002a) attempts at constructing a rights-based public interest, perhaps drawing on some of the rights theorists mentioned above (e.g. Dworkin 1984) and more overtly associating it with more progressive, or even radical, concepts such as environmental justice. Although

this will not be pursued here, it is offered as one of the ways in which the research agenda could be further extended.

This review of rights-based ethical discourse in planning highlights a number of key points. First is that it represents another area into which rights have crept into planning thought, although this has been something of a minority interest due to the dominant presence of teleological reasoning. There are however, competing ethical perspectives on the nature of planning, many of which draw on the concept of rights and which may offer advantages over current reliance on utilitarianism (Alexander 2002b). The emphasis here appears to be once again on process, rather than rights as substantive tests of planning outcomes[95], further lending an emphasis on procedural rights. The second point here is that while planning appears to be teleologically dominated, this does not necessarily mean that there is no place for rights in its ethical landscape – indeed insights from broader considerations of rights and utility suggest that a more sophisticated consideration of both these concepts can allow a degree of accommodation and integration. This will not be attempted here, but does undermine the finality of Miller's claim that "*planning by its very nature is inimical to individual rights*" (2000, p.1899) and leaves the door open for the development of a greater role for rights within planning thought. Finally, it is important to note that within the planning literature reviewed here, the ethical presence of rights appears to say little about distinctively environmental rights but that the final discourse noted in Table 3.3. does offer prospects of accommodating this in planning thought.

3.7. Rights as a conceptual device

It has been suggested that four different rights discourses can be identified in planning literature – three of these focus on values encapsulated by rights (i.e. property, participation and ethics, as reviewed above), while the fourth emphasises rights as a "wrapper", or capsule that protects and priorities the values within and as such can be understood as focussing on the use of rights as *a conceptual device* (Freeden 1991). It is acknowledged that this represents an ill-defined body of work,

[95] This, however, has been attempted by Alexander (2002b).

characterised by overlaps and fuzzy boundaries with other discourses[96], yet understanding of rights as a capsule offers a potential means of synthesising other discourses discussed in this Chapter and as such, contributing to the research objectives of the thesis.

A starting point for exploring this discourse is with the major contribution to planning theory offered by Healey's *Collaborative Planning* (1997). Notwithstanding the broad and detailed criticisms that have been levelled at this perspective (e.g. Flyvbjerg 1998; Tewdwr-Jones and Allmendinger 1998; Huxley 2000 and see Healey 2003), it provides an important analysis of the capability of the current planning system to facilitate communicative rationality and the place of rights within this. Healey describes the apparatus of policy-making in terms of both the hard infrastructure comprising formal organisational structures, departments, committees, laws, taxes etc. and the soft infrastructure made up of social relations, informal arenas, administrative routines, professional cultures etc. Healey identifies rights (and their corresponding duties) as part of the hard infrastructure which "carries power" (p.286) to the individual instances of action. She thus notes that the way rights (and duties) are formally specified, distributed and redeemed has a significant effect on structuring power relations and governance practices. As such rights may support (or distort) what specific stakeholders seek to achieve through policy processes and she uses the example of the lack of constitutional third party rights as being a factor in tipping the balance of power in planning decisions towards property interests.

In this context, Healey suggests rights are one of four areas that shape specific instances of governance activity, which need to be addressed to change the systemic design of the planning system (p.294):

- The nature and distribution of rights and duties;
- The control and distribution of resources;
- The specification of criteria for redeeming challenges;
- The distribution of competencies.

[96] For example, it is conceivable that the work of Beatley (1994) discussed above, could be included as part of this discourse.

Healey underlines the need for creating a "structure of challenges" (p.295) which she considers are essential to underpinning any collaborative approach to planning, thatenable any person engaged in governance to be called to account. Following Held (1987) Healey identifies rights as being central to facilitating respect amongst stakeholders and for empowering the public, specifically identifying four procedural rights that would promote collaborative inclusionary planning (p.297):

- Broadly-based rights of voice and influence - allowing concerned people to express their views on land use and environmental matters and to call governance systems into account;
- Opportunities to challenge decisions made in governance arenas by any one who has a stake in an issue and to ensure that this is adequately taken into account;
- A right to good quality information for all parties;
- A right to call any governance agency into account for any failure in respect to the duties and responsibilities which apply to the exercise of governance responsibilities.

Healey notes that such rights have to be matched by reciprocal duties[97] and highlights that the worth of such rights can only be fully realised if they are carefully specified and supported by broader patterns of governance.

While Healey regards rights from a positivist perspective and prioritises the encapsulation of participatory values over others (e.g. property, ethics), she does provide a valuable way of portraying the role for rights *as a conceptual device* in the context of governance. Importantly Healey notes that the impact of rights used in this way may not be a direct, linear one, but as a *framing* opportunity that will come into play in difference individual instances. Her work is also useful in that it helps identify those factors that are needed in addition to the legal entrenchment of rights, namely that there has to be; adequate resources; institutional competencies; and supportive criteria for redeeming rights-claims – essentially those issues that need to be addressed to overcome the rights being just a liberal illusion. Helpful as this is for mapping the place of rights in the hard infrastructure of governance, Healey does not consider how rights may shape the soft infrastructure in terms of their rhetorical and

[97] These include: the duty to pay attention to concerns of the members of political communities; the duty to carry out agreed policies effectively; and the duty to operate within openly agreed principles and to report back to members of the political community.

mobilising value. The role of rights in this soft infrastructure, drawing on the social situatedness of knowledge and the cultural frameworks in the expression and claiming of rights, remains unexplored.

Given the influence of *Collaborative Planning* in specifiying normative patterns of governance, it is surprising that the prominent role for rights in Healey's vision for planning has been neglected by the volume of work that has drawn on her work. Indeed, to the author's knowledge only one subsequent work (Raco and Imrie 2000) has taken the lead from Healey in a discussion of rights and even here, it is only used it as a contextual issue, rather than a theoretical base.

Alexander (2002a) has also made an important contribution to the understanding of rights *as a conceptual device* by proposing an ethical framework for planning in the form of "Planning Rights" (PRs), which he sees as positive institutional rights and which can be deduced from a set of socially-agreed normative principles (c.f. Beatley 1994). While there is a lack of clarity in the specific nature of such rights[98], Alexander claims that these can be used as an alternative to "*discredited utilitarian evaluation methods*" (p.193) as a means of providing a substantive evaluation of plans. The concept of PRs is applied to two familiar categories; Procedural PRs (including due process; participation; and reason) and Substantive PRs (including rationality; basic human and civil rights; and the public interest). The procedural aspects of PRs have fairly obvious application, but the Substantive PRs perhaps need a little elaboration. Alexander suggests a Substantive PR covering rationality includes a requirement that a plan should pass a test of reasonableness and that the stated purposes and expected outcomes of a plan should be in conformity. The Substantive PR covering basic and human rights encompasses human dignity, equality and property rights, while the PR covering the public interest requires the application of threshold criterion that "*a plan that does not enhance (or reduces) the welfare of the plan area's residents, in the absence of countervailing public policy considerations, is against the public interest*" (p. 202). Alexander proposes that these rights, based on the authority

[98] For example, he suggests they must be both "*concrete, content- and situation-specific*" (p.193) as well as being "*a set of ethical norms*" (p.192)

of the state and the professional standing of planners, offer the basis of plan evaluation, with a plan being too poor to implement if it violates any of the identified rights. Although Alexander appears to have evolved this approach from earlier work in the property rights tradition (e.g. Alexander 2001), he has come to share ground with writers from other ideological traditions, such as Young (1990) and Mitchell (1997), who have come to see rights as an important potential mechanism for achieving justice in public policy and share the belief that *"it is nigh impossible to achieve democratic non-exclusionary urbanism without recourse to some standard of universal value that is non-reducible and applies to all"* (Merrifield 1997, p.219).

While the ontological basis for rights of Alexander's work is not entirely clear[99] and has some difficulties in conceptual and operational terms, it is important for a number of reasons. First it applies the concept of rights as a protective and prioritisation device directly to the planning process and as such offers the potential for interpretations of what may be seen as abstract notions (e.g. human dignity) of rights into a concrete planning activity, such as plan evaluation. Second, it suggests how the deontic nature of rights could conceivably be applied to planning decisions where certain standards are maintained for all and not as if they can be traded off against other benefits - thus indicating how the idea of rights as being "*prioritising, protecting and action-demanding*" (Freeden 1991, p.10). Third, it highlights how the concept of rights could potentially contribute novel ways of approaching enduring theoretical problems, such as the relationship between rights and the public interest.

A further example of the application of rights as a conceptual device is offered by King (2003), who has attempted to develop a rights argument for housing. He notes that while previous authors have attempted to define the need for shelter as a right (e.g. Bengtsson 2001) these have been put forward as a social right (i.e. a second generation right) and therefore subordinated to "core" rights such as those to life and

[99] For example, it is difficult to understand the nature of the rights to *reason* (other than those covered as part of due process such as consistency in the rule of law etc). Furthermore the distinction between procedural rights and substantive rights is not always clear, for example the Substantive PR on *rationality* includes criteria covering some aspects of decision-making (and therefore procedural?) while the Substantive PR covering *basic human and civil rights*, by definition includes many procedural aspects.

liberty - King proposes that the right to housing should also be seen as a core right (or "*freedom right*" as he puts it) and therefore on a par with rights of property. Following Waldron (1993a) and Nussbaum (1999), King suggests that rights can be used to justify housing and that this may be the most significant right because it acts as a basis for all others as all rights must be situated[100]. His reasoning has implications for planning - for example "a healthy environment" has much the same moral basis as that of shelter, while planning could be seen as being necessary to facilitate a right to housing. King makes a number of important points here – first that as a right, housing becomes politically prioritised alongside education, health etc and therefore on moral terms should be seen alongside property rights and other unimpeachable "core" rights. While a little optimistic in its conclusions, Kings arguments do offer an example of how the abstract notion of moral rights can be applied to a field not unrelated to planning, although it does not offer a convincing explanation of how this can be operationalised.

Until now rights *as a conceptual device* have been applied either as institutionalised rights (e.g. Healey) or moral rights (e.g. Alexander, King). However, as noted throughout the thesis, an equally important dimension to understanding of rights is the varied social meanings attributed to rights by different stakeholders in the planning process. This implies an examination of the socially-constructed nature of rights and while this is an under-researched area, a number of authors have made useful contributions to how this can be understood. One example of this is March (2003), who considers how perceived rights to views in Victoria, Australia are constructed and maintained. While this article is of most value because of its discussion of the relationship between rights and utility (see section 3.6.2), it provides some insights into the practical impact of socially-defined rights. Therefore, while Victorian planning law (and indeed, in the UK) does not provide legal rights to the enjoyment of a view, homeowners clearly value these highly and will lay claim to such rights wherever possible, providing a stimulus for their engagement with the planning process. Despite the lack of legal foundation for protecting rights to a view, March illustrates

[100]Waldron (1991, p.296) notes that "*No one is free to perform an action unless there is somewhere he is free to perform it.*"

that such claims are commonly taken into account at Planning Tribunals, where they are acknowledged during mediation between the two sides of the dispute and end up contributing to the wider concept of the public interest. In so doing March (2003) provides an example of both how individual rights may be accommodated with utilitarian considerations and that even "imagined" rights may have value in determining agency and outcomes in planning practice.

Similarly, Parker (1999a) has taken rights as the basis for a fascinating study of micro-level politics in rural English society, which clearly highlights how the very term "rights" is filled with symbolic value and potential to incite action[101]. Drawing on Giddens (1984) he suggests that "*a 'right' is what understood as being a right; as what is being understood in terms of the practical consciousness of the agent*" (p.1208) and, like Healey (1997) supports the view that construction of rights and responsibilities between individuals, groups and institutions is a key aspect of governance. Using a case study of a scheme to open up countryside rights of way, Parker shows the way rights (and responsibilities) are perceived is very much dependent on local cultural factors and where the state's interpretation of rights may be significantly different from that found in local communities, it has implications for law and policy. Using theoretical insights from Bourdieu (1990) Parker highlights that many rights may be mediated informally in rural communities, but that uncertainties in the extent of such rights (and responsibilities) may result in legal rulings, thus bringing about institutionalisation of the rights in question.

This is further developed by Parker and Ravenscroft (2001), who explore the restructuring of rural societies using rights as a theme, through their examination of the Countryside and Rights of Way Act 2000 (CROW), providing interesting insights into the role of "*rights and responsibilities*" (i.e. the "official" discourse discussed in section 3.5.3) in recent policy formulation. They suggest that under New Labour, new rights tend only to be ceded where a new responsibility can also be identified and likewise, a new responsibility may be rewarded with new rights. Thus while debates on land-based legislation have previously focussed on the economic capital of

[101] See also the discussion of Parker's (1999a) analysis of property rights in section 3.4.

landowners, they now tend to be infused with a moral discourse of rights and responsibilities. This therefore represents what Smith (1989) refers to as "*a politically inspired restructuring of human rights*" (p.148) and marks a shift in governance symptomatic of wider social and political changes. Echoing the view of Raco and Imrie (2000), they suggest this has fundamental implications for governance, indicating, in this case, a shift from property law to contract law and from land law to sumptuary law[102] (Hunt 1996).

> *"Previously power lay in the law's overt protection of the rights associated with private property; it now lies with the contractual arrangements governing the exercise of those rights"*
>
> (Parker and Ravenscroft 2001, p.391)

This quote therefore appears to suggest that even within wider political and legal discourse, there is a discernable shift from an emphasis on protecting the values encapsulated within rights, to a growing appreciation of rights themselves.

This section has outlined some of the literature concerned with planning that has taken rights *as a conceptual device* as its main focus of attention. This common theme is difficult to discern as different authors tend to apply a different notion of rights in their analysis and any synthesis of approach is difficult to achieve, but it clearly underlines the growing interest and value in rights as a field of study on their own. This includes a range of perspectives, such as governance, morality and defence of individual interests - yet what binds these contributions is the common use of rights as a heuristic tool for understanding how or why certain values are protected or prioritised and the impact this can have on the planning process.

3.8. Planning through a "Rights Frame"

This Chapter has reviewed the ways in which rights have been expressed in planning discourse. The variation in the meanings applied and the variety of the moral and ideological concepts associated with the term highlights the difficulties in identifying a coherent relationship between planning and rights. The purpose of this research is

[102] i.e. disciplinary codes for the governance of consumption.

not, however, to develop an overarching rights-theory of land use regulation[103], but to evaluate the potential role of environmental rights in planning. This does not therefore necessarily require a meta-narrative on rights and planning, but needs to be based on a clear understanding of how the concept of rights is to be deployed. This Chapter has suggested that a variety of approaches that could feasibly be applied for such a deployment; for example, one could explore the concept of environmental rights as extended property rights to address problems of common resource ownership; one could assess the legal and political basis of calls for greater procedural rights or the *Right to the City*; or one could take rights in a more narrow moral sense and, following Alexander (2002a) use this to construct alternative concepts of the public interest.

While all these may offer interesting avenues for research, they are not essentially about rights themselves, but relate to the values protected by them. It is suggested that the issues discussed in section 3.7. indicate an emerging body of work which appreciates rights primarily as *a conceptual device* for expressing and protecting key societal values. This interpretation draws on Freeden's (1991) definition of rights as discussed in section 2.4, which acknowledges that rights do not necessarily have to meet rigorous legal or philosophical standards but must be socially-recognised, to a greater or lesser degree, as protecting values of critical importance. While this does not eliminate the substantive debate on what should be given rights-status, it retains flexibility for the social definition of rights and allows rights to be associated with a variety of ideological perspectives. Furthermore, Freeden critically notes that the usefulness of such a concept is its ability in "*ordering ideas, conveying knowledge and promoting comprehension*" (p.10). Although unacknowledged, by contributing authors, this is how the fourth discourse of rights (see section 3.7) applies the concept. It is thus suggested that it is best to understand rights in planning, not as moral legal or political constructs, but as heuristic tools for understanding how various values are expressed and prioritised within the planning process, or in other words, in applying a *rights-frame* to planning.

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[103] To be effective, such a theory would have to meet the criteria set by Waldron (1993) in that it would have to *"work out what rights people have, how they are to be formulated, and how important they are in relation to the moral and political considerations*" p.29). The contested nature of rights in planning makes this no easy task and even questions the worth and validity of doing so.

The concept of "framing" has had only occasional use in planning research and tends to have been most extensively used in social movement research and policy analysis. For example Snow and Benford (1992) Capek (1992) and Taylor (2000) have illustrated how the understanding of interpretive frames can bring explanatory insights into the emergence and mobilising power of social movements. In terms of policy analysis, framing has been used to give meaning to the ideologies and core beliefs on which policy may rest, thus providing *"conceptual coherence, a direction for action, a basis for persuasion and a framework for the collection and analysis of data – order, action, rhetoric and analysis"* (Schoen and Rein 1994, p.3) – thus having close parallels with Freeden's (1991) assertion that the value of rights lies in how they order ideas, convey knowledge and promote comprehension. This is essentially based on the premise that there will be a variety of interpretations of reality, with every individual's understanding being based on a differing meaning or emphasis of the elements of that reality. An example of this is the differing interpretation based on the technical rationality of the planning professional and the practical rationality of the public (see section 3.5.3.). In this context, the metaphor of the "frame" is used to explain the basis of these understandings and can be defined as being an *"organising principle that transforms fragmentary information into a structured and meaningful whole*" (Van Gorp 2000, as quoted in Fischer 2003, p.144). Thus, by applying a rights-frame as a heuristic tool, it can act as a synthesising and organising principle for understanding the relationships and values protected and prioritised within the planning system. This may also provide insights into the way power is used in land use regulation by revealing discrepancies between expressed civic values and planning outcomes.

While the label "*rights-frame*" may be a novel one, it encompasses an approach implied by a number of other authors. Thus Healey (1997) suggests rights offer a way of interpreting instances of governance activity, while Rydin (2003, p.5) notes that in the context of governance, stakeholders are defined in terms of rights and impact on planning as much as their contribution to the planning process. Smith (1989) has made a more overt call for the application of a rights frame in her suggestion that it is

possible to use concepts of citizenship and rights as the basis of an analytical framework, which, according to her, transcends the *"uncompromising individualism from the Right and an insensitivity to personal identity on the Left"* (p.147). Thus she notes that:

> *"Citizenship as critique regards civil, political and social rights as entitlements whose universality – in a de jure and de facto sense, remain to be realized. It offers a comprehensive vehicle through which to explore discrepancies between the obligation required of, and the rights extended to, members of a nation-state"*
>
> (p.148).

Although the method of such a critique is left rather undeveloped, she does provide examples of how this could be generally applied, in an analytical and normative sense, to issues of racial segregation and gender inequality to give a deeper understanding of spatial and social relations[104]. Smith thus applies rights not in the sense of being legal or abstract concepts, but *as devices* to evaluate outcomes of social, political or bureaucratic processes against the core values around which there is rhetorical agreement in society (such as due process, equality or even sustainable development). This strikes some resonance with the suggestion of using rights to expose hegemonic relations of subordination (Laclau and Mouffe 1995) and Alexander's (2002a) "*Planning Rights*", as evaluative criteria for land use plans. It also suggests that rights may be of some interpretive value in evaluating the planning process in terms of equity and sustainability.

The idea of a *rights-frame* is thus proposed as a perspective to be adopted when reviewing the process or outcomes of land use regulation. This is not proposed as a normative model but as a means of exploring the potential analytical values of rights in planning. To do this, it is possible to speculate on its application according to what Freeden sees as the exclusiveness of the concept of rights in that it is simultaneously *prioritises, protects and demands action*:

[104] Another example here is Fabra's (1996) analysis of the position of indigenous peoples in Ecuador.

- *Understanding priorities.* The degree to which rights are claimed, recognised and formally instituted within planning discourse infers much about the priorities, political aspirations and officially-sanctioned purposes of land use regulation. Therefore the fact that property rights appear to be a natural part of planning law, while TPRA are resisted by government, suggests an ideological bias within the planning system (as noted by McAuslan 1980; Reade 1987 et al) and from which additional significance can be implied, such as the relative priority assigned to economic and social goals. Furthermore a rights-based interpretation of planning outcomes entails a recognition of *all* the interests holding such rights and as such forces a greater acknowledgement of the distributive impacts of the planning process. This is of significant political and analytical value and as such encourages additional lines of inquiry, for example focusing attention on the morality of planning outcomes, rather than just questions of utility or economy (King 2003, p.662-663), or on the principles at stake, rather than the practicalities of an action.

  The analysis of the varying priorities placed on different values in formal planning discourse also helps illustrate two key interpretations of rights proposed by Blomley (1994). As noted in section 3.5.2. he highlights the scepticism over the use of rights as formalised instruments in the court room, which tends to reflect the deeper values prioritised by the state. Indeed, Hancock (2003, p.1) notes that the law is an instrument of hegemonic power and as such there may be a difference between the values embodied in rights and the implementation of them, reflecting the legalistic prioritisation of corporate interests over the social values implied in human rights (Goodin 1985)[105]. Blomley contrasts this with the optimistic use of rights as a basis for mobilisation and critique of current policy, which can be used as powerful

[105] An example of this could be seen to be the outcome of the cases taken by residents around Heathrow, who claimed that early morning flights violate their right to privacy and family life under Article 8 of the ECHR. Several such cases have established that these rights *are* violated by aircraft noise, but that the values protected by those rights are outweighed by the public interest served by maintaining the economic value of the airport. Where the courts *have* ruled more positively in favour of the applicants, the state response has been one of rejection and further appeal (Hart and Wheeler, 2004).

demands for political reform. This therefore implies that environmental rights may have value for encouraging popular mobilisation around issues of equity and sustainability, but less potential as a vehicle to secure such values as formalised rights in the policy process and courts.

- *Understanding values protected.* While many authors have made similar observations about the ideological bias and power structures of planning without recourse to a rights-frame, it is suggested that this may confer additional insights because of the privileged position of rights within liberal democracies. Thus, because rights are supposed to accord special protection to the values they encapsulate, it is possible to infer that discourses which invoke rights will focus on what different interests consider to be the most important values that need to be protected in the planning system. An interpretation of such discourses may then be used to reveal the explicit and inferred values of stakeholders making and resisting rights-claims, which will reflect what they accept as being foundational principles, associated concepts and appropriate responses. As such rights can be used to understand the deeper ideological outlooks of stakeholders and infer whether they seek to challenge or sustain existing power structures (Stammers 1993). This could then contribute to the explosive potential of rights to transform relations of subordination into those of oppression and domination (Blomley 1994; Laclau and Mouffe 1995). Furthermore, by considering the degree to which rights-claims are accepted, or rejected, within a specific instance of planning activity, it may be possible to consider the underlying values that are protected, or unprotected, in the process of land use regulation. Indeed the very fact of whether certain issues are accepted within a rights discourse indicates the value placed on them by different elements of planning governance.

- *Understanding the action demanded.* Once placed and accepted within a rights-discourse, protected values gain additional status, which implies a different state response in terms of their prioritisation and protection. Thus the interpretation of state actions and responses to rights-claims may also offer

insights into the ultimate balance of power within the planning system and the ideological beliefs upon which it is based. It is therefore expected that while there may appear to be consensus around certain rights (e.g. free speech, equality before the law), a critique of the ideological associations of different rights and how they are differentially facilitated and realised via the action of the state may reveal the "discrepancies" suggested by Smith (1989) above. This may contribute to understanding the key goals and values embedded in the planning system and in some cases may highlight the factors of obfuscation that may lead to the "liberal illusion" of rights.

Following these observations, a rights-frame offers a number of other specific perspectives on the process and outcomes of planning. First is that such a frame allows more consideration to be given to the distribution of the impacts or risks of planning activity and the consequences of these on specific stakeholders. An example of this is provided by Millichap (1995), who notes that understanding planning impacts in terms of rights necessitates the identification of those individuals (i.e. the "*communities at risk*", p.290) whose rights would be prejudiced by any particular development, thus "*particularising amenity*" (p.290) and making such impacts immanent, real and owned by a community, compared to the "smokescreen" of the public interest (Reade 1987).

A *rights-frame* may also provide a sharper focus on issues subject to trade-off in the policy process, implying that the most critical values should be given special protection from calculations of utility and where there has to be a trade-off between different rights, this should be open to the political scrutiny.

Finally, it should be noted that a *rights-frame* may have some empowering dimensions. Thus once a development has been identified as causing harm to specific individuals, it becomes highly immoral (within a rights framework at least) for the planning authority to award permission, unless free and informed consent (see Westra 1998, p.539) was secured from the effected population. Indeed, Sax (1990) notes that no individual should be compelled to run risk for the greater social good

unless given a genuine choice and that *"assuring risks are the product of such genuine choice is fundamental to the legitimacy of environmental decisions"* (p.97). Furthermore, it has been noted that rights have rhetorical power and tend to be easier to understand than other calls for political mobilisation as they make direct connections between individuals and the state. Indeed, once placed in a rights discourse, issues can become more politically-charged and become associated with notions of justice, thus stimulating more widespread political engagement.

The adoption of a *rights-frame* also places an emphasis on the way in which rights can alter the perception of those involved in the planning process and influence their conceptualisation of issues such as justice or duty and ultimately effect their actions in the context of the planning system. Although these are complex and subtle issues to discern, it does suggest that it may be appropriate to apply a social constructionist approach when considering the impact of enhanced environmental rights on stakeholders in the planning system. In this case, this refers to how an individual perceives the act of claiming an environmental right, rather than, for example, how the whole notion of "rights" has been constructed in western societies. Indeed the idea of social construction of rights is highlighted as an overlooked characteristic of the concept, but used specifically here to understand what influences individual rights claims. While some of the findings will therefore be very specific to the context of the case study (see section 7.7.2), the final chapter attempts to draw out more general conclusions on what this may mean for the research hypothesis.

It is therefore suggested that the fourth rights-planning discourse identified here could lend itself to provide new insights into the impacts of the planning processes, through the adoption of a *rights-frame*. The relevance of this perspective becomes clear when one considers that some issues are naturally expressed within a rights discourse (e.g. interests in property), others, such as environmental issues, struggle to be accepted within such a framework. This has analytical significance on its own and can create an interesting arena of argumentation when issues, such as TPRA, are debated within a rights framework and subject to competing interpretation of rights themselves. This example will form the basis of a key empirical element of this thesis

and its consideration will aim to further evaluate the merits of viewing planning in a *"rights-frame"*.

3.9. Conclusion

While Chapter 2 discussed the origins and definition of the concept of rights, this Chapter has attempted to understand how it has been applied in planning. In some ways this is a novel approach as most of the rights literature concerns itself with political theory or jurisprudence, rather than attempting to apply rights principles to specific situations or areas of public policy. Yet even within this relatively restricted area of academic pursuit, one finds a multitude of perspectives that make up the "*rightsnet*" of planning – this may be due to a lack of intellectual rigour in the way the concept has been applied, or more likely is that it has never before been seen as a coherent area for research. However, in reviewing rights in planning it has been shown that it is a concept that is increasingly being evoked and an attempt has been made to isolate the way it is employed into a discrete number of rights discourses covering property rights; legal concepts; participation; and a fourth discourse that considers rights themselves as a suitable focus of research. This last discourse can be used as a basis for using a *rights-frame* as a heuristic tool for understanding the impact of planning practice and outputs.

The discussion included in this Chapter has addressed a number of the research questions posed in Chapter 1 concerning the more general relationship between rights and planning and the presence of environmental rights in planning discourse. In particular, the Chapter can be seen to contribute the following key insights for the overall objectives of the thesis:

- The concept of rights touches on core foundational concepts of land use regulation, including key issues of morality and the balance between public and private interests. Rights have not had a prominent position in planning discourse and the meanings attached to them are highly varied with no overall coherent framework of understanding, yet do offer a distinct perspective of the

planning process. The contested nature and social construction of rights in planning means that they are best understood as a feature of discourse, rather than a distinctly coherent concept. This has methodological implications for this thesis (see Chapter 4) and consequently, the type of conclusions that can be drawn from the research.

- There is little appreciation of environmental rights within planning discourse, despite the centrality of environmental protection to land use regulation and the increase in rights-talk in general. While there has been some debate on environmental rights emerging from the ECHR, the Aarhus Convention and EU Directives, these have not been taken up by more general planning discourse and where debated, there has been an emphasis on the procedural, rather than substantive environmental rights. It has also been highlighted that it is unrealistic to assume that rights, on their own, will deliver any fundamental transformation in social relations, but should be seen as one part of a broader reform of planning governance.

- Historically, rights have had something of a minority presence in UK planning discourse, with an emphasis on rights in property. Key influences on how rights have been expressed in planning are the legal relationships created by the 1947 Act and later, the HRA. This has meant that the concept of rights has evolved as the planning system has grown up, so that it is increasingly used in more diverse situations, further opening up the potential for the emergence of different rights discourses in the future.

- Property rights remain the dominant rights discourse in planning and are seen to have deep metaphysical and moral legitimacy that has emerged from enlightenment philosophy. This creates a naturalness over the discussion of private property interests in a rights context, and contributes to a social belief in the nature of such rights that may be "*in arrears*" with the current legal landscape. Within planning there is a distinct property rights discourse that is strongly associated with libertarianism and economic efficiency and the

strength of this discourse has meant that rights have tended to become associated with this ideological outlook. It is important that an environmental rights approach adequately distinguishes itself from this perspective.

- Participation is now central to planning theory and practice and both are increasingly becoming associated with rights discourses. This Chapter identified three distinct planning discourses of participatory rights: a populist discourse that tends to be used to support claims over individual interests in the planning system; a radical-campaigning discourse that makes more progressive claims over justice and democratic rights (such as the EJM and calls for *The Right to the City*); and an official discourse, which under New Labour primarily expresses rights in terms of their relationship with responsibilities. A key tension exists between the last of these two, with the radical-campaigning discourse representing an optimist use of rights, employing them for calls for progressive purposes, while in the context of planning, the official discourse represents a more sceptical view of rights. The scepticism is based on particular concepts of citizenship and their embroilment with what could be termed the "dark-side" of participation, where existing powerful interests are seen to dominate opportunities for public involvement. Deeper understanding of this particular issue is seen to be a pivotal issue in the future role of procedural rights in planning.

- The third discourse discussed in this Chapter relates to the use of rights in understanding the ethical basis of land use regulation. Some authors have suggested that the fact that planning ethics are based on teleological forms of reasoning, such as utilitarianism precludes further consideration of rights-approaches. However, a more sophisticated consideration suggests that there is scope for some accommodation of rights and utility. A number of authors have even suggested that rights could form an alterative ethical basis for planning (e.g. Beatley 1994) or the public interest (Alexander 2002b).

- The fourth discourse identified here focuses, not on the values protected by rights, but the use of rights themselves *as a conceptual device*. A number of authors have taken this perspective, although it has not previously been appreciated as a single discourse. This covers multiple uses of the concept of rights all of which can be accommodated by Freeden's (1991) definition. Consideration of rights from this perspective leads to an understanding that they may be useful as a heuristic tool in understanding the impacts of planning practice. The heuristic dimension to rights can be better articulated as the conscious application of a "*rights-frame*", from which insights of the key values and power structures of planning may be inferred from the way in which rights are expressed, protected, prioritised and responded to.

- Overall, a review of rights in planning highlights the great plasticity of the concept, whose openness allows for multiple interpretations. Rights are however as rhetorically powerful in planning as they are in wider civic culture and the acceptance of certain forms of rights over others can be seen as being critically a reflection of the power structures on which the planning is based. This ultimately may determine the role of environmental rights in the British planning system.

These findings tie up the more conceptual elements of this study, while suggesting a number of interesting avenues of research that have to be by-passed here in the interests of addressing the key research questions. These findings will now be taken forward in the empirical sections of the thesis with the next Chapter, outlining the key methodological issues and research strategy adopted.

CHAPTER 4: RESEARCHING RIGHTS

4.1 Introduction

The research questions posed in Chapter 1 offer a number of methodological challenges arising from the contested nature of rights and an absence of previous studies on similar topics from which a research design could be verified or adapted. This Chapter will therefore explore these challenges, review previous research aimed at evaluating environmental rights (and indeed, rights more generally) and then explain and justify an appropriate empirical strategy for the thesis. The discussion in this Chapter is supplemented by Appendix A, which provides a more detailed description of specific data collection techniques used in the research.

Before considering the proposed research strategy, it is worth briefly rehearsing the objectives of this study. The hypothesis seeks to understand the impact of incorporating environmental rights into planning for the purposes of encouraging greater equity and sustainability outcomes. In seeking to do this, it is intended to make a number of contributions to knowledge, of a conceptual, empirical and methodological nature, some of which have been addressed in the preceding Chapters. In order to make these contributions, a most carefully designed empirical strategy is required and it is upon this that this Chapter will primarily focus.

4.2. Researching rights

There are many commentators that have stressed the importance of understanding the nature of rights in society. However, such an endeavour is problematic due to the multi-dimensional nature of rights (i.e. as legal, moral or political constructs), the contestation around their meaning within each of these constructs and because rights engage deeper principles and ideological associations, they are subject to infinite social interpretation influenced by temporal and geographic contexts. Despite this, there has been no shortage of research seeking to understand the meaning and role of rights, with a tendency to

focus only on a particular philosophical, legal, or political perspective. Each of these perspectives was summarised in section 2.4, and for the purposes of developing a research strategy for this study, will be briefly reviewed again here to highlight their methodological implications.

While philosophical engagement with rights may draw on legal or political principles of the social world, for the most part they involve themselves with normative questions and thus are based on hypothetical arguments, often associated with liberal ideology and its assumptions of timelessness and universal principle (see Waldron 1984; Benton 1993; O'Neill 1996). This approach has been deployed on the more specific issue of environmental rights by, for example, Sax (1990) and Westra (1998) who apply ethical reasoning to the need to establish environmental rights, drawing on a variety of arguments, such as the Kantian principle of maintaining the integrity of the individual. Such work provides a foundation for understanding the moral basis of rights and their value to political and social organisation but does not provide the more tangible empirical required to highlight their potential contribution to a specific realm of public policy, British planning.

Legal considerations deal in more tangible issues and contribute perhaps the largest body of work on rights, ranging from the perspective of jurisprudence (e.g. Dworkin 1977) to more specific analysis of individual court cases (e.g. Clayton and Tomlinson 2000). While some jurisprudential approaches share the ethical reasoning of the philosophers, many legal analysts take a more positivist approach based on the assumption that there is an objective world and as far as truth is concerned, it is the courts and legislative bodies that ultimately define the existence, worth and extent of rights. Examples of legal analysis of environmental rights are legion, for example, Boyle's (1996) review of the environmental implications of mainstream human rights instruments, Shelton's (1991) interpretation of European law as a basis of environmental rights, Popovic's (1996b) review of environmental rights in national constitutions and Hart (2000), amongst others, providing more direct comment on the environmental implications of cases brought under the ECHR. These generally seek to explain the impact of legally-formalised rights, as tested by the outcomes of court cases. An example of

how this approach has been applied to the field of planning is Miller (1998a) who has attempted to evaluate the influence of environmental rights on the planning system, through an examination of legislation, courts cases and appeal case studies.

Such legal analyses are critical to understanding the value of rights, both for their exploration of the detailed issues of justiciability and because of the great influence of legal discourse in structuring planning governance. It would be possible to adopt such an approach to explore the research questions in this thesis - for example by refining the analysis undertaken by Miller (1998a) to take into account more recent legal developments or by evaluating the impact of the Aarhus Convention on the planning process as expressed through formal procedures and legislation. However, such an approach is constrained in its explanatory capacity in a number of respects. First is that being essentially positivist it is limited in its ability to provide insights into the normative and hypothetical dimensions of this investigation. Second, previous Chapters have highlighted how rights may have value, not just in terms of the hard infrastructure of the law, but also have a "softer", less tangible influence in the way they are socially-defined and acted upon by different stakeholders in the planning process. Third is that, as highlighted by Hancock (2003), such a legal analysis presupposes that considerations of jurisprudence and new legislation can determine social relations and thus prioritises the influence of law above other factors, while in reality it is probably social relations, among other factors, that determine the legal context (e.g. Yeager 1991). While legal interpretation of rights provides a useful insight into the way power structures and establishment values are constructed and reproduced, it is important to understand that this deals with only one dimension of rights - one that is arguably extremely influential, but also conservative in its view of the transformative value of rights[106].Thus in the context of environmental debates in the UK, it has been noted that the judiciary are "*environmentally myopic*" (Woolf 1992) and in the past, English law has been accused of reducing environmental issues to those of property (Scarman 1976).

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Therefore, legal perspectives offer limited appreciation of the broader worth of rights and will tend to emphasise a more sceptical view of the potential of environmental rights. The intention here is to apply an objective, yet optimistic, analysis of environmental rights, so that while legal opinion will be used to reflect on some of the pragmatic issues of rights implementation, the research strategy will employ alternative methods of analysis that are better suited to uncover how rights are experienced by the broader population, not just the legal establishment.

While it could be said that all discussions of rights are political, in that they invoke different ideological values, some analyses have taken an explicit political perspective. Thus, for example Held (1987) and Healey (1997) have normatively considered how rights can contribute to governance, while Mitchell (2003) has considered the struggle for rights in the context of social justice and Eckersley (1995; 1996), has debated rights in terms of democratic theory. There is also a long tradition of political-economic research that evaluates rights in terms of their impact on social relations, power and hegemony, complementing the vast body of liberal theory. Hayward (2004; 2005), has suggested a variety of empirical approaches for the political investigation of environmental rights including comparative studies (e.g. Layard 1999) or longitudinal research, although he ultimately adopts an approach that seeks to extrapolate the hypothetical value of environmental rights based on the experience of implementing EU law, leading to an interesting treatise that falls short of being entirely empirically convincing. Hancock (2003) has attempted to provide a more evidence-based argument for environmental rights by complementing a theoretical investigation with qualitative surveys of NGOs, corporations, state environment departments and UN/Global Economic institutions to ascertain how environmental rights are perceived and deployed. This particular work successfully illustrates the degree of recognition and endorsement of environmental rights by advocacy NGOs, but also falls short of providing real evidence of their impact on specific areas of environmental policy.

Indeed, it does not appear that any of the literature that deals explicitly with evaluating the worth of rights is able to provide a convincing empirical strategy for addressing the research questions in this thesis. However, a number of works

reviewed in earlier sections of the thesis provide key insights from which such a strategy can be developed.

First, Stammers' (1993) assessment of whether rights challenge, or sustain power relations makes the important point that contrary to the abstract nature of liberal approaches "*by seeking to validate human rights by reference to power relations, as least some anchorage in social reality could be achieved*" (p.82). This suggests that critical dimensions in understanding the value of rights are on the one hand the relationship to power and on the other how the rights are actually experienced – pointing to the appropriateness of a social-constructivist investigation. Second, is the argument of Blomley (1994), as discussed in Chapter 3, that the *location* of where rights are deployed may determine their potency. This suggests that there may be more mileage in focussing the investigation on where the potency of environmental rights may be at its greatest, i.e. not in formal legal procedures, but where rights-claims can be made directly by members of the public. The third insight relates to Mitchell's (1997) comment that "*a claim of a rights, no matter how contested, establishes a framework within which power operates*" (p.124). This not only underlines the importance of relating rights to power, but also places a value on the language and discourse of rights in understanding expressing and mediating power.

Insights from the more generalised rights literature are complemented by research on environmental justice and environmental disputes, highlighting a *location* (in Blomley's sense) of where environmental rights are deployed. Of significance here is the literature noted in Chapter 3 on NIMBYism and rights-claims – not only does this appear to be a pivotal issue for interpreting the worth of rights, but it further supports the adoption of a social-constructionist view point in that it was shown that this provided appropriate insights into why individuals may invoke rights-claims against proposed development (Burningham 1998; 2000). In terms of environmental justice, Chapter 1 highlighted the work of Boyce and Torras (Boyce 1994; Torras and Boyce 1998; Boyce, Klemer et al. 1999) which applied a statistical analysis to identify factors most important in determining state level environmental equity, which indicated a strong influence of rights regimes. This provides an example of how regression analysis can be used to support normative

and qualitative investigations of the potential of rights in that it allows the presence and deployment of rights to be linked to experienced environmental and socio-economic conditions in the real world.

This suggests that it may be possible to develop a *bricolage* of research approaches to address the research issues at hand, recognising that such qualitative questions inherently require multiple research methods (Brewer and Hunter 1989) and that there are many ways of knowing, rather than a knowledge to be discovered (Healy 2003). This has lead to a strategy that first identifies a key environmental right as a case study and then applies a series of nested methodologies to explore various impacts at the different locations at which this right is experienced.

It is proposed that the empirical strategy adopted in the thesis will therefore comply with standard social science requirements of being rigorous, valid and reliable etc, which will be delivered through a research design that moves from the theoretically abstract to increasingly specific examples of right-claims in practice. The epistemological issues that this raises are discussed described below.

The research design takes a single procedural environmental right in planning (TPRA) as a case study. The choice of this is more fully justified in the next Chapter, but includes the fact that rights embedded in procedure, rather than substantive outcomes, are of more systemic relevance to the procedural based British planning system; that TPRA have been subject to intense political debate in recent years and as such provide a rich example of contemporary discourse of rights debates in planning; and finally, robust data exists to inform a political and comparative analysis of this right. The value of TPRA to provide findings applicable to wider rights issues essentially rests on the centrality of the values protected by this right, which fully described in Chapter 5.

Unlike other research on rights, this thesis is not intended to be entirely speculative so its findings should be based on a sound empirical investigation of actual instances of rights-claims and the discourses deployed at these locations. This implies taking a case study approach and as TPRA do not currently exist in British planning systems, it will involve examining evidence from outside the UK,

which is discussed and justified in section 4.4 below. The contested nature of rights suggests that the empirical strategy has to be particularly robust in order to capture the variety of meanings implied in the term. It is therefore suggested that it should incorporate both quantitative analysis to provide some evidence of the impact of rights on the outcomes of the planning process and more phenomenological approaches that facilitate insights into the socially constructed nature of rights. The social construction of rights will be explored using discourse analysis, which can indicate intent and power relations in the planning process (Hastings 1998). This is fully discussed below, along with a justification of why certain discourses were chosen for detailed analysis.

The previous Chapter identified that in terms of procedural rights in planning, the issue of NIMBYism and the intent and power of those making rights-claims is pivotal to test whether it is more appropriate to take an optimistic or sceptical view of the role of rights. In order to test this issue it is suggested that the empirical strategy will have to address two key questions:

- Do those invoking rights tend to be those that exhibit attributes associated with social, economic or political power? If so, should such rights seen to be supporting existing power relations, rather than power challenging and thus not particularly compatible with the promotion of social equity?
- What are the motivations of those making rights-claims? Do they make the claims as possessive individuals or are there more community-based motivations at play?

With these more general points made, the next section describes the adopted empirical strategy in some detail.

4.3. Empirical strategy

The empirical strategy is described below and summarised in Figure 4.1., which portrays the strategy in terms of layers, with different elements of the strategy focussing on an increasingly specific location of rights use. Each layer also tends to utilise a different methodological tactic to ensure that, overall, the strategy is robust and draws on complementary sources of evidence. Where part of the strategy involves significant data-generating tasks, these are described in detail in Appendix A.

CHAPTER 4: RESEARCHING RIGHTS

4.1 Introduction

The research questions posed in Chapter 1 offer a number of methodological challenges arising from the contested nature of rights and an absence of previous studies on similar topics from which a research design could be verified or adapted. This Chapter will therefore explore these challenges, review previous research aimed at evaluating environmental rights (and indeed, rights more generally) and then explain and justify an appropriate empirical strategy for the thesis. The discussion in this Chapter is supplemented by Appendix A, which provides a more detailed description of specific data collection techniques used in the research.

Before considering the proposed research strategy, it is worth briefly rehearsing the objectives of this study. The hypothesis seeks to understand the impact of incorporating environmental rights into planning for the purposes of encouraging greater equity and sustainability outcomes. In seeking to do this, it is intended to make a number of contributions to knowledge, of a conceptual, empirical and methodological nature, some of which have been addressed in the preceding Chapters. In order to make these contributions, a most carefully designed empirical strategy is required and it is upon this that this Chapter will primarily focus.

4.2. Researching rights

There iare many commentators that have stressed the importance of understanding the nature of rights in society. However, such an endeavour is problematic due to the multi-dimensional nature of rights (i.e. as legal, moral or political constructs), the contestation around their meaning within each of these constructs and because rights engage deeper principles and ideological associations, they are subject to infinite social interpretation influenced by temporal and geographic contexts. Despite this, there has been no shortage of research seeking to understand the meaning and role of rights, with a tendency to

focus only on a particular philosophical, legal, or political perspective. Each of these perspectives was summarised in section 2.4, and for the purposes of developing a research strategy for this study, will be briefly reviewed again here to highlight their methodological implications.

While philosophical engagement with rights may draw on legal or political principles of the social world, for the most part they involve themselves with normative questions and thus are based on hypothetical arguments, often associated with liberal ideology and its assumptions of timelessness and universal principle (see Waldron 1984; Benton 1993; O'Neill 1996). This approach has been deployed on the more specific issue of environmental rights by, for example, Sax (1990) and Westra (1998) who apply ethical reasoning to the need to establish environmental rights, drawing on a variety of arguments, such as the Kantian principle of maintaining the integrity of the individual. Such work provides a foundation for understanding the moral basis of rights and their value to political and social organisation but does not provide the more tangible empirical required to highlight their potential contribution to a specific realm of public policy, British planning.

Legal considerations deal in more tangible issues and contribute perhaps the largest body of work on rights, ranging from the perspective of jurisprudence (e.g. Dworkin 1977) to more specific analysis of individual court cases (e.g. Clayton and Tomlinson 2000). While some jurisprudential approaches share the ethical reasoning of the philosophers, many legal analysts take a more positivist approach based on the assumption that there is an objective world and as far as truth is concerned, it is the courts and legislative bodies that ultimately define the existence, worth and extent of rights. Examples of legal analysis of environmental rights are legion, for example, Boyle's (1996) review of the environmental implications of mainstream human rights instruments, Shelton's (1991) interpretation of European law as a basis of environmental rights, Popovic's (1996b) review of environmental rights in national constitutions and Hart (2000), amongst others, providing more direct comment on the environmental implications of cases brought under the ECHR. These generally seek to explain the impact of legally-formalised rights, as tested by the outcomes of court cases. An example of

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Therefore, legal perspectives offer limited appreciation of the broader worth of rights and will tend to emphasise a more sceptical view of the potential of environmental rights. The intention here is to apply an objective, yet optimistic, analysis of environmental rights, so that while legal opinion will be used to reflect on some of the pragmatic issues of rights implementation, the research strategy will employ alternative methods of analysis that are better suited to uncover how rights are experienced by the broader population, not just the legal establishment.

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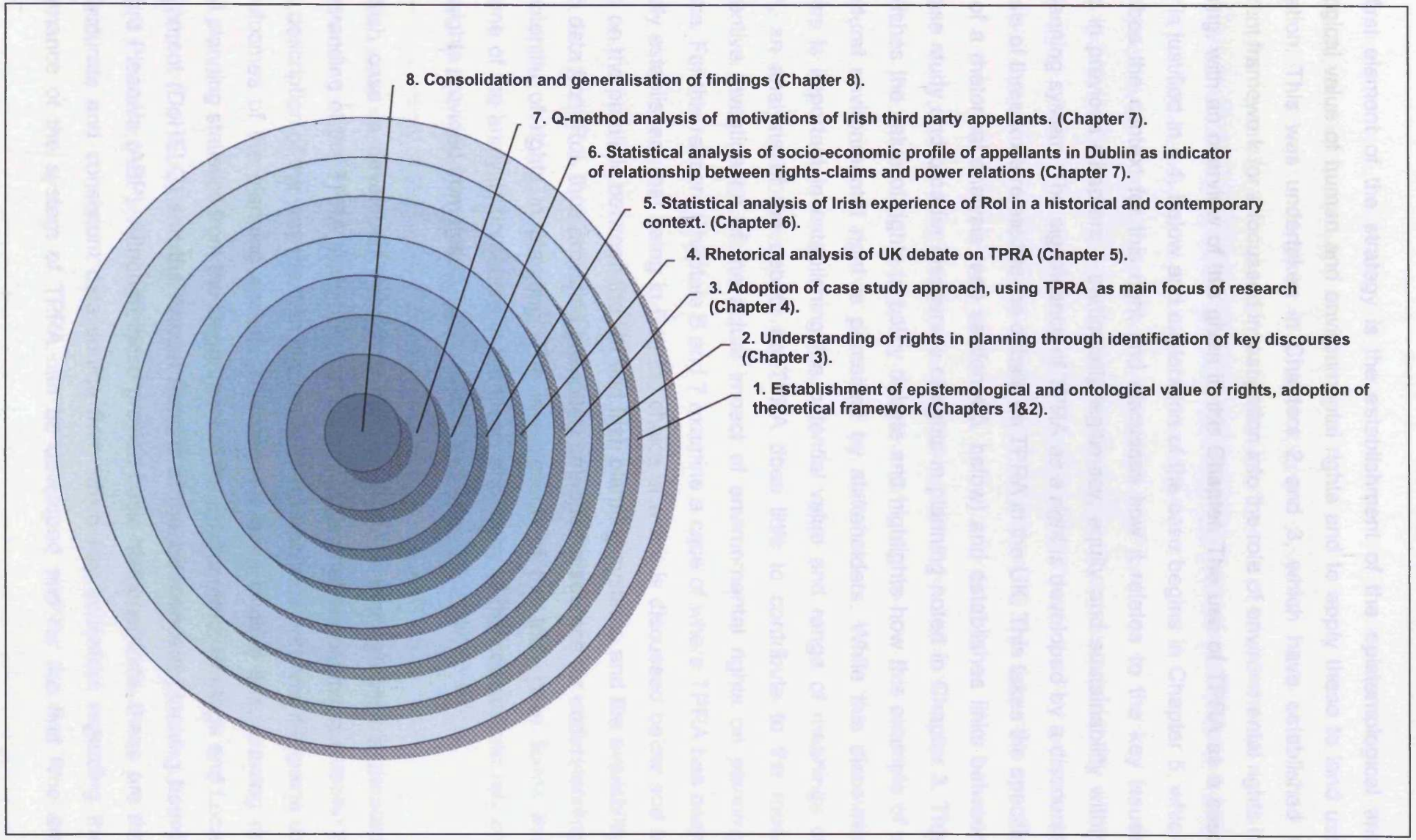
Figure 4.1: Summary of empirical strategy



The first element of the strategy is the establishment of the epistemological and ontological value of human and environmental rights and to apply these to land use regulation. This was undertaken in Chapters 2 and 3, which have established a coherent framework for a focussed investigation into the role of environmental rights in planning, with an overview of this given in this Chapter. The use of TPRA as a case study is justified in 4.4. below and exploration of the case begins in Chapter 5, which describes the context for this right and discusses how it relates to the key issues raised in previous Chapters – particularly legitimacy, equity and sustainability within the planning system. The significance of TPRA *as a right* is developed by a discourse analysis of three texts related to the debate on TPRA in the UK. This takes the specific form of a rhetorical analysis (see section 4.5. below) and establishes links between the case study and broader discourses of rights in planning noted in Chapter 3. This establishes the value of rights in policy debate and highlights how this example of a procedural environmental right is perceived by stakeholders. While this discourse analysis is important in establishing the *potential* value and range of meanings of TPRA, an analysis of the debate on TPRA does little to contribute to the more substantive investigation of the actual impact of environmental rights on planning practice. For this reason, Chapters 6 and 7 examine a case of where TPRA has been formally established, that being in RoI, the choice of which is discussed below and is based on the parallels between the UK and Irish planning systems and the availability of rich data from RoI, thus providing previously untapped resources for understanding the potential of rights in planning. The investigation of the Irish case forms the keystone of the analysis presented in the thesis and many of the conclusions rely on the insights provided from this.

The Irish case is developed through a number of steps that establish a detailed understanding of the TPRA system in that country. This analysis begins in Chapter 6 with a description of the way the Irish system of TPRA operates and how it impacts on the outcomes of the planning system. This analysis is an original one, drawing on official planning statistics from the Department of the Environment, Heritage and Local Government (DoHELG) and the Annual Reports of the independent planning board, An Bord Pleanála (ABP). Although these provide basic historical data, these are the only accurate and consistent data source from which key indicators regarding the performance of the system of TPRA can be developed and for the first time are

brought together in an extensive database developed for this research (*TPA Trends 1999-2002*, see Appendix A), which casts light on unappreciated dimensions of TPRA in RoI. The historical analysis of TPRA provides insights into how the system has evolved over the last 30 years, which is then complemented by a comprehensive picture of current impacts of TPRA drawn from an original database of TPRA's in 2002 (*2002 TPA Database,* see Appendix A). This data source has been painstakingly developed from individual appeals returns on the ABP website and contains 92% (5137 cases, of which 2790 are third party appeals) of all appeals decided in 2002. The analysis of this data, presented in Chapter 6, facilitates a quantitative appreciation of the influence of TPRA on the overall performance of the Irish planning system.

While providing useful insights into the impacts of TPRA on Irish planning practice, this does not facilitate an understanding of how such rights are understood by those making rights-claims and whether their deployment relates more to the optimistic or sceptical views of rights. It was noted insection 3.9 that this can best be appreciated from a social constructionist approach so that Chapter 7 focuses the analysis on the rights-claimants of TPRA in RoI and their motivations for making third party appeals. The overall aim of this part of the empirical strategy is to develop a profile of appellants according to their socio-economic status and motivation for making a rights-claim, in order to test questions raised in previous Chapters. This profile is developed through a series of methodologies. It initially draws on a pilot S*urvey of the users of the appeals system* (see Appendix A), based on a random sample of 250 appeals decided in 1999. This was used as a base for a postal survey of planning authorities, appellants and applicants as described in Appendix A, which highlighted a number of inadequacies in using this approach for this type of research. Fortunately, subsequent to this survey, ABP began making a much greater range of data available on their website, enabling the development of a far more robust data-set. This includes the *2002 TPA Database* discussed above and which was used to develop a more detailed picture of all third party appeals in Dublin in 2002 in the form of *2002 Greater Dublin Area Sample* database (see Appendix A). This developed data from the *2002 TPA Database* supplemented this with additional information from individual appeal decision letters accessed via the ABP website. Using GIS, each Dublin appeal was then been plotted according to the address of the development, which allowed a correlation of appeals rates per Electoral District (approx, 500-8000 persons) with a

range of socio-economic data to assess whether appeals are more likely to be used by those groups that already hold significant social power. This analysis is provided in the first half of Chapter 7.

This detailed statistical analysis is then complemented by an investigation of appellants' motivations for making rights-claims using Q-methodology (see section 4.5.2 and Appendix A). This involved contacting 26 third party appellants drawn from across the Republic of Ireland, soon after they had lodged an appeal (and before ABP had made a decision) who were then asked to complete a Q-sort based on a number of statements developed through appellant interviews. This has enabled the development of a set of typical profiles on why appellants make such rights-claims and provides a test of whether appellants act as "*possessive individualists*", thus conforming to the sceptical view of rights-claims (c.f. NIMBY theory), or whether they act out of a broader range of motivations.

It is acknowledged that using an Irish case study to develop insights on individual motivations and Scottish examples of rhetorical argumentation may appear to mix the focus and scales of this research. However, each case has been selected to highlight a particular aspect of environmental rights and a complete set of such examples were not available in a single jurisdiction. Furthermore, while this research places a great emphasis on the social context of rights, a dissection of how the context of each of these examples influences that particular instance of use of rights is beyond the scope of the thesis. The thesis thus makes the point that rights *are* socially defined and does not fundamentally explore *how* they are so defined. The value of each of these examples is not therefore in how it has grown out of, or shaped by its context, but for other reasons – in the case of the Q-methodology it highlights some of the motivations exerted at the time of appealing. As noted in section 4.4 below the critical point about case studies is not in the content of the case, but how it supports wider reasoning of the research.

The different elements of the empirical strategy are brought together in the conclusion which combines this evidence base to provide a final reflection on the thesis' research questions.

Having set out the overall strategy employed in the thesis, it becomes clear that, in addition to the more conventional statistical analysis of various features of the planning system, the success of the research strategy ultimately relies on the validity of two different research traditions – a case study approach and discourse analysis. These are discussed in more detail below.

4.4. The case study approach

As noted above, an important element of the overall research design is the validity of using the case study approach – although this has a long tradition within social science, clarity is needed on the way in which it is applied here and to indicate what it is expected to deliver in terms of testing the hypothesis. The research design adopts the use of case studies in two senses, one nested within the other. The first relates to the adoption of TPRA as an example of an environmental right and the second relates to the use of the RoI as an example of TPRA in practice which illustrates the importance of context and *location* on rights-claims.

In understanding how these are used, it is important to highlight that *"the purpose of case studies are not to represent the world, but to represent the case"* (Stake 1994, p.245), that is they are not chosen to provide a representative sample or even necessarily be typical, but to contribute analytical insights through other forms of reasoning. Thus Clyde Mitchell (1985) defines case studies as "*A detailed examination of an event or series of related events which the analyst believes exhibits (or exhibit) the operation of some identified theoretical principle*" (p.192) and suggests that it is not the content of the case study that is its most important feature, but the way it is used to support theoretical conclusions. Clyde Mitchell (after Eckstein 1970) uses the relation to theory to describe a five-fold typology[107] of case studies, of which the example used in this research can be regarded as being *heuristic* in that its main purpose is to develop theory – in this case by providing a first empirical test of normative rights theory in the context of land use regulation and to specifically test whether the incorporation of rights into planning results in more progressive outcomes.

[107] This includes configurative-idiographic studies; disciplined-configurative studies; heuristic case studies; plausibility probes; and crucial case studies.

In order to further clarify the role of the TPRA case here, it is useful to reflect on another definition of "case studies", provided by Yin (1989, p.23), who suggests they represent:

"... an empirical inquiry that;

- *investigates a contemporary phenomenon within its real-life context; when*
- *the boundaries between phenomenon and context are not clearly evident; and in which*
- *multiple sources of evidence are used"*

These three features are clearly relevant, the first of these being the most important in justifying why the case study approach has been adopted here. Indeed previous Chapters have highlighted the voluminous debate on the role of rights in society; yet, this has been almost entirely informed by abstract academic debate, with few analyses of actual instances of the impact of rights on specific aspects of the real world. This issue is addressed by taking the contemporary phenomena of TPRA, as it exists as a feature of political debate in the UK and an institutionalised feature of Irish planning system. The choice of TPRA above other potential cases[108] may also be justified by; the procedural nature of the British planning system (see Chapter 3); the relevance to recent policy debates and environmental justice; and the importance of TPRA as a symbolic challenge to dominant rights discourses in planning.

Previous Chapters have highlighted how the concept of rights also has key relevance to Yin's second feature of case studies, in that the high degree of social definition of the meaning of rights suggest a blurred boundary between the phenomena (i.e. the worth of rights) and context (i.e. their operation and social-definition within society). This raises questions of the validity of inferring conclusions for the British planning system based on the experience of rights-claims in Irish society. In response to this issue, it is suggested that to begin to understand the impact of rights, it is essential that evidence is drawn from the experience of TPRA *in practice* and given that they are not currently a feature of British Planning, this will inevitably come from other planning jurisdictions. While TPRA's are a feature of a large number of planning systems (see Chapter 5), the case of the RoI provides a relatively close fit to the UK's planning system and offers an appropriate basis for this investigation – although

[108] For example a right to environmental information or substantive right to a healthy environment.

caution still needs to be applied in interpretation. The value of the RoI case is not based on claims of "typicality" but because it holds particular explanatory power arising from its uniqueness of having the combination of available data, an established tradition of TPRA and broadly similar cultural and legal frameworks to the UK. Indeed, there are close similarities between British and Irish planning systems, particularly:

- Both nations have comprehensive regulation of development through planning permission, with the legal definition of "development" being almost identical[109].
- The institutional arrangements regarding policy guidance, implementation and accountability are generally similar, with a Minister issuing binding policy guidance via a central government department and Local Planning Authorities (LPAs) largely responsible for local planning policy.
- A discretionary responsibility on LPAs to determine planning applications, having regard to planning policy and other factors.
- An appeal procedure for applicants refused planning permission, although appeal rights are defined more widely in the RoI.
- Defined minimum requirements concerning notification and publicity of planning applications.

These factors, combined with issues of scale, accessibility and shared planning ideologies allow for theoretical implications to be drawn from a RoI case study that are more relevant to Britain than from studies of other planning systems with comparable TPRA (e.g. those of Australasia and the Isle of Man). However, as Clyde Mitchell (1985) notes, the extent to which generalisations may be made from case studies depends on the adequacy of the underlying theory and the body of related knowledge, rather then the particular instance of the case in itself, while the validity of extrapolation relies not on typicality or representativeness, but on the cogency of the theoretical reasoning applied. As such, a full description of the Irish context is given in Chapter 6 to allow the reader to determine the rigour of the research claims made,

[109] See s.55(1) Town and Planning Act 1990 (England and Wales) s.11 of The Planning (Northern Ireland) Order, s.26(1) Town and Country Planning (Scotland) 1997 and s.3 of the Planning and Development Act 2000 (RoI), the latter of which defines development as *"the carrying out of any works on, in, over or under land or the making of any material change in the use of any structures or other land"*.

while theoretical insights from the case study are limited to those that have genuine heuristic validity.

The third of Yin's features of case studies, that they use multiple sources of evidence, reaffirms the view that case studies are not a methodological choice, but choice of an object to be studied (Stake 1994, p.236), so that a huge variety of data and analytical approaches may be utilised within a case study. As described in section 4.2. the case study of TPRA involves an analysis at a variety of scales and generates a variety of data ranging from hard statistical evidence to softer qualitative information on the discourses and motivations of rights-claims. This rich data mix provides ample opportunity for triangulation of the evidence gathered, ensuring internal validity and confidence in the conclusions (Roe 1998).

4.5. Discourse analysis

The last two decades has seen a rapid growth in the social constructionist tradition (Schwandt 2003) particularly in environmental studies (Hannigan 1995; Burningham 1998; Macnaghten and Urry 1998). This emphasises the subjective and ideological nature of knowledge, which in turn has stimulated interest in environmental discourse. There are a variety of interpretations of what we mean by discourse, but here it is referred to as being "*a specific ensemble of ideas, concepts, and categorisations that are produced, reproduced, and transformed to give meaning to physical and social relations*" (Hajer 1995, p.44). As such discourses can refer to all forms of language (conversations, text, adverts etc) and are based on the assumption that all actions, objects and practices are socially meaningful and that these meanings are shaped by the social and political struggles in specific historical periods (Fischer 2003, p.73). It is widely recognised that the analysis of discourse can be used to provide insights into the use of power and "*reveal the hidden*" (Rydin 2003, p.15) assumptions and hegemonic values embedded in all forms of social interaction, including policy debate and practice related to land use regulation (Rydin 2005). Discourse can therefore be one way of providing insights into the ways in which different stakeholders in the planning system express their concerns and aspirations about development interests and the way in which these are played out in the context of the current political, economic, social and political system. It is important to note however, that while it is

possible to focus on one form of discourse (e.g. those engaged in by objectors) these only take the form they do because of the dynamic interplay with contextual issues and the discourses projected by other stakeholders, such as regulators and developers.

The concept of discourse was used in Chapter 3 to categorise different interpretations of the concept of rights. This was, however, used primarily to identify and *describe* certain academic outlooks, rather than *analyse* their deeper meaning. Yet, because discourses are regarded as encapsulating profound values and carrying power in social and policy arenas, more rigorous analysis of discourses can provide additional insights for a wide range of purposes and has been used widely in planning and environmental research (Hajer 1995; Myerson and Rydin 1996; Richardson 1996; Hastings 1998; Addams and Proops 2000; Rydin 2003; Dryzek 2005; Rydin 2005). Discourse analysis can take a variety of forms (Van Dijk 1997), spanning linguistics, cultural theory and social psychology, although most theorists (particularly Foucault and Habermas), stress the institutional nature of discourse and its situatedness in the social (Macdonnell 1986). There is also a substantial range of how written texts can be subject to discourse analysis (Kaplan and Grabe 2002), including content and rhetorical analysis, hermeneutics and deconstruction, with a divide between those that involve a close reading of texts and those that deploy coding or computer assisted analysis (Rydin 2003, p.183).

Discourse analysis, when complemented by the other elements of the empirical strategy, offers a particularly effective way of gaining insights into the way in which rights are understood within planning governance and allows links to be developed between discovered meanings and the expression of power relations. Indeed, discourse analysis has been shown to have effective analytical value where there is a high level of argumentation (Rydin 2003). Rydin (2005) has also shown how discourse analysis can identify the role of discursive ambiguity of concepts and highlight how policy processes actively use such ambiguity to manage conflicts – with obvious significance for the contested nature of rights. The concept of discourse and is employed in subsequent Chapters through two forms of investigation, from each of the main approaches to discourse analysis, one based on close reading of texts, the other on computer assisted analysis.

4.5.1. Rhetorical analysis of arguments for and against TPRA

Chapter 3 suggested that the different meanings applied to rights in planning are articulated in a variety of discourses, each of which rests on certain assumptions, values and judgements about the world. This reflects the post-empiricist tradition, grounded in the awareness that "*language does not simply offer a mirror or picture of the world, but instead profoundly shapes our view in the first place*" (Fischer and Forester 1993, p.1) and as such related to the use of power (Foucault 1980). This becomes particularly evident in the context of policy debates, when different stakeholders engage a whole range of discursive strategies to further their argument (Rydin 2005), such as in debates over the introduction of TPRA in the UK. This example highlights how the concept of rights can become centrally engaged in a high level policy debate and in a way which potentially challenges the core ideology of private property. It is argued therefore that an analysis of how rights are invoked and contested within the TPRA debate can provide important insights into the broader role of environmental rights in planning.

This is explored in Chapter 6, which describes the implications of TPRA *as an environmental right* and takes three examples of discourse that take very different stances on the uptake of TPRA in the UK. The three discourses represent arguments in support of TPRA, arguments against and official statement of government policy towards TPRA. The protagonist (environmental) view is represented by a briefing paper published by Friends of the Earth Scotland (FoES, 2004a) and the antagonist (economic) view by the response of the Confederation of British Industry in Scotland (CBIS, 2004) to the Scottish Executive's consultation paper on TPRA (Scottish Executive 2004a, see also Watchman 2004a; 2004b). The debate in Scotland has been selected here because it is here where TPRA have had the most prolonged and open policy debate in the UK. FoES have been the main advocates of TPRA in Scotland, which they have pursued within a discourse of environmental justice and CBIS the main opponents of the right, invoking arguments based on the virtues of the free market and impacts on private property.

The third example comes from the Westminster government's *Planning Green Paper* (DLTR 2002), which was selected because the document represented a milestone in stating the New Labour policy direction for land use planning, as well as providing a definitive statement that virtually ended speculation on TPRAs in an English context and set the precedent then followed by other UK planning jurisdictions.

All three texts echo the issues of rights highlighted in Chapter 3, particularly claims that procedural environmental rights will be selectively and frivolously used by a small section of the community. As noted previously, this is a pivotal issue with some significance from both a theoretical perspective and in terms of environmental rights in practice. The three texts represent archetypal examples of policy argumentation (Fischer 2003) and as such can unpicked through a study of the rhetoric they employ. While the concept of rhetoric was long neglected with social science because of its predominance as a negative concept associated with verbal manipulation, in the context of the "argumentative turn" in social science (Fischer and Forester 1993) it has been restored to its original Aristotlian meaning of the art of persuasion and now seen as being constructive of social life (Throgmorton 1993) and therefore of analytical value to a broad range of social scientific investigation (e.g. Myerson and Rydin 1996, p.12). From this perspective, a rhetorical approach views language as essentially an expression of persuasion, so that any discourse will show how its originator sees the world and attempts to persuade others to adopt similar standpoints. Rhetoric helps identify this process of argumentation by clarifying the resources the originator deploys in putting her message across, the creativity of language, the understanding of context and the claims she makes on rationality. As such, this view is ideal for understanding how different stakeholders contest the concept of rights, with the discourses deployed over TPRA saying much about the interpretation of, and the power embedded in, the use of the term "rights".

Within the field of planning and environmental studies, a rhetorical approach has been used by Myerson and Rydin (1996), Fischer (2003), Rydin (2003), and Dryzek (2005) with some effectiveness. For the purposes of the analysis of the three texts indicated above, the method of analysis will take its lead from that of Rydin (2003). In applying her rhetorical analysis to policy debates in environmental planning, she focuses on the concepts and rhetorical devices (or "tropes") used by the originator of a text to reveal

their world view. Following Throgmorton (1993), Myerson and Rydin (1996) and Dryzek (2005), she focuses on the different devices that make arguments more or less effective, including:

- *Ethos, the personification of credibility of the speaker;*
- *Pathos, the creation of 'mood music';*
- *Logos, the path of argumentation using various tropes such as:*
  - *metaphor (describing one thing in terms of another: 'silky hair', 'policy cascade';*
  - *synecdoche (taking a part for the whole): one school for all education;*
  - *metonymy (one thing standing for another): the American flag;*
  - *irony (literally saying one thing and clearly meaning the opposite): 'Of course, I want to go' (the appropriate tone needs to be applied!).*

(Rydin 2003, p.184)

The analysis of these rhetorical devices in the three selected texts follows Rydin's use of simplified figures (e.g. Figure 5.5) that take key quotations from the text, identify the rhetorical tropes at work and indicate the line of argument through the text. The texts used to analyse the various discourses are too long to be included in the Chapter 5, so are included in Appendix C for reference.

4.5.2. Q-method investigation of appellants motivations

The role of rights in policy debate clearly represents an important dimension to the investigation being pursued here. As critical as this is to providing evidence for addressing the research questions posed in Chapter 1, on its own this does not provide insights into the reasons why right-claims are made in the context of land use regulation and how such claims relate to existing power structures. Previous discussion in Chapter 3 has highlighted that much of the negativity towards rights in planning is based on the assumption that they will be used primarily for promoting self-interest. Indeed, the rhetoric analysis in the next Chapter indicates that this is used by the New Labour Government as a key reason for not enhancing the current rights regime in planning. There appears to be little or no evidence for this claim, yet major policy decisions have been justified upon it. It follows that if it can be understood why individuals make environmental rights-claims, a clearer picture can be developed on the validity of this policy stance. Therefore, the empirical research will assess the discourses deployed by those who had made third party appeals in the RoI, which will then be used to assess the motivation for making rights-claims and any link to self-

interest ascribed by the idea of NIMBYism. As there is no readily available source of written documentation that reflects this discourse, these were generated using *Q-methodology*.

This is an approach to the study of human subjectivity (McKeown and Thomas 1988) which attempts to combine the qualitative study of attitudes with the statistical rigour of quantitative research techniques. It is named "Q-methodology" as a means of distinguishing it from the more familiar "R-methodology" that comprises "objective" research in the social science, such as surveys. Supporters claim that Q-methodology is not just another research technique, but represents a different philosophical approach to social science research as it avoids the pre-specification of concepts by the researcher and does not require large numbers of participants to produce valid results (Addams 2000). Indeed, although it involves a relatively small number of participants, this still provides a statistically relevant profile of appellants' attitudes because, unlike standard survey analysis, Q-Methodology establishes patterns within and across *individuals* rather than across *traits* such as gender, age etc. and is based on the assumption of 'finite diversity' in that there are generally not as many discourses as there are participants (Barry and Proops 2000). Its key strengths are identified by Dryzek and Berejikan (1993) as being *"explicit, publicly constrained by statistical results, and replicable in its reconstructions and measurement of subjects' orientations, thus affording less interpretative latitude to the analyst."* (p.50).

Q-method has its origins in psychology research (e.g. Stephenson 1953) and despite being accused of having "*somewhat fugitive status*" within the social science community (McKeown and Thomas 1988, p.11), it has been successfully utilised in a wide range of research areas (Brown 2000) including environmental politics (Barry and Proops 2000). There are however, few examples of its use in planning research (e.g. Coke and Brown 1976; Swaffield and Fairweather 1996; Wolsink 2005), despite the claim by Focht and Lawler (2000) that it is an ideal tool for revealing stakeholder perceptions in environmental controversies.

It is important to note that the findings of Q-method are never claimed to be statistically representative of all populations (e.g. all third party appellants), but is an intensive analysis of a relatively small population – or more accurately, an intensive

analysis of the discourses and attitudes of a small population and as such, provides sophisticated insights into the attitudes related to specific phenomena. It would therefore appear to be highly suitable for this part of the investigation into TPRA in the RoI.

The technique involves identifying a range of key statements used in discourses around a particular topic, in this case TPRA in the RoI. Once an appropriate number of statements have been selected (in this case 36), participants are asked to rank each of them according to a nine point scale of agreement/disagreement, forcing choices on the statements they most agree or disagree with. The results from these Q-sorts are then subject to a factor analysis that is able to identify a number of idealised discourses on the chosen topic. The technical details of how Q-method has been used in this study is described in Appendix A, with the results in the form of a series of idealised types of discourses, described in Chapter 7. While these idealised discourses are generated from individual appellants, they are developed by taking a wide range of statements (footnote: The statements used in this method are drawn from a range of sources, including interviews, responses to previous postal surveys and press cuttings, see page 366) commonly invoked in discussions of TPRA. They can therefore be regarded not as just being reflective of the individual participants, but also as being nuances of more enduring discourses of TPRA used in the broader social world. Furthermore, it should be noted that the idealised discourses do not represent the totality of the discourse on TPRA and does not emphasize how objector discourse interplays with those of other stakeholders, which is discussed in Chapter 5. It is hoped however, that by providing a glimpse of the type of discourse engaged in by objectors just at the point at which the third party appeal is made can provide insights into the motivation of appellants and reveal some of their aspirations they hold in making an appeal. This is arguably the most critical point for understanding TPRA from an appellant perspective, and as discourse tends to be dynamic, this could be expected to evolve once appellants are exposed to the counterargument of applicants and more fundamentally, in learning of the appeal decision which would be expected to revising their view of the appeal process.

4.6. Conclusion

This Chapter has described and justified the empirical strategy adopted by this thesis and outlined the various methodological components that come together to test the hypothesis outlined in Chapter 1. Throughout the thesis it has been noted that it is important to recognise that rights have value not just as important legal and political constructs but also have significance in terms of being socially-defined concepts. Any research that undertakes to assess these different dimensions will by necessity have to adopt a variety of approaches. This Chapter has highlighted that previous research on rights has generally regarded the concept as a normative or ephemeral topic, which is rather disconnected to real life, with a lack of no research that has attempted to connect rights with real experience or a specific realm of civic life. The proposed empirical strategy and the various methodologies nested within it, has therefore been developed to throw some new light on these topics, drawing on a variety of research traditions. The result is a layered approach, shown in Figure 4.1, which aims to provide multi-dimensional insights on the role of environmental rights in the British land use planning. The subsequent Chapters describe in detail the context and findings of this investigation and are synthesised in an overall outcome in the concluding Chapter.

CHAPTER 5: THIRD PARTY PLANNING APPEALS AS A PROCEDURAL ENVIRONMENTAL RIGHT

5.1. Introduction

Chapters 2–4 have established a conceptual and empirical framework through which an exploration of the role of environmental rights can be pursued. This Chapter launches the empirical analysis by focussing the discussion on a single example of a procedural environmental right that could have substantial significance for the process of land use regulation in UK, third party rights of appeal (TPRA). This represents an opportunity for interests other than the applicant (the first party) and the regulatory body (the second party) to initiate a review of a development control decision on the planning merits of a proposal. Although public engagement in planning is often debated, Chapter 3 noted that it is rarely regarded as being a matter of rights, rather than being primarily concerned with administrative procedure (i.e. the mechanisms of public participation) or politics (e.g. representative vs. participatory democracy). However, the ability of third parties to enforce a merits review of an initial planning decision is almost always set within a rights discourse. This fact provides an initial reason for deploying TPRA as an example of a procedural environmental right and is further justified when one considers the wider significance and potential impact of the rights on British planning. The investigation of TPRA proceeds in two stages, first this Chapter examines how the right functions as a concept and contributes to political debate, while the following two Chapters review the role of TPRA in practice.

Taking TPRA as its focus, this Chapter sets out to make a number of contributions to the thesis. First it justifies the use of TPRA as an example of a procedural environmental right. It then uses the concept of rights adopted in Chapter 2 to explore what TPRA represent and whether they have broader significance for British planning. The Chapter then examines the main dimensions of the most recent debate on TPRA in Britain, using discourse analysis to tease out differing social-constructions of the right and uses this to set out a number of key positions

that can be taken in respect to procedural environmental rights. The Chapter then concludes by identifying the values that TPRA could be seen to be encapsulating.

5.2. TPRA as a procedural environmental right

The use of TPRA as a case study offers an effective tool to measure the potential role of environmental rights in planning, but is based on the premise that TPRA *is* a procedural environmental right. This section briefly reviews this assumption.

In some senses justifying TPRA as a procedural environmental right is a relatively simple matter – it is clear that planning plays a crucial, if often underplayed, role in mediating environmental change and enhancing environmental quality (e.g. RCEP 2002) and that a right to appeal a decision on a planning application is specific to the process of environmental regulation. While this appears to be sufficient justification for subjecting this right to further examination, previous sections have also stressed that establishing the ontological basis of any right is rarely a simple matter but one which can unravel under the contested meaning of rights. To overcome these potential problems, the thesis has adopted Freeden's (1991) definition of rights in which they can be seen as conceptual devices, or capsules, surrounding critical values that "*prioritises, protects and demands action*" (Freeden, 1991, p.10). Figure 2.3.and 2.4 provided illustrations of how we can imagine environmental rights fitting in with this conceptualisation and following further exploration through out this Chapter, a similar analysis is provided of TPRA (see Figure 5.7.). While not wanting to pre-empt the subsequent discussion, this effectively establishes that TPRA can be comfortably accommodated under Freeden's definition and that the values they appear to protect are relevant to issues of equity, sustainability and environmental justice. Indeed, it will also be suggested that TPRA meet Stammer's (1993) "power test" for the worth of rights, in that they challenge deeply held values of the current planning system and which can actually be seen to be counter to the objectives of sustainability, in particularly those related to the ideology of private property and the notion of the full liberal ownership of property. In so doing, this right and the political debate around its adoption may contribute to revealing some of the hidden assumptions in the

current planning system and help transform the nature of the power relationships they support (c.f. Blomley 1994; Laclau and Mouffe 1995).

Having briefly established the basis of TPRA as a procedural environmental right, some comment is also needed to further justify its selection as the key case study. This has been touched upon in Chapter 4, but worth reiterating here in the light of the discussion above. Thus, as well as fitting the adopted definition of a right, it has been noted that TPRA is one of the rare issues in planning that always seems to be articulated in rights-talk. While it is feasible that the mechanism of challenging LPA decisions could be alternatively embedded in the language of participation or statutory procedure, it is significant that it is inevitably discussed *as a right*. Thus, following Freeden's definition, TPRA appears to already be established as a right in linguistic terms, thus overcoming major obstacles in portraying this mechanism of challenge in a rights-frame. Furthermore, as is discussed in the following sections, TPRA relates to the most critical location of determining rights in the planning system, that of Development Control (DC).

Furthermore, current arrangements for determining rights in DC largely reflect the post-war settlement discussed in section 3.4. While this arrangement has been subject to considerable modification and debate since that time, the fundamental "hardware" of the system remains largely unreformed, including the privileged position of the applicant[110] with third parties having considerably less influence in the decision–making process[111]. Yet the past five decades have seen significant changes in the socio-political and legal contexts of land use regulation, with increasing influences being exerted from, *inter alia:* EU law; an emphasis on "post-materialist" issues; and evolution of attitudes to the state, citizenship, community and the democratic process. From this perspective the distribution of rights in the planning system could be seen as being "*in arrears*" in a similar sense to that applied to property rights in Chapter 3. It is arguable that TPRA may offer one way of redressing these wider issues and as such may be a procedural environmental right of deep significance to the planning process. The rest of this Chapter will not

[110] Grant (2000a) for example suggests that "*In terms of legal rights, the British planning system is wholly one-sided*" (p.1216)
[111] See Miller (1998), p.48 for an attempt to define the rights of third parties in the planning system.

only unpack this issue but will explore how TPRA contribute to the functions of procedural environmental rights noted by McCracken and Jones (2003) as being enhancing social cohesion; efficiency, education and effectiveness.

5.3. The functional significance of TPRA for the British planning system

If we assume that TPRA is a valuable procedural environmental right, it is important to reflect on the significance of this for land use regulation in the UK. As one can only appreciate the contribution of TPRA to efficiency and effectiveness of planning decisions (c.f. McCracken and Jones, 2003) in terms of the wider system in which they are embedded, it is useful to envisage their significance related to three separate levels; the importance of the entire system of DC; the place of all appeals within the DC system; and the specific impact of TPRA on DC.

5.3.1. The significance of development control

Before considering the value of TPRA themselves, it is important to note that this is essentially contingent on the wider significance of DC[112]. This is the most publicly recognised element of planning in the UK and generally regarded as being a "*legitimate and valued aspect of public policy*" (McCarthy et al. 1995, p.vi) and the "*executive arm of the planning process*" (Audit Commission 1992, p.45). Although DC has received relatively less academic scrutiny than some other aspects of planning practice, there remains a significant body of work which clarifies its dynamics and effectiveness (e.g. Davies 1980; Davies, Edwards et al. 1986; Healey, McNamara et al. 1988; Tewdwr-Jones 1995; Thomas 1997; Alexander 2001) so that such issues need not be covered in detail here.

This literature highlights the importance of DC to wider society – for example half of all UK investment is made in land, buildings and works, all of which is regulated in some way via DC (Thomas 1997). Furthermore, DC represents the greatest volume of planning activity, in that a majority of professional planning officers are involved in the process of determining planning applications. Most important in the context of this study is that in Britain's discretionary planning system, DC is *the*

[112] See also section 3.4.2 for consideration of this in a rights context.

point at which the extent of property and competing rights are determined. This has deep political import as the discretionary allocation of development rights can result in the creation of substantial "unearned" wealth and which may impose uncompensated external environmental, economic and social costs on third parties. As such one can view current arrangements of DC as being an expression of the distribution of power in the planning system and the way in which rights are allocated, claimed and protected through this process can provide insights into broader social relations.

Given the importance of the planning system it is surprising that its purpose is so ambiguously defined (Reade 1987; Pearce 1992; Vigar, Healey et al. 2000). Indeed, while "sustainable development" has recently been added as a major objective of the planning systems of England and the Irish Republic, the key guiding principle for DC decision-making continues to be that planning applications should be determined in the "public interest". Both the "public interest" and "sustainable development" are both notoriously contested concepts (Redclift 1987; Beckerman 1994; Taylor 1994; Booth 2002b; Campbell and Marshall 2002; Jacobs 2003), which can be exploited to give the appearance of fairness, but which maintains a system that is inherently pro-development (McAuslan 1980; Reade 1987; Purdue 1991a; Grant 2000a)[113]. In the absence of specific substantive objectives, debate on DC has invariably been dominated by questions of procedure and managerial efficiency (Booth 2002a), a fact that is directly echoed in recent debates on environmental rights (see section 5.5). Furthermore this pro-development bias was enshrined in 1947 when the need for planning permission was seen as "*the biggest interference with the liberty of the individual short of jail*" (Heap 1997, p.697) and could only be justified if accompanied by a first party right of appeal. This suggests that that the right of appeal was seen as essentially a property right (Crow 1995) rather than being connected with wider issues of governance and as such, TPRA was not seen to be justifiable.

If one considers the importance of DC for the arbitration of development rights, the effect of giving a right of appeal to the applicant rather than (or in addition to) other

[113] This is expressed *inter alia* by a system that despite being plan-led, ultimately has a presumption in favour of development.

interested parties should be seen as being politically profound in that it accentuates the pro-development image of the planning system, constrains the ability to examine externality costs of development and has substantial implications for the distribution of regulatory control in the planning system. This last point can be more fully appreciated if one considers the role of appeals in the overall planning system.

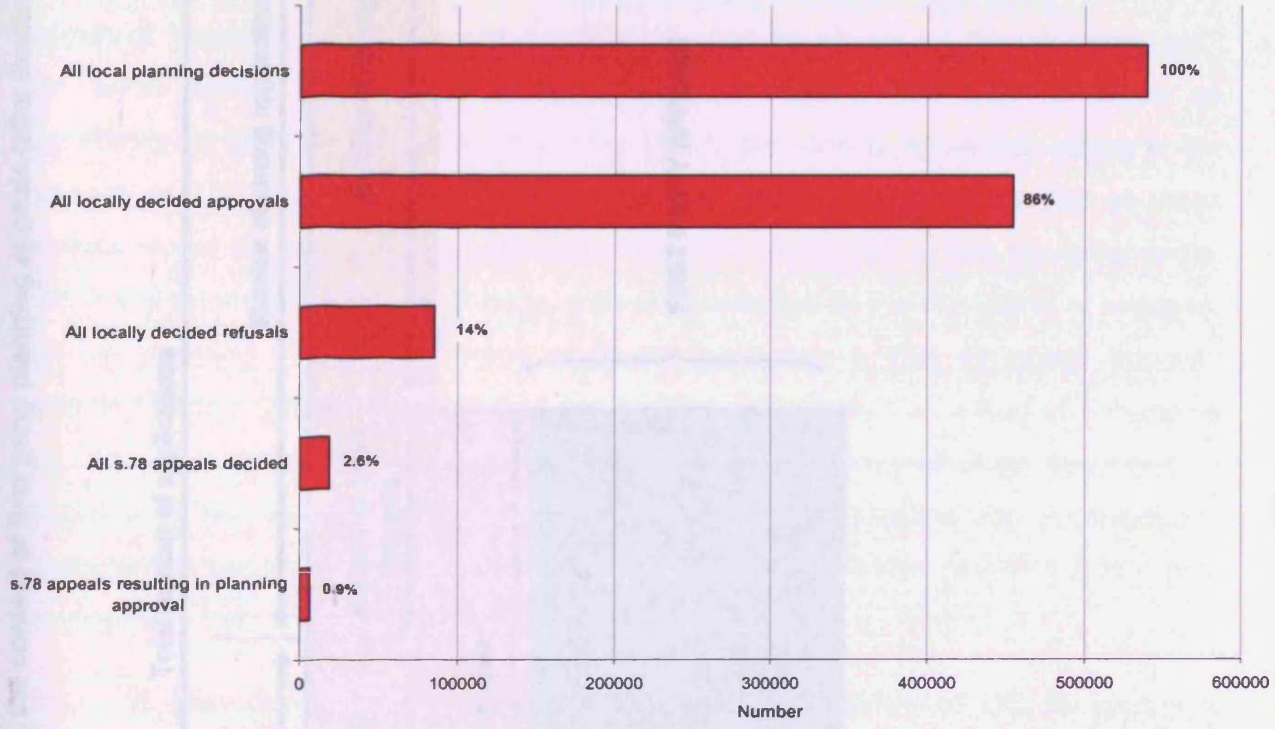
5.3.2. The role and significance of planning appeals

While the ability to challenge a refusal of a planning application (or a condition attached to a permission) is a fundamental component of the British planning system, the appeal process is also relatively under-researched, with McNamara, Jackson et al (1986), Rydin (1990), Purdue (1991c), Punter (2000), Bingham (2001) and Willey (2005) providing notable exceptions. This is more surprising when one considers that although typically only 3-4% of local planning decisions result in an appeal in the UK (see Figure 5.1), their significance goes well beyond this minority of cases, with some believing they play a major role in accounting for the legitimacy and public's acceptance of the whole of the planning system. Indeed, Davies Edwards et al. (1986) suggest that appeal decisions arguably represent the "*true objectives*" of the planning system by offering in-depth consideration of policy objectives, set in a context of achieving national consistency. Punter and Bell (2000) also comment on their significance of appeals, noting that they are an important test of the quality of the type of development required by a planning authority and may reflect the quality of the planning authority's own decision-making. Willey (2005) has more recently also reviewed the role of appeals, similarly finding that they catch the "*truly awful decisions*" (p.311), offer a safeguard to the indiscriminate exercise of power in the planning system and give critical protection for property rights.

In securing these benefits, one also needs to recognise that when a planning decision is made by appeal, it precludes any negotiated amendments to a development and tends to emphasise the interpretation of government policy (Punter and Bell 2000). It also tends to centralise planning decisions, supplanting local democracy with jurisdiction of a quasi-judicial body (Willey 2005). This

therefore alters the dominant policy process for allocating development rights from the politico-rational and consultative processes of local planning committees to the semi-judicial and techno-rational processes of the appeal body (Healey 1990). In so doing this may effect the distribution of power across different interests, according to their capacity to engage with more formal decision-making processes (Thomas and Krishnarayan 1994).

Figure 5.1: Planning applications and appeals in England, 2002/3[114]

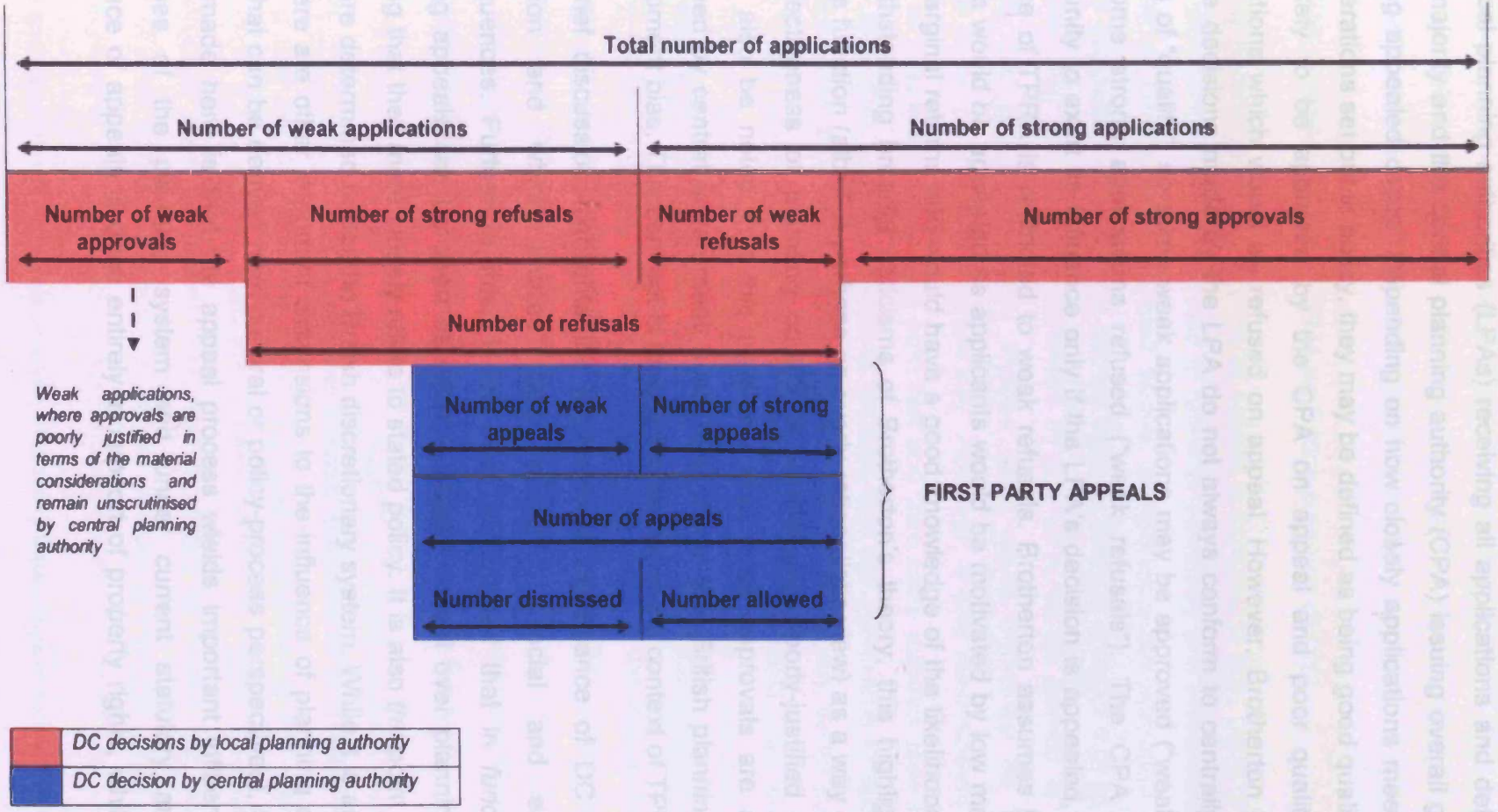


Source: ODPM (2004)

Brotherton (1992; 1993) has tried to conceptualise the role of appeals as part of a larger theory of planning control. While his model is not without criticism (e.g. Healey and McNamara 1984) and in the context of the methodology set out in Chapter 4 can be seen to be neglectful of the institutional and cultural dimensions of DC, it does serve some purpose here in suggesting how appeals effect the efficiency and effectiveness of planning control (c.f. McCracken and Jones, 2003). The element of Brotherton's work that is most relevant here is highlighted in Figure 5.2, indicating that planning control can be divided into local and central functions,

[114] There is a six month delay in the processing of planning appeal statistics, so that at time of writing (October 2005), 2003/04 is the most recent set of complete statistics available for England. These figures do not include applications in National Parks or those called in to the ODPM for decision.

Figure 5.2: The structure of planning control, in the context of first party planning appeals (after Brotherton 1992)



with local planning authorities (LPAs) receiving all applications and determining the great majority and the central planning authority (CPA) issuing overall guidance and deciding appealed cases. Depending on how closely applications meet all material considerations set out in policy, they may be defined as being good quality or "strong" and likely to be approved by the CPA on appeal and poor quality or "weak" applications which would be refused on appeal. However, Brotherton (1992) notes that the decisions made by the LPA do not always conform to centrally-determined notions of "quality", so some weak applications may be approved ("weak approvals") and some strong applications refused ("weak refusals"). The CPA is given an opportunity to exert its influence only if the LPA's decision is appealed, which in the absence of TPRA is restricted to weak refusals. Brotherton assumes that all weak refusals would be appealed as applicants would be motivated by low marginal costs, high marginal returns and would have a good knowledge of the likelihood of success. Not withstanding broader criticisms of Brotherton's theory, this highlights the way appeals function (albeit in perhaps an overly rationalistic view) as a way of enhancing the effectiveness of planning control by challenging poorly-justified decisions. It should also be noted that this highlights how weak approvals are automatically condoned by central government, supporting claims that British planning has a pro-development bias. This concept is returned to below, in the context of TPRA.

This brief discussion highlights the fundamental significance of DC to land use regulation and which implies wider economic, social and environmental consequences. Further to this, it has been established that in *functional terms* planning appeals can be seen as exerting quality control over planning decisions, ensuring that they more closely relate to stated policy. It is also *the* point at which key rights are determined under the British discretionary system. While it is acknowledged that there are other important dimensions to the influence of planning appeals (e.g. those that can be derived from cultural or policy-process perspectives), the key point to be made here is that the appeal process wields important influence over the outcomes of the planning system and under current statutory arrangements, allowance of appeals is done entirely in support of property rights, while neglecting

other values such as those protected by environmental rights[115]. This stands as a key justification for exploring the potential of procedural environmental rights such as TPRA, which will be further examined below.

5.3.3. The potential impact of TPRA on British planning control

While the potency of TPRA in political debate is explored in later parts of this Chapter, this section establishes their value in terms of efficiency and effectiveness, following the work of Brotherton discussed above. Brotherton's consideration of first party appeals suggests that under the current system, there is a tranche of so called "weak approvals" that are implicitly condoled by the CPA, to the benefit of development interests and which potentially impose what would otherwise be unacceptable external costs on the wider community. However, if one reformulates the situation shown in Figure 5.2. to include both first and third party appeals (see Figure 5.3), it can be seen that it is not only weak refusals that are vulnerable to appeal, but also weak approvals, as *any* LPA decision may then be challenged. While the assumption that all weak refusals would be appealed can be maintained (due to the marginal cost/benefit of appeal by an applicant), it is not reasonable to assume that all weak approvals would be appealed because of a narrower discrepancy between the marginal cost/benefits to a third party, less awareness of the appeal mechanism or that costs and benefits are diluted across a wider population to the degree that no one third party's interest is sufficiently effected to warrant the transactions costs of an appeal. For these reasons and for the purposes of illustration only, Figure 5.3. notes that a proportion of weak approvals are left unscrutinised by the CPA.

The TPRA scenario shown in Figure 5.3 suggests a number of key differences to that of Figure 5.2. First, if we assume that Davies, Edwards et al. (1986) are correct in asserting that appeal decisions reveal the "*true objectives*" of the planning system (see section 5.3.2. above), then the situation shown in Figure 5.3 represents a far more effective planning system that that indicated in Figure 5.2, with a smaller number of weak applications being approved. Following from this, the TPRA scenario suggests more of the approved applications will be "strong" and therefore more in line

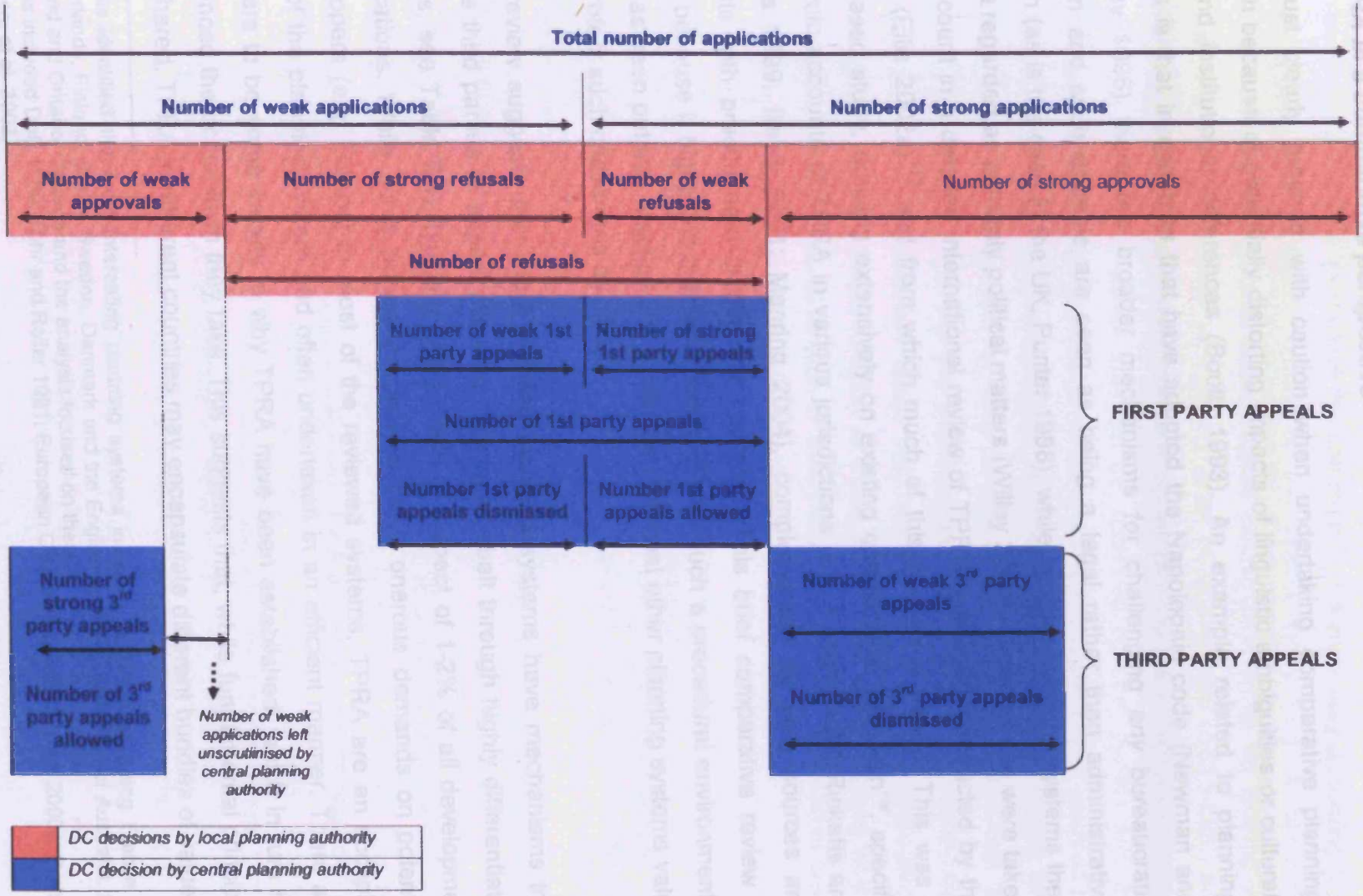
[115] The adjudication of such appeals is however, based on a wider range of factors (see section 6.6).

with the objectives of the planning system. In theory any (weak) third party appeals to strong applications would be refused as being contrary to the "public interest". This compares to the scenario depicted in Figure 5.2. where a proportion of weak applications are approved resulting in significant and unjustified benefits for the applicant and otherwise unacceptable costs on other interests. Finally under the scenario in Figure 5.3 the claim by Brotherton (1992) that planning is primarily locally-led cannot be sustained. This is because, not only does the CPA now decide a higher proportion of applications, but that central control is restricted, not just by LPA decisions, but also by the propensity of first and third parties to appeal, in effect those whose rights are being primarily effected by a planning decision.

This conceptual model cannot be taken too literally, but does serve a purpose here for illustrating the potential impact that a procedural environmental right may have both in functional terms and on the distribution of power of planning control. However, subsequent to the discussion in Chapter 3, it should be noted that an environmental right such as TPRA has significance far beyond these functional considerations and will offer protection to the values that they specifically encapsulate (see Figure 5.7). These issues are explored below by reviewing key discourses of TPRA, but before this is done, it is important to place these discussions in a wider context by noting that none of the major UK planning systems[116] have adopted TPRA, so that any claims made for or against their potential impact remain largely hypothetical, although still of intense interest here. It was also noted in Chapter 3 that because rights derive much of their value from the location in which they are claimed the political, economic and social context of this is likely to play a significant role in contributing to their overall worth. For this reason, the later Chapters take a case study of how TPRA are actually deployed in Ireland. It should be noted however that this is far from being the only example of where such rights exist and a large number of jurisdictions have recognised the importance of protecting values by establishing TPRA. Therefore, before moving to consider the British discourses of TPRA it is useful to very briefly review how these are dealt with in other countries.

[116] The Isle of Man has a long-standing system of third party rights (see Crow, 1995), while the Channel Islands have passed, but not implemented legislation that would introduce such rights.

Figure 5.3: The structure of planning control, in the context of first and third party planning appeals (adapted from Brotherton 1992)



5.4. TPRA in a comparative perspective

One must clearly proceed with caution when undertaking comparative planning research because of potentially distorting impacts of linguistic ambiguities or cultural, legal and institutional differences (Booth 1993). An example related to planning appeals is that in countries that have adopted the Napoleonic code (Newman and Thornley 1996) there are broader mechanisms for challenging *any* bureaucratic decision and such appeals are seen as being a legal rather than administrative function (as is the case in the UK, Punter 1988), while in other planning systems they may be regarded as primarily political matters (Willey 2001). These issues were taken into account in a detailed international review of TPRA previously conducted by the author (Ellis 2002a)[117] and from which much of this section is based. This was a desk-based study, drawing extensively on existing comparative research[118], specific academic accounts of TPRA in various jurisdictions (e.g. Eccles 1999; Ricketts and Rogers 1999; Illsley 2001; Manring 2004), complemented by web sources and contacts with practitioners in different countries. This brief comparative review is useful because it highlights different models of how such a procedural environmental right has been put into practice and illustrates that most other planning systems value and protect such challenges *as of right*.

This review suggests that most of these planning systems have mechanisms that enable third parties to appeal planning decisions (albeit through highly differentiated modes, see Table 5.1), typically being made in respect of 1-2% of all development applications. While some appeal procedures place onerous demands on potential developers (e.g. France) in most of the reviewed systems, TPRA are an accepted part of the planning system and often undertaken in an efficient manner. There also appears to be some variety in why TPRA have been established, which in turn has influenced the actual form they take. This suggests that, while fundamental principles are shared, TPRA in different countries may encapsulate different bundles of values.

[117] This identified the most interesting planning systems in terms of TPRA as being France, the Netherlands, Finland, Spain, Sweden, Denmark and the English-speaking countries of Australia, New Zealand and Ontario, Canada and the analysis focused on these.
[118] This included DoE 1989; Führ and Roller 1991; European Commission 1997; Grant 2000c; Green Balance, et al. 2002.

The review by Ellis (2002a) found that the nature of TPRA may vary according to a range of factors that includes: nature of the appeal body (e.g. a specialist environmental tribunal or general administrative court); time limits for making an appeal (ranging from two weeks to 4 years); level of appeal fees (c.£18-£95); and ability to award costs. However, most critical in understanding the values protected by such rights are the type of cases that can be appealed by third parties and the different interests permitted to claim such rights. In some jurisdictions *any* decision by a local planning authority can be challenged, in others it is restricted to certain land use zones, size of development or only where public interest criteria can be established. Related to this is are the interests that can claim TPRA which may include any person or organisation, those only with a direct interest, organisations with a recognised public interest function or those involved in earlier stages of the decision-making process. Consideration of these factors suggests TPRA have been adopted for a variety of functions, which include:

- An accountability mechanism for quasi-judicial or administrative decisions;
- A safeguard of general citizen rights against decisions of the state;
- A forum for public interest litigation and in particular, environmental protection;
- A safeguard of property rights of those landowners adjacent to proposed development;
- Enhancing public participation in planning decisions;
- A concession to popular and political pressure to demands for enhanced third party influence in the planning process.

This highlights that TPRA may be used to protect a range of values and that their use may vary according to the specific location (i.e. the jurisdiction) in which they are invoked. This also appears to suggest that most of the planning systems regarded as being appropriate comparators with the UK (e.g. EU members or other English-speaking nations) have seen a need to adopt TPRA to protect such values. It also suggests that current UK arrangements of rights in DC are neither inevitable nor, even perhaps, desirable. This leads us to question exactly why there has been no formal recognition of TPRA in the UK and to speculate on the potential of such rights within the more specific locations provided by the British planning system.

Table 5.1: Applicant and third party rights to challenge planning decisions in the European Community
(taken from European Commission 1997)

Member State	To the courts on legal and procedural grounds		To a higher authority on substantive policy/technical grounds		To a higher authority on legal and procedural grounds		To the determining authority on substantive policy/technical grounds		To the determining authority on legal and procedural grounds	
	Applicants	3rd parties	Applicants	3rd parties	Applicants	3rd parties	Applicants	3rd parties	Applicants	3rd parties
UK	✓	✓	✓							
Republic of Ireland	✓	✓	✓	✓						
Austria	✓	✓	✓	✓	✓	✓	✓	✓		
Belgium	✓	✓	✓		✓					
Denmark	✓	✓			✓	✓				
Finland	✓	✓	✓	✓	✓	✓				
France	✓	✓	✓	✓	✓	✓				
Germany	✓	✓			✓	✓			✓	✓
Greece	✓	✓			✓	✓				
Italy	✓	✓								
Luxembourg	✓	✓	✓		✓					
Netherlands	✓	✓					✓	✓	✓	✓
Portugal	✓	✓								
Spain	✓	✓	✓	✓						
Sweden	✓	✓	✓	✓						

5.5. Third party appeals and planning in the UK

5.5.1. The evolution of the TPRA debate in the UK

During the first 40 years of the UK's comprehensive planning system, TPRA did not appear to be an issue warranting any substantive debate. Although there were some passing references to the desirability of such appeals (e.g. Reade 1987), these were rarely reflected in mainstream policy debates. During the 1990s, as quality of life and environmental issues have crept up the political agenda, so to has interest in TPRA. In 1990 and 1991 amendments were proposed to the Planning and Compensation Bill for England and Wales that would have introduced a limited TPRA, but was rejected by the then Conservative Government on the grounds that local authorities already acted on behalf in the interests of third parties; that any major departures from a development would in any case be subject to a public inquiry via the Secretary of State's call-in procedure; and because it had already been rejected by the Environment Select Committee (1986, quoted from Green Balance, 2002, p.25-26). In 1992 the Labour Party's manifesto included a proposal to allow TPRA where permissions were given contrary to a development plan (Labour Party 1992). Although leading members of the Labour Party went on to make supporting statements in support of TPRA prior to their successful general election (Crow 1995, p.376), the proposal was not included in their more business-friendly manifesto of 1997. The introduction of a TPRA has however continued to be a policy of the Liberal Democrats (Liberal Democrats 2000) and was included in the Conservative Party Manifesto in 2001 (Conservative Party 2001).

In the late 1990s, a number of influential reports took up the cause of TPRA, particularly in the context of increased rights-talk in the wake of the HRA (see below). For example, the Nolan Committee considered the adoption of TPRA as a way of addressing local authority corruption, but considered it to be an overreaction to the problem and would compromise the principle of permitting development unless there is reason not to (Committee on Standards in Public Life 1997, para.331-21). The Government came under further pressure in 2000 when the Select Committee on Environment, Transport and Regional Affairs, in its review of the Planning Inspectorate and Public Inquiries, found that:

"We find the arguments for a third party right of appeal convincing. Regardless of the direct consequences of the Human Rights Act 1998 and the Aarhus Convention, the absence of such a right goes against the spirit of greater public involvement in planning. We were worried and disappointed that the Government do not appear to be giving active consideration to introducing a third party right of appeal, apparently because of the risk of introducing delays into the planning appeals system. This principle is an important one and we recommend that the Government consult as soon as possible on the details of introducing a limited third party right of appeal, possibly restricted to those applications contrary to the development plan or land in which the local planning authority has an interest. Restrictions on the six-month period allowed for appeals to be lodged should also be consulted upon. After consultation, the Government should act to introduce a third party right of appeal as soon as practicable".

(2000, para.93).

As before, the Government responded by stating that it believes such amendments are "*neither desirable nor necessary*" and it believed that existing arrangements were able to strike the right balance between development and the public interest, that TPRA could cause delay and that there were already enough opportunities for participation (DoE 2000). Further support for TPRA can be found in the recommendations of two of the reports from the Royal Commission on Environmental Pollution – its 18th report on Transport and the Environment (RCEP 1994) and most comprehensively in its 23rd report on Environmental Planning (RCEP 2002), which makes the following recommendation;

"We recommend that third parties should have a right of appeal against decisions on planning applications in certain circumstances and that similar rights of appeal for third parties should be introduced for other forms of environmental regulation"

(para 5.46)

With the following qualifications:

"... we do not believe it should be an unrestricted right available to any third party under any circumstances. Subject to compliance with the Human Rights Act and the Aarhus Convention, the right of appeal should be available only in certain circumstances that would be specified in legislation. Appropriate criteria might include the size of a development and whether the applicant has been required to provide an environmental impact assessment...."

(para. 5.44)

The Government once again declined to accept this recommendation (ODPM 2003), prompting a further response from the Chairman of the Commission, Sir Tom Blundell,

who noted that *"... we take the view that the government's rejection of a third-party right of appeal will prove to be misguided."* (RCEP 2003).

Given this history, it is not surprising that the *Green Paper on Planning* in England (DLTR 2002), also rejected the notion of TPRA as part of its broader modernisation of the planning system. The reasoning offered for this decision was that the threat of frivolous use of TPRA meant the right of appeal has to be limited, but that all suggested limitations face procedural difficulties and thus TPRA are rejected. While the Westminster Government has continued its position of unequivocal opposition it is significant that it was considered necessary to explicitly mention TPRA, if only to justify their rejection. Previous major reviews of the planning system, including the Skeffington Report did not even acknowledge this as an issue. The Welsh Assembly has also taken a position of opposition, with its Green Paper on Planning (Welsh Assembly 2002), not mentioning TPRA.

There is a slightly different situation in Scotland and Northern Ireland, where TPRA have had a slightly warmer welcome, yet have still not been adopted. In Scotland, an initial consultation paper on public participation (Scottish Executive 2001) rejected TPRA as an option for Scotland, but consultation responses nevertheless stressed their value, forcing the Executive to include a commitment to consult on this specific issue. The result was a consultation paper (Scottish Executive 2004a) which set out the arguments for and against, outlined a number of options in terms of those who could be given a rights of appeals (e.g. the general public, those with interests in land, original objectors, community representatives etc), discussed a number of models of potential reform and listed four categories within which new rights of appeals could be considered[119].

The consultation paper resulted in a vociferous debate in Scotland with those opposed to TPRA, led by the CBI (e.g. Macmillan 2004a; 2004b), suggesting it would have a detrimental economic impact and supporters, led by the RSPB and Friends of the Earth (e.g. FoES 2004a; 2004b; RSPB Scotland 2004), highlighting the benefits to

[119] These include where the local authority has an interest; where the application is contrary to the local plan; when planning officers have recommended rejection; where an Environmental Impact Assessment is needed.

social and environmental justice. Some examples of this debate are used below to highlight the discourses around the concept of TPRA. The Scottish Executive ultimately decided not to proceed with TPRA in the White Paper published in June 2005 (Scottish Executive 2005), yet there is some anecdotal evidence that at the time of writing (October 2005) there is a possibility that it may be introduced as a result of a private members amendment to forthcoming planning legislation.

In Northern Ireland the issue of TPRA has always been higher on the political agenda because of the lack of direct democratic control of the planning system under direct rule and greater familiarity of TPRA due to proximity of the RoI. Thus in 1983 the Stormont Assembly passed a resolution calling on the UK Government to amend legislation to introduce such a right of appeal under certain circumstances. The DoE(NI) however, considered that "*the arguments against the introduction of a full third party appeal system are such that it would not be justified in promoting new legislation at this stage*" (DoE(NI) 1983). In 1996 the Northern Ireland Affairs Committee, in its review of the NI planning system, also concluded that "*third party appeals are a useful way of increasing the accessibility of the planning process to the public in the absence of democratic control*" (House of Commons NI Select Committee 1996, para.145.) and recommended that consideration be given to "*opening access to appeals by third parties*" (para. 149). The Government was not persuaded by the committee's arguments and rejected the recommendation (NIO 1996).

Under devolution, the position in Northern Ireland continued to be out of pace with the policy being pursued in Westminster, with the Minister for the Environment noting that:

> "*The question of third party appeals is a big issue at this time. We are giving it serious consideration, and it is quite possible that it will eventually be brought into force. However, I cannot say exactly when.*"[120]

In September 2002, in the face of a high level of interest in TPRA amongst NI Assembly members, the Minister conceded to go to a full consultation process on

[120] Sam Foster MLA, as reported in Official Report (Hansard) of the Northern Ireland Assembly, Monday 20 November 2000, line 3783.

TPRA[121] as a way of avoiding a strongly supported private member's amendment to introduce TPRA as part of what was to become the Northern Ireland Planning Amendment Order, 2003. Before the consultation process was begun however, the Assembly was suspended and while a Regulatory Impact Assessment (RIA) on TPRA was prepared, the NI Green Paper on Planning (DoE(NI) 2002), noted that no further consideration be given to TPRA at this time because of the "*immediate priority to speed up the planning decision-making process*" (DoE(NI) 2004, p.19). This decision was confirmed in October 2005 with the publication of draft planning reform legislation, which suggested that TPRA would be matter for a future Assembly.

In the context of the other planning systems of the UK, it is also relevant to note that TPRA already exist in two of the smaller planning administrations of the UK, namely the Isle of Man and the Channel Islands. The case of the Isle of Man has been briefly described in Crow (1995), while the Channel Islands passed legislation facilitating TPRA in 2002, to be implemented "later" (Thorne 2002-4).

The increasing interest at a political level has been accompanied by a growing body of research into TPRA. While much of this has concerned itself with legal aspects of debate (see below) a number of authors provide useful insights into the practice and principle of TPRA. Perhaps the most comprehensive research, drawing on a comparative analysis of some of the countries that have adopted TPRA has been undertaken by Green Balance, et al. (2002) for a broad based alliance of NGOs[122] in support of their calls for TPRA. This provides a strong case for the introduction of TPRA, recommending a right that is open to all who objected to the original planning application but limited to a number of circumstances such as when a planning application is contrary to the provisions of a development plan or when a planning officer has recommended refusal of planning permission.

Although there is a range of summary material (e.g. Barclay 2002), short articles (e.g. Murphy 1995) and student dissertations (e.g. O'Malley 1998) on the topic of TPRA, apart from the legal material reviewed below, only two academic papers (Crow 1995;

[121] Official Report (Hansard) of the Northern Ireland Assembly, Committee for the Environment, 12 September 2002 *Minutes of Evidence* Planning (Amendment) Bill: Committee Stage (NIA 12/01).
[122] Including CPRE, RSPB, FoE, TCPA, the Environmental Law Foundation, WWF, Civic Trust, and Room.

Ellis 2000) make a substantive contribution to intellectual debate. Crow (1995) was the first to provide a more considered appreciation of the implications of TPRA and should be acknowledged for structuring much of the debate that has followed. His analysis is based on a limited review of the existing third party appeal systems in the Isle of Man and the RoI, coupled with a consideration of legal principles and potential application within the UK planning system. In highlighting the key issues related to TPRA (e.g. abuse, delay, issues of standing etc) and the procedures currently open to objectors to development, he discusses the various options for the introduction of TPRA (e.g. use of fees, linking appeal with departures from the development plan and potential impact on planning system resources). He concludes by noting that a system of TPRA could be made to work in England and Wales, but at the cost of delay, uncertainty and a transfer of decision-making from local to central level. Although Crow adopts a generally functional and legal approach to this issue, he does make a number of explicit comments that address the rights issues at stake. In particular he suggests that in terms of rights in the planning process, he considers that property-owners[123] have special rights to natural justice and these should be set aside from those rights that relate to all citizens. This is a proposition that is not emphasised here, in recognition that the preferential rights of first party property owners can result. While it is acknowledged that development can deliver positive externality effects, it can also have significant negative consequences on neighbouring properties and the environment.

In contrast to Crow, in an approach more compatible with the approach developed in this thesis, {Hugh} Ellis (2000), sees TPRA as one component of the bundle of rights that define the relationship between citizens and state in land use regulation. While Ellis' typology of these rights have been critiqued in Chapter 3, he does manage to establish the case for seeing TPRA as a way of redressing the unequal distribution of rights in the planning system and goes on to make links with Collaborative Planning theory and the declining legitimacy of planning decisions. On the basis of a series of stakeholder interviews, Ellis suggests that there are two main motivations for introducing TPRA: as a way of overcoming barriers to public participation and to redress the current inequality of rights in planning. Unlike other contributors, Ellis

[123] In Crow's paper this specifically refers to first party property-owners, rather than third party property owners.

begins to address some of the political issues inherent in the TPRA debate and by examining this in relation to other rights expressed through the planning system, implicitly adopts a "rights-frame" (see Chapter 3). Unlike Crow, Ellis unequivocally supports the need for TPRA.

The last five years have therefore seen a mushrooming of debate on TPRA through government, NGO and private sectors and a growing contribution from the academic community. While this debate reflects a broader interest in evaluating the effectiveness of the planning system and reforming institutional arrangements following devolution, the key factor in orientating this debate towards a rights-agenda has been the changing legal landscape of land use regulation, in particular the changes introduced by the HRA 1998 and the prospect of incorporation of the Aarhus Convention into UK law. The key dimensions of this debate are discussed below.

5.5.2. Legal perspectives of TPRA

One of the strongest drivers of the recent debate on TPRA has been the wider legal discourse on human rights in the UK, which has included specific discussion of whether the HRA points to the need to enhance third party rights in planning. The legal consideration of this issue has given rise to a distinctive discourse, which in turn, it can be argued, has informed the rights debate in other arenas. Although a number of contributions to this legal discourse have been based on jurisprudential principles such as equality of rights or barriers to accessing judicial review (Hinds 1988; Brown 2001), the main focus has been speculation on the HRA and the Aarhus Convention, which have been discussed in Chapters 2 and 3. In the light of subsequent legal cases some of this speculation has proved to be rather hyperbolic, yet nevertheless can be seen as having a critical influence in fuelling wider rights debates in planning and therefore briefly reviewed below.

In terms of the HRA, a series of cases have established that planning falls under the protection of Article 6[124] and that this applies to third parties[125]. This has led to much

[124]E.g. *Bryan v United Kingdom*, (2001) JPL 291, 13/12/00.
[125] E.g. *Skarby v Kingdom of Sweden*, (1991) EHRR 90 and *Ortenberg v Austria* (1994), 19 , EHRR, 524, *Zander v Sweden* (1993) 18, EHRR 175.

conjecture that due to the absence of TPRA, the UK's planning systems may be vulnerable under human rights claims (Grant 2000a; Loveland 2001; Purdue 2001; Green Balance et al. 2002)[126]. This threat was at one point seen to be so serious that the RTPI suggested that the introduction of TPRA was "inevitable"[127], while Prof. Malcolm Grant expressed the following view to the Environment Select Committee:

> *"One likelihood is that it* {the HRA} *will require a fresh look to be taken of the system of planning appeals, in particular to look at the prospect of introducing a third-party right of appeal, and to consider what the implications are in terms of the tension that presently exists between individual rights and collective rights. My belief is that we shall need to see something of a resettlement in the relationship between the individual rights being determined by the planning inspectors and the collective rights that government policy is keen to advance... When one looks closely at the convention rights and looks at the case law that has arisen from the court in Strasbourg and from our national courts, it is difficult to avoid two conclusions. One is that in planning appeals Article 6 applies to appeals by developers because it involves the determination of people's civil rights and obligations. If that is true of prospective developers, it is also equally true of objectors, although not in every case. However, there will be cases in which it would be foolish to deny that people who are objectors to a development had civil rights and obligations that were being determined. If that is the case, at present we would be falling short of our convention obligations were we not to have a third-party right of appeal in such instances.* [128]

A further distinguished planning law expert also predicted the introduction of a TPRA:

> *"...it is not a question of whether third party rights of appeal need to be introduced, but rather how they should be introduced"*
>
> (Purdue 2001, p.88).

These claims, and the broader questions over compatibility under Article 6, initially led to speculation that the UK's planning system would require a radical overhaul (Harrison 2000) but have gradually subsided as the courts have decided cases brought under the HRA. Although the one of the most tangible influences of the Act now appears to be slow incremental reform of local authority procedures (Stockhall and Thomas 2001; Crow 2004), rather than a big bang impact on case law, such

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[126] These all discuss the legal basis of this claim at length, so it will not be repeated here, although many of the arguments presented have been incorporated into Appendix C.

[127] See Q234. Evidence to the Select Committee on the Environment, Transport and Regional Affairs, 5th April 2000.

[128] Q3-4. Evidence to the Select Committee on the Environment, Transport and Regional Affairs, 28th March 2000.

decisions provide a good example of how rights in planning have been dealt with in the courts. The most high profile judgement was *Alconbury*[129] (Elvin and Maurici 2001; Lindblom 2001) which in December 2000, resulted in a High Court ruling that the planning system was incompatible with the ECHR because the Secretary of State's role as both policy-maker and decision-maker was seen as being contrary to the independence and impartiality required in the appeal process. This decision was then appealed to the House of Lords, who in May 2001 found that the provisions of the ECHR are satisfied because any appellant has the right to challenge any impropriety in a court of law (Times Law Report 2001). While *Alconbury* established that the legislative framework for planning appeals was generally compatible with Article 6[130], it did not explicitly resolve whether the absence of TPRA were contrary to the ECHR, so that *"There can be little doubt that the issue of third party "rights" remains the largest unresolved question in this area of law"* (Lindblom 2001, p.6). A number of subsequent cases[131] have applied the *Alconbury* ruling to a range of circumstances in which third parties have questioned their inability to appeal against proposed development (Corner and Brown 2002; Findlay and Bird 2002; Purdue 2004). These have focussed on: differences between decisions requiring fact-finding and policy judgements; the role of the administrative decision-maker; and the opportunities given to third parties to present their case during the local authority considerations of the application. One conclusion from these cases has been that:

> *"The absence of third party appeals is not conclusively incompatible with the Convention rights protected by the Human Rights Act 1998... Until there is a decision of the House of Lords directly on this issue, the position will remain uncertain."*
>
> (Green Balance et al. 2002, p.55).

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[129] *R. vs, Secretary of State for the Environment, Transport and the Regions ex parte Alconbury Developments Ltd and others.* This was co-joined with two other cases. (2001) JPEL 291.

[130] Although it must be noted that the scope of the *Alconbury* decision was limited to appeals that were called in or recovered by the Secretary of State (Lindblom 2001).

[131] For example: *R.(Vetterlein) v Hampshire County Council,* (2002) JPL 289, *R. (Kathro) v Rhondda Cynon Taff County Borough Council*, (2002) JPL 304, *R. (Malster) v Ipswich Town FC*, (2001) EWHC 711 and (2001) EWCA Civ 1715, *Friends Provident Life Office v Secretary of State; Norwich City Council and Lend Lease*, (2002) 1 WLR 1450, *British Telecommunication plc v Gloucester City Council*, (2001) EWCH Admin 1001 , *R. (Cummins) v London Borough of Camden SSLTR*, (2001) EWHC Admin 1116 , *Adlard v SSLTR*, (2002) EWCA Civ 671, Begum (FC) v London Borough of Tower Hamlets (2003) UKHL 5.

Short of such a definitive legal ruling, the clearest statement of the position is provided by Corner and Brown (2002), who note the following principles derived from the post-Alconbury cases:

- For Article 6(1) to be applicable, third party claimants need to show that any decision on a planning application had an *immediate* and *significant* impact on the right claimed, rather than just a "generalised concern". The result is that this applies to a relatively narrow range of interests and is most likely to be successful in the case of direct or very close neighbours to the property on which the decision is being made and where the decision will affect the value or enjoyment of their property.
- The supervisory powers of the High Court can act as a sufficient safeguard to most decisions, except those involving a significant fact-finding role, for which an inspector or other quasi-judicial equivalent would be required. Furthermore, any disputed facts need to have been raised in some form when the decision was taken. There remains however, some division amongst the judiciary on the degree of fact-finding needed in a policy decision such as granting planning permission.
- The main area of dispute now focuses on the dividing line between cases where a quasi-independent fact finder is required (e.g. a planning inspector) and those where a limited power of judicial review is enough.

Corner and Brown (2002), conclude by noting that the way this last point has been differentially applied by different judges leaves a "*recipe for uncertainty*" (p.671) and like Green Balance (2002), suggest that further case law is required to define the detailed boundaries needed for a compliance with Article 6.

While the prospects for establishing TPRA under legal principles contained in the ECHR are now waning, arguments remain for them to be introduced in order to *"comply with the ideals of a participative democracy of the 21st century"* (Grant 2000b) and under provisions of the Aarhus Convention (UN/ECE 1998, see Chapters 2 and 3). While not all commentators believe the Aarhus Convention necessitates TPRA[132],

[132]E.g. Green Balance et al (2002).

Stookes and Razzaque (2002) claim that its absence *is* contrary to Article 9(2), which notes that the Government should:

> *"...within the framework of its national legislation ensure that members of the public concerned (a) have sufficient interest (b) ... have access to a review procedure before a court of law or an independent and impartial body, to challenge the substantive and procedural legality of any decision"*
>
> (UN/ECE 1998, Article 9(2).

However, in line with its views on TPRA noted above, the Government has stated that apart from the need to upgrade existing rights of access to environmental information, the Convention is being implemented in the UK[133]. Therefore, the case of TPRA under the HRA and Aarhus provide a very good example of how the courts function as a *location* for the realisation of rights. Thus it was noted in Chapter 3 that while the legal system offers the promise of equality and fairness, when rights issues are brought before it, there is a tendency to result in rather conservative outcomes that tend to belie deeper establishment values, which in this case tend to prioritise values encapsulated in private property rights. While this does suggest that rights may indeed contribute to some form of "liberal illusion", it does neglect the view articulated in earlier Chapters that rights function as more than just legal principles and that their progressive value may lie elsewhere. This appears to be true of the TPRA debate sparked by the HRA and Aarhus Convention - while these instruments may not have directly resulted in the enhancement of the rights-regime for third parties, they have stimulated a recognisable legal discourse on rights in planning, which has been a catalyst to encouraging a range of stakeholders to think about the planning system in terms of rights. It is no coincidence therefore that following this legal discourse, all UK planning jurisdictions have felt the need to at least justify why they are not proceeding with TPRA, with some more actively exploring the potential for their introduction. In effect, the emergence of this legal discourse has led to a *reframing* of the *macro* context (Rein and Schön 1993) of UK planning by priming the political arena for the need to seriously consider whether TPRA should be adopted. However, as noted in Chapter 3, while there may be some agreement at a *metalevel* on the value of rights as a general concept, the specific proposal for a TPRA remains heavily contested (see

[133]DEFRA correspondence of November 2001 noted in Stookes and Upton (2002) and see reply to Parliamentary Question, House of Commons Debate, 12/4/02 c.654-5W.

Rein and Schön 1993). The discourses deployed in the debate for and against the adoption of TPRA speak deeply of the way in which different interests attribute meaning to the nature of rights in planning, how rights function at the location of policy argumentation and help reveal the way in which the values attributed to TPRA are socially-constructed and disputed. This may, in turn provide a number of insights for the way other environmental rights could function within the planning arena.

5.6. Discourses on TPRA in the UK

It is clear that different stakeholders have adopted different "*frames*" to view TPRA and it is the conflicting nature of these perspectives that has fuelled controversy around this issue in recent years (see Chapter 3 and Rein and Schön 1993). These frames are articulated through a variety of discourses that express different narratives and forms of rhetoric which portray a range of rationality-claims surrounding the potential impacts of TPRA. These discourses can provide key insights into which values TPRA are seen to encapsulate and in turn the reaction these provoke can be seen to reflect the dominant values embedded in the planning system.

To explore these issues, three different views of TPRA will be subject to a discourse analysis below, using a rhetorical approach. This method of analysis follows Rydin (2003), Myerson and Rydin (1996), McClosky (1994) and Hood (1998) and has been discussed in more detail in Chapter 4. The selected discourses represent three of the main competing views on TPRA and, as such, comprise key elements in the '*rightsnet*'" or '*net of topicality*' (Myerson and Rydin 1996) of TPRA. The first, a *Protagonist Discourse* offers a supportive view of TPRA and is represented by a briefing paper produced by Friends of the Earth (FoES, 2004a), as part of their campaign to establish TPRA in Scotland. The second, an *Antagonist Discourse* represents the opposition to TPRA, in this case illustrated by the Confederation of British Industry Scotland's (CBIS) response to the Scottish consultation paper on TPRA (CBIS 2004). The final view is provided by the 'official' view of the Westminster government on the need for TPRA, as expressed in the 2002 Planning Green Paper, *"Planning: Delivering a Fundamental Change"* (DLTR, 2002).

5.6.1. Protagonist Discourse

As discussed above, a wide range of the interests promoting planning reform have advocated TPRA, and these rights have become something of a *cause célèbre* for the environmental movement, typified by the reports by the consortium headed by the CPRE (Green Balance et al. 2002) and the National Trust in Northern Ireland (NI Planning Commission 2004). TPRA have also become a key objective of Friends of the Earth (FoE), particularly in Scotland, where the organisation has run a high profile campaign on environmental justice and, with RSPB, have spearheaded the call to include TPRA as part of broader Scottish planning reform, ultimately resulting in a consultation paper from the Scottish Executive (Scottish Executive 2004a). FoES have thus been relatively successful in articulating the benefits and values of TPRA to the public, politicians and the broader planning community. For this reason, one of their briefing papers, produced as part of the Scottish consultation process has been selected as typifying how the meaning and value of TPRA has been projected in policy debate.

"*Briefing on the Introduction of a Third Party Right of Appeal in Scotland*" (FoES 2004a) was issued in March 2004 to raise awareness of the issues surrounding TPRA prior to the official start of the consultation period and in particular to act as an a rebuttal of the claims being made of the impacts of TPRA by opponents of widening appeal rights. A rhetoric line of this document is provided in Figure 5.4., with the complete text given in Appendix B and some of the key rhetorical devices (tropes) noted in Table 5.2.

In considering this text it is important to note the context – the briefing has been produced specifically to encourage the Scottish Executive to support the introduction of TPRA and uses a range of devices to do this. As one would expect from FoES, it portrays a discourse where development is seen as primarily in terms of its cost and the planning process is viewed as an adversarial arena for the struggle between developers and communities. However, not withstanding this, the *principle* of planning as a regulative process for environmental protection is seen as a positive mechanism, although it is seen to be currently "imbalanced" or biased towards developers and TPRA is seen as a way for correcting this. In developing its argument, the briefing note calls on notions of inequality and environmental justice, while attempting to

mobilise the rhetorical value of the concept of rights. It is also interesting to point out that while FoES rights arguments are made in terms of the "community", as a campaign organisation they would also become significant beneficiaries of the TPRA.

Table 5.2.: Rhetorical tropes in FoES discourse in support of TPRA

	Communicative rationality in support of TPRA
Metaphors	The level playing field
Synecdoche	Public participation stands for whole planning process
Metonymy	Community voice represents fairness
Ethos	Advocate for justice
Form of closure	Plea for good faith

As one can see from Figure 5.4, the briefing also tries to steer a course between demanding more radical versions of environmental democracy[134] and the utilitarian-based procedural rationality that deploys the concept of the "public interest", as used in the Executive's own consultation paper (see Rydin 2003). This tension is mediated by a call for a "limited" TPRA, defined by a number of conditions that would ensure that the right would be used in a "responsible" way, such as the use of appeal fees and time limits, thus engaging with the New Labour "*rights and responsibilities*" agenda as discussed in Chapter 3 and below. The briefing paper also plays down the notion that TPRA are a radical claim by indicating that it is an ordinary part of many other planning systems. The briefing attempts to portray TPRA as part of a wider approach to improving the performance of the whole planning system, linking it with increased use of mediation, corporate responsibility and education. While the briefing does acknowledge that a TPRA would "*probably increase the number of applications appealed*" and that "*some applications would take longer*", it makes some effort to first, stress the impact in terms of the improved quality of the decision-making process and second, to downplay the procedural costs of TPRA. Indeed, the briefing shows an acute awareness of the strength of economic rationality within planning debate and attempts to overcome this by staking a claim on truth through rebutting eight different "myths" related to TPRA[135].

[134] Such as a presumptions against development and more direct participation in decision-making.
[135] e.g. *Myth 4: TPRA would be used to block needed development.*

Figure 5.4. Rhetorical line for Friends of the Earth Scotland *"TPRA Briefing Paper on Introduction of TPRA in Scotland"* (FoES 2004a)

Note: Rhetorical line indicates the main elements of argumentation in the document. Underlined text provides examples of how communicative rationality is used and **bold text** indicates the concept of rights as a persuasive device.

Above all, however, it can be seen that the briefing is tinged with a discourse of communicative rationality in that it implicitly sees the involvement of communities in the planning process as an unquestionably good thing and portrays the key problem of the current system as being the disproportionate influence of the development industry (i.e. the basis for distorted communication), for which increased participation is seen as being the key antidote. FoES do not call for community *control* of the planning system, but rather the more reasonable sounding "*level playing field*", "*a foundation of trust and co-operation*", "*good faith*" and the ability "*to be able to participate on an equal footing with developers*" - all reflecting communicative rationality.

As noted by Healey (1997) and Rydin (2003), communicative rationality is a politico-legal discourse based on the philosophy of rights and fitting with this, the FoES briefing deploys the concept of rights as a key persuasive device in their argument for TPRA and is in sharp contrast to the other discourses discussed below. In portraying developers as having unfair and disproportionate power within the Scottish planning system, the use of a rights-frame by FoES establishes a rational case for TPRA that appeals to broader notions of justice. In particular, the briefing takes care to dispel the negative connotations of the more sceptical views of rights, namely frivolous rights-claims, individualism, adversarialism and an undermining of representative democracy. As with other examples of discourses of communicative rationality, the briefing does not dwell on the problems that arise from it, such as the over-reliance on process rather than outcome (Rydin 2003, p.160).

Analysis of this discourse contributes a number of observations for this research – it provides a good example of how the notion of rights can be used to demand justice in the planning arena and it effectively highlights how rights-claims can be used to challenge what are seen as distorting power structures. Specifically in relation to the TPRA debate, the discourse illustrates how portraying wider public access to decision-making as a *right* can be a more effective means of articulating those values upon which participation is supposed to deliver and which may be the values also encapsulated in TPRA (see section 5.7. below). This therefore highlights arguments for TPRA from an environmental campaign perspective and suggests that, when couched in a discourse of rights, the rationale for planning reform can be made more effectively and appeal beyond procedural and public interest arguments to those

involving justice, equity and sustainability. Many of the issues raised by the rhetorical analysis of the FoES paper are revisited below, once competing discourses have been examined.

5.6.2. Antagonist discourse

While the main support for TPRA in Scotland has been the environmental movement, opposition has been led by the business sector, including the Institute of Directors, Tesco, and Homes for Scotland, the trade association for Scottish house builders (e.g. Ballantyne 2004; Murden 2004). One of the most vociferous antagonists has been the CBIS, which made a steady stream of press comment during the consultation process on the Executive's consultation paper on TPRA (e.g. Macmillan 2004a; 2004b; BBC News Online 2004). In June 2004 the CBI issued its formal response to the consultation (CBIS 2004), which reflects the view of big business and, as one would expect, completely opposes the introduction of TPRA in any form. The paper makes a reasoned argument of why this should be resisted and, as such, provides a suitable case study of a discourse in opposition to TPRA. A rhetoric line of this document is provided in Figure 5.5., a summary of the rhetorical devices shown in Table 5.3. and the complete text of the response given in Appendix B.

When reviewing this discourse, one must also consider the context – the CBI has traditionally opposed any government initiative that it considered would increase intervention and has supported those that represent a more *laissez-faire* stance (see Thornley 1991). From this perspective, it is unsurprising that CBIS have adopted a classic discourse of economic rationality (Dryzek 2005) in its response to TPRA and attempts to link the dependency of economic growth with the Scottish Executive's main social objectives, such as improving health services. Flyvbjerg (1998) and Hajer (1995) have argued that economic rationality remains a strong presupposition in the public policy process, particularly in relation to planning and the environment. This seeks to establish the market as the best place for decision-making, both theoretically and practically. Rydin (2003) notes that this is fundamentally at odds with communicative rationality, which suggests all interests should be treated equally, and not privileging any one voice, such as the market. This is reflected in CBIS' response as the first paragraph reiterates that the agreed top priority for Scotland is economic

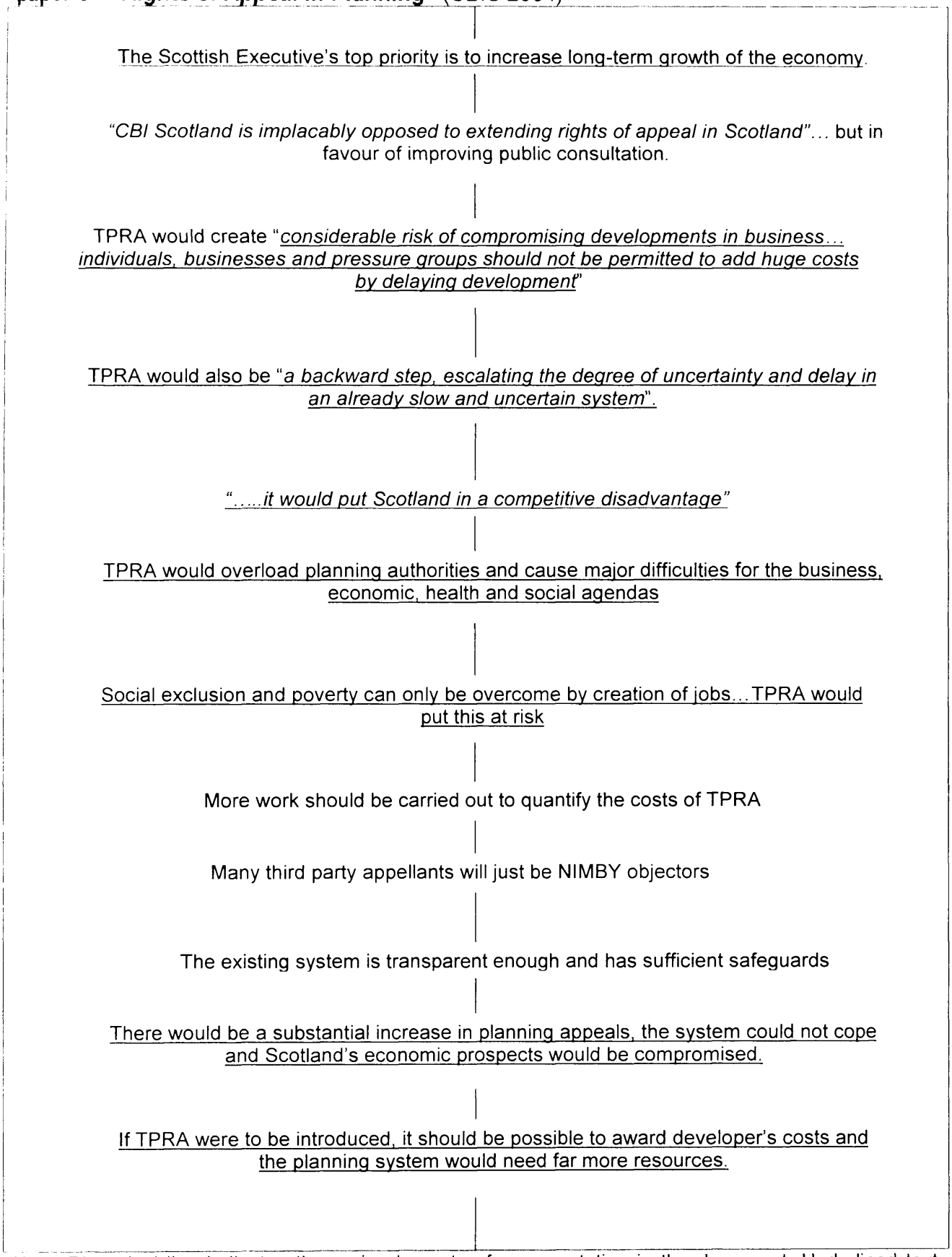
growth and establishes that the CBIS speaks with authority on this topic. Everything in this discourse reiterates that the economy is the most important issue and anything that compromises this is unacceptable. As noted by Rydin (2003), the "empire" of economic rationality retains close links with scientific rationality and we see a plea in the CBIS response for a quantification of the costs of TPRA, comfortable in the knowledge that any application of an expert discourse in this area, particularly in terms of "costs" (McClosky 1994) could be made to support their position.

Table 5.3.: Rhetorical tropes in the CBI's discourse in opposition to TPRA

	Economic rationality in opposition to TPRA
Metaphors	The Free Market
Synecdoche	A good economy means a better Scotland
Metonymy	TPRA is a NIMBY's charter
Ethos	Business knows best
Form of closure	Do you realise how much this will cost?

The CBIS response acknowledges that some improvements are needed in the planning system and it concedes that more consultation should be undertaken to address "*legitimate concerns*", yet it is resolutely opposed to putting this on a statutory basis by giving objectors a right of appeal. The introduction of TPRA would not only compromise the invisible hand of the market, and in an iteration of the sceptical view of rights, it suggests that TPRA would be predominantly used by NIMBYs to pursue their narrow objectives such as to "*curtail development ... near their own properties*", thus distort the logic of the market. It thus sees the pursuit of economic development and inward investment (i.e. securing profit and protecting asset values) as a legitimate concern for the planning system, while not recognising the concerns of those affected by development. This is reflected in CBIS' view that the planning system should "*actively promote*" investment (i.e. is fundamentally pro-development), rather than being a regulative process for environmental protection (as seen by FoES). The differences in the two discourses is also clear in the use of the same metaphor of calling for a "*level playing field*" – while it was used by FoES to represent the political process in planning, the CBI use it in a very different sense in terms of allowing market forces to determine outcomes, with TPRA being represented as a further burden on Scottish business fighting in a competitive market.

Figure 5.5: Rhetorical line for CBI's response to Scottish Executive's Consultation paper on "*Rights of Appeal in Planning*" (CBIS 2004)



Note: Rhetorical line indicates the main elements of argumentation in the document. Underlined text provides examples of how economic rationality is used.

The CBIS response acknowledges that some improvements are needed in the planning system and it concedes that more consultation should be undertaken to address "*legitimate concerns*", yet it is resolutely opposed to putting this on a statutory basis by giving objectors a right of appeal. The introduction of TPRA would not only compromise the invisible hand of the market, and in an iteration of the sceptical view of rights, it suggests that TPRA would be predominantly used by NIMBYs to pursue their narrow objectives such as to "*curtail development ... near their own properties*", thus distort the logic of the market. It thus sees the pursuit of economic development and inward investment (i.e. securing profit and protecting asset values) as a legitimate concern for the planning system, while not recognising the concerns of those affected by development. This is reflected in CBIS' view that the planning system should "*actively promote*" investment (i.e. is fundamentally pro-development), rather than being a regulative process for environmental protection (as seen by FoES). The differences in the two discourses is also clear in the use of the same metaphor of calling for a "*level playing field*" – while it was used by FoES to represent the political process in planning, the CBI use it in a very different sense in terms of allowing market forces to determine outcomes, with TPRA being represented as a further burden on Scottish business fighting in a competitive market.

The CBIS rejects each of the TPRA options given in the consultation paper[136] on the basis that the current system has "*sufficient safeguards*". This belief in the status quo is further echoed in the CBIS' implied threat of discord, should existing arrangements be altered, as the organisation is "*implacably opposed to extending rights of appeal*" (i.e. there will not be peace if TPRA are introduced) leading to further upheaval, uncertainty and an orgy of adversarial action; "*business against business (small and large), individuals against individuals, businesses and individuals against each other, various parties against health and social developments*". This is as if the status quo has enabled the achievement of some form of social equilibrium and any disruption of this would result in an imbalance that would be unable to correct itself. On this issue it stakes a claim on truth in direct opposition to FoES ; "*those who support the introduction of third party rights of appeal believe that the system is unbalanced ....this is a distortion of reality*".

[136] E.g. to apply TPRA only to cases where the local authority have an interest, contrary to an officer's recommendation etc.

A further distinction between the discourses offered by FoES and CBIS is that while the former uses a rights-frame to pursue its argument, the latter does not even acknowledge rights as being relevant to the TPRA debate. This may be due to the fact that the business sector sees the only legitimately claimed rights as being "core" first generation rights (see Chapter 2) such as property ownership, freedom of expression and rule of law, which are already provided for and are, incidentally, fundamental to the free market. Furthermore, as noted by Rydin (2003), the rights discourse is an extremely powerful one, that links arguments with the nature of state, society and democracy – given the claims made by FoES, such issues may be best avoided by those opposing TPRA, should they be drawn into deeper debates concerning the outcomes of planning practice.

5.6.3. Government discourse

Earlier in this Chapter it was noted that while TPRA has a pedigree dating back several decades, it has only really emerged in serious policy debate during the last six years. As a consequence, the Governments of the various UK administrations have felt obliged to formally consider the costs and benefits of TPRA and make public statements on whether their introduction is a desirable policy option. The differing views of each of the devolved administrations have been discussed above and it was noted that in terms of the English planning jurisdiction, the ODPM (and its former incarnations) have firmly rejected TPRA in a variety of responses and policy papers. The lengthiest articulation of the Governments' position was given in its Planning Green Paper (DLTR 2002) and once published, this appears to have set the lead to which the devolved administrations have ultimately followed. The reasoning given is reproduced in Appendix B, with the rhetoric line for this discourse provided in Figure 5.6. and examples of the tropes used given in Table 5. 4. This discussion also builds on the review of the "official" discourse on participatory rights in section 3.5.3.

This purposefully brief rhetoric line must first be placed in three important contexts. First is that the Green Paper followed an established policy line in which TPRA had previously been rejected (see section 5.4). Second is the pathos ("mood music") established by the rest of the Green Paper, which establishes a scientific rationality,

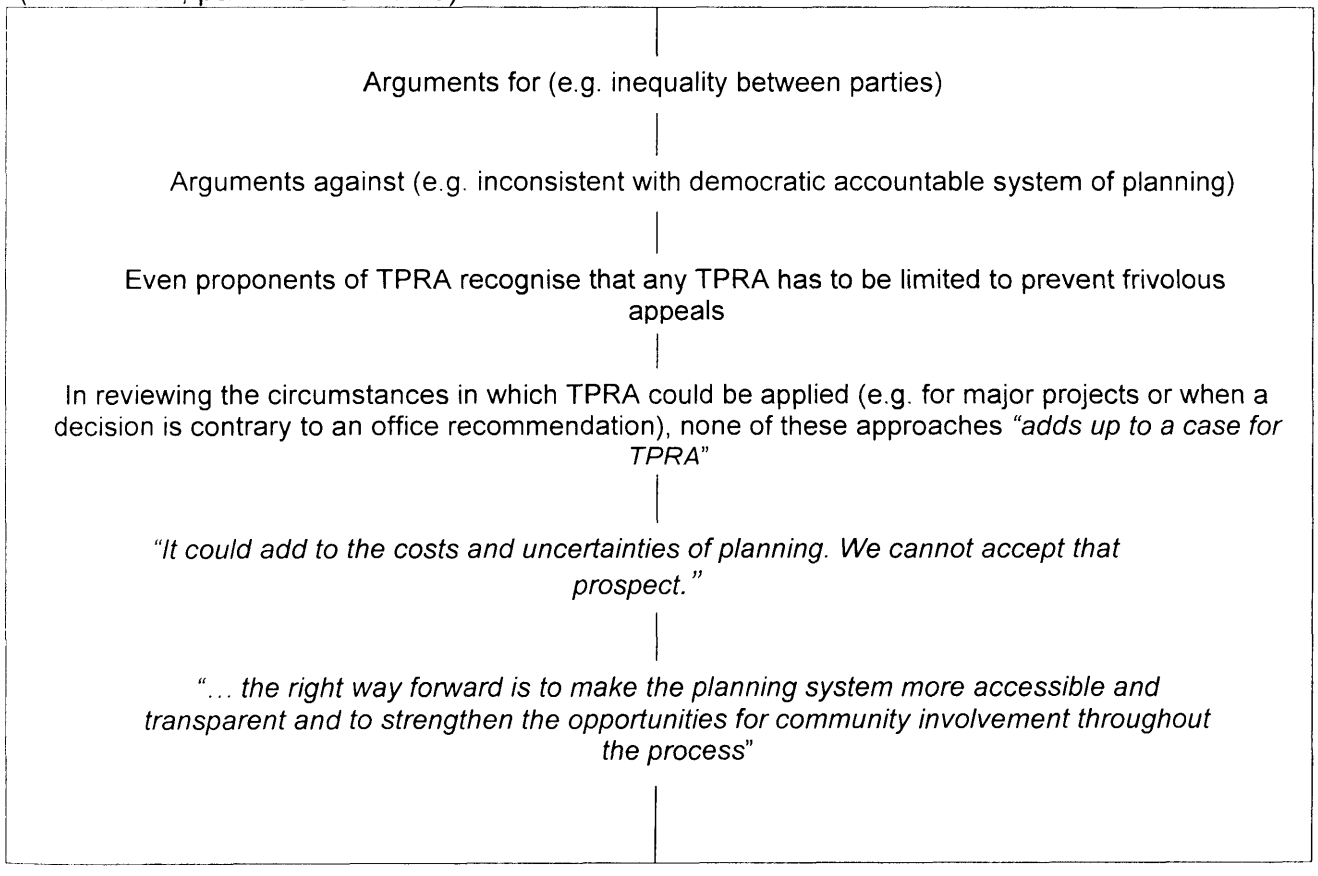
albeit with both economic and communicative undertones, with the former being more dominant (e.g. through the streamlining proposals of Local Development Frameworks etc). Third, the Government is keen to stress that it is acting neutrally and in the public interest – it recognises the difficulties in the planning system being faced by both communities and businesses and seeks a typical "third way" approach through this tension and apparently overcomes the traditional conflict between efficiency and public involvement:

> *"There will be a fundamental change in planning so that it works much better for business..."*
>
> (para. 2.10).

> *"We are going to deliver a system that better engages communities. We propose real community participation..."*
>
> (para. 2.11).

> *"We believe in good planning. Fundamental change is needed."*
>
> (para 2.12).

Figure 5.6: Rhetorical line for DLTR's rejection of TPRA in the Planning Green Paper. (DLTR 2002, paras. 6.19 – 6.23)



While the intention here is not to deconstruct the composite ideology of New Labour, the pathos established in the opening of the Green Paper is consistent with the *macro*

context (Rein and Schön 1993) of Blairite politics, which aims to combine the ethics of entrepreneurialism with a moral agenda based on conformism and communitarianism (Dean 2004), social justice and the market (Allmendinger and Tewdwr-Jones 2000). As such the Green Paper empathises with both business and community perceptions of the planning system, offers solutions that are both market–supportive and communitarian and does so in an evangelistic way.

Table 5.4: Rhetorical tropes in the Government discourse on TPRA.

	The New Labour discourse for rejecting TPRA
Metaphors	Objections = frivolous appeals
Synecdoche	Problems on implementation of TPRA undermines the principle.
Metonymy	Even proponents of TPRA recognise the problems...
Ethos	We act in the public interest
Form of closure	We must avoid uncertainty and increased delay at all costs

This provides the context for the more detailed reasoning provided in the Green Paper (paras 6.19–6.23) for the rejection of TPRA, which includes both principled and pragmatic arguments (Pontin 2002) that include:

- TPRA are inconsistent with the democratically accountable system of planning (para. 6.20);
- There is a danger of TPRA being dominated by frivolous appeals (para. 6.21);
- TPRA would add to costs (para. 6.22).

Furthermore the Paper puts forward four situations in which TPRA could be applied[137] and for each a reason is given for why TPRA would not provide a solution – for example, in the case of departures from the local plan, there is a difficulty of defining what a "departure" is; for major projects it is suggested it would just cause would cause even more delay. As noted in Chapter 3, the logic for rejecting each of these forms of TPRA is based on an (unproven) assumption that most rights-claims will be unfounded, so any form of TPRA would have to have limitations on who could invoke the right[138]. By setting out the difficulties of limiting TPRA in four different ways, the principle of TPRA is then rejected, despite the fact that planning (albeit via the courts) has been able to conquer many other comparable definition issues (e.g. the degrees of intensity of development that may effect Use Classes).

[137] These are: departures from the plan; major projects; decisions contrary to office recommendations; and where a local authority grants permission to itself.
[138] This appears to overlook how the system has been established in the Irish Republic, see Chapter 6.

On scrutiny, the argument given in the Green Paper appears less than robust and a number of critical observations are offered here. First is the view that the principle of TPRA is incompatible with the economic rationality and managerialism of the Blair Government (Clarke and Newman 1997), which places a primacy on making public services more efficient and retaining the confidence of business, many of whom have voiced concerns over TPRA, as shown in the last section (see also Winkley 2002; Dewar 2003). While the reformist-communitarian strand of New Labour ideology recognises the need for an agenda of "fairness", in this instance it has been subordinated to the development bias of the planning system and the recognition that to engage in a rights-discourse is certainly not in the interests of efficiency. The Government's argument against TPRA is ultimately made on the difficulties of detailed implementation, rather on matters of principle and abnegates any interest in tackling issues arising from "weak" approvals. It is also possible to see these implementation problems as a metaphor for the incompatibility of TPRA with an efficiency-dominated planning system.

A further observation on this text is related directly to discourses of rights. It is significant that, unlike that presented by FoES, but similar to that of the CBIS response, the Green Paper's arguments are not embedded in a rights-frame, but it does allude to rights in two significant ways. First is that it notes that a rights-approach is not consistent with the democratic principles of planning (para. 6.20), thus suggesting that the ballot box accountability is the only measure of political choice in planning (see Grant 2000b) and that politico-rational policy processes should be dominant in planning (and therefore the attributes of power which they reflect). It is notable that this view directly contradicts the opinion offered by Lord Hoffman in the *Alconbury* case that there is no conflict between human rights and the democratic principle (Lindblom 2001). Indeed as Pontin (2002) notes the Government's position implies a curious logic that they see the democratic nature of planning deriving rights for applicants, but not those who are affected by development.

The second way in which the concept of rights is applied in the Green Paper illustrates a sceptical view that if granted, TPRA would be routinely abused by frivolous appeals (para. 6.21). This may be interpreted a reification of the New Labour/Communitarian ethic that there should be *"no rights without responsibilities"* (Giddens 1998, p.65, see

also Etzioni 1995). Indeed, in Chapter 3, it was noted that Parker (2001) suggested that New Labour have not tended to create new rights unless a corresponding "responsibility" can be established, which is exactly the rationale pursued in the Green Paper. The difference in this case is that no effective way of enforcing "responsibility" can be identified, so no new right is introduced. The basis for assuming why this right would be used "irresponsibly" draws on deeper New Labour ideology and concepts of citizenship as discussed in section 3..5.3. This implies a dominance of *instrumental participation* rather than the more desirable *communitarian participation* (Campbell and Marshall 2000), effectively places responsibilities *before* rights and focuses attention away from demands on the state as holders of correlative obligations (O'Neill 2000) towards the need of citizens to prove their worthiness as rights-claimants. This raises a number of fundamental issues of relevance to the potential role of environmental rights in planning, which will be further examined in later Chapters in the context of the Irish Republic.

5.6.4. TPRA discourses compared

In reviewing these three distinct discourses of TPRA, this section has attempted to develop an understanding of the political debate on this issue and use this as an example of how the concept of environmental rights (and the rights-frame in general) function in the context of policy argumentation. For comparative purposes, the main elements of the three discourses are summarised in Table 5.5., where they are accompanied by the legal discourse on TPRA as discussed in section 5.5.2., included because of the apparent influence this has had on other discourses of TPRA.

Table 5.5. highlights the gulf of understanding that lies between each of these discourses, based on different rationales by which actions are judged and the very ontology of the planning system. It should therefore come as no surprise that each of these discourses ascribes different priority on the values that it sees as being encapsulated in a TPRA. This also reaffirms the necessity of understanding environmental rights as social constructs, dependent on subjectivity and contextual factors and underlines how the adoption of a narrow legal or constitutional view of rights will fail to grasp their deeper significance to society.

Table 5.5: Analysis of the discourses of TPRA[139]

	Discourse Element			
	ONTOLOGY	AGENCY	ASCRIBED MOTIVATION	RELATIONSHIPS SEEN AS BEING NATURAL
Legal Discourse	Legal entities (individuals, corporations), the courts.	Judges, the legislative	Legally prescribed notions of justice	Obedience to the law.
Protagonist Discourse	Communities, local residents	Presently developers, properly communities	Environmental justice	Equality, adherence to policy
Antagonist Discourse	The "invisible hand", businesses, NIMBYs	The market mechanism	Profit in the public interest	Planning as a burden
Government Discourse	Elected councillors, Government, business and citizens.	Recalcitrant citizens, local authorities	Self interest (for the recalcitrant citizens), public interest (for government and local authorities)	Government action and the public interest

It is also useful to consider how these different discourses invoke the concept of rights in relation to positions of power, noted earlier in the thesis (see Stammers 1993). Thus we can see that the legal discourse invokes power through its respected interpretation of law and that such interpretation is generally regarded as binding on other sectors and stakeholders. This is based on the fundamental acceptance of the principle of the rule of law as a basis for governance and the privileged position of the legal profession in interpreting what this should mean for society. The generally conservative nature of the analysis applied in this discourse clearly reflects establishment credentials of the legal system and ensures it enjoys continued support from the status quo. It has also been noted that legal discourse is particularly influential in the field of planning, as this is principally judged in terms of statutory-defined procedure. The fact that legal discourse has begun to define issues in terms of rights, where they may be previously been discussed in the context of policy, proportionality or reasonableness, has

[139] The format of this table is taken from Dryzek (1993) who provides the following explanatory guidance: *Ontology* refers to those entities recognised as existing (e.g. individuals, classes, nations etc; *Agency* refers to those entities seen to be that are autonomous (e.g. classes, by Marxists) or objects acted upon; *Ascribed motivation* refers to the motives that are recognised or denied (e.g. material self-interest, survival, civic virtue etc.); *Relationships seen as being natural* refers to conceptions of natural and unnatural relationships (e.g. as taken-for-granted hierarchies, social class etc).

legitimated the adoption of a rights-frame in other arenas and it is here that the key value of the legal discourse lies. Thus while experience suggests that the direct legal interpretation of rights has generally been in support of existing power relations, the legal reframing of some debates as rights-issues has facilitated a more effective use of rights approaches within policy argumentation.

An example of this is the protagonist discourse, which effectively engages the concept of rights to highlight injustices of current planning governance and to call for rights-based reform. This underlines the rhetorical value of the concept of rights and invokes the powerful notions of justice, equality, fairness etc and as such highlights the discrepancies between the planning system as implemented and those values aspired to by society. In doing this, it may be able to more effectively portray existing arrangements as being unjust or even expressing dominance of key interests (c.f. Laclau and Mouffe 1995). In this sense, the protagonist discourse can be seen as challenging existing power relations, in particular the way it questions the priority given to property rights and the ensuing pro-development basis of the planning system.

After several decades of intermittent debate on TPRA, once the protagonists articulated their arguments within a rights-frame, suitably backed by legal discourse, it ensured that the government was obliged to provide a reasoned response in the form of the official discourse on TPRA. This discourse is forced to acknowledge the issues of justice provided by the rights-frame, but recognises that TPRA are in conflict to deeper held values of the planning system and therefore articulates its opposition to them in more "palatable" terms, using a combination of economic rationality, managerialism and invoking "the public interest". Having been forced to address this issue through rights-based arguments, this discourse does not engage in debate in these terms, perhaps aware of the weakness of official reasoning once placed in a rights-frame. Therefore, while we can envisage the articulation of the TPRA in a rights-frame as inherently power-challenging, the state response is to avoid the debate in these terms in order to secure the status quo.

The antagonist discourse shares much of its underlying rationale with that of the official discourse, yet appears to be based on such a different ontological basis that it simply cannot understand the rationale of the protagonist discourse. As such, it is as if

the antagonist discourse is aghast at the temerity that economic rationality should be questioned and because it sees the planning system as a burden; the last thing it thinks is needed is the intervention of additional stakeholders in investment decisions. The antagonist discourse portrays protagonists as illogical and deviant. As in the official discourse, the antagonist discourse does not therefore engage in debate on the validity of the rights-claims being made, but attempts to override these by portraying the priority of protecting the rights which it sees as being of fundamental value to capitalism such as those of property and invokes these to support existing power relations.

This series of discourse analyses has therefore been extremely insightful in generating understanding of the role of rights in political debate and has clearly illustrated the rhetorical value of placing arguments within a rights-frame. This observation is not just of academic significance but has real effects – in this case forcing the acknowledgment of TPRA as a high level policy issue, even if it has not yet resulted in their actual adoption. The examination of rights-talk as policy argumentation will be further complemented by the review of TPRA in practice in the next two Chapters, yet to appreciate fully the nature of TPRA, the next section will attempt to define the type of values that it can be seen to encapsulate.

5.7. The values encapsulated by TPRA

Chapter 2 introduced Freeden's definition of rights and developed it by attempting to portray examples of environmental rights in diagrammatic form, illustrating the foundational principles, values protected and the types of action demanded by such rights (see Figures 2.3. and 2.4). Given that TPRA forms the main case study of this thesis it is appropriate to speculate on how these components of this right could be similarly portrayed. Having reviewed the literature on TPRA and reviewed a range of discourses focusing on this right, it is argued that it is possible to establish what can be regarded as the *concourse* of TPRA, where a concourse is the volume of discussion on any particular topic, or more formally "*the population of statements about some topic*" (Dryzek and Berejikan 1993, p.50). The concourse of TPRA has been developed by taking all the key statements from reviewed literature and the discourses discussed above and summarising these in Table A.6, found in Appendix

C. This Table categories the various arguments for and against TPRA by the main forms of rationality (i.e. legal, communicative and economic/managerial), which highlights that if one adopts economic rationality, arguments against numerically outweigh those in favour and the reverse is true when viewed from the point of view of communicative rationality. From a legal perspective, the arguments for TPRA appear more balanced and unresolved.

In addition to highlighting the competing arguments around TPRA, this also contributes to understanding the values protected by the capsule of TPRA, shown in Figure 5.7. A statement of the values protected and action demanded by any right is an inherently subjective process and this Figure is not intend to be a definitive, objective statement of the dimensions of TPRA, but an interpretation based on the concourse on procedural environmental rights reviewed in earlier sections of the thesis and the identified discourses of TPRA discussed in section 5.6.

From Figure 5.7 it can be seen that TPRA draw on a number of established foundational principles, such as a right to a fair trial and other issues articulated in a range of other international human rights and environmental protection instruments. This also highlights the fact that TPRA assumes the notion of "full liberal ownership" of land is a flawed concept (see Chapter 3) and that rights tend to be accompanied by implicit values including those of scrutiny and procedural justice. Together with the discussion in this Chapter, this suggests that TPRA challenges a number of fundamental issues currently embedded in the British planning system.

Figure 5.7: The capsule of TPRA

EXAMPLES OF ACTION DEMANDED

The right grants any person the ability to challenge the technical basis and/or policy interpretation of an initial decision made by a local planning authority on a planning application.

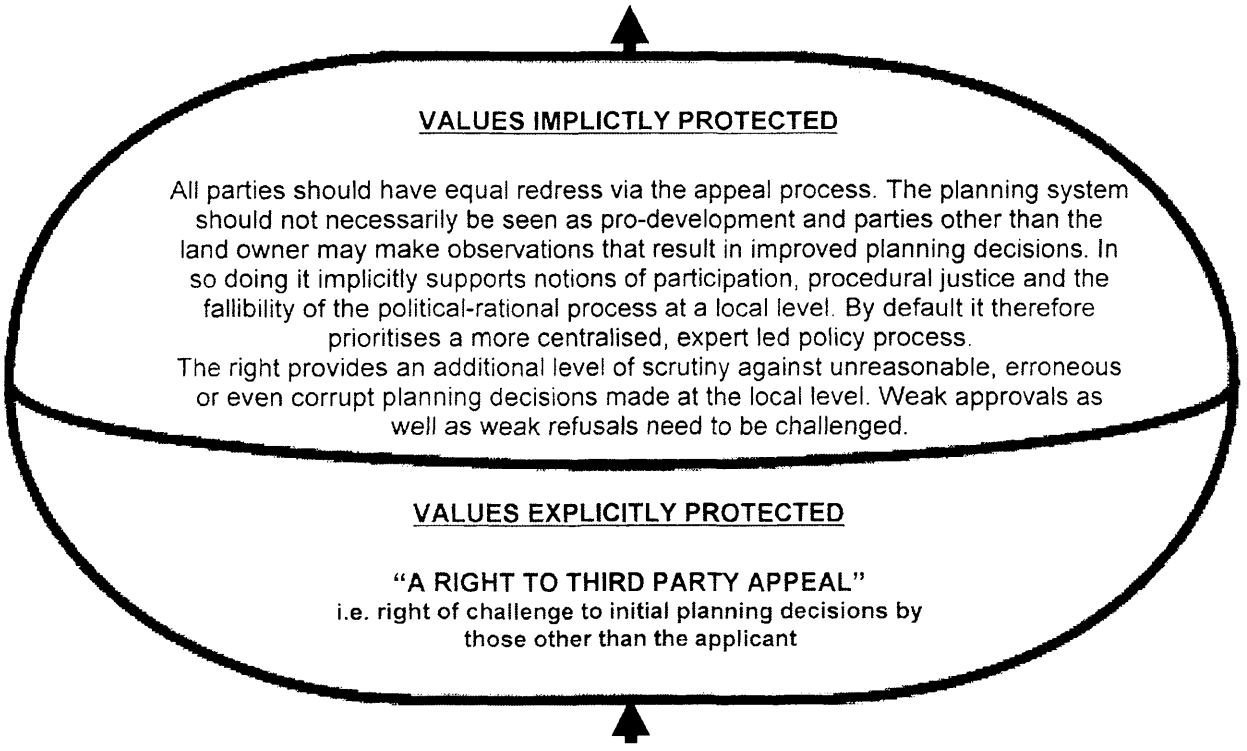
This requires an effective and efficient tribunal system with competency in planning expertise. It may also require additional resources for local authorities to be effectively represented at such hearings.

The right is likely to have both post- facto and ex-ante effects as on the one hand the appeal body may impose a different outcome on the case by deploying differing reasoning, while on the other local planning authorities may approach the initial decision differently knowing that such a right existed or take steps to minimise the level of such appeals through enhanced consultation etc..

An effective TPRA relies on adequate access to information, education, transparency in decisional processes and capacity building including technical aid.

TPRA may challenge the dominance of utilitarian reasoning as it enhances the opportunities to highlight the specific distribution of costs and benefits of any planning decision and thus "particularises amenity".

Such a right does not guarantee a better environmental or equity outcomes.



FOUNDATIONAL PRINCIPLES

Both liberty and effective democratic representation demands that there has to be safeguards and scrutiny of elected leaders and the bureaucracies that support them, as well as the protection of core rights, such as freedom of expression. Political debate should be based on the full facts available and any action undertaken in the name of the public interest should be open to challenge by all.

All stakeholders have an equal and meaningful role in planning governance, which includes other rights such as those to a fair trial, supported by the UDHR, ECHR, Rio Principle 10 and the Aarhus Convention. A right of redress acts as part of the implementing process for other rights.

The concept of "full liberal ownership" of land is not necessary valid and that a land owner must recognise the rights of owners of neighbouring land and those of the community to influence development on any piece of land.

5.8. Conclusion

This Chapter has introduced the issue of TPRA as a case study of a procedural environmental rights in the context of land use planning. It has justified why we should regard TPRA as such a right and highlighted, in the context of the wider system of DC and appeals, why it is of substantial significance to land use regulation. In order to understand the current UK debates on TPRA, the Chapter briefly reviewed the extent of adoption of these rights in other planning jurisdictions and provided a brief history of how TPRA have emerged in recent British policy debates. In particular it was noted that it appears that the legal discourse surrounding the HRA has been influential in stimulating broader political debate in TPRA, which in turn has provoked an official response and an antagonist reaction. A review of these discourses has facilitated an identification of the values and action demanded by such a right, implying the adoption of TPRA may have substantial significance for the UK planning systems.

In analytical terms, the Chapter contributes a number of insights for addressing the hypothesis and supplementary research questions established in Chapter 1, namely:

- It has confirmed the validity of TPRA as a useful case study for the thesis, justifying why this should be regarded as a procedural environmental right and through a discussion of the wider planning process, clarified the role it may have in both in functional terms and as a challenge to currently dominant ideologies.

- The discussion of recent debates on TPRA in the UK effectively reaffirm the view articulated earlier in the thesis that when viewed purely as legal constructs, rights are seen to have a rather muted impact, compared to a more progressive role when constituent of political debate and policy argumentation. However, the Chapter has also pointed to an important priming role of legal discourse, which in the case of TPRA has ensured that subsequent protagonist discourses set with a rights-frame are imbued with greater authority that has demanded attention from Government.

- This last point relates to the rhetorical strength of articulating issues in a rights-frame, as illustrated in the protagonist discourse discussed in this Chapter. This allowed the issues of participation and equity to be linked to other powerful concepts such as justice and equality and as such can be less easily sidelined.

- The analysis of the different discourses also reveals the gulf between various positions on what the planning systems should deliver, to the extent that the antagonist discourse was so embedded with economic rationality that it exhibited nothing short of incredulity that the Scottish Executive were contemplating introducing enhanced rights for third parties. This not only illustrates why TPRA will remain a hotly contested issue but also highlights that because rights-discourses (other than those relating to private property) have been relatively rare, there appears to be a degree of illiteracy in the understanding of their implications and meanings.

- This also reflects the wider literature that suggests that those rights that effectively challenge existing power structures are never easily won (c.f. Stammers, 1993), and involve intense political struggles. The review of the TPRA debate highlights such a fight for enhanced third party rights in planning and one that is still some way from being realised.

While the more abstract values and political argumentation related to TPRA have been reviewed in this Chapter, these can only really be further tested by an examination of how TPRA relate to practice. In order to do this, a case study of the RoI will be undertaken, which is introduced in the next Chapter.

CHAPTER 6: THIRD PARTY RIGHT OF APPEALS IN THE REPUBLIC OF IRELAND

6.1. Introduction

Previous Chapters have established the rationale for examining environmental rights as part of planning governance and highlighted the example of TPRA as a procedural right endowed with symbolic and, potentially, practical value. This Chapter provides a detailed contextual analysis of the main case study used in the research, existing TPRA in RoI.

As noted in Chapter 4 and explained in detail in Appendix A, the prime data sources for this Chapter are various databases that have been developed from decision notices and official statistical returns on planning and appeals provided by DoHELG[140] and ABP, supplemented by limited evaluations of the Irish appeal system presented by the Comptroller and Auditor General (2002) and Quinn (2000). These sources have been left untapped for the purposes of secondary analysis, so much of the evaluative material presented in this Chapter casts light on unappreciated dimensions of the Irish system of TPRA, thus illustrating the effects of an enhanced environmental rights-regime on a planning system not dissimilar to that which exists in the UK. These insights are generated by describing the legal basis and procedures adopted for TPRA in RoI and assessing their impact on the outcomes the Irish planning system. This quantified, objective look at the impact of TPRA is then complemented by the analysis in the following Chapter which shifts attention to how rights-claims are perceived from an appellant perspective.

6.2. Planning in the Republic of Ireland

While a full account of the Irish planning system is described in detail elsewhere (Grist 1999a) an awareness of its main dimensions is required to appreciate the full role of TPRA. This section therefore briefly describes the RoI's planning system and

[140] The Department of Environment, Heritage, Local Government.Until this was 2003 known as *Department of the Environment and Local Government* and prior to that the *Department of the Environment.* These former titles are used in identifying earlier references.

highlights comparative aspects where this will help understand the context for the appeal system.

The Irish planning system is loosely based on the 1947 Town and Country Planning Act of England and Wales, with its main purpose being:

> *"To provide, in the interests of the common good, for proper planning and sustainable development, including the provision of housing..."*[141]

Established in its current form in 1963, the Republic's planning system has undergone a number of amendments to cope with the changing context of development. This has been particularly important during the 1990s, when unprecedented economic growth placed a huge strain on the ability of local planning authorities to regulate effectively land use in support of the "Celtic Tiger". This has resulted in a major reappraisal of the planning system that culminated in amending and consolidating legislation in the form of the Planning and Development Act 2000.

Although there are broad patterns of similarity with planning in the UK (see Chapter 4), there are many differences over detail, with the main features of the Irish planning system being:

- **Planning administration.** There are 88 LPAs (29 County Councils, 5 County Borough Corporations, 5 Borough Corporations and 49 Urban District Councils), acting in much the same way as the local planning authorities in Britain and are similarly subject to the supremacy of central government, rather than having powers of general competence. Most of the Urban District Councils do not directly employ planners and rely on staff of a higher authority, usually County Councils. Many of the executive functions of LPAs are the responsibility of the City or County Managers, who have their own statutory powers and will, for example, determine most planning applications. There is no ministerial power to call in an application for central determination. The Manager cannot grant permission to a development that contravenes the local development plan and in such cases the application is referred to the elected membership of the

[141] Planning and Development Act, 2000.

Council. The elected membership has only reserve powers in relation to DC and retains powers over all policy matters. The Minister has "*general supervisory jurisdiction*" (Keane 1982, p.149) over local planning policy, but all powers of appeal over development control decisions have been passed to an independent planning board, ABP.

- **Planning Policy.** The policy framework is governed by the legislation, policy directives and general guidance issued by the DoEHLG, which LPAs and ABP have to take into account when formulating their policies and DC decisions. Each LPA is obliged, under the Planning and Development Act 2000[142], to prepare a development plan for their local area and this must be reviewed every 4 years[143]. These have become the key criterion in deciding development proposals.

- **Public participation in the planning process**. In addition to the two main ways of engaging the public in planning experienced in the UK (i.e making observations during plan formulation or in relation to a planning application) there is a third opportunity in RoI , that of making a third party appeal. TPRA *as a tool of participation* should however, be understood in reference to these other opportunities for participation, which are:

  - *Development plan.* The LPA must publicise its intention to make or revise a plan in a local paper and then "*take whatever additional measures it considers necessary to consult with the general public and other interested bodies*"[144]. The LPA must also hold a public meeting and invite written or oral submissions in regard to the preparation of a new plan. There is a minimum of eight weeks for members of the public to make comments on the local LPA's intention to make a plan. The Manager then produces a draft plan, which is subject to a similar process but this time with a minimum of ten weeks for comments. The Manager must report the outcome of this process to the Council and

[142] s.9, Planning and Development Act, 2000.
[143] s.11, Planning and Development Act, 2000.
[144] s.11(3), Planning and Development Act 2000.

may amend the plan in line with these comments. Ratepayers who object have the right to state their case directly to a member of the LPA (Grist 1999a). It is then up to the elected members of the Council to adopt the plan - there is no provision for a public hearing.

- *Development Control.* An applicant must give notice in a newspaper circulating in the area two weeks before the application is made and erect a site notice. There is no provision for direct neighbour notification. The LPA cannot make a decision on the application within 14 days of submission, but must issue a decision within two months; otherwise it will receive default permission. Members of the public can make written observations on payment of a fee. Applications are decided by the City/County Manager (or under some circumstances, the elected members) and there is no provision for holding an enquiry prior to the LPA's decision.

- **The Appeal system.** Since 1977, all planning appeals have been made to ABP, an independent tribunal with responsibility for "*the determination of appeals, references and certain other matters*" (Pleanala 1999), p.9) as defined under planning and other environmental legislation. It acts as a tribunal for planning appeals, EIA, local authority projects and licenses related to water and air quality. A planning appeal can be made to the Board against any planning decision of a local planning authority, including those which award planning permission. It has absolute independence in making decisions on planning appeals and no ministerial influence is exercised over individual cases. The Board's decision is final and can only be challenged by judicial review within 8 weeks and then only on legal and procedural grounds.

  The Board currently consists of 12 members, appointed by the Minister from nominees put forward by organisations representing professional, environmental and development interests and from the civil service. The Board is serviced by a total staff of 133, supported by fee-per case inspectors, most of who are based in the UK (McDonald 2001). According to the last available Annual Report (for 2004) the Board's overall expenditure was €14.95m, 11% of

which was met by fees from users of the appeal system. The Board is given statutory objective periods for different types of appeal, which stands at 18 weeks for normal planning appeals – during 2004 this was met in 85% of cases.

- **Freedom of Information.** The RoI's planning system is highly transparent and has been subject to Freedom of Information legislation for many years, meaning that all planning files have to be available for inspection as soon as the LPA have made their decision and in the case of appeals, no later than three days after ABP have made their decision[145].

While Chapter 4 set out the suitability for using the RoI as a case study, the problems of comparative research do need to be acknowledged, such as the differing nature of legal systems (Newman and Thornley 1996), institutional and political arrangements and cultural factors (e.g. Booth 1993). The brief description of Irish planning given here highlights a number of key differences with the various UK planning systems, which need to be taken into account in any attempt to make inferences for Britain. These include:

- LPA officers in the RoI are designated with a range of statutory responsibilities, including the determination of planning applications that are in compliance with the development plan. There is therefore a distinct division between the formulation and implementation of policy, avoiding many of the legal questions raised in the context of the UK's HRA (Findlay and Bird 2002).
- RoI has an appeal board independent of ministerial control, with close parallels to the notion of an environmental court (see Grant 2000c).
- Qualified standing for making observations on planning applications, in the form of a €50 fee, a provision introduced in March 2002.
- Default *permission* is received in RoI if a planning application is not determined within eight weeks, in the UK a default *refusal* is received after 8 weeks[146].

[145]s.38, Planning and Development Act 2000.
[146]Decisions on some applications are deferred in agreement with the applicants or the time extended by local authority requests for more information. In 2002, 65% of applications were processed within the deadline DoEHLG (2003).

These structural differences in the hard infrastructure of planning are complemented by softer influences of political/administrative culture and public expectation/agency, which will lead to further differences in the way in which the two planning systems operate. One implication of this is that the each planning system places varying emphasis on different policy processes (Healey 1990). For example the fact that individuals are required to pay a fee for making representations on planning applications presents a barrier to "*consultative*" forms of decision-making, while the fact that officers in the RoI can determine most applications means that these will be decided via a "*bureaucratic-legal*" process, rather than the "*politico-rational*" process, as is the case in the UK. Furthermore, the fact that planning appeals are made to an independent board who view cases *de novo* means that decisions on practically all controversial cases are determined by a "*techno-rational*" and "*semi-judicial*" process rather than a "*politico-rational*" one, as is often the case of the UK. These differences can in turn result in significant differences in the way in which different groups are able to engage in the decision-making process (Thomas and Krishnarayan 1994) and is an issue that will be returned to later in the thesis.

6.3. Procedures for planning applications and TPRA

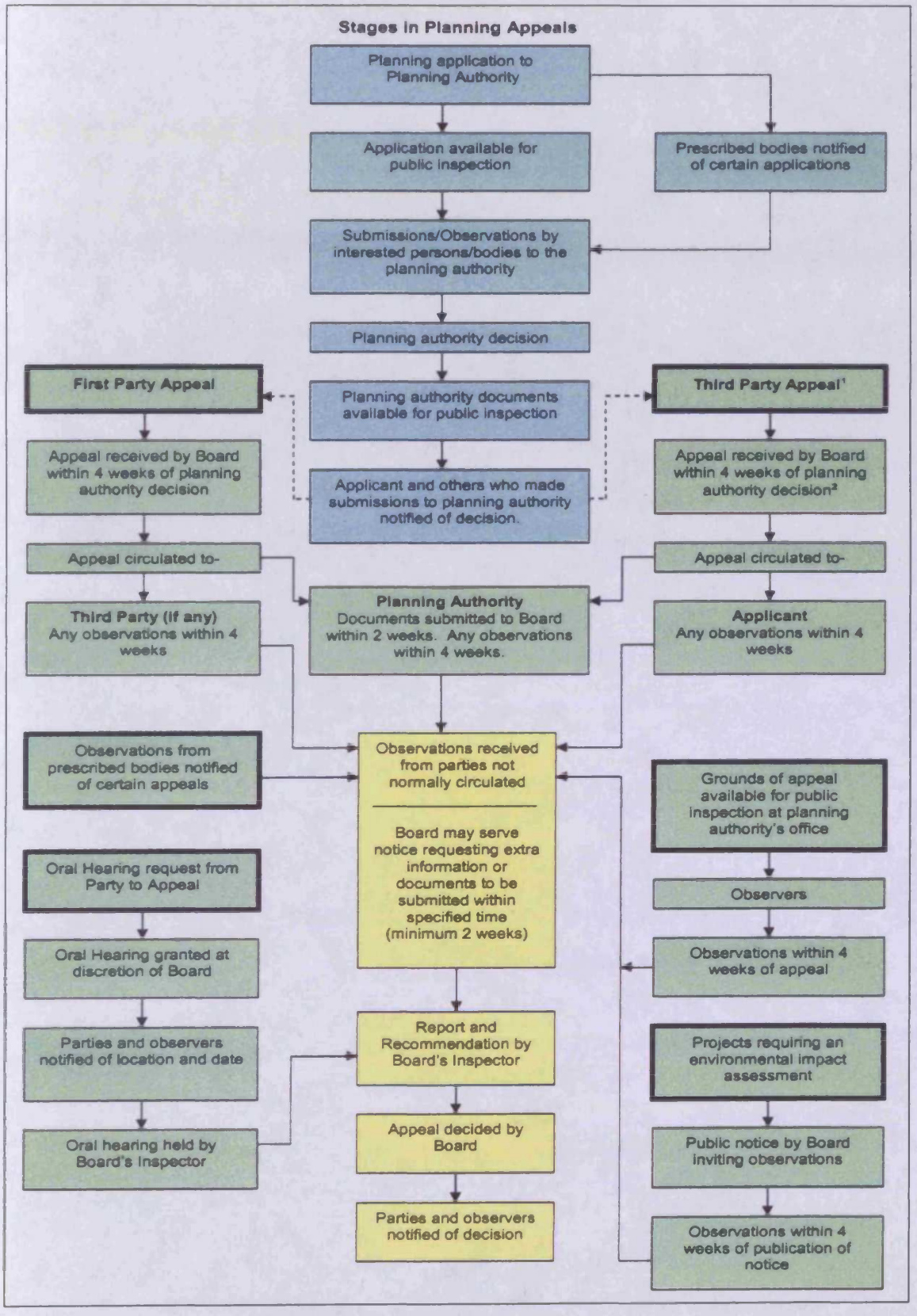
The detailed procedures for TPRA are available on the on the ABP website[147], in their Annual Reports and in the accounts of the Irish planning system by Grist (1999a; 1999b). The following summary is largely taken from these sources, with the overall procedure also summarised in Figure 6.1.

6.3.1. Legislative provision for appeals

As noted above, Irish planning legislation has been consolidated into the Planning and Development Act 2000, which defines the powers and role of the Ministers, central government, LPAs and ABP in relation to the regulation of land use. Section 37(1)(a) of the Act provides for planning appeals by both first and third parties and can be against the principle of a decision (i.e. to award permission) or the conditions attached to a decision.

[147] www.pleanala.ie/

Figure 6.1. Stages in Third Party Planning Appeals



1. Generally only by persons who have made a submission or observation at planning application stage.
2. Different period applies where application for Leave to Appeal is granted.

(from ABP Annual Report, 2004)

6.3.2. Making a planning application

All planning applications have to be decided by the LPA. There is no alternative procedure for determining major applications, such as Ministerial call-in. As noted above, the applicant must advertise the intention to develop in a newspaper circulating in the district of the site and erecting a site notice. The LPA also publishes weekly lists of all applications received and these are displayed in their headquarters and in public libraries. All documents submitted as part of the application are available for inspection and the planning authority are precluded from making a decision on the application within 14 days of it being submitted, to allow objections. In most instances, planning applications are decided by the County or City Manager.

6.3.3. Making a third party appeal

If a planning application is awarded permission, any one who meets basic criteria can appeal to ABP against the LPA's decision. Permission by default can also be appealed in this way. Other parties may apply to the Board for leave to make an appeal at a cost of €105, with those with an interest in adjoining lands having the automatic right to apply for leave. The appeal can be made against a condition or the entire proposal. However, the following conditions must apply if the appeal is to be valid[148]:

- The appellant must have made a written observation on the original planning application or been given leave to appeal;
- The appeal must be made in writing, stating in full the grounds of appeal;
- An appeal fee must be paid, currently set at €210 (€105 for those having been awarded leave to appeal) [149].
- The appeal must be made within one month of the planning authority making the decision (or failing to make the decision in the case of default permissions).

In addition to satisfying the above conditions, an appellant must satisfy the Board that the appeal is not:

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[148] s.127, Planning and Development Act 2000

[149] A number of prescribed bodies, including An Taisce (a national environmental NGO), Regional Fisheries Boards, Royal Irish Academy, local authorities etc are only required to pay a reduced fee of €50.

- Vexatious, frivolous or without substance or foundation, or;
- Made with the sole intention of delaying the development or securing financial reward or other inducement[150].

Quinn (2000) has noted that the Board has found it difficult to dismiss appeals on the basis of these last two points, as most appellants include some planning grounds in their submission, even if these are not the main motivation for the appeal.

Once satisfied that the appeal is valid, ABP send a copy of the appeal to the applicant and the LPA, who then have four weeks to make submissions. Other interests are also allowed to make observations on the proposed development during this time, but are also subject to a fee (currently €50).

6.3.4. Determination of third party appeals

During the 4 weeks allowed for submission of documentation, any of the three parties to the appeal (appellant, applicant or planning authority) may request an oral hearing[151], on payment of an additional non-refundable €95. There is no automatic right to an oral hearing, which is at the discretion of the Board. It is the Board's policy to hold them only *"where this will aid its understanding of a particularly complex case or where it considers that in a case involving significant national or local issues, written submissions need to be supplemented by an oral hearing of the issues*" (ABP 2003, p.19). This request is only upheld in a minority of cases and only 24 hearings were held for all kinds of planning appeals in 2002, less than a third of the requests made and 0.56% of all planning appeals made.

If a request for an oral hearing is upheld, these must be conducted "*without undue formality*"[152] and as Grist (1999b) points out, courtroom styles of behaviour such as aggressive cross examination are discouraged, although counsel are often employed in connection with major appeals. In the case of oral hearings, observers appear at the discretion of the inspector where this is "*considered appropriate in the interests of justice*"[153].

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[150]s.138, Planning and Development Act 2000.
[151]s.134, Planning and Development Act 2000.
[152]s.135, Planning and Development Act 2000.
[153]s.135, Planning and Development Act 2000.

If no request for an oral hearing is made, or a request is turned down, the appeal is decided by written representation. The Board can ask any party or observer to make submissions on any matter that has arisen in the appeal and has the power to request any party to submit any document or information it considers necessary. The Board will specify a strict time limit (a minimum of 14 days), for this.

Following the oral hearing or consideration of the written representations, and having visited the site, an inspector will compile a report, which is considered at a meeting of the Board. ABP considers this report and comes to a decision regarding the appeal, based on majority voting. Decisions are generally in accord with the inspector's report and in 2002 only 11% of all decisions did not confirm the inspector's conclusions (ABP 2003).

As noted above, the Board considers the case *de novo*, except in relation to appeals against conditions. In determining the appeal the Board applies the same criteria as the planning authority, including (see Comptroller and Auditor General 2002, p.18):

- The proper planning and development of the area, including the preservation and improvement of amenities;
- The policies and objectives of Ministers, planning authorities and certain other public authorities as appropriate;
- Policy on economic development;
- The principle of sustainable development.

Unlike the LPA, the Board may grant permission to development that materially contravenes the development plan if it considers that[154];

- The proposed development is of strategic or national importance;
- The plan has contradictions or ambiguities in regard to the proposed development;
- The proposed development is in line with regional guidance or other national policy guidelines;
- The context for development has changed significantly since the making of the development plan.

Within three days of reaching a decision, the Board must notify in writing its verdict to everyone involved. The Board has power to determine a sum to be paid in

[154] s.37(2), Planning and Development Act 2000.

compensation for the expense incurred in the appeals process – this was never used until 2000, but has been increasingly used in a handful of cases per year.

6.3.5. Judicial review

The decision of the Board is final in terms of consideration of the technical planning matters, but the Planning and Development Act 2000 makes provision for judicial review by the High Court on legal and procedural grounds[155]. An application for judicial review must be made within 8 weeks of the Board's decision. There is a two-stage judicial review process, where applicants first have to obtain leave to apply for a review and prove that they have "*substantial interest*"[156] before being allowed to proceed. Although there has been an increasing trend to apply for judicial review, the number of successful challenges has only been 4 in every 10,000 appeals (Quinn 2000). The decision of the High Court is final and can only be appealed to the Supreme Court on a point of view of exceptional public importance (Grist 1999b).

6.4. Evolution of TPRA in the Republic of Ireland

While the preceding section has explained the contemporary system of TPRA, it has undergone a gradual evolution since it was introduced in 1963. A brief consideration of this evolution assists in understanding some of the tensions intrinsic to the TPRA mechanism.

6.4.1. Origins

Although a number of pieces of planning legislation had been passed prior to the 1963 Local Government (Planning and Development) Act, it was this that introduced the current system of a comprehensive requirement for planning permission, the statutory need for a development plan and minimum requirements for public participation. Although there were strong US influences on Irish planning thought at this time (Bannon 1989), the legislation was largely modelled the British 1947 Act. However, at a time when British planning was beginning to be perceived as being undemocratic

[155] s.50, Planning and Development Act 2000.
[156] s.50 (4)(b), Planning and Development Act 2000.

and overly managerial (Bartley and Waddington 2001), there was a commitment to improve on British practice and that the third party provision was one way to do it (Crow 1995). No doubt the legislation was also influenced by the political culture of the time, particularly the dominance of Fianna Fáil, whose outlook and political ideology was firmly grounded in the small farmer communities of the western part of the country, which stressed the political significance of land ownership and the need to protect the rural economy (Garvin 1974). Bannon (1984) has also highlighted an anti-urban bias as a general characteristic of Irish politics. However, overriding these considerations were the provisions of the RoI Constitution, which enshrines equality before the law (Article 40.1) and the protection of property (Article 43), thus pre-empting some of the demands of the ECHR.

As such, the 1963 Act introduced an unrestricted right of appeal, with the Minister of the time stressing that "*every interested person*" would have a right of appeal "*if anything... leaning over backwards for the benefit of the public*" (quoted in Crow 1995, p.382). Remarkably, and in contrast to current debates over TPRA described in the previous Chapter, Crow notes that the proposal for third party appeals attracted little attention or controversy. Indeed, the provision hardly merits a mention in a history of Irish planning (Bannon 1984) and has until recently been regarded as an unremarkable part of the system.

Although the system of TPRA is regarded as an intrinsic part of the Irish planning system, as the number of appeals has increased (see Figure 6.2) it has been adapted to changing circumstances, although Grist (2001) notes that the desire to reduce the number of third party appeals is rarely explicitly articulated by the Government. As noted in Figure 6.3, most of these changes have resulted in an erosion of the unlimited right of appeal and imposed additional limitations on third parties as increased checks have been introduced to avoid abuse and speed up the appeal process[157]. Galligan (1997) notes that these changes bear the "*imprint of intensive lobbying from the construction industry*" (p.237) – indeed it has been noted that the developers are irritated by third party action and were "*apoplectic*" following one

[157] Interestingly, broadly parallel reforms have been experience in some parts of Australia (e.g. Eccles, 1999; Ricketts and Rogers, 1999) and indeed even seen in UK's continual emphasis on delay and managerial efficiency in the DC system (see Chapter 3).

particularly high profile case[158] (Taylor and Murphy 2002). The amendments to the TPRA system can be conceptualised as having focussed on three main objectives; increased administrative and political independence; improved administrative efficiency and limiting the abuse of the system.

6.4.2. Increased administrative and political independence

When the current planning system was established in 1963, appeals were made directly to the Minister of the Environment. Allegations of undue political influence and public concern over the role of the Minister led to the establishment of ABP under the Local Government (Planning and Development) Act 1976 (Zimmerman 1980). Initially the Chairman was a High Court Judge appointed by the government and all Board members appointed by the Minister. In 1983 the selection procedure was changed making it more open and independent of the Government. Although the Government now makes the final decision concerning the composition of ABP, selection is via representative panels, which reflect a range of interests[159]. The Chairman is selected via open competition resulting in names being put forward by an independent panel chaired by the President of the High Court, with the Minister making the final selection[160], with all recent Chairmen being former senior civil servants.

All Board members have to declare their interests and withdraw from any political party or organisation likely to make an appeal[161]. The role of the Board as an independent tribunal has worked well and the Planning and Development Act 2000 has extended ABP's jurisdiction to cover issues of compulsory purchase and appeals over EIAs for public projects.

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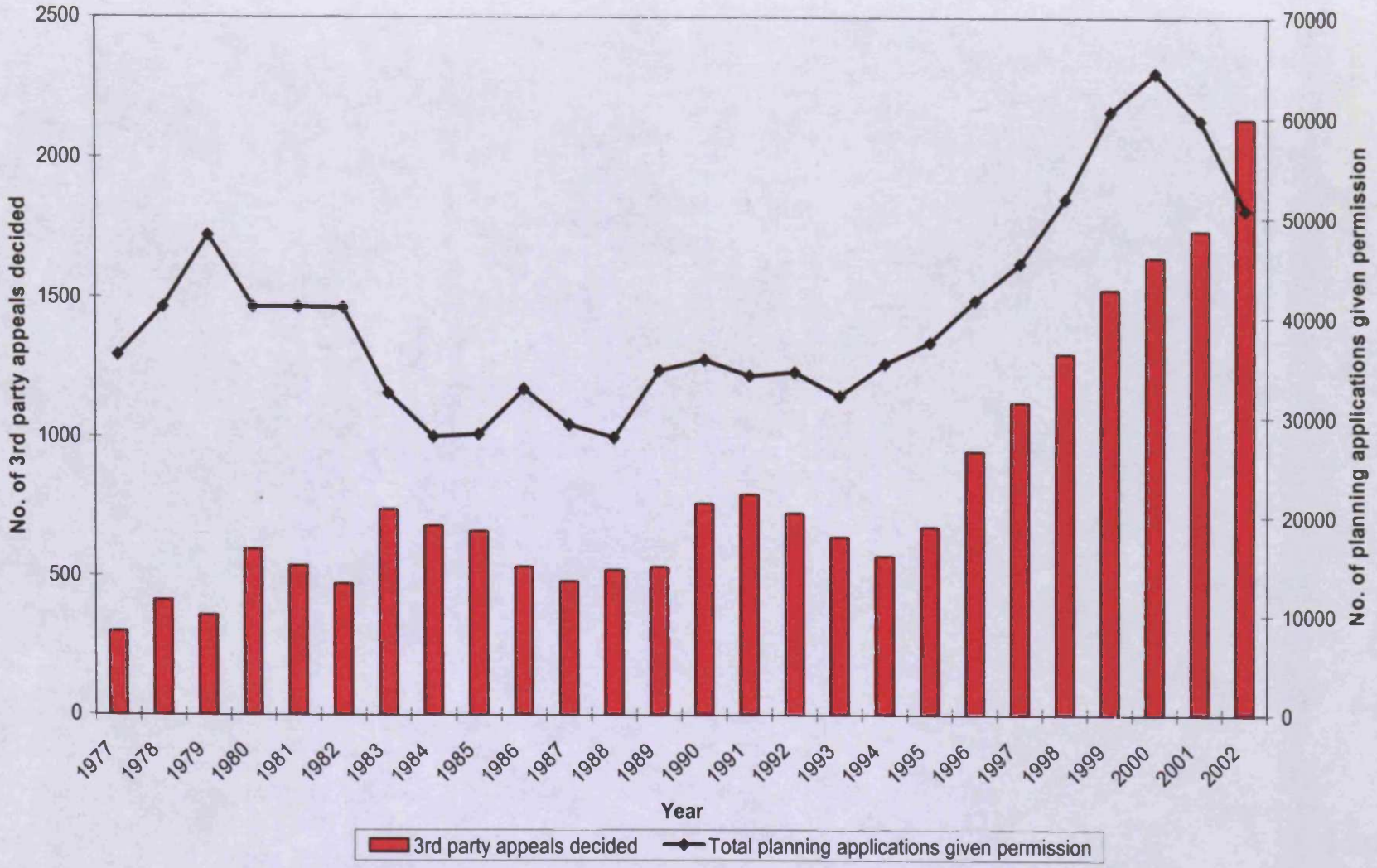
[158] *Lancefort Co Ltd. v. Treasury Holdings Ltd.* (1998) IESC 13.
[159] s.106, Planning and Development Act 2000.
[160] s.105, Planning and Development Act 2000.
[161] s. 147– 50, Planning and Development Act 2000.

Figure 6.2: Number of third party appeals and applications awarded permission 1977- 2002



(Source: TPA Database 1977- 2002, see Appendix A)

Figure 6.3: **Evolution of the provisions for TPRA in the Irish planning system**

Relevant legislation	Amendment to the system
1963 Local Government (Planning and Development) Act	• Introduction of current planning system, incorporating right of appeal for third parties. Under the Act appeals were made to the Minister of the Environment.
1976 Local Government (Planning and Development) Act	• An Bord Pleanála established and responsibilities for all planning appeals transferred from the Minister. • The Board was also given powers to dismiss "*vexatious*" appeals.
1983 Local Government (Planning and Development) Act	• Selection for An Bord Pleanála made more open and accountable. • Board's powers extended to dismiss appeals considered "frivolous" and those "*without substance or foundation*". • Fees introduced for those making appeals.
1992 Local Government (Planning and Development) Act	• Objective of 4 months for all appeals decisions introduced. • Statutory time limits placed on applicant and appellant responses.
1998 Local Government (Planning and Development) Act	• Board membership expanded to cope with increased number of appeals.
2000 Planning and Development Act	• Board membership extended again to cope with increased number of appeals. • Third party appeals restricted to those objecting to initial application, with provision for other parties to apply for leave to appeal. • Fees introduced for making observations on planning applications. • Board's powers extended to dismiss appeals that are made with the sole intention of delaying development or securing financial reward or other inducement. • Responsibilities of Board expanded to cover compulsory purchase and EIA.

6.4.3. Improved administrative efficiency

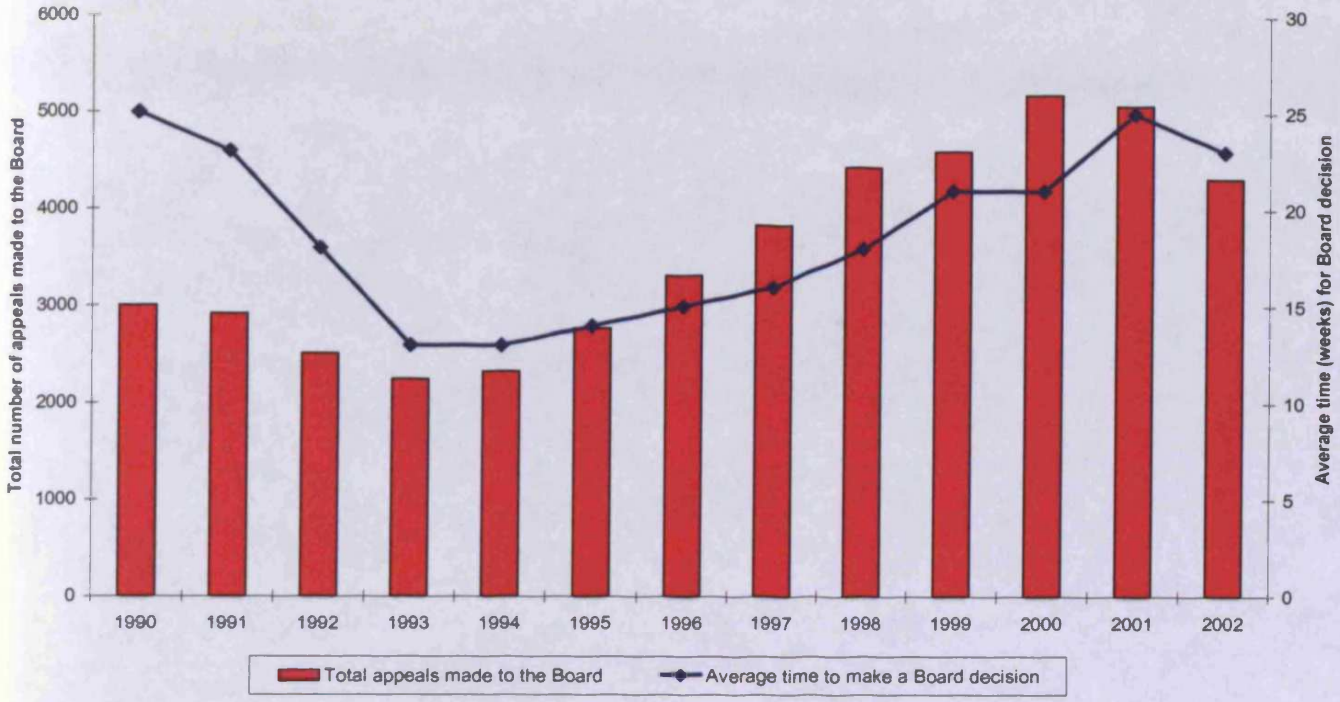
As noted in Chapter 5, a commonly articulated fear in the UK is the potential impact of TPRA on the efficiency of the planning system and the extra resources required in maintaining decision-making performance. Since the introduction of TPRA in the RoI, the number of planning applications and consequent appeals has substantially increased (see Figure 6.2). While the construction industry has attributed increased costs to the existence

of TPRA (Quinn 2000), the actual rate of appeals against planning permissions has been relatively consistent at 4% and always significantly less than appeals against refusals (Comptroller and Auditor General 2002). Successive governments have responded to the calls to ameliorate the impact of TPRA on the development industry by introducing measures that include (see Figure 6.3):

- Increasing the qualification for locus standi;
- Increased powers of the Board to dismiss unfounded, pernicious appeals;
- Introduction of fees for exercising right of appeal;
- Establishing a statutory time limit for the determination of planning applications, so that local planning authorities *must* issue a decision within 8 weeks of receiving an application;
- Imposing deadlines for submission of information from interested parties;
- Introduction of performance targets for the time taken by the Board to make decisions.

The impact these measures is unclear as the overall efficiency of the Board is heavily influenced by the overall volume of appeals and the ability of LPAs to submit necessary documentation within the statutory time limits (Comptroller and Auditor General 2002 see Figure 6.4.) Nevertheless, TPRA remains an enduring and defining feature of the Irish planning system, and characterises a very different model for accountability than the UK system, with a less emphasis on pre-decision participation and more on post-decision arbitration, based on rights-claims. As previously noted, such a model has unappreciated implications for how power is distributed in the planning system by, for example, emphasising different policy processes compared to Britain (see section 6.2) and allows different interests to exert influence on the decision-making process.

Figure 6.4: Average time taken to decide planning appeals 1990-2002



(Source: TPA database 1977-2002 and ABPAnnual Reports)

6.4.4. Limiting abuse of the planning system

As noted in Chapter 5, the discourse on TPRA in the UK tends to emphasise the potential for misuse of appeals by "NIMBYs". While there are similar allegations made by the development industry in the RoI (e.g. Planning Week 2000), there appears to be little evidence of abuse of the system (Quinn 2000). This problem was anticipated in the Irish Republic's Parliament during discussions of the 1963 Act (Crow 1995) and despite the lack of evidence of abuse over the intervening decades increasing measures have been introduced as a safeguard against "irresponsible" use of the appeal system. Many of these measures coincide with measures intended to speed up decision-making (e.g. powers to dismiss appeals and introduction of fees).

Each of these changes can be seen as a progressive erosion of the unlimited right of appeal by placing further constraints on rights-claimants to the benefit development interests. While many of these amendments were primarily aimed at speeding up the appeal process, it was the *Planning and Development Act 2000*, that introduced the first

limitation on those *who* could appeal (rather than *how* they appeal), in that there is now a general qualification of having to have objected to the initial planning application and a fee for observations introduced in order to prevent blanket objections. Despite this restriction, the procedure is still relatively "unlimited", in the sense that *anyone* may appeal as long as they follow the necessary procedures and *any* planning permission can be still appealed.

6.5. The evolution of TPRA in a rights-frame

When the comprehensive planning system was first established in the 1960s, RoI was a predominantly rural country, having experienced a long period of emigration and economic stagflation (Grist 2001), with an average income of only 90% of the EU average, with society and state closely attached to the Catholic Church. While the country experienced relative stability during the 1960s and 70s, the country underwent a dramatic transformation during the 1990s exemplified by rapid economic growth far above EU and OECD averages and by 2003, RoI had 30% above the EU average for GDP per capita. Some of these changes are summarised in Table 6.1, and while there remains high levels of poverty and increasing polarisation of incomes, this economic growth has transformed social relations, public attitudes and political culture and has had major environmental consequences (Boyle 2002). As it has been shown that rights are a reflection of their social context, it will therefore be unsurprising if there have also been detectable shifts in the way in which rights are perceived and acted upon – indeed Grist (2001) has suggested that it was not until the 1980s and 1990s that the public began to use their rights of participation in the DC process.

Table 6.1: Population and social indicators for the Republic of Ireland 1971 – 2001

Year	National population	Urban population (%)	Dublin city and county population (%)	Males in Agriculture (% of workforce)
1971	2,978,248	52.2	26.9	31.9
1981	3,443,405	55.6	29.1	21.7
1991	3,525,719	57.0	29.1	19.1
2001	3,917,203	59.6	28.7	10.5

(Source: Census of Ireland and Statistical Abstracts, various dates)

While there has not been any specific analysis of the changing attitudes to rights in Ireland, a number of factors do suggest some of the key dynamics that may have effected this over past decades. Underlying many of the changes in Irish society has been overall

socio-economic development which has seen a shift from an agrarian, protectionist economy to one of the most globalised, in little over 20 years. Major changes have been experienced in social mobility, rates of urbanisation, educational attainment, communications and secularisation of society (Coakley and Gallagher 1999). This has had a profound influence on the changing political culture of the country – traditionally Irish political culture was characterised by nationalism, anti-intellectualism and personalism (Coakley and Gallagher 1999) and while elements of these traits are still perceptible in Irish society, it does exhibit a strong commitment to democratic values, with higher rates of trust in institutions such as the police, civil servants, parliament and the press than other Europeans (Coakley and Gallagher 1999). Such a political culture is however, underlain by higher levels of authoritarianism than in other parts of Europe, which allows a considerable degree of delegation to politicians and officers (Hardiman, 1994; MacGreil, 1996). The commitment to democracy is also underlain by significant levels of political intolerance (Fanning 2002), exemplified by a high majority in the referendum of June 2004 proposing the introduction of restrictions on citizenship to immigrants.

A further influence on the changing nature of rights in Irish society is the nation's constitution, dating in its current form from 1937, with major reviews taking place in 1966-67 and 1995–96. Like many constitutions, the *Bunreacht nahÉireann* guarantees a core of liberal democratic rights such as habeas corpus, free association, free speech etc (Chubb 1991) and has incorporated the ECHR as part of the Good Friday Agreement. While the *Bunreacht nahÉireann* does not provide any specific guarantees over environmental quality as witnessed in other constitutions (see Chapter 2), it does specify rights to property and administrative justice. Indeed, the rights and principles of constitutional justice are one of the key principles upon which ABP makes its decisions. This has led Quinn (2000) to suggest that the planning system in the RoI has been able to anticipate many of the implications of article 6(1) of the ECHR[162], thus avoiding many of the questions of legality of planning powers raised in the UK following the HRA.

[162] The right to a fair trial.

Another factor in determining how Irish society has viewed and used TPRA is the evolving awareness of, and attitudes to, the environment. Grist (2001) notes that environmental awareness was extremely low during the 1960s and 70s and that the growth of ecological consciousness from the late 1980s onwards has been reflected in an increased use of TPRA. While the causal factors are likely to be more complex, the country has witnessed significant shifts in awareness, activism and discourses of the environment over the last 20 years. Motherway, Kelly et al. (2003) suggest that this is attributable to a range of factors that include public attitudes, growing parliamentary representation of the Green Party[163], an evolution in discourse from a economy/environment dichotomy to a more integrated concept of sustainable development and significantly in this context, a proliferation of local environmental activism. Thus while during the 1970s and 1980s activism focussed on the community impacts of large scale state-sponsored development (Allen and Jones 1990) and elitist, expert-orientated environmental concern (Tovey 1993), in more recent decades in a reaction to a proliferation of perceived environmental threats such as mobile phone masts and waste management facilities, activism has become more prevalent and based more on grassroots mobilisation (Motherway, Kelly et al. 2003). While environmental issues will be only one factor influencing the propensity to appeal, Motherway, Kelly et al. (2003) highlight that environmental commitment and concern are differentially held across a range of socio-demographic variables suggesting that such factors may influence the propensity to make rights-claims under TPRA (see Chapter 7). This also makes a link to the claims by Boyce (1994) of the existence of an inverted Kuznets curve in relation to environmental quality (see Chapter 1) – with the population demanding higher standards as the economy grows and attitudes shift to more post-material issues.

When viewed through a rights-frame, the evolving nature of TPRAs can be interpreted as reflecting the changing social and politico-economic context for environmental rights in Ireland. There has been a significant shift in the last 40 years in Irish society's use of these rights and in response to this, the government's attitude to such a provision. Thus, as noted in section 6.4.1., in 1963 the Minister of the Environment was at pains to

[163] The first Green party TD was elected in 1989 and now there are 5, with a further 12 councillors in local government (Motherway, B., M. Kelly, et al. 2003).

highlight the open and participative nature of the planning system, through which the rights of the small landowner could be freely expressed. However, by the turn of the millennium the number of rights-claims using TPRA had grown considerably, reflecting increased environmental concerns, growing criticisms of the planning system (Taylor and Murphy 2002), breakdown of traditional social ties and declining respect for planning professionals while clashing with the dominant Irish discourse of economic modernisation and the increased political influence of the property lobby. Thus while in the 1960s the Minister boasted about the efforts introduced to facilitate participation by 2003 the Environment Minister noted the planning system was *"over-democratised"* and did not see the need for the public's views to be expressed *"at so many levels"* (quoted in Neary 2003).

As a consequence, TPRA has come under increased pressure and while the principle of TPRA has not been breached, it is being eroded at the margin (Grist 2001), as a result of the various restrictions discussed above. The combination of these provisions suggests that the state increasingly sees TPRA as an extension of rights to property, rather than a civic right of securing administrative accountability or a procedural right related to the protection of the environment.

This has close parallels with the accusation made by Benton (1993) and others that rights are a "liberal illusion" – that rights perform a service of legitimation under liberal democracy and that when they begin to have some impact on actual outcomes, the state may revise their view of them. However, it also highlights the rhetorical value of a rights-discourse – having articulated a specific opportunity to demand a review of a planning decision *as a right*, (rather than say, a feature of policy), it becomes difficult or even impossible to retract the values protected, despite intense pressures from those exerting significant political influence (i.e. the development industry). Indeed, while this section has suggested that over time TPRA in Ireland has been eroded at the margins, it does not imply that it has lost its essential value, which will be described in the next section.

6.6. The practice of TPRA in the Republic of Ireland

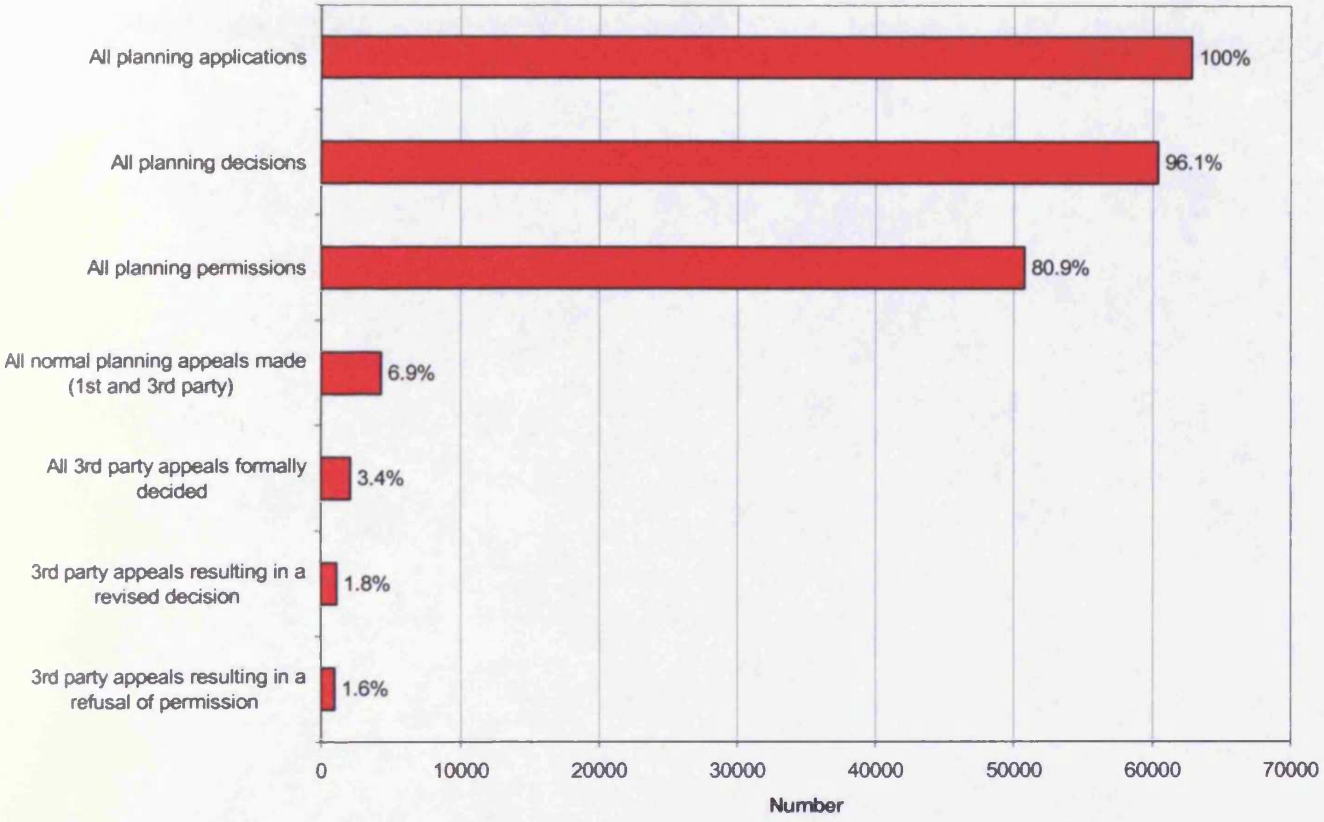
Having discussed the procedure and evolution of the TPRA, this section will examine how this has worked in practice in Ireland. It is important to note that when this research process began in 2000, the only information available on the appeal process was a narrow range of interpretative material (e.g. Crow 1995; Quinn 2000) and limited descriptive statistics found in official reports. This has meant that much effort has had to be placed in generating primary data in order that an accurate and reliable picture of TPRA in Ireland can be established. This is described in detail in Appendix A and has involved several rounds of qualitative and quantitative surveys, interviews and a painstaking retrieval of the details of every third party appeal decided in 2002 from decision letters published in the ABP website.

6.6.1. Appeal volumes and rates

The starting point for understanding the impact of TPRA is to place them in the overall context of all the planning decisions made. Figure 6.2 shows the overall number of third party planning appeals, set against the number of planning applications being awarded permission since 1977, the year in which ABP was established. This illustrates how the number of TPRA has a close correlation with permissions awarded, particularly after 1983, when the Board of ABP was revised to its current composition. The fluctuations in the number of permissions (and hence third party appeals) is a function of the number of applications made, which in turn is closely linked to the economic performance of the RoI.

A more detailed breakdown of this is shown in Figure 6.5, which shows how the quantitative impact of TPRA appears relatively muted when viewed in the context of *all* decisions made at every stage of the planning system, with only 1.6% of all planning applications being completely overturned at appeal. It is important to note however, that the volume of *decisions* appealed is not the same as the volume of *development* subject to appeal, as larger developments are more likely to be appealed (Comptroller and Auditor General 2002, p.22-23).

Figure 6.5: Third party appeals and all planning decisions, 2002



(Source: *2002 TPA Database*, see Appendix A)

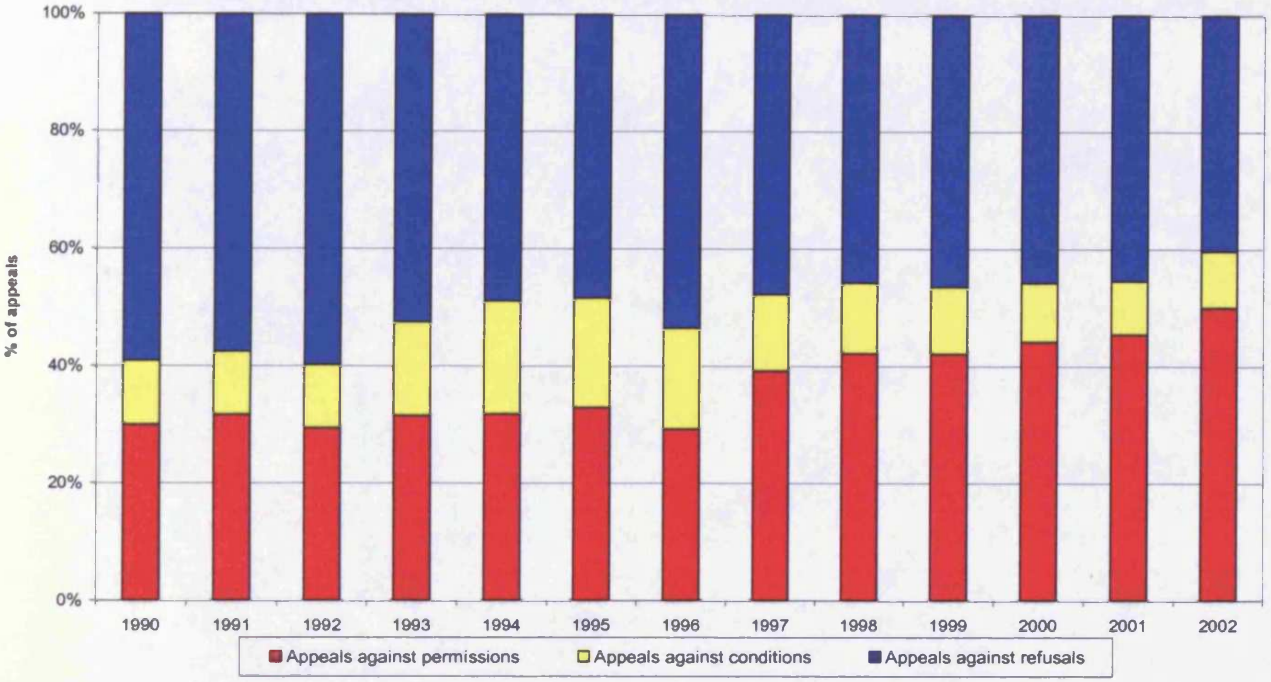
Figures 6.2 and 6.5 do not however highlight the increase in the *propensity* to use TPRA over past decades, as suggested by Grist (2001). This is best expressed as an appeal rate (i.e. number of applications/appeals x 100) which has actually remained relatively constant for the past 15 years. The *average* appeal rates for planning applications permitted and refused are shown in Table 6.2. and the impact this has on the appeals decided by the Board is shown in Figure 6.6.

Table 6.1.: Appeals against planning decisions 1995 – 1999

	Permission refused	Permission granted	Total
Planning decisions	29,000	237,200	266,200
Appeals	8,400	10,500	18,900
Rate of appeal	29%	4%	7%

(Source: Comptroller and Auditor General 2002, p.23)

Figure 6.6.: Planning appeals by type, 1990–2002



(Source: *TPA Trends Database*, see Appendix A)

The annual rates of TPRA shown in Figure 6.6. appear to be explained by variations in the number of applications gaining permission. Permissions have been awarded to an average of 87.6% of decided applications 1990–2002. There has been an overall trend to award a declining proportion of permissions during this period, for example approximately 90.3% were permitted in 1990 and 84.1% in 2002. Figure 6.7.shows the percentage of permissions being appealed by third parties against the *number* of permissions for the years 1990–2002, while Figure 6.8 shows the appeal rate by third parties against the *rate* of permissions awarded.

These suggest that there is a *positive* correlation between *volume* of permissions and the rate of third party appeal, but a *negative* correlation between the rate of third party appeal and the *rate* of permission awarded. Although it is difficult to disaggregate the dominant influence of each of these effects on the third party appeal rate, this overall pattern does conform to Brotherton's (1993) analysis of appeals in the UK (see Chapter 5), which would suggest that:

- The higher the volume of planning applications, the lower the overall initial permission rate. This may indicate either a higher proportion of weak applications, or a stronger local authority interpretation of what constitutes a material consideration as development pressure increases, or a combination of both.

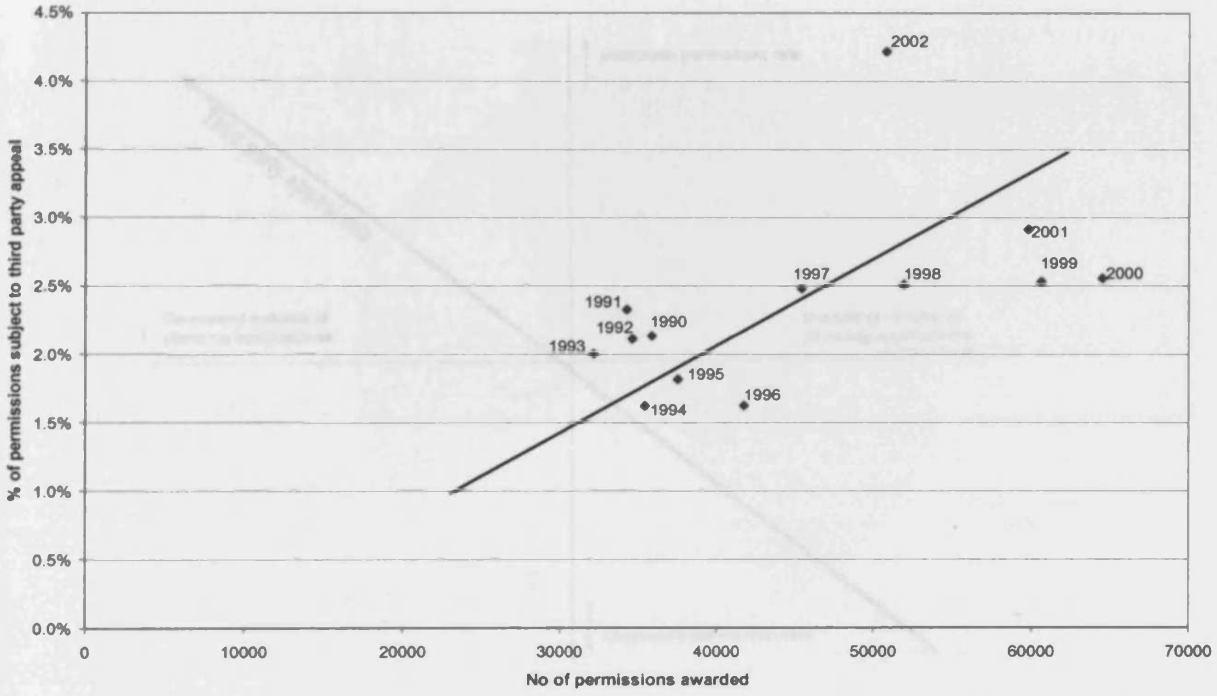
- As volumes of applications increase and initial permission rates decrease, third party appeal rates increase, perhaps also explained by either a diminishing quality of applications or more third parties being motivated to appeal by a growing perception of reduced neighbourhood quality as development pressure increase, or a combination of both.

These relationships are illustrated in Figure 6.9, which does not take into account the influence of additional factors, such as the growth in environmental attitudes, activism and in particular, increased affluence during the sampled timeframe, so that these interpretations should only be taken as indicating loose, contributing factors only.

The growth in the volume of appeals over recent years has also caused problems for ABP in terms of coping with an increased workload, as the time taken to process appeals has gradually increased over the last 5 years (see Figure 6.10), strengthening the claims of the development industry that TPRA was hampering economic performance. ABP have sought to tackle this by securing additional resources, expanding its professional staff and the employing fee-per-case inspectors, mostly sourced from British planning consultants. This has resulted in increases in overall expenditure and in the average cost of dealing with appeals, which was estimated in 2000 as being €1,600 (Comptroller and Auditor General 2002).

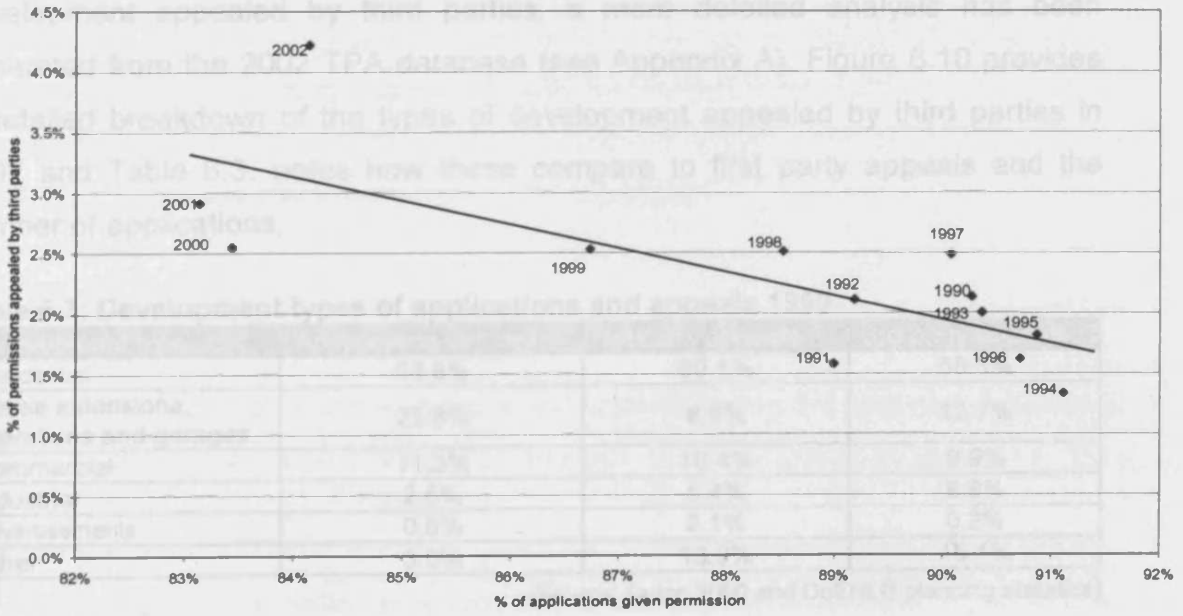
This suggests that the fears that have been expressed in the UK that TPRA would result in administrative chaos appear to be largely unfounded and that increases in rights-claims under TPRA can largely be addressed through managerial issues internal to the appeal body. Furthermore, it appears that TPRA does not result in an objection free-for-all, but appears to be linked to issues of affluence, environmental awareness and perhaps most importantly, the quality of the applications being made, and as such should be seen as a valid expression of the values shown in Chapter 5 as being protected by such a right.

Figure 6.7: Number of permissions awarded and % of appeals by third parties, 1990-2002



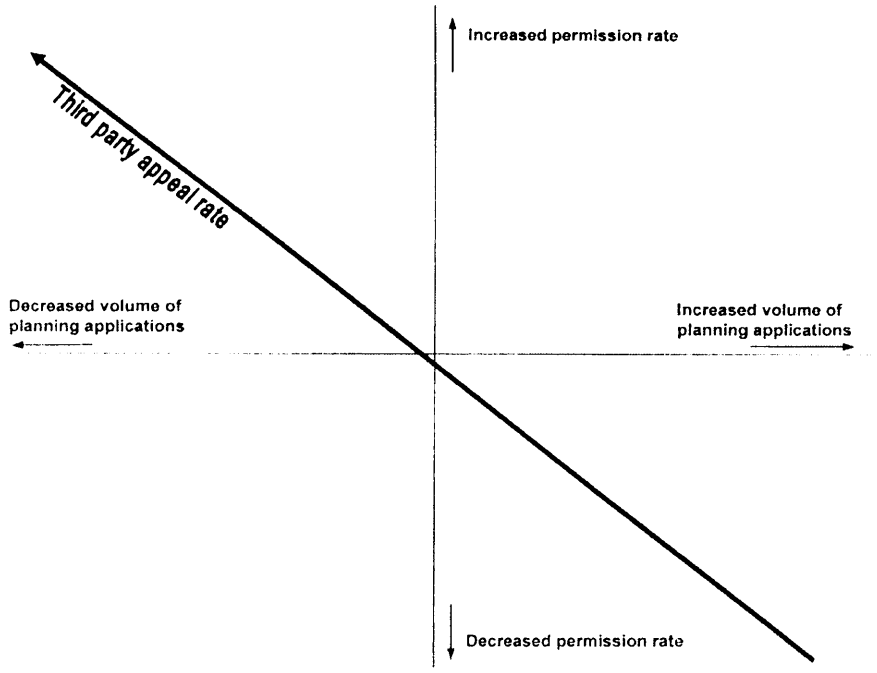
(Source: *TPA Trends 1977-2002 Database*, see Appendix A)

Figure 6.8: Appeal rate by third parties and permission rate on all decided planning applications, 1990–2002



(Source: *TPA Trends 1977-2002 Database*, see Appendix A)

Figure 6.9: Relationship between third party appeals and volume and rate of permissions awarded by local planning authority



6.5.2. Development types

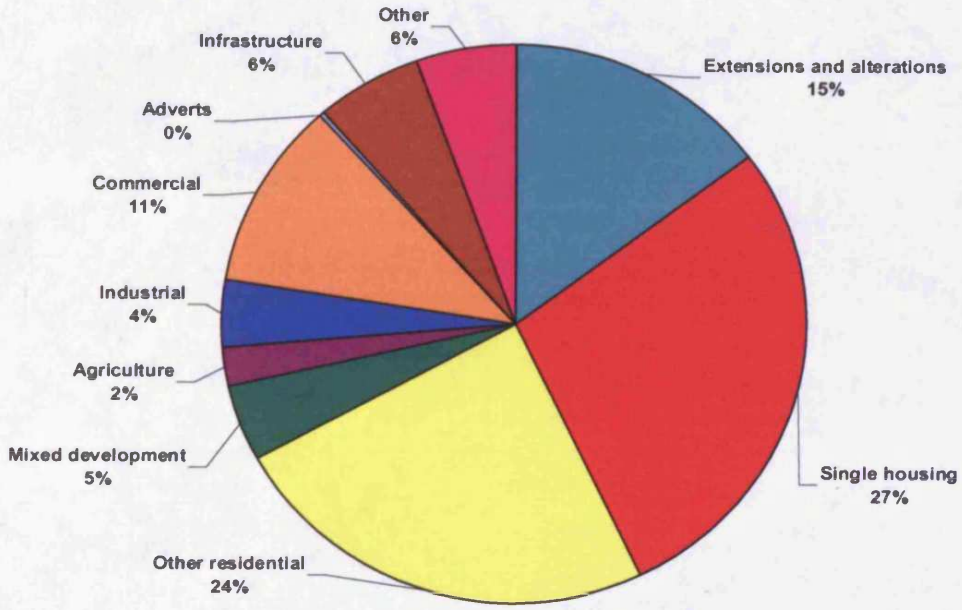
Although Quinn (2000) has provided a basic breakdown of the types of development appealed by third parties, a more detailed analysis has been generated from the 2002 TPA database (see Appendix A). Figure 6.10 provides a detailed breakdown of the types of development appealed by third parties in 2002 and Table 6.3. notes how these compare to first party appeals and the number of applications.

Table 6.3: Development types of applications and appeals 1999

Development type	Applications decided	1st party appeals	3rd party appeals
Residential	58.8%	60.1%	55.3%
House extensions, alterations and garages.	23.6%	8.9%	12.7%
Commercial	11.3%	10.4%	9.9%
Industrial	2.6%	5.4%	6.8%
Advertisements	0.6%	2.1%	0.2%
Other	3.0%	13.0%	15.1%

(Source: Quinn 2000 and DoEHLG planning statistics)

Figure 6.10: Third party appeals by development type, 2002[164]



(Source: *2002 TPA Database*, see Appendix A)

This provides a basic picture of the types of development that appear to be over represented in third party appeals, notably industrial developments and particularly those developments that fall into the "other" category". The "other" category covers utilities, transport and recreation and includes wind farm development and telecommunications, both of which tend to attract a high number of appeals, from both first and third parties.

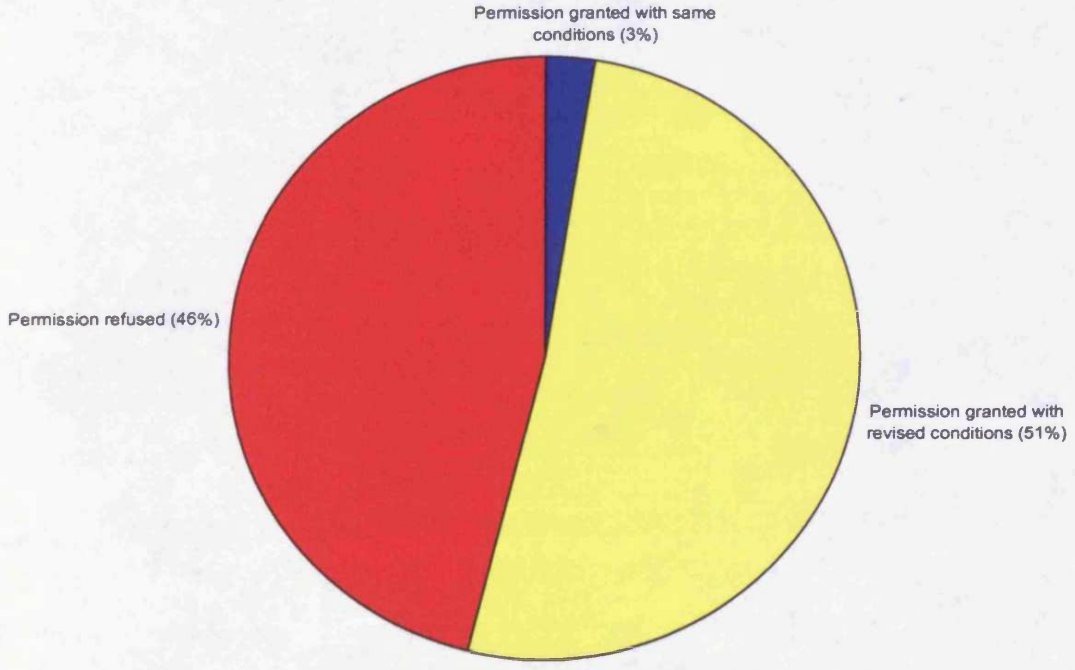
6.6.3. Appeal outcome

Another key factor to be considered when understanding the role and dynamic of TPRA is the outcome of the appeal process, summarised in Figure 6.11. This

[164] It should be noted that this represents the number of planning decisions but not the volume of development, for which no data is available, for example, the Auditor and Comptroller General (2002) notes this and estimates that perhaps 20% of all final grants of permission for housing are made by ABP.

indicates a startling picture of success in reversing and modifying LPA decisions, with only 3% of the Board's decisions being exactly the same as that of the local planning authorities. Furthermore, Figure 6.12 indicates that there has been an increasing trend of success, particularly over the last decade. This is more significant when compared to the outcome of appeals against refusal or conditions[165], which have shown contrasting trends in recent years (see Figure 6.13). Thus in the case of first party appeals, ABP confirms the view of the LPA in 60–70% of appeals, but only 2-5% in the case of third party appeals.

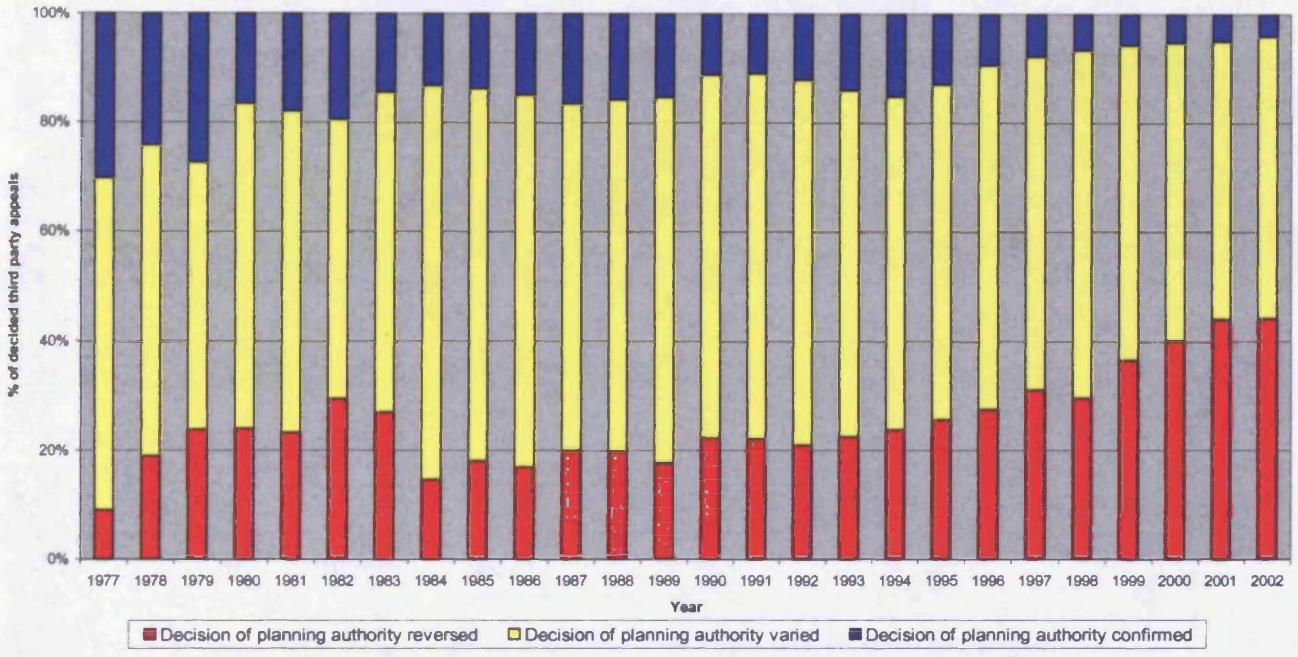
Figure 6.11: Outcome of third party planning appeals, 2002



(Source: *TPA Database 2002*, see Appendix A)

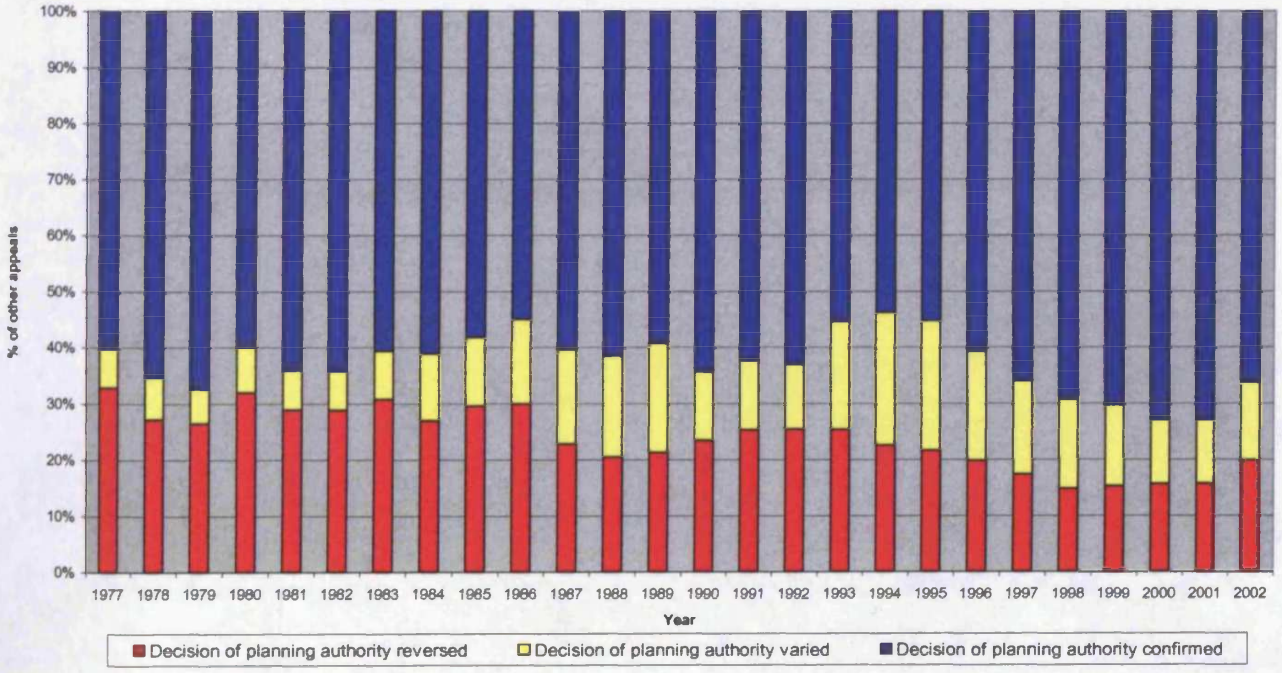
[165] While a very small number of third parties make appeals against conditions these types of appeal are generally regarded as being made by first parties.

Figure 6.12: Outcome of third party appeals 1977–2002



(Source: *TPA Trends 1977-2002 Database*, See Appendix A)

Figure 6.13: Outcome of appeals against refusals and conditions, 1977-2002



(Source: *TPA Trends 1977-2002 Database*, See Appendix A)

If we take Brotherton's (1992;1993) analysis (see Chapter 5) as a starting point for interpreting these findings, it suggests that the majority of third party appeals are successful (i.e. "strong") because they challenge "weak" permissions, whilst the opposite is true of appeals by first parties (i.e. many of them are "weak" as they seek to challenge "strong" permissions). Indeed, as noted by Comptroller and Auditor General (2002), there is a significant financial incentive for first parties to appeal *any* unfavourable local authority planning decision and are therefore more likely to challenge even "strong refusals", which are likely to be confirmed by ABP. For third parties, it would appear that they tend to challenge "weaker permissions" and thus have a much higher rate of success. This would appear to be a slightly ironic position given recent debates in the UK, where the discourse of both Government and the development industry has been focussed on the threat of third parties clogging up the appeals system by challenges that lack substance (see Chapter 5). Furthermore while ABP formally view appeals *de novo*, the high proportion of third party appeals that result in a revision of planning conditions (54% in 2002), suggests that in fact they often act in mediating role, in effect attempting to make development more acceptable to third party objectors. In contrast, appeals involving first parties appear to primarily be based on the *principle of development* itself, with the Board taking a more precautionary stance towards allowing development than local planning authorities (see section 6.6.6. below). Thus while ABP may direct ameliorating measures in the case of third party appeals, first party appellants appear to lose any opportunity at a negotiated settlement using mechanisms such as planning gain, which can only be bargained for during the LPA consideration of the application.

This observation opens up an interesting perspective as in UK debates TPRA have almost exclusively been seen as in adversarial terms. Yet the *effect* (i.e. not necessarily the process) of third party appeals in RoI appears to imply that they may offer an opportunity for more discursive outcomes of the planning process than previously considered. This in turn may have some important

implications for the wider rights perspective being considered in this thesis and will be discussed further in the concluding Chapter.

6.6.4. TPRA outcome and development type

While the last section reviewed the aggregated outcomes of third party appeals, it is also useful to consider how this may be differentiated across development types. Table 6.4. summaries the outcomes of all third party appeals by development category, while for the purposes of analysis, Figure 6.14 compares selected development types against the average outcome rates for third party appeals.

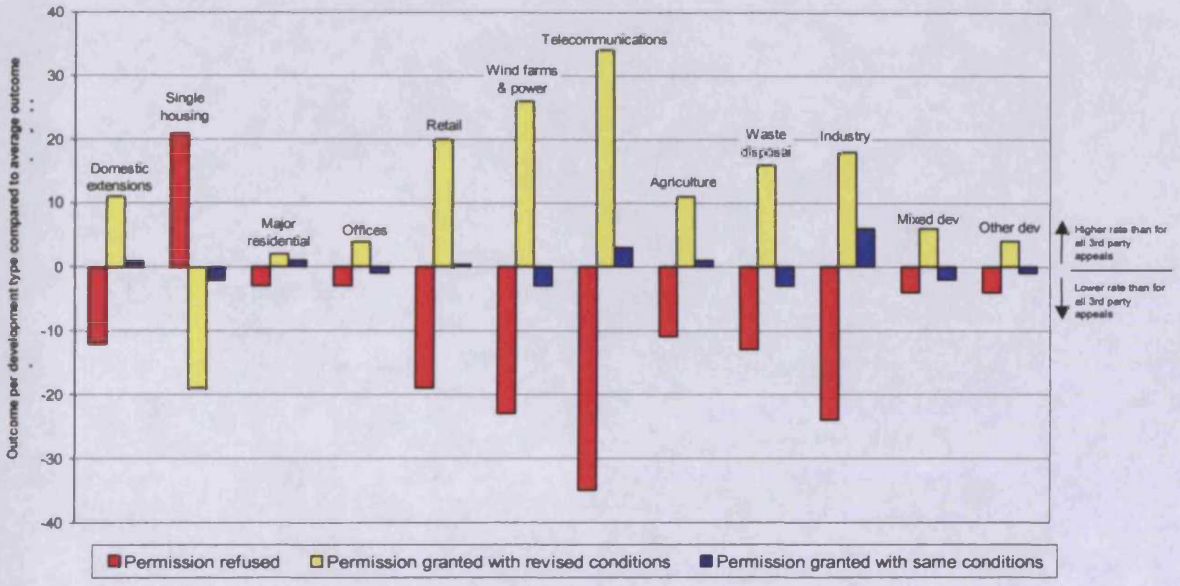
Table 6.4: Outcome of third party appeals by development category, 2002

Development category	Permission refused	Permission granted with revised conditions	Permission granted with same conditions
Domestic extensions and alterations	34%	62%	4%
Single housing	67%	32%	1%
Major residential development	43%	53%	4%
Offices	43%	55%	2%
Retail	27%	71%	3%
Wind farms/power generation	23%	77%	0%
Telecommunication masts	9%	85%	6%
Agriculture	35%	62%	4%
Waste disposal	33%	67%	0%
Industry	22%	69%	9%
Mixed development	42%	57%	1%
Other development	42%	55%	2%
ALL DEVELOPMENT	46%	51%	3%

(Source: *2002 TPA Database*, see Appendix A)

Although the patterns shown in Figure 6.14 have to be treated with some caution as the overall number of appeals in each development type will influence how close to the average rates it appears, it does confirm some of the points made elsewhere in this analysis. This suggests that in terms of the outcomes of TPRA, there are three broad categories into which each of these development types fall:

Figure 6.14: Outcomes of third party appeals by development type, compared to average, 2002



(Source: *2002 TPA Database*, see Appendix A)

- Single housing, which receive disproportionately far more refusals and less permissions with revised conditions, suggesting ABP decisions on this type of appeal are primarily based on the principle of development, particularly in consideration of broader national objectives to reduce urban sprawl and one off housing in the countryside. It also suggests that LPAs award proportionately more "weak permissions" on this type of development than others, potentially being influenced by local incremental pragmatism rather than being primarily policy driven.
- Applications disproportionately resolved through the awarding of permissions with revised conditions. While the majority of all third parties appeals are resolved through revised conditions, this group of development types represent extreme examples of this. These appear to be differentiated into four sub-categories. First are domestic extensions, where one would assume neighbours appeal because of their fears of overshadowing, loss of privacy etc. The second category includes classic

LULU proposals, which invoke widespread disquiet regarding public health, in particular industry, telecommunication masts[166] and waste disposal proposals. The third is wind farms, which have recently attracted widespread opposition in the UK and Ireland primarily because of their visual impact (Devine-Wright, 2005). Lastly, is retail development, which has attracted a disproportionate number of objections from businesses (see Chapter 7). It appears that in all these cases, the majority of applications may be "strong" in that the underlying policy priorities are immutable, but that the very nature of the proposal invokes a great deal of local opposition. It may be the case that faced with such a situation, ABP is more likely to offer a mediated resolution on the belief that third party objections tend to be based on particularly subjective, or socially constructed fears regarding the likely impact of the proposed development. While some of these fears may be relatively easily overcome, for example through screening or design amendments to domestic extensions, it does appear that the Board seeks to allay fears on a wide range of development types. It should also be noted that different appellant types tend to appeal against different development types, as explained in the next Chapter.

- Other types of development, including offices and mixed development which tend to reflect more typical outcomes of third party appeals – where the majority are awarded permission with revised conditions, a small proportion permission with the same conditions and the balance by refusals.

This breakdown begins to illustrate a more fine-grained understanding of the impact of TPRA on the overall planning system and indeed, suggests why such a right-claims are made in the first place. While the motivation for such rights – claims are assessed in more detail in the following Chapter, some additional

[166] For example, 85% of all third party appeals relating to telecommunication masts result in revised conditions.

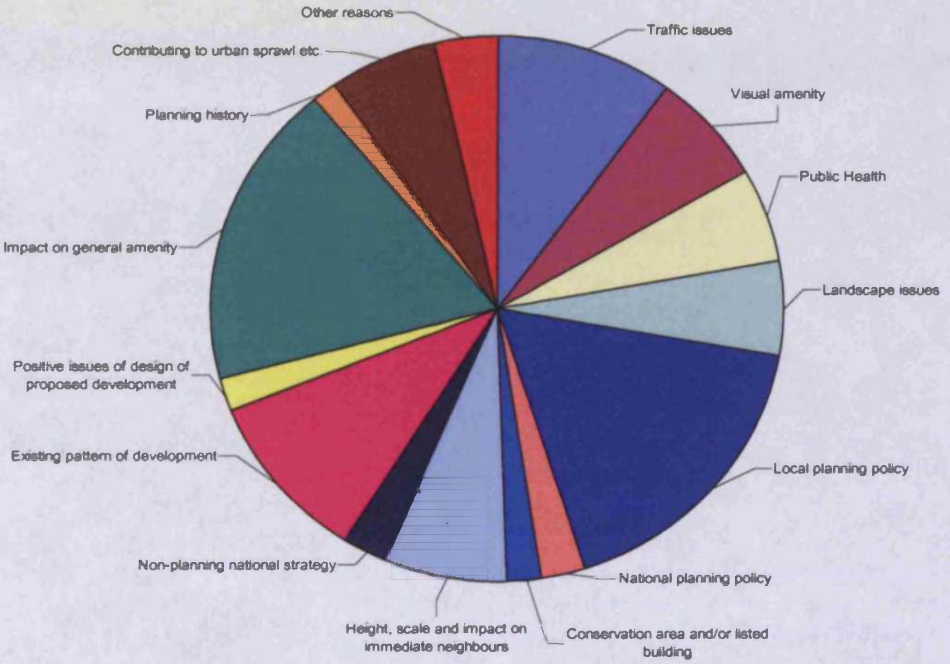
insight can be gleaned from an evaluation of the reasons provided by ABP for its decisions.

6.6.5. Reasons for decisions of third party appeals

To facilitate a better understanding of the basis of ABP's appeal decisions, a sample of 281 appeal notices from 2002 (10% of all third party appeals) was drawn from the database generated from the Board website, according to the sampling frame described in section A.A.5 in the Appendix. These were selected on the basis of both appeal outcome and the development type.

For the 327 appeals, a total of 653 reasons were given (i.e. an average of 2.0 per appeal). The full details of what each of these reasons entail is also given in Appendix A. The frequency of use of these reasons is given in Figure 6.15 and Tables 6.5 and 6.6 break this down according to land use and decision outcome. Understanding how the Board interprets planning issues is of some importance to the functioning of the Irish planning system, as short of the courts, ABP becomes a critical arbiter of what can be considered material considerations and how local and national planning policy should be interpreted. In this context, it subsumes some of the functions of the central planning authority envisaged by Brotherton (1992) in that, while it does not determine national planning policy, it does ultimately decide which development proposals are permitted and as such adjudicates between "strong" and "weak" applications.

Figure 6.15: Reasons for third party appeal decisions, 2002.



(Source: *TPA Trends Database*, Appendix A)

Table 6.5: Percentage of third party appeals based on selected decision reasons, by outcome, 2002.

Reason given in decision notice	Refuse permission (%)	Permission with revised conditions (%)	Grant permission (%)
Traffic issues	9.2	11.4	3.3
Visual amenity	11.7	2.0	0.0
Public health	8.3	3.4	0.0
Landscape issues	5.2	5.4	6.7
Local planning policy	20.9	13.1	20.0
National planning policy	1.2	3.0	10.0
Conservation area and/or listed building	2.5	1.3	0.0
Height, scale and impact on immediate neighbours	11.0	3.7	0.0
Non-planning national strategy	0.0	4.0	10.0
Existing pattern of development	5.2	15.2	13.3
Positive issues of design of proposed development	0.0	3.7	6.7
Impact on general amenity	6.4	30.3	20.0
Planning history	0.0	2.4	6.7
Contributing to urban sprawl etc.	12.3	0.0	0.0
Other reasons	6.1	1.0	3.3
Total (%)	**100**	**100**	**100**
Total (number)	**326**	**297**	**30**

(Source: *Sample of decision reasons, 2002*, see Appendix A)

Table 6.6.: Third party appeal decision reasons, by land use, 2002.

Reason given in decision notice	Domestic extension	Single House	Retail	Offices	Wind farm and power	Telecomms
Traffic issues	2.9	12.0	19.6	18.9	3.3	0.0
Visual amenity	8.0	6.3	7.8	5.7	10.0	4.2
Public Health	2.2	9.3	2.0	1.9	3.3	0.0
Landscape issues	1.5	5.1	0.0	3.8	13.3	20.8
Local planning policy	10.9	20.7	21.6	20.8	16.7	4.2
National planning policy	0.0	0.6	0.0	0.0	6.7	25.0
Conservation area and/or listed building	4.4	0.3	2.0	1.9	6.7	2.1
Height, scale and impact on immediate neighbours	14.6	4.2	5.9	9.4	13.3	2.1
Non-planning national strategy	0.0	0.0	0.0	0.0	16.7	20.8
Existing pattern of development	12.4	7.2	19.6	13.2	3.3	14.6
Positive issues of design of proposed development	7.3	0.0	0.0	0.0	0.0	6.3
Impact on general amenity	32.1	16.2	13.7	18.9	6.7	0.0
Site planning history	2.2	1.2	3.9	0.0	0.0	0.0
Contributing to urban sprawl etc.	0.0	11.4	0.0	3.8	0.0	0.0
Other reasons	1.5	5.7	3.9	1.9	0.0	0.0
Total (%)	**100**	**100**	**100**	**100**	**100**	**100**
Total (number)	**137**	**134**	**51**	**51**	**30**	**48**

(Source: *Sample of decision reasons, 2002*, see Appendix A)

As one would expect, the reasons given by the Board for its decisions are highly varied, but with the two main reasons of impacts of general amenity and local planning policy (17% and 18% of all third party appeal respectively). A better appreciation of what these reasons tell us of the role of TPRA is however is derived from understanding how the different reasons are used to justify different types of decision and development types.

In cases where the Board decides to refuse permission, by far the most common reason is of local planning policy, implying that in this plan-led system, LPAs interpret policy differently from ABP. The next three reasons given for refusals (height and scale, visual amenity and urban sprawl) are mentioned mostly in relation to housing. A number of reasons are used exclusively with certain types of decisions. Some of these are expected (e.g. contribution to urban sprawl for

justifying refusals), yet a number are less expected, such as the fact that the planning history of a site appears never to be used as a reason for refusing a development. The vague reason "impact on general amenity" is used far more commonly to support a development, particularly when conditions are revised.

Local planning policy is quoted extensively as a decision for all development types, with the exceptions being those with a very localised impact (e.g. extensions) or those where local policy is nonexistent or overruled by other considerations (e.g. wind farms and telecommunications). These two latter development types are the only ones where non-planning national strategies are evoked and always in the context of awarding permission - interpreted here as being because they are considered to be nationally important infrastructure that elicit local objections. In the case of domestic extensions, nearly a third of all decisions quoted the impact the development would have on visual amenity, irrespective of the type of decision, suggesting that many such decisions are made, not on the basis of policy but on the professional judgement of the Board (and its inspectors) on what constitutes acceptable neighbourly intrusion. Given the success of the third party appeals noted in section 6.5.1., it would seem that such judgement was something at odds with that of LPA.

Although inconclusive, the analysis of the reasons for the reasons given by ABP for its decisions suggests that it may be possible to make the following generalisations:

- The reasons given by the Board are wide and varied, suggesting a sophisticated consideration of individual cases, rather than the application of a set formula for each type of development. If Davies, Edwards et al. (1986) are right in their assumption that appeals represent the "true objectives" of the planning system (see section 5.3.2), then the reasons given here are the material considerations of most significance to the Irish planning system.

- The Board does not tend to override local policy with central guidance, but in the case of successful third party appeals, does seem to offer a significantly different interpretation of local policy than that applied by the LPA. The third party appellant's role is to ensure this difference of policy interpretation is applied.
- In the case of the development category that attracts the single most third party appeals (domestic extensions, 27% of all third party appeals in 2002), many of the decisions of the Board are not based on established policy but on "softer" issues such as impact on general amenity, which are primarily based on individual professional opinion. The third party appellant's role in such a situation is to ensure that an alternative professional judgement is exercised.
- In the case of national infrastructure (i.e. wind farms and telecommunications) ABP places a significant emphasis on non-planning strategies (e.g. that aimed at promoting renewable energy). These strategies are used exclusively in support of proposed development, indicating that the Board does not base its interpretation of the public interest solely on narrow planning matters.
- The Board is the ultimate arbiter of what applications are seen as being "strong" and those it regards as being "weak". Taking the into account the decision rates shown in Table 6.4, the "strongest" applications seem to be those relating to telecommunications and the "weakest" for single housing. Given that it is likely that the local planning authority would come under strong local pressure to *refuse* applications related to telecommunications (due to perceived health risks) and be lobbied to *allow* single housing (i.e. by local or prospective residents) - it may be possible to surmise that the local planning authority is more prepared to set aside policy and professional judgement in favour of political pragmatism. If this is so, the impact of TPRA may be to reinforce the intent of both local and national policy and in so doing, undermine the politico-rational basis of local planning authorities.

6.7. Conclusions

This Chapter has described the context, procedures, evolution and outcomes of TPRA in Ireland. It has provided a detailed picture of how the Irish TPRA is invoked in terms of the impact on different types of development, the decisions reached by ABP and the reasons the Board gives for making those decisions. This begins to provide tangible evidence of the impact of an enhanced environmental rights-regime, in particular:

- RoI has adopted what has been, until very recently, an unlimited right of TPRA, in that *anyone* could appeal *any* planning decision. It appears that this was initially established for the purposes of encouraging public involvement in the planning system, rather than legal reasons such as securing the right of a fair trial. The threshold for *locus standi* has now been slightly raised in that appellants must have made an observation to the LPA, but no other restrictions exist other than the appeal being made for credible planning reasons.
- In the context of the relatively unrestricted right of appeal, the appeal process is tightly managed to avoid excessive delay. While the decisions times of ABP increased in the 1990s, this is now being reduced and do not compare to those predicted by business interests in the UK. This offers a useful insight into the issue of delay that is constantly voiced by detractors of TPRA – in Ireland they have accepted an unlimited TPRA as an important principle and adopted a bureaucratic procedure that can best deal with it, rather than allowing the spectre of potential delay to inform the principle of TPRA.
- The procedure of Irish TPRA has been subject to legal amendment since it was established in 1963, following pressure from the development industry. Recent amendments suggest that the Government now sees TPRA as a right primarily associated with property, rather than with participation. However, despite intense political pressure, it remains today.

It is suggested here that this is because it has always been articulated in a rights discourse and as such benefited from a protective capsule, as noted in previous Chapters. Arguably, if this had been articulated as policy, it could well have been seen as being fungible and therefore removed some time ago.

- In 2002, 4.2% of all planning permissions were subject to TPRA – 46% of those were refused and 51% resulted in revised conditions. Therefore, when invoked, the TPRA appears to be very effective in influencing the ultimate outcome of the planning process, implying that almost all appeals were justified and as such could be seen as resulting in an improved planning outcome.
- As the majority of third party appeals result in revised conditions, the *outcome* of the appeals process can be seen as most effective in securing amelioration of the impact of a development and therefore, could be seen within a deliberative context.
- The influence of TPRA varies according to the type of development under consideration. For example, appeals against single houses appear to result in a disproportionate number of refusals. The nature of ABP decisions provides a useful insight into what are regarded as being "strong" and "weak" applications. In coming to its decisions, ABP relies mostly on local planning policy and professional judgement of what constitutes "amenity". In some types of development it commonly invokes non-planning national guidance.

While a quantitative assessment of the numbers and outcomes of TPRA suggests a mechanism of some importance in shaping the overall objectives of the Irish planning system, it does not reveal other potential effects of TPRA, which include:

- A TPRA has a symbolic value in that it indicates that the planning system is not entirely pro-development. In certain circumstances, therefore it may

empower interests, other than regulatory agencies and applicants, to call for a test of strength of an initial planning decision against the "true objectives" of the planning system. In the Irish case, this power results in the application of different professional reasoning to the impact of development, which in the majority of cases leads to ameliorative action in favour of third parties.

- Irrespective of whether outcomes are similar to that witnessed in the RoI, a TPRA will result in the deliberation of a planning decision through a different set of policy processes, (e.g. techno-rational and semi-judicial, rather than politico-rational) which therefore places a differing emphasis on various forms of power in the planning process. It would appear that in the Irish case, this acts in favour of third parties, although it may compound the marginalisation of certain interests (e.g. those disempowered by techno-rational and semi-judicial processes).
- The mere presence of TPRA also offers a significant *ex-ante* effect in that both the applicants and local planning authority will be aware of the implications of the nature of their application (for applicants) and their decision (in the case of LPAs). While the impact of this effect remains unevaluated[167], it will certainly exist. It is likely to have a greater impact on applicants as they would bear the greatest costs (in delay etc) should a TPRA be invoked. One would therefore expect that in a significant number of cases, this may result in developer-induced amelioration of potential impacts of the development, or pre-application negotiation with other interests.

While this provides a vital context for understanding how a TPRA may work in reality, it is recognised that the evidence presented in this Chapter has been

[167] For example, will a LPA make a decision in a more in a more considered way, in order to ensure it is upheld by ABP, or in a less considered way as it understands any controversial case would be reviewed again at the appeal stage?

largely positivist in nature, focussed on quantitative analysis of appeal decisions. However, as noted in earlier Chapters, such an approach will only go so far in understanding the nature and value of environmental rights, as it is a concept imbued with subjectivity. It is therefore proposed to now shift the analysis away from the *system* of TPRA to the *rights-claimants* themselves, thus facilitating additional insights through a social-constructivist approach and allowing further consideration of the "rights frame" discussed previously. The next Chapter will take this forward and attempt to assess this system by discussing the Irish system in the "rights-frame" discussed in Chapter 3.

CHAPTER 7: THIRD PARTY RIGHTS IN THE REPUBLIC OF IRELAND THROUGH A "RIGHTS-FRAME"

7.1. Introduction

In an attempt to build up a greater understanding of how an enhanced environmental rights-regime may impact on land use regulation, the previous Chapter began to develop a picture of TPRA in the Irish Republic by focussing on their impact on planning decisions. Critical as this is to understanding the worth of TPRA, on its own it neglects how they are deployed and perceived by rights-holders, noted throughout the thesis as an important dimension of understanding the role of rights. This Chapter therefore shifts attention towards those who actually make rights-claims by developing a profile of those using the TPRA mechanism and to examining why they are motivated to do so. It is argued that this important because it reflects the importance of social-definition to understand the role of rights. This Chapter also revisits the concept of a *rights-frame* of planning as a heuristic tool for understanding of how various values are expressed and prioritised within the planning process.

This Chapter will therefore develop a picture of those invoking TPRA and following the empirical strategy described in Chapter 4, will do so in a series of nested methodologies. It first breaks down appellants into various institutional types, using the *2002 TPA database* (as described in Appendix A). This allows different types of appellant to be cross-tabulated with appeal outcome, development types and other features of the TPA system. This provides a useful, but still rather limited portrait of appellants, which is further refined by two additional approaches; first a more detailed socio-economic profile of appellants in Dublin, developed using an spatial analysis of appeal locations; and second, a discourse analysis of appellants using Q-methodology (see section 4.5.2), which provides insights into the attitudes and motivations of appellants. A final section draws together the implications of the evidence generated in the Chapter and highlights a number of issues to be further considered in the concluding Chapter.

7.2. Who appeals? A categorisation of third party right-claimants

A first step in understanding the types of interest served by TPRA is to identify those who make such rights-claims in RoI. The Irish case is important for clarifying the UK debate on TPRA, as it was noted in Chapter 5 that a critical difference between supporters and opponents of this right was the perception of who would most gain from its introduction. Supporters project this as a right that is deployed predominantly for the benefit of the public good while those opposed to them suggest that they would be predominantly used by self-interested individualists, characterised by the "NIMBY" label. Needless to say, while TPRA in RoI is open to everyone[168] on closer inspection the situation in Ireland does not conform neatly to either of these discourses.

To begin this analysis, Figure 7.1. summarises the proportion of appeals made by the main types of rights claimants.The typology of appellants shown below is based on an initial categorisation made by Quinn (2000), further developed following the analysis of primary data generated for this research and is broken down into:

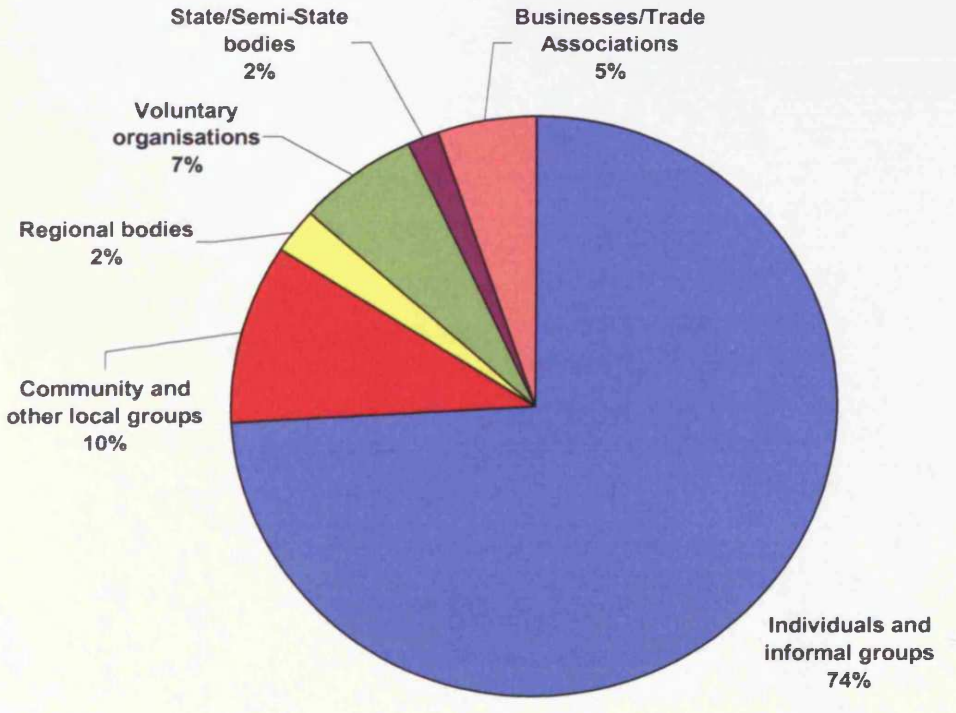
- *Individuals and families* - appellants lodging appeals on their own behalf or together with members of their family resident at the same address.
- *Informal groups* - groups of individuals had come together to lodge a single appeal (but not as a formally constituted residents group).
- *Community organisations* - including formal residents' associations, parish and community councils and schools, aiming to make a collective response on behalf of local people.
- *Other local groups* - including formally-constituted groups formed specifically to counter a proposed development or other groups whose main purpose is the protection of local amenity, such as local environment groups and civic societies.
- *State bodies* - including government departments, particularly the Department of Heritage, Arts, Gaeltacht and the Islands that make appeals against developments it believes would be damaging to the objectives of

[168] Provided they have made an observation on the initial application, see Chapter 6.

the department. Quinn (2000) notes that these do not often appeal against the principle of development, but seek to impose new conditions and often have a high withdrawal rate.

- *Semi-state bodies* - including semi-independent government funded organisations such as the Heritage Council.
- *Regional bodies* - including Fisheries Boards and Health Boards.
- *Voluntary bodies,* including nationally organised groups such as An Taisce ("the Irish National Trust") and the Irish Georgian Society.
- *Businesses* - including individual enterprises of a variety of scales and sectors, from small independent traders that may be seeking to protect their interest from proposed development to property and development companies that may have differing motives. This also includes Aer Rianta, the Irish Airports Authority which manages the country's main airports and which occasionally makes appeals on the grounds of interference with flight operations.
- *Trade associations* - including local chambers of commerce and nationally organised organisations, such as RTDATA, which represents the independent retailing sector

Figure 7.1: Appeals made by different types of right-claimants, 2002



(Source: *2002 TPA database*)

The fact that a high proportion of appeals are made by individuals and local groups is not entirely surprising and is closely linked to the types of developments appealed against (see section 6.6.2 and 7.3 below). This breakdown of appellants does however highlight two points that are not commonly represented in the wider discourse on environmental rights. First is that businesses and trade organisations are not an entirely insignificant group of appellants, a fact completed neglected in political debate and conceptualisation of TPRA in the UK[169]. Second is that while the majority of objectors appear to represent local interests, there is a significant representation of regional and national bodies. This suggests that a proportion of appeals are being made on more strategic matters and depending on the interpretation, represent either an example of special interest capture[170] (Pennington 2000) or that they exert a powerful influence in ensuring sustainability policies actually have some 'bite' in the planning system (Owens and Cowell 2002). In either case, this opens up the prospect that at least a proportion of cases will not be focussing on issues of local amenity but matters with potentially wider, economic, social and environmental significance. Indeed, some of the most important cases decided in recent years have been instigated by national environment groups, such as An Taisce, on the basis of percieived compromises to sustainable development, particularly in relation to development on floodplains, those that encourage car dependency and the protection of valued landscapes. It is important to recognise that the precedence issues established by such cases can have a wide-ranging and enduring impact on the whole of the planning system.

Not withstanding these issues, it is clear that individuals and informal aggregations of individuals are by far the most important groups in numerical terms. This links well with the perspective of a rights-frame, as although corporations are regarded as having rights entitlements as if they were individuals, rights debates are also almost entirely predicated with the individual citizens as the central unit of

[169] However, businesses have also brought some of the most significant planning related cases under human rights legislation in the UK, such as *County Properties v The Scottish Ministers (2000)* SLT 965 and *R. vs, Secretary of State for the Environment, Transport and the Regions ex parte Alconbury Developments Ltd and others* (2001) JPEL 291.

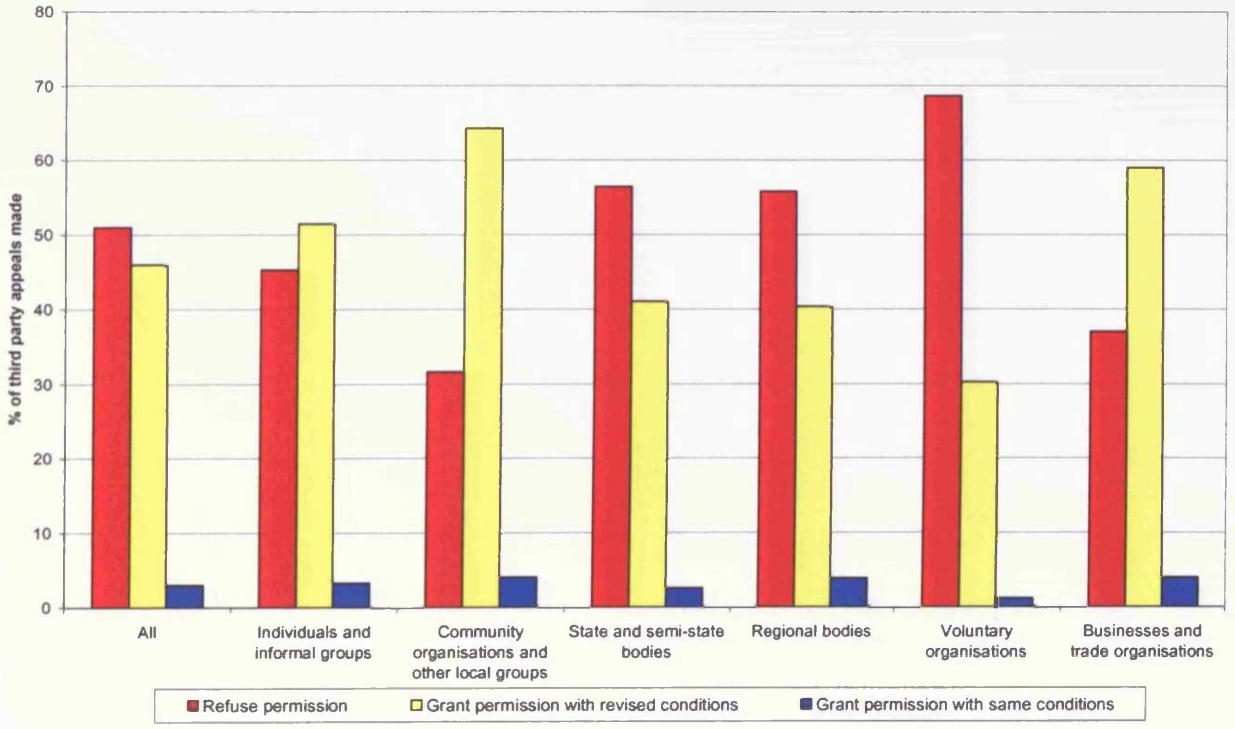
[170] Indeed, in November 2001, during the Irish general election campaign, the Minister of Rural Development attacked conservation interests for "*meddling with the housing rights of rural dwellers*", after An Taisce had decided to object to all one off houses in the countryside as a matter of policy.

analysis. Furthermore, many of the key questions raised in Chapter 3, such as that related to "NIMBYism", are primarily aimed at rights-claims made by individuals, rather than the broader range of groups noted above. For this reason, following a brief consideration of the how these broader appellant groups relate to overall appeal outcomes, the analysis will focus attention on individual appellants.

7.3. Rights-claimants, development types and appeal outcomes

The appeals made by the different groups of appellant, result in very different outcomes, as shown in Figure 7.2. This does not necessarily indicate the relative success of each group, as there may be differences in the objective of each type of appellant - for example businesses and trade organisations may primarily lodge appeals seeking to ameliorate impacts of the development, while voluntary organisations such as An Taisce may focus on the appropriateness of the principle of development at a particular location. This may also be influenced by the development types each appellant type tends to appeals against, as different development types tend to have very different appeal outcomes, as shown in Figure 6.14.

Figure 7.2. Types of right-claimant and outcome of third party appeal, 2002



(Source: *2002 TPA database*)

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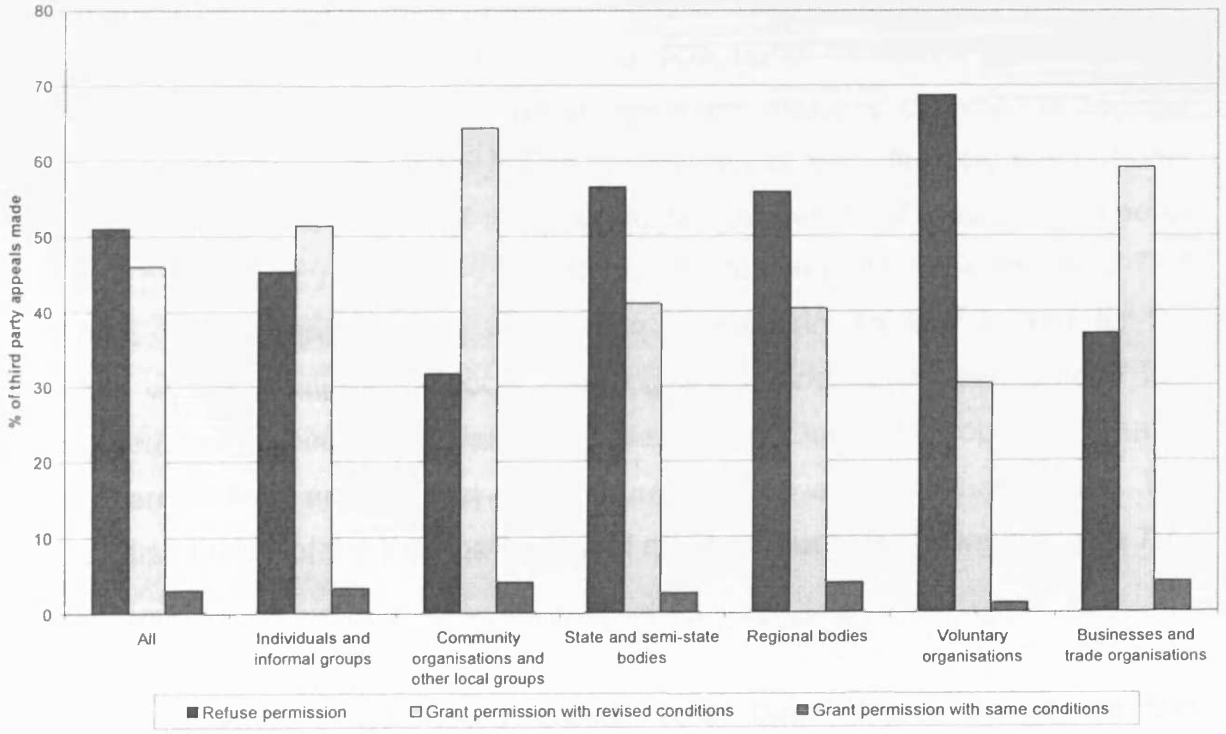
The appeals made by the different groups of appellant, result in very different outcomes, as shown in Figure 7.2. This does not necessarily indicate the relative success of each group, as there may be differences in the objective of each type of appellant - for example businesses and trade organisations may primarily lodge appeals seeking to ameliorate impacts of the development, while voluntary organisations such as An Taisce may focus on the appropriateness of the principle of development at a particular location. This may also be influenced by the development types each appellant type tends to appeals against, as different development types tend to have very different appeal outcomes, as shown in Figure 6.14.

Figure 7.2. Types of right-claimant and outcome of third party appeal, 2002



(Source: *2002 TPA database*)

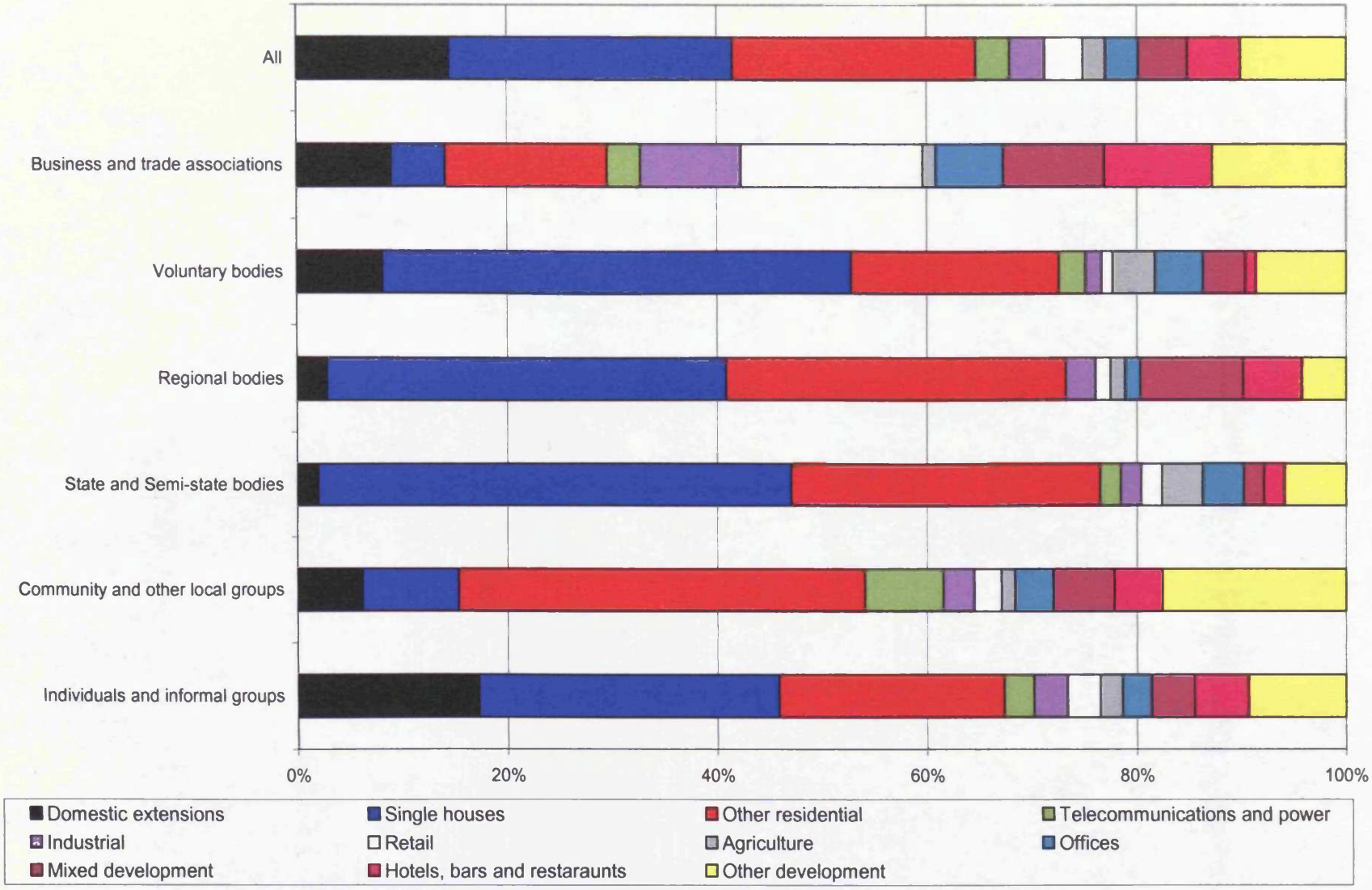
The different development types appealed by each appellant group is shown in Figure 7.3. It is interesting to note that residential developments comprise the majority of appeals by all types of appellant except businesses and trade organisations, who tend to make a higher proportion of appeals against commercial developments, such as industry and retail. As one would expect individuals make more appeals against domestic extensions and community organisations make more appeals against those developments seen as threats to health or social stability, such as larger scale residential development or telecommunication masts. Voluntary organisations, regional bodies and state and semi-state organisations all make a high proportion of appeals against single houses, reflecting the sensitivity and controversy of this as a key environmental issue in the RoI in recent years. Although all appellant types make appeals on a wide variety of development types (see for example the number of businesses appealing against domestic extensions), this does indicate a relatively unsurprising distribution and contributes the finding that all appellants make a varied use of TPRA when they perceive their most valued interests to be compromised by proposed development.

7.4. Geographic patterns of third party appeals

The review of the literature on planning and rights reviewed in Chapter 3 suggested that local context will have a significant influence on whether appeals are made or not. As a way of beginning to understand this influence, it is possible to gain an aggregated picture of the geographic distribution of third party appeals from data published by the DoEHLG and the information gathered in the *2002 TPA database*. A summary of this information is given in Table 7.1. and for the purposes of this analysis the local planning authorities have been divided into three categories, those authorities that make up the Dublin Metropolitan area[171], other urban areas[172] and the rest of the country, which is predominantly rural. The national distribution of the third party appeal rate by County is shown in Figure 7.4.

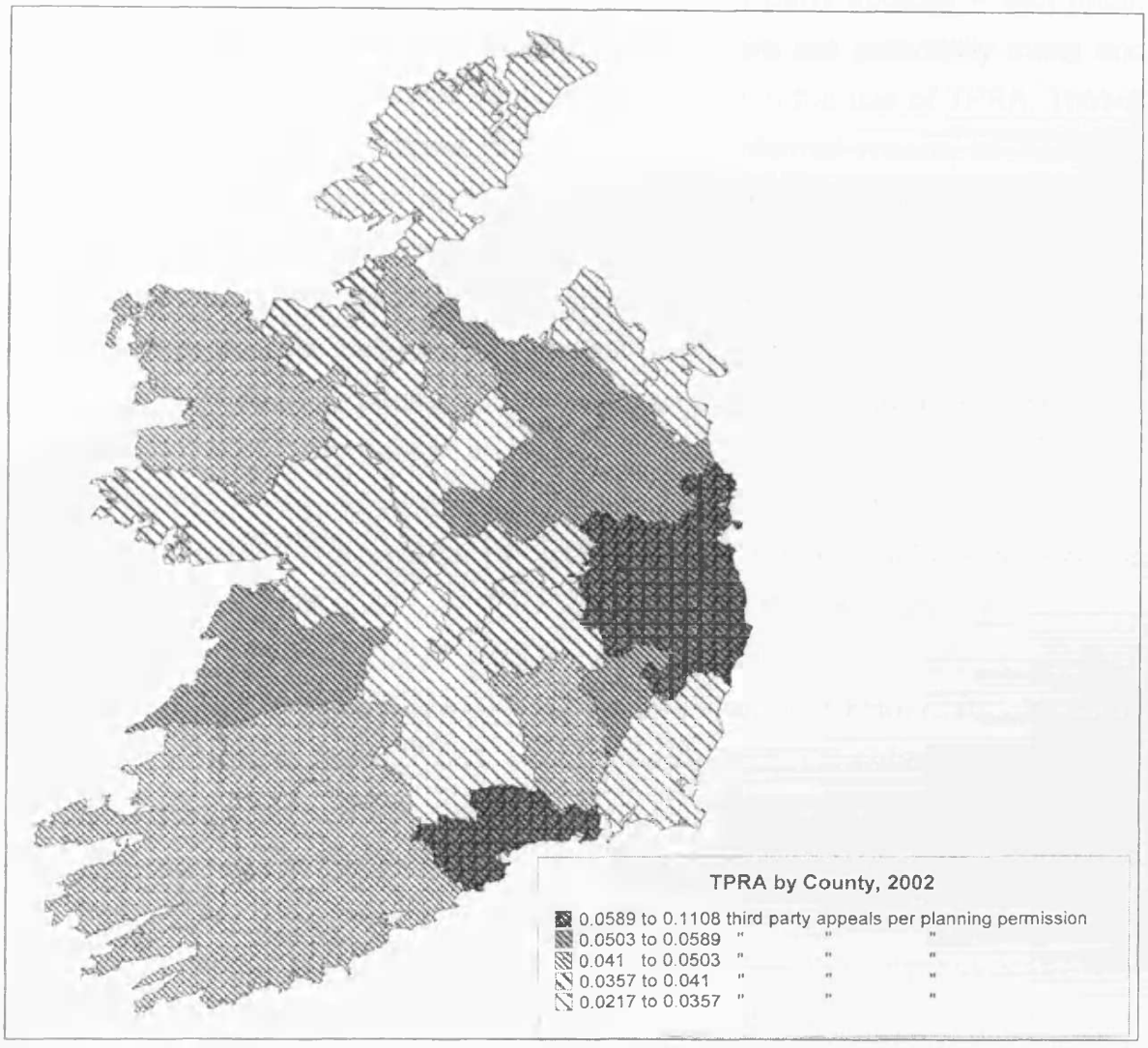
[171] Dublin Corporation, Fingal County Council, South Dublin County Council and Dun Laoghaire/Rathdown, Bray Urban District Councils.
[172] Cork, Galway, Limerick and Waterford Corporations.

Figure 7.3. Appeals made by development type for each types of right-claimant.



(Source: *2002 TPA Database*)

Figure 7.4: Third party appeal rate by County in the Republic of Ireland, 2002



(Source: *2002 TPA Database*)

Table 7.1: Geographic distribution of third party appeals and initial planning decisions, 2002

Area	Population	Initial Planning decisions	All appeals made	Third party appeals	third party appeal rate[173]
Greater Dublin Area	28.7%	12.3%	28.9%	26.1%	11.7%
Other urban areas	7.3%	3.5%	8.6%	6.8%	9.3%
Rest of the Country	64.0%	84.2%	62.5%	67.6%	4.4%

(Source: DoEHLG, Census 2002 and *2002 TPA database*)

[173] i.e. percentage of planning permissions subject to third party planning appeal.

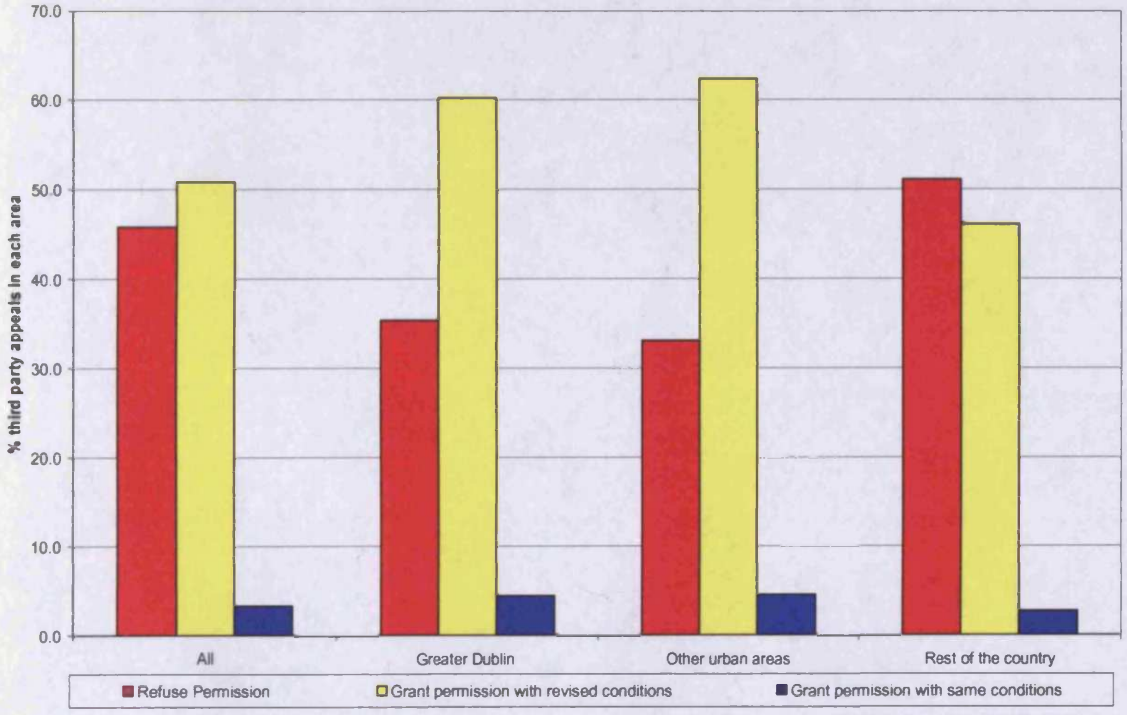
This suggests that in more urbanised areas, particularly in Dublin, planning permissions tend to attract a higher proportion of third party appeals – with urban areas having over double the rate of rural areas. There are potentially many and varied factors that may explain the geographic variation in the use of TPRA. Theses variations may reflect the greater opportunities for informal means of mediating development disputes in rural areas, while urban dwellers may be more likely to resort to the more legalistic, anonymous approach represented by formal rights-claims. It may also reflect other factors, including greater population density in urban areas providing a larger reservoir of potential appellants (Comptroller and Auditor General 2002); or cultural differences that impinge on attitudes to development and the environment (Kelly, Kennedy et al. 2003).

One consequence of these variations in appeal activity are geographic differences in appeal outcome, shown in Figure 7.4. This suggests that appeals made against development in rural areas ("rest of the country") are far more likely to result in an outright refusal than in other areas, with urban areas having a higher rate of revising conditions. These patterns may partly reflect the activity of different appellant types in each of the geographic areas and their objectives in appealing, with community groups and businesses being more highly represented in urban areas, particularly Dublin and regional bodies and voluntary organisations being relatively more active in rural areas. This may also reflect appellants' reaction to different policy stances or decision outcomes in different geographic locations (see Figure 7.6 from the Report of Comptroller and Auditor General, 2002). One factor that may contribute to this pattern is the potential for a higher degree of clientism in rural communities, particularly in relation to single houses, where "weaker" permissions may be awarded and where heightened perceptions of local clientism may further compel any neighbours disgruntled by any decision to make an appeal. The mix of development types in each area will also influence the activity of appellants, with Table 7.2. providing an indication of this.

As one would perhaps expect, in rural areas ("rest of the country") development proposals are dominated by one-off houses in the country, for which there may be

stronger policy grounds for their outright refusal, while the development mix of urban areas may lend itself to amelioration of some objections through conditions, such as controls over traffic impacts or design alternations. This in turn will attract differing number of appeals from each appellant group.

Figure 7.5.: Third party appeal decision by geographic area, 2002



(Source: *2002 TPA Database*)

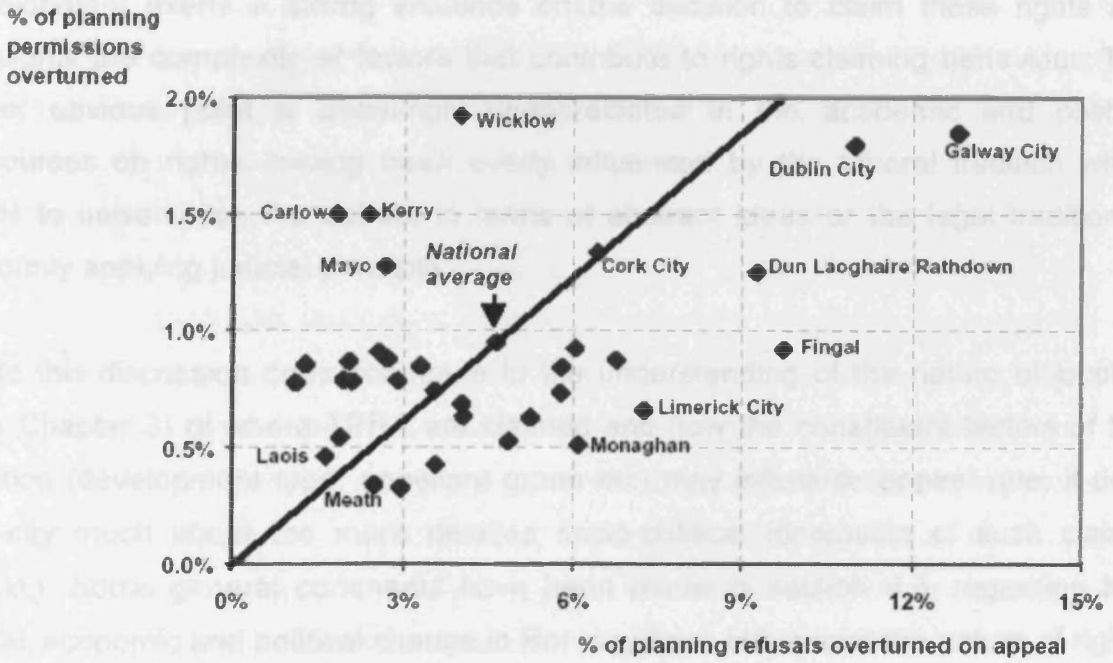
Table 7.2: Geographic variation in third party appeals by development type by, 2002

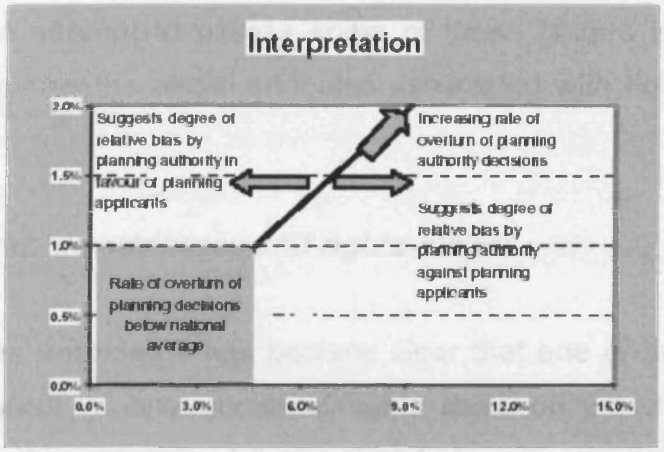
Area	Examples of development type as % of all third party appeal in different geographic regions		
	Single housing	Other residential[174]	Offices and other commercial[175]
Greater Dublin County Area	14.3	19.9	16.6
Other urban areas	9.9	26.9	19.8
Rest of the Country	35.4	22.9	9.1

(Source: *2002 TPA Database*)

[174] This includes all residential schemes involving more than one dwelling but not domestic extensions etc.
[175] This includes retail, hotels, etc

Figure 7.6. Relative impact of appeals system on planning decisions, by local authority 1995–1999 (taken from Comptroller and Auditor General, 2002, p.37)[176]





Source: Analysis by Office of the Comptroller and Auditor General

Note: '% of all planning permissions overturned on appeal' is defined as 'the number of planning permissions granted by planning authorities that were subsequently appealed to and overturned by An Bord Pleanála, expressed as a percentage of all planning permissions granted by planning authorities in the period 1995-1999'.

'% of all planning refusals overturned on appeal' is defined as the number of planning permissions refused by planning authorities that were subsequently appealed to An Bord Pleanála and where planning permission was granted by the Board, expressed as a percentage of all planning applications refused by planning authorities in the period 1995-1999.

[176] Please note that this illustration refers to ALL planning appeals and not just third party appeals.

The reasons for different rates of appeal therefore appear to be determined by a complicated mix of inter-related factors, it is clear that the context of proposed development exerts a strong influence on the decision to claim these rights and highlights the complexity of factors that contribute to rights-claiming behaviour. This rather obvious point is seemingly unappreciated in the academic and political discourses on rights, having been overly influenced by the Liberal tradition which tends to universalise the debate in terms of abstract ideas or the legal tradition of uniformly applying judicial principle.

While this discussion does contribute to the understanding of the nature of *location* (see Chapter 3) of where TPRA are claimed and how the constituent factors of that location (development type, appellant group etc) may influence appeal rate, it does not say much about the more detailed socio-political dimension of such claims-making. Some general comments have been made in section 6.5. regarding how social, economic and political change in RoI may have influenced the nature of rights-claims, while Chapter 3 highlighted how the micro-politics of place may also influence such behaviour. An attempt to assess some of these factors is made in the next section, which examines the social attributes associated with rights-claims in Dublin during 2002.

7.5. Socio-demographic attributes and rights-claims

As this research has unfolded it has become clear that one of the key issues in the debate over the worth of environmental rights rests on whether such rights are invoked primarily in the interests of those already having significant social power, or whether they act to empower more marginalised groups in society. Chapter 1 introduced the work of Torras and Boyce (1998) and Boyce, Klemer et al. (1999) which examines the influence of power distribution on environmental quality. As part of their analysis, Boyce, Klemer et al. (1999) take a number of indicators of power and attempt to correlate them against environmental quality to provide evidence that states with more equal distribution of power tend to show improved environmental quality. This is an important area of work for this thesis, not only because it provides

empirical evidence relevant to the main research question (i.e. that mechanisms for distributing power result in improved environmental quality), but also because their methodology may also have relevance to the research questions being addressed here. In particular, their use of various social attributes as proxies for power can be employed in the case of the RoI, using data generated from the 2002 census. Thus Boyce, Klemer et al. (1999) suggest that variables such as voter participation, dependence on benefits, educational attainment and *rights* can provide insights into the distribution of power within various political units. This is based on the assumption, considered valid here, that while power is difficult to measure and can take a wide variety of forms (e.g. Lukes 1974; Flyvbjerg 1998; Hillier 2003c), it will be perceptible in social attributes, such as income, educational attainment and engagement in the political process. It is therefore proposed that an examination of the relationship between the propensity to make third party appeals and such power-related variables has the potential to illuminate the link between environmental rights-claims and the distribution of power. This analysis has been undertaken in two stages.

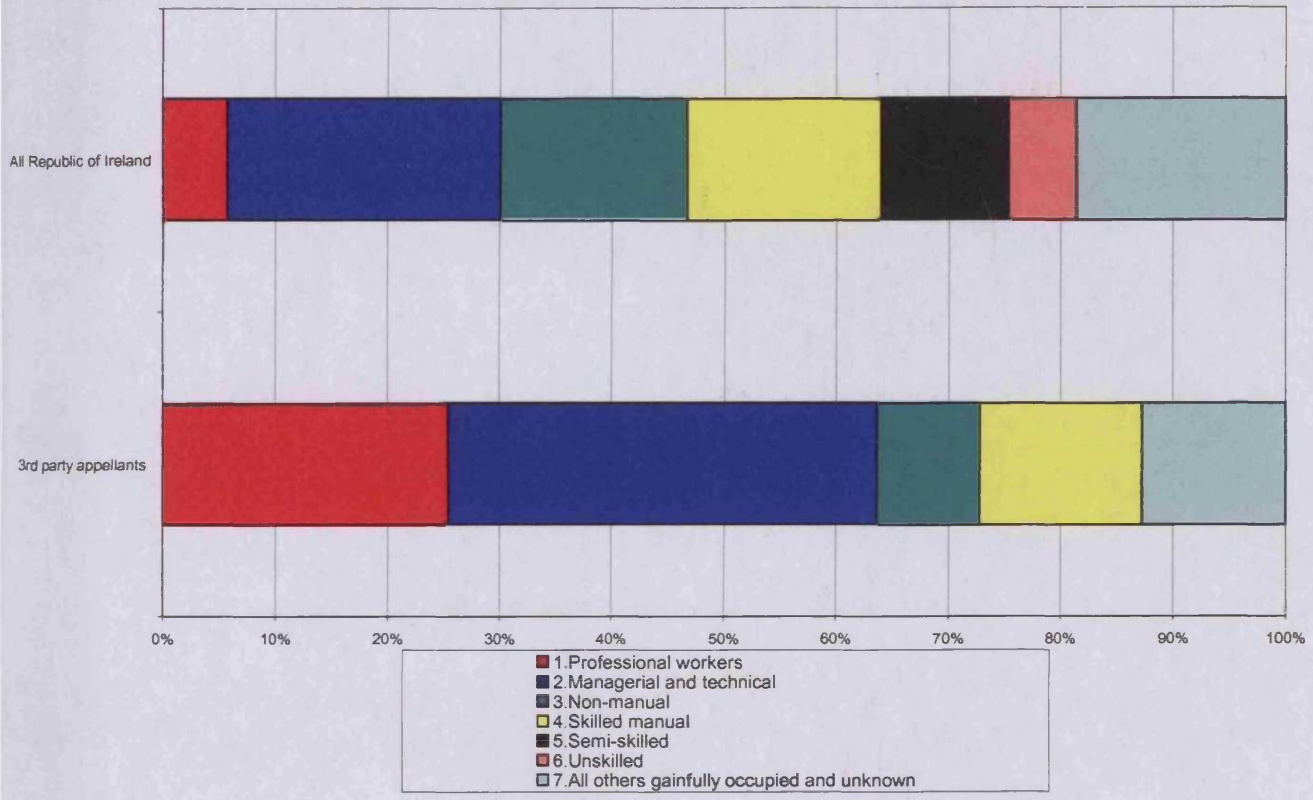
The first stage of this analysis is based on the profile of appellants developed from a postal survey undertaken as part of the *Survey of users of the Republic of Ireland appeal system, 1999* as described in Appendix A[177]. The main dimensions of the appellant profile are shown in Figures 7.7 – 7.9 below, with national averages given for comparative purposes.

This evidence suggests that third party appellants do not represent a cross section of Irish society with, for example, a majority of third party appellants having higher than average household income and this group being far more likely to be in full employment or retired than the population as a whole. Indeed, this sample did not pick up a single appellant who stated that they were unemployed. Similarly it appears that third party appellants are disproportionately drawn from the "higher skilled" social

[177] Although this survey generated a total of response from 67 appellants, not all provided all the requested socio-economic data, so the sample varies per attribute studied. While this represents a relatively small sample, key features of the responses have been validated from other sources (see Appendix A), providing confidence that the sample is generally representative of all appellants.

classes - with professionals and managers being over represented, while all other classes (e.g. manual workers and the unskilled) being under-represented.

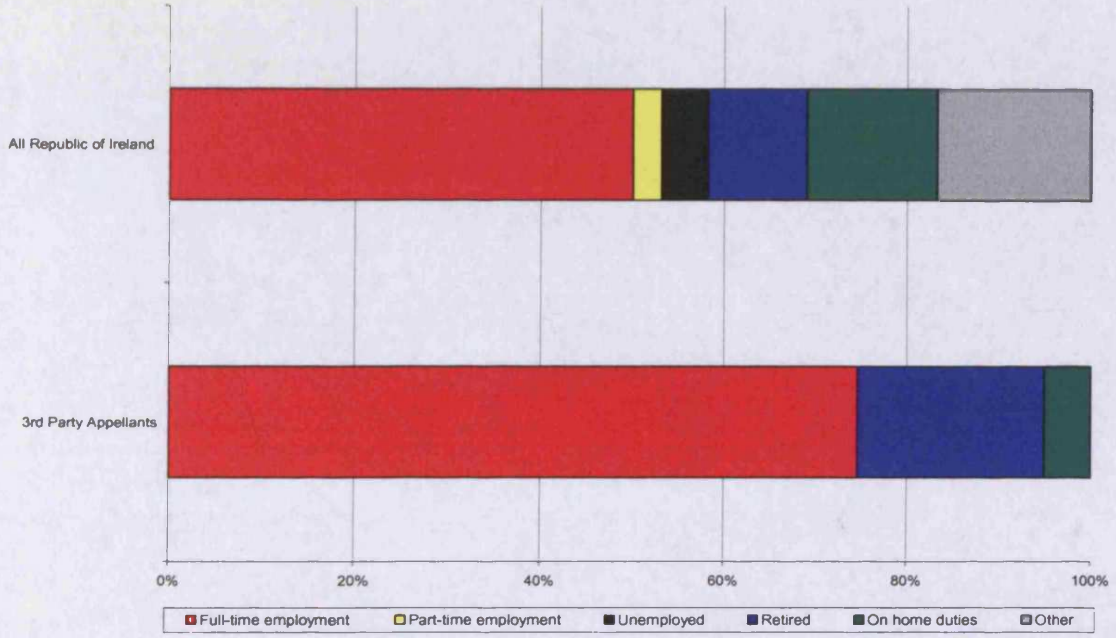
Figure 7.7: Social class of third party appellants, based on main household earner[178].



Based on survey sample respondents (59). Source of national statistics: Census 2002)

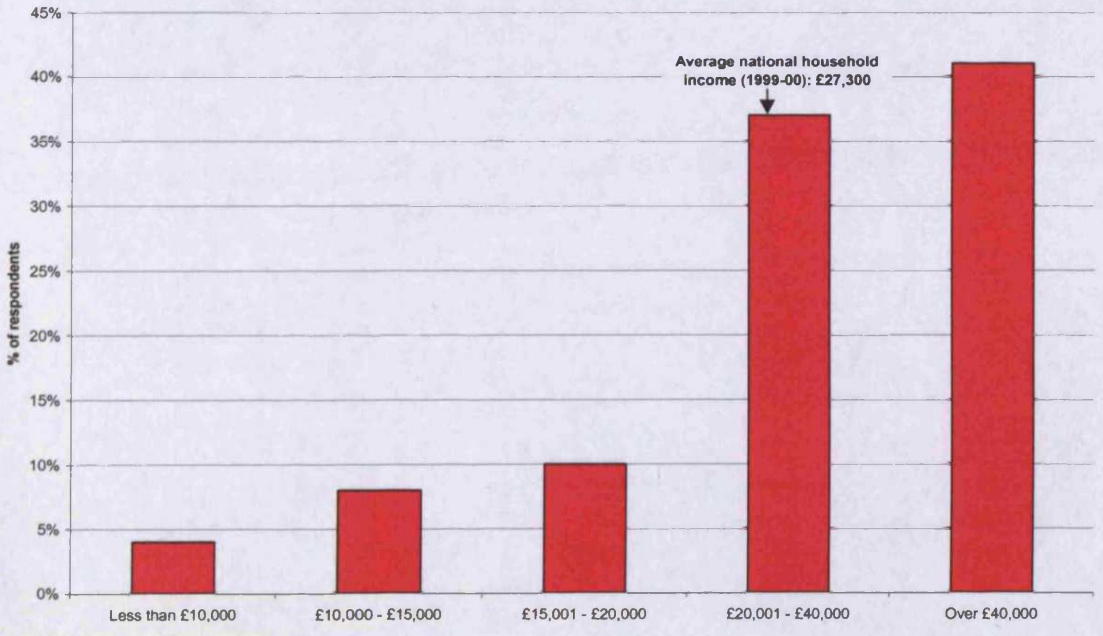
[178] These categories are taken from 2002 Census and defined in full in Central Office of Statistics (2004). This based on occupational skill and does not take into account other factors such as educational attainment.

Figure 7.8. Employment status of third party appellants



Based on survey sample respondents (59). Source of national statistics: Census 2002).

Figure 7.9: Annual household income of third party appellants, 1999[179]



Based on survey sample respondents (51) Source of national statistics: Census (2002)

[179] Note that this survey was undertaken prior to the conversion to the Euro and these figures represent Irish punts.

This suggests that appellants are more likely to be drawn from the more advantaged sections of Irish society and, by implication, as a group are more likely to exhibit a disproportional degree of power. On this basis, the evidence appears to give some credence to the sceptical view of rights. If validated, this would represent a critical finding for the whole of this thesis, with some broader relevance for wider rights issues. It is therefore considered appropriate that this issue is subject to a more focussed investigation to triangulate the evidence from the survey described above. In order to do this, the analysis takes the specific case of Dublin, selected on the basis that it has the highest concentration of third party appeals as shown in Table 7.1. The analysis draws on a subset of the *2002 TPA database* which forms a *2002 Greater Dublin database*, as described in Appendix A. Using this data, the location of proposed development subject to third party appeal has been plotted on a GIS map of Dublin using *Mapinfo*, to provide the distribution shown in Figure 7.10. From this it is has been possible to develop an index of appeals per person for each of the Dublin Electoral Districts (DEDs), which can then be subject to a regression analysis against a range of variables to test whether there is a link between certain social attributes and the distribution of rights-claims. It is anticipated that some explanation of the variation in the distribution of third party appeals against a range of socio-economic attributes will provide further insights into who is more likely to make an appeal, which can then be related to the optimistic/sceptical view of rights and the relation of rights use to existing power structures (Stammers 1993) and other issues. Because of the exploratory nature of this work, a wide range of such variables were initially selected to identify those that would provide the best predictive model for the propensity to appeal.

The data used for this analysis is centred on a dependent variable, *appeals per person* for each DED, generated from the distribution shown in Figure 7.10. This suggests that in absolute terms rights-claims via third party appeals are rare, with only 1 in 1570 people making a claim in each year, or an average of 0.0007 appeals per person, per annum. It is also acknowledged that this does not represent a perfect measure of the propensity to appeal as it is based on *appeals per person*, rather than appeals *per planning permission* and that it is generated as a measure for a whole

DED, for which appellants may or may not be representative. However, due to the difficulty of securing accurate data at this scale for all planning permissions and on the profile of each appellant, it is considered that this measure represents the best feasible option for generating an indicator of the propensity to appeal against comparable socio-economic data.

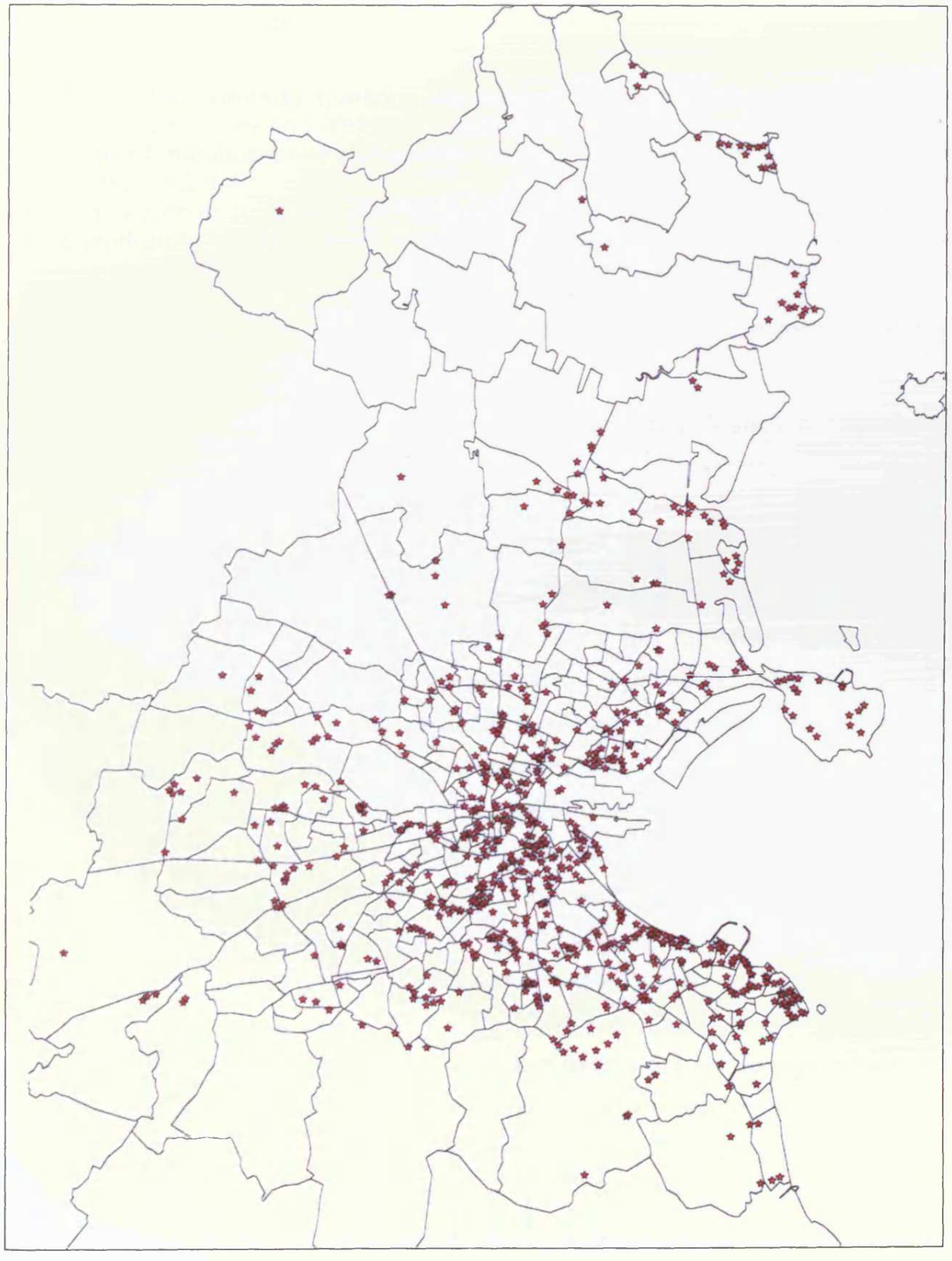
Appeals per person was then subject to a regression analysis using a wide range of independent variables, selected according to factors identified previously in the thesis (e.g. the evidence generated from the postal survey) or from suggestions made in the reviewed literature, including the characteristics of so called "NIMBY"s (e.g. Dear 1992 and the report of the Comptroller and Auditor General 2002)[180]. These factors also had to be capable of being supported by compatible data, i.e. it had to be available for each DED for the year 2002. This resulted in a list of 11 independent variables, summarised below and which are described and justified in detail in Appendix A.

A first group of independent variables were selected because they offer some correlation with notions of social power, thus:

- **Deprivation** *(Deprivation Index,* Haase and Pratschke, 2004).
- **Citizen engagement** *(Voter turnout,* Kavannagh, Mills et al. 2004).
- **Social Status** *(Social Class* and *Socio-Economic Group, SEG*, both measures includes in the RoI Census as a census measure).
- **Employment status** (*percentage of the over 15 population in work*, *percentage of the over 15 population unemployed*; and *percentage of the over 15 population that are retired* – all from the RoI Census).
- **Educational attainment** (*percentage of the over 15 population that have attained a degree* – from RoI Census).
- **House prices** (*Quarterly survey undertaken by the Permanent TSB*[181])

[180] For example this notes that "*a decision to appeal may be influenced by a variety of local factors including population density, proximity of the proposed development to other people or property and the value of property*". Comptroller and Auditor General (2002, p.36,para 4.20).
[181] See http://www.permanenttsb.ie/footer/hpi.asp.

Figure 7.10: Distribution of third party appeals in the Greater Dublin County, 2002



While the above can be seen to relate to differing measures of social power, the thesis has also suggested other factors may influence the propensity to object to development and these are included to test whether these have significance along side those identified above:

- **Population Density** (persons per hectare *calculated from RoI census and Ordnance Survey GIS files).*
- **Rate of development** *(Change in deprivation index 1996-2001,* Haase and Pratschke 2004).
- **Age** (*percentage of the total population over 60 years old*, a census measure).
- **Community stability** (*percentage of the population that were born outside the Republic of Ireland* ("other place") and the *percentage of the population living in permanent accommodation*, both measures from the RoI census).
- **Owner occupation** (*percentage of the population living in owner occupied accommodation*, a census measure).

A detailed defintion of each of these factors is provided in section A.A.6 in the Appendix.

These were identified by hypothesising the potential profile of objectors from the literature reviewed in Chapter 3, combined with the insights generated from the initial postal survey discussed above and matching this with data available at the required resolution and date. This broad range of variables was then narrowed down by subjecting each to a simple correlation against *appeals per person* and an analysis undertaken of the resulting scatterplots. The result of this exercise is shown in Table 7.3, which suggests a range of performance of each of these variables, noting that a number of them are closely related[182]. This initial test suggests that variables related to social class, socio-economic group, education and community stability appeared to be influential phenomena and which could be taken forward to build a more explanatory regression model.

This initial analysis suggests that a number of factors did not appear to have any significant relationship with *appeals per person*, so that those that scored less than 0.2 in the Pearson coefficient were eliminated from further analysis, as shown in the Table 7.3. It is useful to note that on the basis of this simple correlation, the strongest relationship with appeals per person appeared to be a positive one with

[182] For example, the deprivation index is composed of other variables while the percentages of unemployed is the inverse of those in work and social class and socio-economic groups share core data.

SEG B (Higher professionals). SEGs A (employers and managers) and C (lower professional), Social Class 1 (professional workers) and attainment of a degree level education also show significant positive relationships. The Deprivation Index, SEGs E (manual workers) and F (semi-skilled workers) and Social Classes 4 (skilled manual) and 5 (semi-skilled) portray significant negative relationships. This appears to indicate that those groups associated with greater affluence and educational attainment *are* more likely to make more rights-claims, although a simple correlation does not establish a strong explanatory link and, for example, overlooks the potential of more than one variable for explaining the propensity to appeal. To gather more conclusive evidence, a number of multiple regression models were developed, taking groups of explanatory variables in turn.

As social class and SEG appeared to have particular collective explanatory potential these groups were first subject to independent multiple regression[183], as shown in Tables 7.4. and 7.5. In terms of social class, Table 7.4 suggests collectively this can collectively explain 34.1% of the distribution of appeals per person, with Social Class 1 offering the greatest single contribution. It is also significant to note that while Social Classes 1 and 2 have significant positive relationships other classes, have negative relationships – indicating lower propensity to appeal.

Table 7.4: Multiple regression of social classes as explanatory variables for appeals per person, DEDs 2002[184]

Explanatory variables	Beta scores	R-Square for Model
Total Social class 1 as % of DED population	0.345*	0.341
Total Social Class 2 as % of DED population	0.241	
Total Social Class 3 as % of DED population	-0.274	
Total Social Class 4 as % of DED population	0.126	
Total Social Class 5 as % of DED population	-0.083	
Total Social Class 6 as % of DED population	0.01	

Note: * Statistically significant at $p < 0.05$ and ** Statistically significant at $p < 0.01$.

[183] Based on 307 DEDs as noted in the simple correlation test.
[184] Social Class 7 (*All Others...*) was excluded from this analysis because of the small numbers in each DED and the non specific nature of the category.

Table 7.3: Results from correlation of all potential explanatory variables for appeal per person, DEDs, 2002[185]

Attribute	Variables used	Pearson correlation for appeals per person	Taken forward for further analysis? (yes/no)
Deprivation			
	2002 Deprivation Index	-0.457	Y
Citizen engagement			
	Turnout GE2002	0.074	N
Social Class			
	Total Social class 1 as % of DED population	0.560	Y
	Total Social class 2 as % of DED population	0.442	Y
	Total Social class 3 as % of DED population	-0.238	Y
	Total Social class 4 as % of DED population	-0.508	Y
	Total Social class 5 as % of DED population	-0.494	Y
	Total Social class 6 as % of DED population	-0.383	Y
	Total Social class 7 as % of DED population	-0.106	N
Social economic group			
	SEG A as % of DED population	0.420	Y
	SEG B as % of DED population	0.564	Y
	SEG C as % of DED population	0.429	Y
	SEG D as % of DED population	-0.409	Y
	SEG E as % of DED population	-0.510	Y
	SEG F as % of DED population	-0.504	Y
	SEG G as % of DED population	-0.380	Y
	SEG H as % of DED population	-0.221	Y
	SEG I as % of DED population	0.047	N
	SEG J as % of DED population	-0.042	N
	SEG Z as % of DED population	-0.191	N
Employment status			
	Total in work as % of DED+15 population	0.019	N
	Total unemployed as % of DED +15 population	-0.317	Y
	Total retired as % of DED +15 population	0.236	Y
Education			
	% of degrees for total DED +15 population	0.490	Y
House prices			
	Average house price by postcode	0.283	Y
Density			
	Persons per hectare	-0.142	N
Rate of development			
	Change in deprivation index 1996-2002	0.027	N
Age			
	Total +60 as % of total DED population	0.139	N
Community stability			
	Perm accommodation as % of total DED pop	-0.088	N
	Other place of birth as % of total DED population	0.255	Y
	Movers as % of total DED population	0.276	Y
Owner occupation			
	% owner occupier of total stated in DED	0.081	N

[185] As noted in Appendix A this is based on returns for 307 DEDs as 12 have been excluded due to their small population (i.e >1000) and another three (Dalkey Coliemore, Dalkey Hill and Blackrock Seapoint) because of their regular appearance as outliers in the regression analysis)

This link with social hierarchy and the propensity to appeal is further, and more strongly, illustrated by the multiple regression for SEG, as shown in Table 7.5. This indicates a higher overall explanation of the variance in appeals per person (i.e. of 34.4%) and again with the highest degree of explanation being offered by SEG B, with lower status groups similarly indicating negative relationships.

Table 7.5: Multiple regression of SEG as explanatory variables for appeals per person, DEDs 2002[186]

Explanatory variables	Beta scores	R-Square for Model
SEG A as % of DED population	0.000	0.344
SEG B as % of DED population	0.322	
SEG C as % of DED population	0.098	
SEG D as % of DED population	-0.199*	
SEG E as % of DED population	0.017	
SEG F as % of DED population	-0.113	
SEG G as % of DED population	0.026	

Note: * Statistically significant at $p < 0.05$ and ** Statistically significant at $p < 0.01$.

Given the diverse range of factors that may influence the propensity to appeal, this suggests an identifiable link between social hierarchy and rights-claims, with SEG offering greater explanatory value than Social Class. While it is important to illustrate the influence of these factors, it is possible to develop a combined regression model that includes all the factors seen to be significant. While it is inappropriate to include both social class and SEG in a single model due to the shared data, a model can be constructed using all the other variables not excluded from the initial correlation test above as shown in Table 7.6.

Table 7.6: Multiple regression model for explaining appeals per person, DEDs 2002

Explanatory variables	Beta scores	R-Square for Model
2002 Deprivation Index	-0.334	0.377
SEG A as % of DED population	0.134	
SEG B as % of DED population	0.291	
SEG C as % of DED population	0.039	
SEG D as % of DED population	-0.164*	
SEG E as % of DED population	0.038	
SEG F as % of DED population	-0.081	
SEG G as % of DED population	0.054	
Total unemployed as % of +15 DED population	0.147	
Total retired as % of +15 DED population	0.245**	
% of degrees for total +15	0.220	
Other place of birth as % of total DED population	0.092	
Movers as % of total DED population	0.126	
Average house prices	0.003	

Note: * Statistically significant at $p < 0.05$ and ** Statistically significant at $p < 0.01$.

[186] SEGs I *(Farmers)*, J *(Agricultural Workers)* were excluded from this analysis on the basis that there were very small number falling into these categories in most of the enumeration districts, while SEGs H *(Own Account Workers)* and Z *(All Others...)* was non-specific and therefore, not meaningful for this analysis.

Thus while this does not produce a model that could be considered to be strongly predictive, it does suggest a positive relationship between general factors of affluence and social status with the propensity to claim TPRAs – this is perhaps best described as an "association" of factors, rather than a strict causative relationship. It also draws some parallels with wider surveys in Ireland and beyond (e.g. Jones and Dunlap 1992; Dietz, Stern et al. 1998; Kelly, Kennedy et al. 2003) that suggest only 10–15% of variation in environmental attitudes is explained by socio-demographic variables, but concern and commitment scales rise with income, education and social class, with identity-related variables such as such as occupation, education being the most important.

The results for the propensity to appeal are therefore very similar to those of more general environmental attitudes and while the associations cannot be taken as conclusive evidence that rights-claims are made overwhelmingly by the more powerful, it is possible to say that an appeal is *more likely* to be made in areas with higher proportions of their population having attributes closely associated with social power. This raises an interesting parallel with a more general exercise of citizenship, which, in the context of the UK, Pattie, Seyd et al. (2003) found to be most strongly exerted by those with a similar socio-demographic profile as those who tend to be more likely to make environmental rights-claims in the Irish Republic – namely older, more affluent individuals with a university education, particularly with professional and managerial backgrounds. This presents two useful observations – first that rights *in themselves* do not appear to be challenging current distribution of power, so that rights-claims seem to reflect the same selective involvement as witnessed in broader patterns of civic engagement. Second, these parallels appear to encourage the view that engagement in the planning system could be set in a rights-frame and as such any individual activity in this sphere rightly seen as much an expression of citizenship as other forms of political engagement.

7.6. Discourses of objection – understanding the motivations of rights-claimants

While the analysis above inches the exploration of the role of environmental rights a little further, it does not provide any suggestion as to *why* any citizen, irrespective of social status and power, would make a rights-claim using TPRA. It is suggested here that an understanding of what appellants want to achieve and what actually motivates them to claim rights is essential to complete the picture of environmental rights being developed in this thesis. This section aims to provide this final element of the picture.

7.6.1. The motivations of rights-claimants

There is no easy way of discovering the specific issues that motivate someone to make a rights-claim. On the one hand there is a social context that portrays objectors as "NIMBYs", supported by a pro-development stance and on the other there are poisitive drivers in the form of environmental sub-cultures and the threats of potentially disruptive development. One way of understanding these conflicting pressures is in terms of public and private preferences. Thus Sagoff (1998a) suggests private preferences reflect how goods affect individual interests and utility, while public preferences will reflect more moral values about what people think is right for society.

This normative model suggests that different modes of questioning may be more likely to evoke one set of preferences over another, making it more difficult to discover the real motivational facors behind rights-claims. A first attempt to identify the preferences of appellants was made in the initial pilot survey undertaken for the thesis (*Survey of users of the RoI appeal system, 1999*, see Appendix A), which included a number of exploratory questions related to the motivations of appellants. In order to appreciate the relationship between rights-claims and other forms of activism, appellants were asked to describe what else they had done to make their views known in respect to the proposed development. Thus Table 7.7 highlights the attempts made by third parties to influence the local authority's decision, showing that most presented their arguments through a variety of

channels at this early stage in the decision-making process, rather than wait for the opportunity of an appeal. The fact that around 20% also contacted local politicians highlights how important the political dimension is perceived to be, despite the fact that according to statutory regulation, most planning applications would be determined by the City or County Manager, with no political input.

Table 7.7 What action did third party appellants take to influence the local authority's decisions concerning the proposed development?[187]

Action	% of third party appellants[188]
Contacted local councillor	23.8
Contacted TD	19.0
Contacted planning officer	25.4
Letter of objection	84.1
Signed/organised petition	17.5
Attended/organised public meeting	7.9
Other	15.9

Based on survey sample respondents (63). as part of *Survey of users of the appeals system of the RoI*, 1999.

In follow up questions respondents were asked if they were satisfied with the opportunities they had to influence the local authority's decision - 63% suggested they were not and nearly 80% noting this as a contributing factor in why they made the appeal. Furthermore, 69% of the respondents felt that the LPA had not considered the application to the best of their technical ability and 71% felt that the local authority had not made their decision in an open and accountable way. It is clear from the responses that most of the appellants take a rather dim view of the decision-making process at the local level and many made further derogatory comments about how the application had been dealt with. The survey also asked whether the appellants had discussed their objections with the developers of the proposed development, with a little over half (51%) suggesting they had.

The *stated* objective of making the appeal is shown in Table 7.8. The fact that over 35% wanted to change rather than prevent development, suggests that the motivation for appeal is not always articulated as one of outright opposition, but as a further way of pressing for modifications to the development. This contributes to undermining the received wisdom dealing with environmental rights–claims; not all claimants are intent on stopping development, at all costs but some are essentially

[187] Note that the survey was undertaken prior to the implementation of the Planning and Development Act 2000, which introduced the requirement that a third party appeal could only be made if an observation was made to the initial planning application.

[188] Note percentages add up to more than 100% as many appellants undertook more than one action. "Other" included commissioning an engineers report (3%) and seeking legal advice (3%).

seeking greater influence over proposed development – i.e. using a right-claim to bolster their "seat the table", or as a political trump to push their voice in the decision-making process.

Table 7.8.: What did third party appellants hope the appeal would achieve?

Objective	% of third party appellants
Prevent the development	53.7
Change the type or design of the development	35.8
Delay the development	4.5
Relocate the development	6.0

Based on survey sample respondents (67), as part of *Survey of users of the appeals system of the RoI, 1999.*

These last two tables begin to suggest some of the motivations in making appeal, although such direct questioning could be expected to induce overly "public" expressions of preference and on its own is limited in its ability to explain the more subjective and context-contingent way in which rights are perceived and acted upon. Therefore, in order to complement the insights generated so far, the next section highlights an attempt to provide a deeper understanding of the social-construction of such rights-claims.

7.6.2. Q-method and third party appellants

The cultural or ideological aspects of rights-claims and those preferences that may not be openly articulated via direct questioning, can be explored through discourse analysis around key issues that may have a bearing on the reasons for making an appeal. It is suggested that this facilitates a better understand of how appellants structure their thoughts in regard to TPRA and focuses on how appellants frame their motivations and objectives of appealing in terms of four key issues: identified as being; planning and third party appeals; concepts of rights and citizenship; concepts of community and public interest; and environment/development.

This analysis was undertaken using the Q-method technique, which provides a number of advantages over more traditional survey-based techniques used in attitudinal research, particularly in terms of minimizing the influence of the researcher, allowing the subjects "*to speak for themselves*" (Dryzek and Berejikan 1993), while not requiring large numbers of participants to produce valid results (Addams 2000). A detailed description of this approach is provided in section 4.5.2

and further elaborated in Appendix A, and involved the identification of an initial 104 statements (see Table A.4) representing the whole range of attitudes on the selected issues. These were sourced primarily from those people who had made third party planning appeals in the RoI and collected through telephone interviews and survey returns from a previous research project (Ellis 2001b). These were then narrowed down to 36 statements (shown in Table 7.9), using a cell structure similar to that used by Dryzek and Berejikan (1993). A sample of 35 individuals who had recently made a third party appeal were then identified from across Ireland to reflect the profile of both appellants and the type of development appealed against. The participants were contacted after they had lodged an appeal, but before they knew its outcome, so that the attitudes primarily reflect the motivations for making an appeal, not its success or failure. These appellants then ranked each of the 36 statements according to their importance on a forced nine-point scale ranging from +4 (strong agree) to –4 (strongly disagree), see Appendix A. The results were then sorted using *PQMethod* software, to generate five idealised discourses, as shown in Table 7.9. Each of the five discourses were subject to further interpretation using detailed notes from interviews, identification of their distinctive characteristics and each given a label in an attempt to portray its overall features.

7.6.3 Five discourses of objection

As noted above, the outcome of Q-method is the identification of distinct patterns of responses to the selected statements, which can be regarded as "idealised discourses" on the issues considered. It is also important to note that it is not claimed that the discourses are necessarily representative of *all* third party appeals in the RoI but they do accurately reflect the discourse of all sampled participants. The five discourses identified through this exercise, are as follows[189]:

[189] Please note that the numbers in brackets refer to the numbered statements in Table 7.9 with rankings of significance to the point under discussion.

Table 7.9: Q-method statement rankings with scores for each idealised discourse.

	Q-sample statements	FACTORS ("Idealised discourses")				
		A	B	C	D	E
1	If planning was fair and concerned with the public interest, there would not be a need for third party appeals.	0	-1	1	0	2
2	Our duties towards the environment should come before our rights to property.	3	0	-3	0	0
3	There is a need for mediation between the objector and the developer.	0	2	0	1	1
4	If you are linked to a local official or politicians, it can affect the way a planning application is considered.	1	2	4	3	1
5	Greenpeace and other eco-warriors are just extremists.	-3	0	-1	-2	0
6	Property development has no benefit to the community.	-1	-1	-4	-2	2
7	Enforcing your rights is difficult for those on limited incomes.	3	1	1	2	-3
8	Appeals would be unnecessary if planners were well qualified with sufficient resources.	-2	0	0	1	2
9	Penalties should be imposed for abuse of the appeals system.	1	-1	1	2	-4
10	We face a major global environmental catastrophe.	2	-3	0	-1	0
11	The public interest is defined by economic needs.	-1	0	-2	1	-1
12	You can't just think about the development next door - as all development affects the global environment.	1	0	-1	0	-2
13	The planning system is biased in favour of professionals who understand the jargon.	-1	2	0	2	-2
14	The quality of my local area is very important to me and I'll put up a good fight to make sure its not spoiled.	4	4	3	-1	1
15	The cause of the ecological crisis is greed and money.	0	-2	2	2	4
16	The planning system should protect a homeowners' investment.	-2	3	3	3	0
17	Third party appeals are the only way the public can influence planning.	1	1	0	-2	-2
18	The planning authority had not fully considered the implications of the proposed development and should listen more to those with local knowledge.	4	3	1	3	2
19	People should take things into their own hands and not rely on the government to make the best decision.	0	0	-4	-2	-1
20	Councillors are democratically elected - let them make the difficult decisions.	-2	-2	-3	-1	-4
21	My neighbours see things in a different way than I do.	0	-3	-1	0	1
22	Third party appeals are in the general interest, as they are not motivated by profit.	3	1	2	0	3
23	Environmental organisations like Friends of the Earth fight for all our rights.	1	-1	-2	0	-2
24	It is your duty to make an appeal against poor development if you want to make Ireland a better place for your children.	2	2	4	-1	3
25	If someone has a legal right, they should exercise that right or have it taken away.	-2	-4	0	-4	1
26	Privacy is very important to me.	0	0	2	4	0
27	Town planners tend to be scruffy, unprofessional individuals who know more about rules and regulations than they do about common sense.	-3	-2	1	-4	-1
28	Appeals should only be made by people who are local and totally identifiable.	-3	1	-2	4	2
29	The environment is better now than it was 100 years ago.	0	-4	-2	-3	4
30	We need to tackle local environmental problems such as litter, dog mess and vandalism before saving the world.	-1	0	2	-3	-3
31	Third parties' costs should be reimbursed if they are successful.	0	3	-1	-3	-1
32	I do not normally object to development, but sometimes it goes over the top.	2	1	3	-1	0
33	Third party appeals are a way of securing the proper planning and development of an area.	2	4	0	1	-1
34	Property development is the future.	-4	-2	0	-1	-3
35	People who make third party appeals are powerless against a pro-development planning system.	-1	-3	-1	1	0
36	I'm interested in protecting my house and job not crappy issues like human rights.	-4	-1	-3	0	0
	% expl. Var	19	14	13	10	7

Discourse A -The Critical Green

The distinctive features of this discourse are its strong disagreement with the primacy of property rights and low opinion of the benefits of development, coupled with firm environmental beliefs. It is sceptical about the probity of the local planning process and sees TPRA as a way of asserting collective values. Of all discourses, it also explains the greatest variation in all the responses generated from the survey.

The discourse strongly rejects the notion that property development offers the potential for societal improvement (34) and believes that duties to the environment should come before property rights (2). It thus sees the environment as having a moral dimension and recognises the value of political activism in environmental issues (5, 23). It sees the environment, not as a local amenity issue, but as part of the broader ecosystem (30, 12). It mistrusts the judgement of local councillors (20) and supports the idea of planning (33, 27), recognising its value for broader environmental protection (16) with TPRA a way of asserting the public interest (33, 22). It strongly believes that the planning process should benefit from local knowledge (18), but while other discourses may base such a view on taking power *away* from the local council (and perhaps *to* themselves as individuals), it is suggested that Discourse A does so out of recognition of the broader benefits and ethic of participation (i.e. giving power *to* the public).

In terms of citizenship, the discourse strongly asserts the value of human rights (36), recognising how some sections of society are unable to fully realise them (7) and sees the giving of rights as part of a social contract that should be reflected in citizen responsibilities (2, 24). The discourse displays some reluctance in making an appeal (32) and would rather have the option of objecting anonymously.

Discourse B - The Public Interest Guardian

This discourse is primarily distinguished by its close identification with public interest issues and a faith in the use of appeals to secure better communitarian outcomes.

The discourse firmly believes that TPRA improve the decision-making process

(33) and they can make a real difference (35), to the point that other forms of activism may not be needed (19). As such, it firmly defends the right to make an appeal (25, 1) and believes that any appeal costs should be reimbursed if successful (31). It does not however, identify strongly with notions of duty (2, 24). In defending the public interest, the discourse believes that it expresses the view of the local community (21) and takes this as a strong mandate to fight the case (14, 32). Unlike most other discourses, it agrees with the need for mediation between objector and development, in the recognition that this may be an appropriate way to resolve differences for the common good. It is neutral on issues of privacy (26) and property rights (2). It has more faith in the probity of the planning system than Discourses C and D (4), but still does not have much trust in local politicians, while being neutral on political activism (19, 5, 23) and other ways of influencing the planning system.

It believes that environmental quality is declining (29) but has a fairly parochial view of such issues (12, 14, 30) strongly rejecting alarmist views (10) and neutral on the value of environmental NGOs (5, 23).

Discourse C - The Pro-development Conservative

The distinguishing features of this discourse include its parochial and conservative outlook, a poor opinion of the local planning process and strong support for property rights and development.

Of all the discourses identified, this tends to display more stereotypical "NIMBY" attitudes than the others – it believes that that property rights should be elevated above environmental issues (2) and that property development can bring wide benefits to the community (6), but in making an appeal, is determined that their property and the local area should not be effected by it (30, 16, 24). Like several of the other discourses, it has little faith in the democratic process of planning decisions (4, 20) and sees the use of TPRA as a way of by-passing the local polity to achieve "proper" planning of an area (33). While there is a poor view of local councillors, there appears to be support for planning officers (27) and the whole idea of planning is given mild support on condition that it facilitates development on the one hand (2, 6) while protecting the local neighbourhood on the other (16,

18). While accepting development can bring benefits, it is relatively neutral on environmental issues, making little connection between this and the use of TPRA (2, 12). The discourse places an importance on both the monetary and use value of their home (26, 16).

The discourse recognises the limitations of a rights-based system (7), but believes this is an essential mechanism for expressing concerns and fighting for individual interests (1, 14), while being against direct action forms of activism (23, 5). The discourse expresses a strong sense of duty (24) or at least the concept of duty is invoked (consciously or subconsciously) to cover strong financial motivations (16). While suggesting that neighbours may hold similar views, it does not wish to be seen as being unreasonable in its objections (32) and would like to retain the right to launch covert objections (28).

Discourse D - The Individual Proceduralist

The distinctive features of this discourse are the high value placed on privacy, a procedural outlook and a faith in administrative authority and technology.

Above all else, this discourse places very different values on privacy than other discourses (26), appearing to reflect the importance placed on the home, particularly in terms of its asset value (16). This also underlies an individualist outlook, with little interest in issues related to the public interest (1, 22, 33) and no sense of civic duty (2, 24). This individualist outlook is also reflected in the fact that it sees little justification for the need to reimburse successful appellants (31) and is neutral on community issues (21). Another key feature is a sense of procedural propriety - it strongly agrees that there should be fines for any abuse of the planning system (9) and a need for openness when making appeals (28). This suggests that the discourse is confident and unashamed of the reasons for making an appeal (28), despite being primarily motivated by self-interest (16). It seeks to reserve the right of appeal under any circumstances (25, 2). Like other discourses, it is suspicious of paternalism in the planning system, but does show faith in the professionalism of planners (27) and of all the discourses, is least dismissive of local councillors (20). This may suggest a faith in administrative authority and the state, as it is dismissive of political activism (19, 23), but still mildly defeatist about

what can be gained from making an appeal (33, 17). The discourse recognises deteriorating environmental quality (29, 15), seeing this as having relevance beyond the immediate area (30).

This discourse shuns the value-laden world of politics, being neutral on statements related to the broader issues of human rights (23, 36) and probably sees the appeal process as an extension of the bureaucratic process, rather than as a citizen right.

Discourse E - The Anti-development Process Sheriff

The distinguishing features of this discourse is its strong belief that third party appeals should be used to correct process failures in the planning system, while having a low opinion of the benefits of property development.

The discourse sees the planning system as being generally open and fair (13, 19), but prone to occasional policy failures, which TPRA can be used to correct (1). While not casting doubt on the probity of the local process (4), it has little trust in councillors (20). It also sees the planning system being fairer than all other discourses, having more faith in the planning profession (8, 13), with the causes of policy failure being under-resourcing rather than corruption or incompetence (8, 27).

The discourse sees the environmental lobby as being partisan (23) and alarmist (10, 29), perhaps reflecting an underlying mistrust in pressure group politics. It places a very high value on the need for openness when making appeals (28), but is distinctive in its strong rejection of the need for penalties for abuse of the system (9). It does not see appeals as a way of securing the proper planning of an area (33), as this should be determined by a much broader range of issues (17). In viewing planning primarily as a technical activity, it does not have a strong view of rights issues (36, 23) seeing the role of the citizen more one of an expression of duty (24) and unlike other every other discourse, does not see low income as being an impediment to the realisation of rights (7). This is part of a broader cynical outlook that rejects any notion of idealism (5, 23) and firmly believes (and accepts) that the world is primarily motivated by money and self-interest (15, 22).

The discourse appears to hold complex views on the environment, agreeing strongly that the environment is better now than a century ago (29), it is neutral on whether we are facing an ecological catastrophe (10), but sees money and greed as eroding environmental quality (15) and distrusts the activities of some NGOs (5). It believes its views are not widely shared by its neighbours (21), yet is prepared to be quite open about making an appeal (28, 32)

Having distinguished between these different discourses, it is also useful to highlight areas of consensus between them. For example, all but Discourse D appear comforted by statement 24, which links making an appeal with the welfare of future generations and statement 32 that suggests that in making an appeal, they are not being overly sensitive or apt to complain (Edwards and Potter, 1992, noted in Burningham, 1998, p.550). Also of significance is that all discourses express varying levels of distrust in local councillors (20) and cast doubt on the probity of the local planning process (4), despite all but Discourse C supporting planners as a professional group (27). Somewhat surprisingly, every discourse shows relative ambivalence in terms of statement 17, which highlights the importance of TPRA to the broader planning system. This may suggest that either appellants see appeals as only part of a broader strategy for influencing the system or that they ultimately do not have that much faith in the effectiveness of the appeal process.

7.7. TPRA and the rights-frame

These discourses of objection contribute a number of rich insights into the understanding of why individuals are motivated to make rights-claims in the context of TPRA and highlight why this form of engagement is different from, say, attending a public meeting, primarily because the activity is set within a discourse of rights. From the findings described above and by relating these to issues raised earlier in the thesis, it is possible to comment on a number of key issues that appear to have bearing on why individuals make such claims and link these to the potential role of environmental rights in British planning.

7.7.1. The complexity of motivation

The case study of TPRA in the RoI clearly supports the view that it is misguided to view such procedural rights as being used simply for parochial, self-interested protectionism, i.e. "NIMBYism". It is clear to understand why the "NIMBY" label is readily used in these circumstances – first it offers a useful way of detracting those that appear to challenge the dominant pro-development ethos and there appears to be an association between the propensity to claim rights and social power. Furthermore, there is some representation of "NIMBY" characteristics in the discourses noted above, particularly Discourse C. However the link with power is not conclusively made in the statistical analysis above, while the majority of the discourses portray a much wider range of motivations, that includes cynicism (Discourse E), due process (Discourse D) and environmentally-inspired altruism (Discourse A). Even where there are "NIMBY" undertones, the discourses reveal more complex motivations for objection than just opposition to a particular development. While all these discourses could be seen to be an expression of self-interest in some form, it is clearly wrong to accept that they are acting out some simple form of *instrumental participation* as proposed by Campbell and Marshall (2000) or *"without responsibility"* as suggested by the Government (see Chapter 5. Indeed, we cannot be naive enough to believe that, given the high societal value on individual interest, everyone would automatically subsume their private preferences into those of the collective concern and one would expect individuals to articulate their own point of views given the opportunity - this is precisely the point of participation. Furthermore, it is clear that some of the rights-claimants are compelled not by a narrow self-interest but by a sense of obligation or duty, as is discussed below.

Indeed it is a curious position that allows businesses and corporations to shamelessly project their narrow interest (for example the discourse if the CBIS reviewed in Chapter 5), yet castigate individual citizens for doing the same thing. By placing participation increasingly within a rights-frame may indeed encourage more individual engagement with the planning system, but it also highlights that it is wrong to dismiss the views expressed in this way as being merely "*instrumental*" or "unrepresentative", particularly given the difficulties for individual objectors to

know how many others share their views (Bedford, Clark et al. 2002). Furthermore Sanderson (1999) notes that accusations of unrepresentativeness are commonly used by professionals to dismiss critical voices and protect the status quo, in much the same way as "NIMBY" is used.

Therefore the assumption voiced in the official discourses discussed in Chapter 5 that third party appellants simply act out of narrow self-interest over-simplifies the situation to the point of distortion and ignores the complex contexts in which they act. This is particularly true if one considers that this analysis has only investigated individual appellants and not touched on the roles businesses, civic societies, government agencies and environmental groups may play in claiming TPRAs. On this basis, if we assume transferability of these findings into a British context, it is questionable to claim that that enhanced third party rights of challenge would be predominantly used frivolously and against collective interests, as has been suggested by government and business interests, who have wanted to deny an extension of such rights in the fear that it will be predominantly used by *recalcitrant citizens* (Dean 2004, see Chapter 5) rather than accepting their more progressive use in the context of other forms of citizenship (see below). As noted by Boyce, Klemer et al (1990) on p.12, engagement of this kind may complicate the lives of decision-makers and have short-term costs but ultimately may yield long-term benefits to environmental policy and democracy.

In such a situation, the arguments for unequal rights status of objectors and developers is difficult to sustain. It follows therefore that the debate on the potential introduction of TPRA in the UK needs to be more evidence-based and better informed by matters of principle. It is these matters of principle that ultimately make the issue so contentious, particularly as third party rights challenge deeply held ideologies of private property rights and the boundaries of citizen power. Above all, we need to move away from simplistic notions of individual expression as being inherently bad and begin to explore how every citizen can be given the capacity to channel their views into the planning process.

Furthermore if the management concerns (i.e. irresponsible use of TPRA) related to these rights does not appear to be a critical issue, one can only assume that

there must be a deeper ideological objection to them and by implication, this reveals the relative emphasis placed on different values in the British planning system, for example the contrast between the values that are protected by a right to property compared to the values that are encapsulated by TPRA (see Figure 5.7). From this perspective, such an analysis provides an example of the heuristic value of rights described in Chapter 3, in that it highlights the discrepancy between espoused values and those which are implemented in practice (c.f. Smith 1989).

This makes a rather simple point which is not otherwise made in the debate on environmental rights; rights-claimants are likely to use the right for a wide variety of reasons, which are rarely simply *just* one of self-aggrandisement. Indeed, given the suggestion made earlier in the thesis that the most progressive value of rights is the impact on increased mobilisation around the issues encapsulated, rather than the ensuing legal protection, the placing of public participation within a rights-frame could enhance the overall levels of citizen engagement – universally seen as a desirable outcome under current planning paradigms. This will support the expression of individual views, whatever the motivation for doing so, which in some cases will *"particularise amenity"* (Millichap 1995), p.290) and thus make "real" any impacts of development rather than subsuming them into an aggregated public interest. Furthermore the Irish case suggests that not all rights-claimants act to prevent the development, with nearly a half of appellants in the Irish case seeking some form of alteration in the development, thus opening the possibility for negotiation and consensus between the developer and those who feel most strongly about a proposed development.

7.7.2. The importance of context

The examination of TPRA from the appellants point of view also leads to another critical point in the consideration of the role of environmental rights in British planning, that is the importance of context to understanding the value and motivations for invoking procedural rights. This issue relates to the broader value of an approach that appreciates the interaction between the structural forces in society with the fine grain practices and discourses of governance (Healey 2003), which in turn shapes how the particular location of a rights-claim is perceived by

those making or responding to such claims. An appreciation of the social/structural construction of objection not only helps understand the concerns that spark rights-claims, but also suggests why certain groups may invoke procedural rights more than others (e.g. higher income groups, the retired) or why they should focus on certain types of development, such as telecommunication masts. Such a perspective also underlines the importance of viewing stakeholders in the planning process as socially-embedded people, rather than abstractions (Healey and Gilroy 1990; Lo Piccolo and Thomas 2001).

Indeed, just as Searing, Johnston-Conover et al. (2003) have shown how different political traditions affect attitudes to citizenship and rights in the UK and US, the actions and discourses of right-claimants reflect the specific context that frames individual actions, such as the consumption-driven ethos of society. For example, it appears that in more rural communities, neighbours are less likely to invoke rights against one another and may even have recourse to more informal conflict resolution mechanisms.

A further example of the influence of context is that most of the appellant discourses discussed above display a deep mistrust of the probity of the local planning system, particularly of the role of local councillors. This view has wide acceptability in the RoI, where planning and other government functions have been embroiled in corruption for decades. In recent years, this issue has rarely been out of the media, because of the high profile Flood Tribunal, which was established in 1997 to investigate such corruption and has so far exposed illicit practices of a number of high profile individuals including councillors, planners and even a Cabinet Minister (Cullen 2002). This highlighted the potential for corruption in the Irish planning system and while current practices are vastly improved, it has left the public with deep-rooted misgivings about the probity of the planning system and a questioning of the legitimacy of politico-rational policy decisions (Healey 1990). When this is coupled with the fact that the opportunities for pre-decision participation are significantly reduced in the Irish Republic compared to the UK (Ellis 2002b), it does not come as much of a surprise that people will feel more motivated to seek individual or group justice through TPRA. It is one thing to champion representative democracy above right-claims, but if there is little trust in

politicians, this may not be an accepted channel of accountability. This may also apply to the UK, where trust in politicians is now extremely low and where people are far more likely to trust non-political state institutions such as the courts (Pattie, Seyd et al. 2003) and where planning and planners suffer a poor public image (Tewdwr-Jones 1999). In this respect Darke (1999) has provided evidence that enhanced participatory rights increase the public's trust of the system and make them more likely to accept the ultimate outcome of the process.

From this, it could be said that the fact that the Irish case indicates the propensity to appeal to be loosely associated with indicators of power, says as much about the context of Irish society and the role of planning and development within it as it does about the distributive impacts of rights as a concept. Although the reasons why, for example, those with lower educational attainment, may make less appeals was not specifically investigated, one can speculate that it could either be due to the distribution of development relative to the distribution of educational attainment; the fact that higher levels of education assist in understanding the implications or existence of such rights; that the actual process of appeal is helped by higher levels of education; or that education is indirectly contributory to the propensity to appeal via, for example, attitudes to the environment (Motherway, Kelly et al. 2003). If any, or all, of these reasons apply, then it may suggest that the equity impact of environmental rights is not compromised by their existence *per se*, but because of the nature of Irish (or British) society and that the benefits of such rights could be enhanced, not just from their legal entrenchment, but through an appreciation of how different groups may or may not access different bureaucratic or legal practices (c.f. Thomas and Krishnarayan 1994) and target capacity-building appropriately. This does not, however, escape the significant challenges that an enhanced rights-regime would present, which would demand new skills and procedures for balancing and evaluating the range of stakeholder interests. Indeed any problem that arises from an enhanced rights-regime should essentially be viewed as one of context (e.g. related to the resourcing of the planning system) rather than being symptomatic of rights themselves. While the actual impact on the administration of the planning system remains a fundamental unknown and has not been a prime focus of this research, it must be acknowledged. The scale of such challenge would ultimately rest on the type of

rights-regime introduced, which would have to take into account fears that rights inevitably result in paralysis in decision-making (Campbell and Marshall 2000). Such a view is not, however, consistent with the experience of all those countries that do have more robust rights-regimes than the UK (e.g. the RoI or New Zealand, see Green Balance et al. 2002). Indeed to focus on the unintended consequences of enhanced rights misses the point that it should be the encapsulated values that should be the prima facie issue when debating the worth of rights.

Therefore, while the worth of rights, and their environmental subset, are usually debated in theoretical abstraction, the discussion above suggests that the specific *location* of rights-claims has a considerable influence on the need for their existence and their potential impact. This echoes a select body of work that emphasises the location of rights-claims (e.g. Blomley 1994), until now left unconsidered in the debate on environmental rights (e.g. Hayward 2005) and their relationship to planning (e.g. Alexander 2002a). This ties in with the discussion of a rights-frame in section 3.8 in that it would appear that the greatest potential for environmental rights lies not just where critical procedural or environmental values are being neglected *en masse*, but where it can be shown that the current rights-regime gives rise to patent discrepancies between rhetorical official statements of the priorities embedded in the planning system and those that are actually implemented. In such cases, more tightly defined environmental rights may help clarify, protect and prioritise the most important values that we wish to see reflected in the planning system and perhaps most importantly, induce more specific state action and/or political mobilisation around such neglected issues.

7.7.3. Fairness in process

The issue of context relates to the unease expressed by Hillier (2003b) and Campbell and Marshall (2000) that empowered third parties may, in some circumstances, dominate participation processes to the detriment of both the public interest and the role of the professional planner. Indeed, it is implied in these works and in current state perceptions of citizenship (see Chapter 5) that if participants cannot be trusted to pursue public interest values, then the

responsibility should be further transferred to planners and elected representatives. However the discourses identified in the Irish case suggest that appellants attempted to engage in the planning system through a variety of media, not just via appeal and that it was often in a frustration of seeing a poor decision-making process, or a lack of communication with professional planners, that motivated the rights-claim. This tends to confirm the view of Kemp (1990), as discussed in section 3.5.5.) that conflicts between decision-makers and objectors are often frustrated by differences in values expressed in the technical rationality of planners and the practical rationality of the objectors, so that consensus over what constitutes the public interest is often elusive. This issue brings into focus a debate over power relations between planners and "the planned" as an obstacle to communicative governance (Healey 2003; Pløger 2001). In the absence of adequate procedural rights for the public, technical rationality will invariably dominate the policy process in planning to the further frustration of those unhappy with the development trajectory of an area. There are plenty of examples from the RoI (e.g. Allen and Jones 1990) and elsewhere (Dryzek 1990; Fischer 2000) that confirm that technocratic decisions are not always the most appropriate. This supports Healey's (1997) suggestion that rights of challenge are an important way of promoting collaborative inclusionary planning, particularly in a situation like the UK, where such rights are available to the promoters of development, but not to objectors. This in turn relates to the dismissal of TPRA in the UK on what are essentially managerial grounds (see Chapter 5) as this finding suggests that rights-claims will be minimised when citizens believe their concerns are being fairly addressed within the planning system and in turn, where such rights exist, planners may take greater care to ensure that citizens feel their long term interests are being taken into account. In this sense, an enhanced rights-regime may contribute to a transition towards 'communicative rationality' by forcing agencies into dialogue and understanding with the public (Dryzek 1990; Sanderson 1999).

7.7.4 Rights-claims and citizenship

The depreciative or sceptical view of environmental rights, as discussed throughout the thesis appears to be based on an inappropriate caricature of rights-claimants, seeing them primarily as objectors rather than *citizens*. Although the indicator for civic engagement (*voter turnout*) used in section 7.5. was not seen as having a significant relationship with the propensity to appeal, the idealised discourses produced from the Q-method suggest that the motivation to make a claim via TPRA *is* strongly linked to notions of citizenship and tied in with notions of duty and obligation in relation to the environment and local community. This can be related to wider debates that suggest that it will require more than just improved regulatory control to secure a transition to sustainable development and will need some form of wider public engagement to secure more fundamental shifts in behaviour (e.g. O'Riordan and Voisey 1998). This has shifted attention away from citizens as *passive* consumers of services to the need for *active* citizens who actively engage in local governance (Selman and Parker 1997). This has major implications for public participation, as the more traditional "*information deficit model*" (Burgess, Harrison et al. 1998, p.1447) and *"narrow civic environmentalism*" (Agyeman and Angus 2003) needs to be replaced by a model of "*deliberative and inclusionary processes and procedures*" (DIPS) or "broad civic environmentalism" (Owens 2000; Rydin and Pennington 2000; Agyeman and Angus 2003), which, among other things can help overcome the value-action gap that often hinders environmental initiatives (Blake, 1999).

The renewed emphasis on citizenship is necessarily entwined with the extent and use of rights, and the promotion of various green notions of citizenship[190] specifically entailing enhanced environmental rights. Indeed, as Curtin (2002, p.303) suggests, we are rarely encouraged to respond to government initiatives - such as planning policy - *as citizens*. Indeed in the case of TPRA it has been assumed by government that the public primarily respond as consumers pressing for private preferences. Yet Sagoff (1998a), amongst others, highlights that the public is capable of distinguishing between those environmental policies that require consumerist or citizen responses, borne out by the idealised discourses

[190] Varieties have included "*ecological citizenship*" Curtin (2002), "*environmental citizenship*" (Van Steenbergen, 1994) and "*sustainability citizenship*" (Barry, 2005) .

discussed above. It may therefore be more appropriate to distinguish rights-claims, not between "*heroic*" or "*recalcitrant*" citizens (Dean 2004) but on the basis of whether the rights-claim is being made as a consumer (i.e. primarily to protect one's own property rights) or as a citizen (i.e. on a more generalised concern for an area or duty to protect the environment), on the basis that to function as citizens requires us to engage in public practice rather than the private pursuit of individual goods (Curtin 2002, p.299). Indeed placing planning in a rights-frame immediately links public participation with notions of citizenship and from this comes a very different, more positive perspective of rights-claims, where in a time of citizen withdrawal[191], any such activity should be a welcome expression of civic engagement. It also provides a more comfortable explanation of why people of a certain socio-demographic profile seem more likely to claim TPRA – as it has been shown that a whole range of citizenship activities illustrate similar social patterns (Pattie, Seyd et al. 2003). While there is a substantial range of theoretical perspectives on what it is to be a citizen (see Isin and Turner 2002), it has been suggested that the dominant model in Britain is one of social-orientated liberalism (Searing, Johnston-Conover et al. 2003) where duties are accepted as a central idea of community and civic engagement is extolled. This provides an optimistic context for assuming a more progressive use of environmental rights and contrasts with Searing, Johnston-Conover et al's (2003) view of the dominant model of citizenship in the US that stresses individualism and instrumental engagement, from which it appears the sceptical view of rights may have emerged and that this has been transferred to the political and academic discourse of rights.

If we therefore generalise that British citizens are predominantly socially-orientated, in the context of growing environmental concerns, a "good" citizen would engage in active environmental behaviour (Selman and Parker 1997) which may entail objecting *as a duty* to unsustainable development. In this context "*resistance is fertile*" (Barry, 2005) and not seen as an action frustrating the management of the development process. Indeed Cowell and Owens (forthcoming) have shown how such resistance can be related to the wider objectives of sustainable development and that current planning reforms appear desgined to actually reduce the scope for such opposition. Such local activism is

[191] Robert Putnam has argued that "*the role of the citizen is coming to be defined more as a spectator than as a participant*" (Putnam, 2002, p.412)

seen by some (e.g. John 1996) as being an essential complement to state environmental regulation and reflects the quotation on page iii, that power concedes nothing without a demand. It is suggested here that environmental rights may be an important element in mobilising and prioritising such demands.

The idealised discourses produced as a result of the Q-method exercise has therefore facilitated a much deeper appreciation of the potential role of environmental rights that goes beyond an understanding of rights as a managerial problem or theoretical construct, but has explored rights from the position of the claimant. When this is combined with the more statistically-based findings earlier in this Chapter, it allows the drawing of some important conclusions for this Chapter and in so doing brings the empirical element of this thesis to a close.

7.8 Conclusions

This Chapter has attempted to examine the process and worth of TPRA, as an example of a procedural environmental right, from the point of view of the appellants. This has involved developing a profile of those who claim TPRA in the RoI, drawing on evidence drawn from postal surveys and databases generated from official sources. This was elaborated by portraying the variety of appeal activity by the different appellant groups and relating this to local contexts by exploring the geographic variations in appeal activity. This analysis provided a clearer picture of the ways in which these rights have been used, which was then supported by investigating the socio-demographic attributes of appellants. This described the evidence from postal surveys and then introduced a more detailed analysis of the Dublin area, using a combination of SAPS and GIS analysis. The final section of the Chapter supplemented the statistical inquiry by providing the results of a discourse analysis of those claiming TPRA. The findings generated from this Chapter provide a number of critical insights that help address the research questions raised in Chapter 1, particularly in how environmental rights relate to power distribution, environmental justice and the transition to sustainable development. These are discussed below.

- Rights-claims that deploy TPRA are utilised by a wide range of individuals and organisations, for a wide variety of purposes and for securing different outcomes and with differing levels of success. Whilst this appears to repeat fairly obvious truisms, previous debates on rights, following the abstract traditions of liberalism, have debated rights in a rather uniform, universalising sense, as if they meant the same thing to everyone. This is clearly not the case and environmental rights can be used in a variety of ways to protect the values that are most important to particular interests. The largest single group that evoke TPRA in Ireland are individuals and much of the debate in Britain is as if this is the only group that will evoke such a right. Businesses, voluntary groups and even state bodies use the right to voice their concerns with proposed development. The engagement of these types of organisation via TPRA has not been appreciated in the debate on rights in Britain and suggests that TPRA can be used for expressing a variety of goals, from trade protectionism to advancing sustainable development. In the Irish case, there are examples of how TPRA is regularly used to clarify important issues of principle, such as how sustainable development should be implemented via the planning system and which have come to form precedent principles in the application of planning policy. Needless to say such principles could not be established if there was no TPRA, where the appeal process can only be used to clarify pro-development arguments.

- This Chapter has also highlighted the complexity of the context for TPRA and the range of factors that are likely to influence the decision of whether to make an appeal. This could include social cohesion, development mix, policy stance of the LPA and the level of trust in decision-makers. The mix of such factors leads to a distinct geographic pattern of appeal activity that defies simple description and stresses the importance of context to the nature and worth of rights and rights-claims. This reflects the importance of social-construction in understand rights and echoes Blomley's (1994) comments (see section 3.5.5.) regarding the nature of *location* of where rights are invoked.

- The evidence presented in this Chapter further undermines the position that TPRA should be resisted in Britain on the grounds that there is an inevitability that they will be dominated by irresponsibility. This point has been tackled at several points in the discussion and does not need to be elaborated here, but it does underline several important insights. First it points to the fact that political and academic debate on environmental rights (and rights in planning in general) lacks a strong evidential base and is founded on particular conceptions of citizenship, such as those dominant in the US. This debate has prioritised procedural issues of efficiency above the important values that TPRAs seek to protect. As such, this example could be seen to expose the underlying ideology of the planning system, with a discrepancy between the values expressed and those that have secured protection in practice. In turn this strengthens the need for more explicit environmental values to be embedded into British land use regulation.

- The survey of third party appellants in the Irish Republic also revealed that the decision to appeal was set within a range of other activity that attempted to influence the planning decision related to the proposed development. This highlights that it is perhaps more appropriate to view rights as one, albeit powerful, means of participating in the planning system. Such a view lends itself to seeing rights-claims as a natural (and perhaps even welcomed) expression of citizenship, a fact supported by the idealised discourses generated from the Q-methodology exercise. The close relationship between appeal activity and citizenship also emerges naturally once a rights-frame is adopted when conceptualising participation in planning. This offers a very different and far more positive interpretation of such activity than when appellants are viewed as simply expressing their private preferences (as implied in government perspectives), with implications for both motivating increased participation in the planning system and in moving to more effective engagement. Thus by seeing objections to unsustainable development *as a right* and even a *duty* of "good" citizens, it may encourage a wider range of individuals to become involved.

- Earlier sections of this thesis suggested that, following Stammers (1993), a key evaluative criteria for testing the worth of environmental rights is whether they challenge or sustain existing power relations. This was taken as a starting point for assessing the socio-demographic profile of appellants in an attempt to identify whether any power-related variables (e.g. social class) were closely related to the propensity to appeal. This analysis took two forms – the results of a restricted postal surveys and a more wide ranging assessment of the distribution of third party appeals in Dublin. The results from postal survey indicates a strong link between key power attributes (e.g. above average income), whilst the analysis of Dublin appeals is less conclusive, but does show an association with similar factors. This therefore appears to suggest that in this case at least, environmental rights are more power-sustaining than power-challenging. However, the wider investigation pursued here has introduced additional insights that warn against such simple conclusions. The link between TPRA and citizenship highlighted above suggests that similar social profiles are associated with a range of citizenship behaviour so that this may indicate more about the trends in civic engagement than in the nature of rights themselves. When this is combined with the identified benefits of rights, such as their potential to mobilise citizens (albeit at this stage with relatively narrow social-demographic attributes) in valued deliberative processes, it becomes difficult to reject environmental rights on the basis of Stammers' (1993) criteria alone. This will be further considered in the concluding Chapter.

- Collectively, these issues lend support to the view of Campbell and Marshall (2000) who suggest we need a more sophisticated approach to thinking about public involvement in planning. This appears to be particularly true in developing an understanding of rights in planning, which needs to reflect the complex context from which rights-claims emerge and recognise their connection to deeper held views of citizenship. This has implications for understanding the rationales for participation and suggests that the five-fold model offered by Campbell and Marshall (2000) has some

value as a heuristic tool, but is unable to cope with the complex social, cultural and political worlds in which the decision to invoke procedural rights are made. It is suggested here that the adoption of a rights-frame may contribute to a more sophisticated understanding of participation. The fact that some of the discourses identified as part of the Q-method exercise exhibit high levels of public, rather than private, preferences indicates the potential of rights-induced dialogue (e.g. between appellants, applicants and planning authority) to provide some basis of a truly deliberative exercise that could genuinely engage local knowledge and fears (Sagoff 1998a; Owens and Cowell 2002, p.61) rather inevitably result in the cacophonic circus portrayed by Campbell and Marshall (2000).

- Finally, this Chapter has taken the example of third party appeals and instead of interpreting them simply as a semi-judicial and techno-rational element of the overall planning system, it has placed the appellants experience of this process into a rights-frame, as discussed in Chapter 3. This has a number of implications – first, following Freeden (1991), it places an emphasis on the values that this right protects rather than the bureaucratic or managerial implications of having such rights. Second it facilitates the understanding of appeal activity *as an expression of citizenship* rather than just an outlet for private preferences, which in turn allows the motivations and profile of appellants to be interpreted as part of the wider process of civic engagement.

The case study of TPRA in RoI provides a clear example of rights-claims in practice and as such breaks new ground in demonstrating the importance and complexity of understanding rights in their social, economic and environmental context, rather than as just a liberal abstraction. These can be combined with the findings of the previous theoretical Chapters to provide a final statement of the role of environmental rights in British planning, which will be undertaken in the concluding Chapter.

CHAPTER 8: CONCLUSIONS

8.1. *Introduction and recap*

The aim of this thesis has been to explore the potential role of environmental rights in British land use planning, within the context of increasing "rights-talk", the transition to sustainable development, the pursuit of environmental justice and an ongoing emphasis on public participation within planning theory. The context and specific objectives for the research were set out in Chapter 1, which established the hypothesis as being:

"The incorporation of environmental rights into planning procedures will result in more equitable and environmentally sustainable outcomes"

This was further elaborated through a series of specific research questions:

i. How has the concept of "environmental rights" emerged from the panoply of "human rights" thought and is there a specific definition of "rights" that can be used in planning research?
ii. What theoretical, ethical and ideological perspectives on "rights" have been articulated in planning literature?
iii. What "rights" currently exist in British planning, can any of these be regarded as "environmental rights" and what values do they seek to protect?
iv. Does a "rights" perspective have any value in understanding the nature of planning outcomes?
v. In terms of power distribution, environmental justice and the transition to sustainable development, what are the consequences for planning of embedding environmental values within a rights-discourse?

The veracity of the hypothesis will be reviewed below, but it is useful to first recap on how the supplementary research questions have been tackled. The first of these was addressed in Chapter 2, which examined the scope, meaning and value of rights and reviewed their emergence as a key concept in western political thought. This introduced Freeden's (1991) definition of rights, where they were seen as a capsule to protect and prioritise values. This was shown to be a useful concept, offering a variety of analytical advantages for planning research. This Chapter also explored the concept of specifically *environmental* rights and suggested that it was most appropriate to consider these as consisting of three main types; those related to the *rights of nature* itself and a dichotomy between

substantive and *procedural* anthropocentric environmental rights. It was suggested that procedural environmental rights have greater short-term potential for influencing the British planning system and for this reason the investigation narrowed to focus on their role, using TPRA as a case study.

Chapter 2 also developed a number of other critical points that have served as a basis for the subsequent analysis. This includes establishing that rights have achieved a privileged position (even hegemony) within the political discourse of liberal democracy, so that the acceptance that certain values deserve rights protection appears to bring with it certain privileges. However, despite having such privileged position, the actual *worth* of rights within any specific realm of public life is largely unexplored. Indeed, it was highlighted that beyond the "core" human rights, there is little consensus over which other values deserve rights-protection, particularly those related to the environment. It was suggested that in this context, the role of environmental rights are best judged in taking into account their social-construction and not just the degree of legal entrenchment - a perspective supported by Freeden's concept of rights. This then led to two significant assertions; first that the *location* of rights-claims becomes critical in judging the role of rights and second, that we should recognise that rights function, not only in terms of influencing ethical standards and as a basis of legal action, but also because their use as a linguistic device has strong rhetorical appeal. This focuses on the use of rights as a feature of discourse, which, from a Foulcauldian perspective, can be seen in terms of their relationship to power (Fairclough 1992). Furthermore, it was suggested that the relationship between rights and existing power structures can be used as a test of the worth of rights (Stammers 1993).

The second research question was tackled in Chapter 3, which explored the presence of rights in planning discourse. This highlighted at least four different perspectives on rights, each of which emphasises protection of separate bundles of values; property rights; rights of participation; rights as ethics; and rights as a conceptual device. This suggested that rights-discourses in planning have tended to emphasise rights as vehicles for expressing interests, rather than on how they protect important principles. As a result, the invoking of rights has been seen as a problem of how to manage competing interests in the context of other models of

accountability (e.g. representative democracy), while obfuscating the fact that some interests are accorded the protection of rights (e.g. developer appeals) and others are not (e.g. third parties). There has never before been a consideration of the diverse ways in which the concept of rights is deployed in planning and as such, there is no coherent theoretical framework through which these various perspectives can be debated and, potentially, integrated. This also highlights that the concept of rights appears to serve a wide variety of ideological masters, yet in the planning field (at least) there is an implied association with individualism, libertarianism and a faith in the free market as a result of the strength of the property rights-discourse. It has been suggested in Chapter 2 that the subtle shift in associating rights with *citizens* rather than *individuals*, creates powerful inks with a whole range of more progressive concepts, including community, democracy, accountability etc. and allows rights to be decoupled from more reactionary ideological outlooks. Indeed, following Freeden (1991) it is noted that it is not rights *as a device* that provides ideological content, but its association with "adjacent concepts". This critical point has been overlooked in planning and is a contributing factor to why the progressive potential of rights remains neglected.

The third research question is also tackled in Chapter 2, in that this reviews the standing of environmental rights at the various levels of governance and Chapter 3, which discusses the way in which the concept of rights is embedded in planning discourse. This suggests that environmental rights have been something of a minority interest in planning, but that there is growing awareness arising from legal debates surrounding the ECHR, the Aarhus Convention and various EU Directives, as well as the transfer of the environmental justice discourse from the US. Where the concept of environmental rights has been taken up by planning, there appears to have been an emphasis on their procedural, rather than substantive form. Using Freeden's concept of rights, it was shown how procedural rights could be envisaged as protecting some of the values seen as central to effective planning.

The fourth research question, dealing with the value of rights in understanding planning outcomes was also tackled in Chapter 3 by highlighting the potential of placing planning in a "rights-frame", a concept that emerged from the discourse

that treats rights primarily as a conceptual device. It is suggested that such a rights-frame can act as a valuable heuristic tool for understanding how various values are expressed and prioritised in the planning process and that these assist in interpreting planning outcomes. This has consequences for how we approach issues of the public interest, the aggregation of costs and benefits of planning intervention and public engagement with the planning system. Furthermore, the rights-frame can be used to highlight discrepancies between rhetorical values expressed as being central to planning practice and those actually protected by the *realpolitik* of planning practice. It is suggested therefore that the concept of a rights-frame provides, for the first time, a coherent way for considering the role of rights in planning (and potentially beyond) and adds a powerful tool for the political analysis of land use regulation.

Given the lack of previous theoretical engagement with rights in planning literature, it was critical that the first four research questions, dealing with conceptual issues, were tackled before addressing the final question. This fifth question relates to the consequences of promoting environmental values within a rights-discourse and is critical to testing the overall hypothesis. Taking the conceptual framework developed in the first three Chapters, it then became possible to develop an empirical strategy aimed at generating evidence to address this final research question, the rationale for which was described in Chapter 4.

The last research question was tackled from several perspectives in Chapters 5–7, all of which took TPRA, as a case study of a procedural environmental right. Chapter 5 explored the significance of TPRA for British planning and identified the type of values it encapsulates, the influence appeals exert on the wider planning system and how these values are protected in other planning jurisdictions. An examination of the discourses offered in support or opposition of the introduction of TPRA highlighted the rhetorical power of rights in political debate and their link to environmental justice and sustainable development. While this established the parameters of a debate around the hypothetical impacts of environmental rights, Chapter 6 shifted the empirical strategy towards assessing impacts of actual instances of deployment. This described the scope, outcome and consequences of TPRA in the Republic of Ireland. The impact of this right was shown to be

extensive – not only are appellants very successful in changing original planning decisions, but, as suggested in Chapter 5, the right exerts an *ex-ante* effect and carries much symbolic power by indicating that, procedurally at least, the system is not entirely pro-development. The analysis of the Irish case continued in Chapter 7, which focused attention towards those actually making rights-claims via these appeals. This described the variety of interests using TPRA and how these differ in terms of outcome and the type of development appealed against. The nature of rights-claims were shown to be subject to geographical variation, with the pattern of rights-claims contingent on a multitude of factors, thus highlighting the complexity of what makes up the *location* of rights-claims. Chapter 7 also investigated the link between rights-claims and power, by exploring the socio-demographic attributes of TPRA claimants. The evidence generated from this is not conclusive, but does appear to indicate that more affluent and better educated sections of Irish society are more likely to make rights-claims. This is then linked to the motivation for such rights-claims through a discourse analysis of appellants using Q-method. This proves to be very revealing of the complexity of the stimuli for rights-claims and leads to a deeper consideration of the links between rights, citizenship and context of location. This engages many of the issues developed in previous sections of the thesis and the concluding section of Chapter 7 outlines a number of insights that address the final research question and in so doing, allow a judgement to be made on the overall hypothesis.

In tackling these research questions through the process highlighted above, the thesis has involved an extensive body of conceptual and empirical research. This has resulted in a large number of insights into the relationship between rights and planning, which have been reported in the concluding section of each Chapter. Although many of these findings have antecedents in previous research, it is important to stress that this has almost entirely consisted of theoretical speculation and it is suggested that this thesis stands as the first empirical investigation of the impact on environmental rights on a single area of governance, such as planning. Yet if environmental rights do have the potential highlighted in the thesis, it is strange why this should be such a neglected topic. It is suggested here that this may have arisen for a number of reasons. First of all, the plasticity of the concept of rights and a lack of a coherent framework in which to gauge their impact has

made it difficult to link the worth of rights to instances of planning practice. Furthermore, where rights have had presence in planning discourse it has been mostly associated with the property-rights approach and as a consequence, shunned by those holding alternative ideological outlooks. The adoption of a rights-frame helps overcome these obstacles – first it provides a more tangible concept of rights that stresses the protected values and second, it notes that rights themselves do not have ideological content rather than the concepts associated with them, and as such it has been shown that it is possible to associate rights with progressive principles of citizen engagement and environmental justice.

The comments made above stand on their own as a valuable and discrete set of detailed findings from the research, yet can be drawn together to provide an overall response to the hypothesis established in Chapter 1 and in so doing also addresses the question that forms the title of the thesis.

8.2. The role of environmental rights in British land use planning

The hypothesis suggests that the incorporation of environmental rights into planning procedures will result in more equitable and environmentally sustainable outcomes. Having undertaken a thorough investigation of these issues, it is possible to offer qualified support to such an assertion. In making such a claim it is important to note that this is not based on a legal-derived analysis of rights but primarily on their rhetorical value, identified as being an equal or even more significant dimension to the concept of rights. On this basis, it has been shown that environmental rights, or rather, placing environmental impacts in a rights-frame, can exert some positive influence within the planning process.

One feature of this is that a rights-frame has potential to increase the level and nature of public engagement with the planning process. This arises from the strong rhetorical appeal of rights-talk and the fact that once participation, objector-developer equity and due process are seen to deserve rights-status, it will induce different responses from both state and citizens. For the state, rights-designation demands greater care in promoting and protecting encapsulated values and may result in both *ex-ante* precaution and *post-facto* legal censure. This view also

places an onus on the state, as holders of correlative obligation (O'Neill 2000) to regard these values as non-derogable and not subject them to qualifying criteria, such as an expression of state-sanctioned "responsibility". For citizens, rights-designation provides greater confidence in pursuing grievances over such matters and given the deep resonance of rights issues, induces far more positive attitudes towards such action than would be accorded if it was seen as merely a matter of activism around policy or local planning issues. This factor is likely to result in greater levels of mobilisation when issues are seen in a rights-frame, compared to when they are not. Furthermore if public participation is seen as a rights-issue, it becomes a function of citizenship and thus takes on a variety of positive connotations that undermine the sceptical view that public engagement with the planning system can be denigrated as being *merely* "instrumental" or seen as having a "dark-side". Indeed from some perspectives of citizenship, challenges to political or bureaucratic decisions will be seen, not as an opportunity to further self-interest, but as a *duty* (Kymlica and Norman 1994; Barry, 2005) and as such may have positive benefits, not only for land use regulation, but also for democracy. It was also suggested that as a feature of citizenship, participation becomes more appropriately seen as a *deliberative* process rather than an exercise to address information deficits and as such a critical contributor to the transition to sustainable development (e.g. Owens 2000; Rydin and Pennington 2000; Agyeman and Angus 2003). Indeed, the presence of rights may also provide a strong foothold for organisations pursuing social and environmental agendas to more effectively engage in the policy process (Owens and Cowell 2002).

Furthermore, Chapter 7 suggested that rights-claimants appear to be motivated by a range of factors, which included their respect for, and perception of, the planning authority. Rights-claimants views of the planning system appear to stem from a complex mix of individual ideological outlooks and experiences of dealing with planning authorities. This underlines the need for understanding public participation as involving socially-embedded individuals with as many valid fears and hopes as the rest of us, rather than as if it only dealt with a single bloc of "the community" or sectors as representing certain definable interests. Indeed the frustration that sometimes arises around planning disputes is understandable when one considers that on the one hand society promotes the idea of individual as discerning consumers and on the other aggregates preferences via utilitarian

calculation. A rights-frame helps focus attention on this issue by placing the individual citizen as the key focus of attention, thus promoting an understanding of the real and particularised impact of a proposed development and not just in terms of its effect on "amenity". This, coupled with the consideration of the multiplicity of locations and motivations of rights-claims, suggests that viewing planning through a rights-frame can make a valuable contribution to the more sophisticated understanding of participation called for by Campbell and Marshall (2000).

The final research question called for an assessment of rights in the context of power distribution and environmental justice. While this research has facilitated some clear conclusions on a number of aspects of rights, above, the findings in relation to power (and therefore, by implication, justice) are a little more opaque. However, it is clear that the existence of strong procedural rights, such as TPRA has a profound impact on the balance of power between developers and those affected by such proposals. However, analysis of the use of TPRA in RoI appears to show that such procedural environmental rights are used predominantly (but not exclusively) by more affluent and educated sections of society. This suggests that the current pattern of rights-claims may reinforce the current distribution of power in society, thus confirming comment by critics of the Left that expose the weakness of rights to deliver their promises of justice when set within a context of political and economic inequality. While it was noted in Chapter 3 that this does not necessarily imply a socially regressive effect of rights, it does highlight the limits of rights to deliver on these issues. However, this requires three qualifications. First is that the empirical evidence relates to rights-claims, *not* the worth of rights themselves. Although this it may appear tautological in that the worth of rights is primarily realised through rights-claims, it does highlight that the "blockage" for delivering the equity promises of rights lies at the claiming stage and points to the need for more positive intervention here to ensure that the full potential of rights can be realised, while reminding ourselves that there may also be positive impacts on equity as a result of *ex-ante* influences. The second qualification arises from the suggestion that the rights-claims should be seen as an expression of citizenship, rather than individualism – from this perspective it appears that the propensity to claim TPRA has a similar social profile as other expressions of citizenship, such as voting, blood donation etc. While it is not

intended to wish away this critical rights-issue, this does suggest that the dominance of already powerful groups is not a reflection of rights *per se*, but a symptom of broader patterns of civic engagement. What it does highlight though, is that however useful rights may be, they do not provide the sliver bullet against deeply entrenched patterns of social relations. The third qualification on the equity issue relates to the fact that the empirical research presented here has only considered the impact of procedural rights, while neglecting substantive rights. Ideally any enhanced rights-regime would specify both types of environmental right in the recognition that procedural environmental justice on its own, is not enough (e.g. Pulido 1994). Finally, it is useful to highlight the wide variety of ways in which rights are deployed – they are used by corporations and NGOs as well as citizens and for a range of purposes – while some of these may lack progressive import, the mere existence of rights, given a suitable mix of contextual factors, always holds the prospect of challenge whenever abuse creeps into a planning system and that this factor may lie as a key symbolic value for procedural environmental rights.

In offering evidence to support the suggested hypothesis, it is important to make a number of further qualifications on the limits to how rights may contribute to the issues identified as being important. Thus while the view that rights are *just* a "liberal illusion" (Benton 1993) is rejected, neither is it true that *on their own* environmental rights offer a solution to the problematic issues of equality, sustainable development and environmental justice. These major challenges require much broader adjustments to patterns of consumption and production, social relations and decision-making institutions but, as recognised by Healey (1997) in her systematic institutional design for Collaborative Planning, rights *do* have an important place in the broader patterns of governance, but only when taken forward as part of a strategy that encompasses much broader spatial, social, economic and political issues (Pulido 1994; Harvey 2000). In the short term, an enhanced rights-regime would appear to able to promote greater levels of public engagement and be an important tool for those involved in agitating for a planning system that fully respects social and environmental capacities for development. However, one needs to be more circumspect regarding the ability of environmental rights to address equity issues in planning – because rights are a powerful tool in

argumentation and political debate, they will be used by all stakeholders, including those that are recognised as holding disproportionate social power. However, rights *should* be most explosive within the hands of groups that are disenfranchised from existing processes of decision-making, yet often lack the required skills to detonate their potential. It is therefore not enough that rights *just* become recognised, but that they are accompanied by complementary initiatives to the soft infrastructure of governance such as capacity-building measures and technical aid, which will enable rights to be more effectively claimed by all sections of a society. Indeed, one could claim that to increase capacity without developing a culture of rights-claiming may also be ineffective.

It is also possible to offer observations in terms of the title of the thesis, which asks if environmental rights have a role in British land use planning. It is suggested here that because the value of rights appears so contingent on such an array of factors, there is some danger in over-specifying the roles such rights may play. However, putting such qualifying statements aside, it is possible to suggest four broad roles for environmental rights in planning theory and practice:

- *Environmental rights as a statement of planning principles and ethics.*
  The conferring of rights status to certain environmental and procedural values should be seen as an unequivocal statement that these function as non-negotiable objectives of the system of land use regulation. These would stand as major ethical principles (c.f. Beatley 1994) that all stakeholders would have a responsibility to uphold. This is particularly important in the UK's discretionary model of planning, which has long been dogged by debates over its ultimate purpose (e.g. Pearce, 1992) and where its discretionary character has lead to accusations of a pro-development bias (e.g. Reade 1987). The recognition of environmental rights would then place such values on an equal footing to the protection of property interests and economic development and as such, form the basis of a more secure transition to sustainable development.

- *Environmental rights as a tool for promoting public participation.*
  This research suggests that viewing public participation as a rights-issue can have transformative value in the level and type of engagement with the planning system. This not only encourages more people to become involved, but when seen as an expression of citizenship, should be seen as a more positive activity that deserves a greater level of engagement from the planning authorities. A rights-frame of participation also focuses on the complexity of motivation and location of how citizens may engage with the planning system, thus promoting a more sophisticated understanding of the process of public participation.

- *Environmental rights a heuristic tool for assessing outcomes of the planning process.*
  Although rights have traditionally be seen as an entirely political or moral concept, this research suggests that they may also have a heuristic value in highlighting discrepancies between rhetorical objectives of the planning system and the actual outcomes of the planning process. This interpretative role may also provide a greater understanding of the distribution of the impacts of development activity, the problems of aggregating interests for defining the public interest and difficulties that arise when engaging in trade-offs within the policy process.

- *Environmental rights as a legal protection.*
  A more conventional view of rights sees their key value as affording legal protection from state interference. Although the potential of this role has been downplayed in this thesis for a variety of reasons[192], its existence cannot be denied and the fact that there is a strong popular belief in its value means it cannot be overlooked and should be recognised as a key role of any rights.

As noted above, these role are not offered as a panacea to challenges faced by the planning system, but collectively they do highlight that there is some merit in

[192] For example, this depends on recognition by the courts, raises many difficulties in definition and enforcement and a tendency for the courts to provide rather conservative outcomes.

further incorporating environmental rights as part of a strategy to improve the governance of British land use regulation.

8.3. Future research directions

Although these findings are offered with some confidence, such research inevitably faces a variety of constraints that prevent the pursuit of interesting avenues of enquiry or mean some issues are not given the attention they fully deserve. Throughout the thesis, there have been explicit attempts to highlight the strategic decisions that have taken the research in a certain direction and which have necessitated necessary diversions. As the research journey nears it end, it is possible to reflect on the alternative paths the thesis could have taken and to use these, along with the findings described above, to set out future directions of research on environmental rights and planning.

It is hoped that the thesis has established rights and planning as a viable research area and while it has done much to clarify the conceptual framework through which this can be explored, it is suggested that the full analytical and normative potential of the rights-planning relationship have still not been fully explored. This stands as an area of substantive potential research, which could take a number of directions. One example may be to explore the possibility of building on the diverse and discrete body of existing research in this area (e.g. Millichap 1995; Alexander 2002a; Webster and Lai 2003) to develop a more generalisable rights-theory of planning. This needs to recognise the progressive potential of this concept and taking into account issues of citizenship, equity etc, apply the rights-frame to economic and social issues, in addition to the environmental matters considered here. Similarly, there may be much greater potential in using a rights-frame to elaborate Millichap's (1995) notion of "particularising amenity", which could prove illuminating for the enduring debate on defining the public interest.

More specifically in relation to environmental rights, a holistic appreciation of their worth requires at least some mechanism for recognising the rights of both future generations and non-human entities, particularly other species and, potentially, inanimate elements of ecosystems, such as the atmosphere. While there is an

existing body of work tackling some of the philosophical and conceptual issues that these questions raise, ways in which they could be operationalised via environmental regulation remain unexplored. As ambitious as such an area of work would be, this thesis has shown that there are analytical benefits that can be derived from the adoption of a rights-frame and it is suggested that the incorporation of these rights into the planning process may offer valuable concepts for further operationalising values such as the precautionary principle and protection of critical natural capital.

Furthermore, the empirical analysis has focussed entirely on procedural environmental rights. While many of the conceptual issues discussed above would be shared with substantive environmental rights, there are a variety of useful research questions that remain unanswered in relation to the impact and role of this type of environmental right, particularly, as noted above, when combined with strong procedural rights.

The thesis has also explicitly noted that it has neglected the legal dimension of environmental rights. This is a more traditional way of exploring rights issues and there is an existing body of work that focuses on the legal potential of environmental rights (e.g. when as embedded in constitutions) and the political possibilities that flow from this (e.g. Hancock 2003; Hayward 2005). Important as this work is in grasping the potential of such rights, there is no research that actually illustrates the specific impact this may have on environmental regulation and its outcomes. This thesis does offer a contribution to this debate, but the insights offered here could be valuably extended through first, deeper consideration of how UN proposals for a Charter on Environmental Rights would impact on planning in the UK and second, international comparative research of those nations that have explicitly embedded environmental rights in their constitutions (e.g. Canada, Finland, Brazil). This was considered, and then rejected, when developing the research design of the thesis, primarily due to time and resource constraints and the need to initially develop a sophisticated appreciation of the practical and theoretical context for environmental rights within the UK. However, now that this thesis has achieved this latter aim, a useful next step would be such comparative research.

This is not to say, however, that we now know everything about the potential impact of environmental rights in the UK and there are several research questions that also need to be addressed here. For example, the thesis has returned several times to issues of "*rights and responsibilities*" arising from the discourse of New Labour. This was used to clarify the state's current position on environmental rights, but did not include a sophisticated understanding of what "responsibility" may actually mean. The nature of rights and responsibility should really be treated as having a close (but not contingent) relationship and, as was shown in Chapter 7, exploring one (i.e. responsibility),can reveal much about its correlative other (i.e. rights). It is suggested therefore that the understanding of environmental rights (or even just *rights*) in planning, could benefit from a detailed analysis of how various stakeholders conceptualise their responsibilities towards each other, the environment, community and the state.

The thesis has also identified rights as a potential building block in a process of deliberative engagement in the planning process (following Healey 1997, e.g. using TPRA as an explicit tool for mediation) and offering potential advantages in both broadening the range of interests involved as a result of increased mobilisation and by strengthening the citizen voice in any decision-making forum. Deliberation is not, however, an inevitable consequence of an enhanced rights-regime and there is a need for further work to further explore how these links can be strengthened.

8.4. Final thoughts

In the early part of this thesis (section 1.5) it was suggested that this research would make a contribution to knowledge in four different areas, namely:

- An improved understanding of the role and position of environmental rights in planning theory;
- An enhanced understanding of the links between abstract political theory and the operation of environmental rights in the real world;
- A better understanding of the role of environmental rights in overcoming issues of environmental injustice and inequality in the planning process;

- The development of a rights approach as an analytical tool in planning research and an understanding of the methodological approaches to investigating rights and their "worth" in everyday life.

It is argued there that the thesis has been successful in offering a valuable contribution in all these areas. In particular it has highlighted the complexity and open-ended nature of many of the areas of knowledge linked to rights. Indeed, if there is a single salient point that emerged from the research it is to underline that the worth of rights is defined not just by law but by a myriad of multi-dimensional criteria that vary according to context. It follows that the all too common view that treats rights just as simple, universalising or instrumental mechanisms will fail to grasp their deeper significance and value.

However, just because the worth of environmental rights has a complex basis, it does not mean it should remain the preserve of the academic community. Indeed, the complexity of their value is strongly contrasted with the relative simplicity of the message once demands are made through rights-talk. It has been shown that the adoption of a rights–frame can help isolate complex arguments to the factors that really matter - those of key principles. Armed with these insights, the need for an enhanced environmental rights-regime becomes more real and in turn this can facilitate more effective demands for some of the most important constitutive elements of sustainable development – equity and environmental justice.

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APPENDIX A: DETAILED DESCRIPTION OF THE METHODOLOGICAL ELEMENTS OF THE RESEARCH

A.A.1. Introduction

Chapter 4 described the overall rationale for the research strategy of the thesis and related this to the hypothesis established in Chapter 1. This noted that the research design involved a series of nested methodologies that included a number of surveys and the development of various databases drawn from secondary sources. The details of these different elements of the research are described in full here to provide transparency regarding the validity and robustness of the evidence quoted in the main part of the thesis. All the methodologies described below relate to the Republic of Ireland case study as it is in connection to this case that most of the empirical research has been undertaken.

Prior to moving to a detailed consideration of the adopted research strategy, there is a need for a few preliminary comments. In particular, it should be noted that at the beginning of the research a request was made to An Bord Pleanála (ABP) for access to their appeals database, which was refused on the basis of cost and staff time. This lead to the development of an initial data-gathering strategy based on the physical sampling of ABP appeal files, using Freedom of Information legislation to achieve access to the Board's archives. This sampling provided the basis of the survey noted in A.A.2. below and while this was invaluable in piloting some of the methodological and conceptual approaches of the thesis, it was subsequently superseded by developments on the ABP website that provided a more efficient method of collecting comprehensive appeal data, as described in Chapter 4.

The initial round of data-gathering was accompanied by a series of interviews with key stakeholders in the Irish planning system, which provided additional focus on the issues related to TPRA and their potential implications for UK planning. Those interviewed included the following:

- Oonagh Buckley, Department of Environment, Republic of Ireland.
- John O'Sullivan, Planning Officer, An Taisce.
- Jim Harley, Senior Planner: Donegal County Council.
- Josephine Henry, Community Technical Aid (Dublin).
- Tom O'Connor, Planning Officer, An Bord Pleanála.
- Liam Byrne, Deputy Planning Officer, An Bord Pleanála.

- Tony Doren, Construction Industry Federation, Republic of Ireland (by telephone).
- Raymond Beare, RICS, Northern Ireland.
- John Warke, Chief Commissioner, Planning Appeals Commission (NI).
- Maire Campbell, Deputy Chief Commissioner, Planning Appeals Commission (NI).
- David Small, The Planning Service (NI).
- Sam Frizell, The Planning Service (NI).

The results of these interviews are not explicitly included in the main text of the thesis, but they provided an invaluable orientation to the topic and the assistance of all those listed above is gratefully acknowledged. The early stages of the research also included a detailed examination of five individual case histories of third party planning appeals. Again these are not included in the thesis, but have been written up elsewhere (Ellis 2001a) and have provided a useful contextual background to the main research design.

This Appendix describes each of data sources quoted in the main text, noting how they were developed, the origins of any secondary data and describes other features of the methodology that is relevant to understanding how it contributes to the overall findings of the thesis.

A.A.2. Survey of users of the Republic of Ireland Appeal System, 1999

The first stage of the empirical investigation of the Irish case study was the generation of a sample of appeals from 1999, from which key appeals data (development type, outcome, details of appellant and applicant etc.) was established. In order to generate a sample spanning the entire year, the files for all appeals decided by ABP on every Friday of 1999 were selected. This provided a total of 244 of appeals (16% of all appeals in 1999), and which was broadly geographically representative of all the appeals decided that year (see Table A.1). Indeed, the data collected in this survey that is capable of validation (e.g. geographic distribution, development mix of appeals etc.) suggests that the responding sample is generally representative of all third party appellants.

Table A.1.: Geographic distribution of appeal sample, initial survey of users of the RoI appeal system

Area	Sample	All 3rd party appeals
Dublin Metropolitan area	36.9%	37.3%
Other urban areas	8.2%	7.4%
Rest of the Country	55.2%	54.7%

Source of data on all appeals: DoELG (2000)

The sampled appeal cases were also used to identify a selection of actual users of the appeal system, generating 250 appellants (there are a few appeals with more than one appellant) and 244 applicants. Each applicant and appellant was then sent a postal questionnaire that asked for information concerning their perceptions of the appeals system to establish some initial principles regarding the use of TPRA. The two questionnaires were piloted on 10% of the total sample and amended in the light of comments received. Final questionnaires were then dispatched with stamped addressed envelopes mid-September 2000 to appellants and to applicants in early October 2000, followed by reminder letters if no response had been received within two weeks. The sample sizes and response rates of the surveys are shown in Table A..2.

Table A.2: Initial survey of users of the RoI appeal system - sample sizes and response rates

Survey	Size of sample	% of total population	Total returns	Response rate
Appellants	250	16.4% (1,529 total third party appeals decided in 1999)	67	26.8%
Applicants	244	16.0% (1,529 total third party appeals decided in 1999)	64	26.2%

A similar survey was sent to local planning authorities, which attained a 23% response rate (9 cases). The results from these surveys were used to gauge the key issues related to TPRA as an environmental right. These are used in a limited way in the main text, mostly in Chapter 6, although one of the main contributions the surveys offered was that it the difficulty of gathering large-scale data samples from this population and indeed, the constraints of conventional, positivist approaches for explaining the value of TPRA to those involved. As already noted, subsequent to these postal surveys, ABP began to make available detailed information of all its appeals via its website which then opened additional possibilities for the aggregation of more comprehensive appeal data.

A.A.3. Republic of Ireland TPA Trends 1977-2002

The second element of the empirical research connected with the Irish case study was the development of a database of the overall pattern and trends of TPRA over time. This was possible by collating data provided in ABP Annual Reports, dating back to 1977 when the Board was established. This includes comprehensive information on issues such as the number and outcome of first and third party appeals and the time taken for decisions. This has been supplemented by the annual returns of planning statistics produced by the Irish Department of the Environment (now the DoEHLG), which allows the comparison of the trends of appeals with those of all planning applications. Whilst later Annual Reports include more detailed data, a relatively comprehensive picture has been developed of the main trends. This data is largely included in Chapter 6 and serves to illustrate the changing impact of TPRA over time and provides an overall picture of the way in which such appeals contribute to the ultimate decisions made within the Irish planning system.

A.A.4. Republic of Ireland 2002 TPA Database

As noted above, from 2002 onwards, the ABP website has listed, on a case-by-case basis, the results and background information of almost all appeals decided by the Board, with decision letters attached as downloadable files. Using a time-intensive method it has been possible to develop a database amounting to a sample base of over 5,000 appeals, 92% of all appeals decided in 2002. The development of this database involved:

- Downloading weekly lists of appeals decided by ABP.
- Converting these lists to *Excel* worksheets by removing extraneous characters and inserting relevant field codes.
- As the appeal lists included only basic data such as a reference number, appeal outcome and name of appellants, key data for each appeal then had to be retrieved for each individual appeal by downloading the relevant appeal decision notice and using these to input data such as development type, appeal type etc. onto the *Excel* worksheets, with appropriate coding

where necessary. Information collected for each appeal included: Location; development type; planning authority; name of applicant; time taken for a decision; and appellant(s) name, from which appellant type could be deduced (e.g. individual, private company, NGO etc).

- Comprehensive data was not available for every appeal – for example those that were withdrawn did not have the decision notices that included the necessary information, while a small minority of files were corrupted. This meant that a database of 5137 could be developed, representing a 91.9% sample of all appeals decided by the Board in 2002, with 2790 identified as being initiated by a third party.
- This database was then used to provide a comprehensive quantified analysis of the appeal activity for 2002, allowing cross-tabulation of the various attributes noted above to give a rich understanding of how the TPRA system is used in the Irish Republic.

This database provided the richest statistical source of appeals ever complied for Ireland and has been used in Chapter 6 to provide a more sophisticated picture of the subtleties of the Irish appeal system, such as relating development type to appeal rate or outcome and providing an aggregated picture of the types of stakeholders that invoke TPRA.

A.A.5. Sample of Decision Reasons for TPRA, 2002

Section 6.6.5. involves an analysis of the decision reasons given by ABP in the case of third party appeals. A breakdown of this analysis is provided in Tables 6.5. (by outcome) and 6.6 (by land use). These tables do not represent a full analysis of all third party appeals in the *2002 TPA database*, but are based on a representative sample of 327 cases and the basis of this sample is justified here. Thus Table A.3. shows the number of total appeals in the *2002 TPA database* by land use and outcome, with an approximately 20% sample for each cell. A threshold sample was set at 10 cases and where there are less then 10 cases in the entire *2002 TPA database,* all cases were sampled.

Table A.3.: Breakdown of sample of third party appeals used for analysis of decision reasons

Development type	No of third party appeals sampled (No. in total database sample)			Total sample (total in databases)
	Permission refused	Permission granted with revised conditions	Permission granted with the same conditions	
Extensions and alterations	23 (115)	42 (208)	10 (14)	75 (337)
Single housing	86 (427)	40 (202)	6 (6)	132 (635)
Major residential development	19 (93)	23 (115)	8 (8)	50 (216)
Offices)	10 (25)	6 (32)	1 (1)	17 (58
Retail	10 (20)	11 (53)	2 (2)	23 (75)
Wind farms/power generation	3 (3)	10 (10)	0 (0)	13 (13)
Telecommunication masts	4 (5)	10 (46)	3 (3)	17 (54)
Total	155 **(688)**	142 **(666)**	30 **(34)**	327 **(1388)**

Note: Number sampled in each cell are shown in bold, those in the entire 2002 TPA database shown in parenthesis.

Source: *2002 TPA database*

A.A.6. 2002 Greater Dublin Area Sample

To provide a further level of analysis, the 1454 appeals in the 2002 TPA Database (see A.A.4) falling within the Greater Dublin County Area193 were extracted and the third party appeals plotted onto a GIS map of the area using a street map overlay, according to location of the development (see Figure 7.10.). This distribution allowed a measure of appeals per person to be developed for each of the 322 Dublin Electoral Districts (DEDs). MacLaran (1993) has noted that the DED's may be socially heterogeneous, but in the absence of smaller, more homogenous areas for which census data can be generated, there is little option to use these, if this sort of analysis is to be undertaken, although such limitations should be fully acknowledged (e.g. see Pratschke and Haase 2000). There is however, an established tradition of research that has taken this data set as the basis of a socio-economic analysis of Dublin (e.g. Brady and Parker 1986; Kitchen 2003; Haase and Pratschke 2004) and, given the necessary notes of caution it is regarded as being the best available data source for this analysis. The DEDs have populations ranging from 340-24000 persons - 12 of these had populations of less than 1000 (e.g. that covering Phoenix Park) and as such were considered as potentially distorting influences and consequently excluded from any statistical

[193] This includes the planning authorities of the Dublin City Council, South Dublin County Council, Fingal County Council, Dun Laoghaire/Rathdown County Council and Bray Urban District Councils.

analysis. Initial regression analyses also indicated that a further three[194] regularly appeared as outliers and were also excluded from further analysis, so that any statistics shown in Chapter 7 are based on a total of 307 DEDs.

Appeals per person indicates that in absolute terms rights-claims via third party appeals are rare, with only 1 in 1570 people making a claim in each year, or an average of 0.0007 appeals per person, per annum. Although it is acknowledged that this variable does not represent a perfect measure of the propensity to appeal as it is based on *appeals per person*, rather than appeals *per planning permission* for any given area and that it is generated as a measure for a whole DED, for which appellants may or may not be representative. However, due to the difficulty of securing accurate data at this scale for all planning permissions or generating a detailed socio-demographic profile for each appellant, it is considered that this measure represents the best feasible option as an indicator of the propensity to appeal against comparable socio-economic data.

Having established appeals per person as the dependent variable, it then became possible to test whether there any social attributes that may help explain the rates of appeal. Therefore a range of potential explanatory variables, many of which could be seen as indirect indicators of power were generated for each of these DED's. Many of these factors were collected as part of the 2002 census195 (e.g. educational attainment, social class, occupation, age and gender), while other attributes, including that of house prices, multiple deprivation indices and voter turnout figures, have been complied from independent research. These have been described briefly in Chapter 7, summarised in Table A.4. and a more detailed justification for their selection given below. As noted in Chapter 7, these variable can be divided into those that can be taken as potential indicators of social power and those that can be linked to other factors linked to the propensity to appeal, as suggested in the review of literature in Chapter 3. A detailed definition of each of the chosen factors is given below. Those that can be linked to social power are:

[194] Dalkey Coliemore, Dalkey Hill and Blackrock Seapoint.
[195] This was provided from the Small Area Population Statistics (SAPS) of the Census 2002 and supplied by the Irish Social Science Data Archive (ISSDA).

- *Deprivation*

  While it is acknowledged that a wide number of socio-economic characteristics may be indicative of different forms of power, it was considered important to identify at least one indicator that could be regarded as a single index for such characteristics. A single index for deprivation has been developed by Haase and Pratschke (2004), covering the whole of the Irish Republic at enumeration district level. While it is somewhat inevitable that a single index suppresses the multi-dimensionality of deprivation, if robustly constructed, it can be a powerful way of capturing some key elements of social deprivation and indeed, its antitheses, power and affluence. Haase and Pratschke have based their *deprivation index* using seven different sets of data (e.g. male unemployment rate) that cover a combination of social class disadvantage, labour market deprivation and demographic decline, duly weighted using latent variable analysis (Pratschke and Haase 2000). This constructs a normal distribution around 0, with positive values representing increasing affluence and negative values indicating increasing deprivation. It is suggested that it is reasonable to assume that those areas that suffer the worst deprivation are less likely to be home to those individuals who can be regarded as having social power and that the inverse will also be true.

- *Citizen engagement*

  Voter turnout is a key measure of participation in the democratic process in western societies and, as such, used in Boyce, Klemer et al's (1999) analysis as an indicator of engagement in civic society. Voter turnout data may therefore be regarded as a reasonable proxy for the degree to which individuals engage in acts of citizenship. Fortunately for the purposes of this analysis, comprehensive data on voter turnout has been collected at enumeration district level for the RoI's 2002 General Election as a part of a project at NIRSA in University College Maynooth and University College, Dublin. Some results of this wider analysis have been published in Kavannagh, Mills et al (2004), which shows that overall Dublin has lower turnout than other parts of the country and has significant internal variation with areas of inner city deprivation having the lowest turnout rates. Kavannagh, Mills et al's analysis of national data suggests that factors such as age, owner occupation and social

deprivation are particularly strong factors in influencing turnout and therefore linked to other key power-related variables.

- *Social class*

  As noted above, the RoI Census 2002 provides a classification of individuals based *social class*, in an attempt to bring together groups of people sharing the same level of occupational skill, but taking no account of other characteristics, such as education. The categories, based on occupation and employment status are:

  - 1. Professional workers
  - 2. Managerial and technical
  - 3. Non-manual
  - 4. Skilled manual
  - 5. Semi-skilled
  - 6. Unskilled
  - 7. All others gainfully occupied and unknown

  There is an assumption here that the higher the level of occupational skill, the greater the degree of power held, thus providing a potential indicator to be used in an analysis of propensity to appeal. The initial analysis in section 7.5, suggests that those classes with higher occupational skill are over represented in third party appellants and that could be usefully explored further in terms of a more intensive analysis of the Dublin data.

- *Socio-economic group (SEG).*

  In addition to classifying individuals by social class the Census 2002 also allocates everyone to one of eleven *SEGs*, including a residual category where insufficient details have been provided (CSO 2004). This classification aims to bring together people with similar social and economic status on the basis of the level of skill or educational attainment required. The unemployed or retired are classified according to previous occupation and employment status and those in education or on home duties are classified according to the main household earner. The eleven groups are:

  - A. Employers and managers
  - B. Higher professional
  - C. Lower professional

- D. Non-manual
- E. Manual skilled
- F. Semi-skilled
- G. Unskilled
- H. Own account workers
- I. Farmers
- J. Agricultural workers
- Z. All others gainfully occupied and unknown

This is used as a potential set of explanatory variables in the regression analysis, on the basis that occupation and employment skill are key determinants of power in society.

- *Employment status*

  Employment status clearly has a critical link to affluence and as such can be regarded as an indicator of economic power. The Census 2002 provides a number of potential indicators related to employment status and three have been selected to test as part of this analysis: *percentage of the over 15 population in work*, *percentage of the over 15 population unemployed*; and *percentage of the over 15 population that are retired.*

- *Educational attainment*

  A further dimension to power is the level of educational attainment, which is also used by Boyce, Klemer et al. (1999). While the Census 2002 includes a number of measures of attainment at different levels of the educational system, the *percentage of the over 15 population that have attained a degree* has been selected as the key indicator here as this may be regarded as being one of the principal educational attributes for defining critical life chances, which may then reflect distribution of power.

- *House prices*

  It is assumed that house prices are related to housing demand in any one area of the city and as such, can be used as an indicator of the desirability of living in an area. It has been noted that the Report of the Comptroller and Auditor General suggested that the rate of appeal was linked to the value of property (Comptroller and Auditor General 2002). It can also be assumed that the greater the house price, the more affluent the residents. House price data is

available for the Dublin area in the form of a quarterly survey undertaken by the *Permanent TSB* financial institution and available on their website[196]. This is however only disaggregated to postcode level, which in Dublin covers an area much larger than a DED. It is presumed that this level of dissaggregation will prevent any meaningful correlation with the propensity to appeal, but given the potential strength of house price as a measure of affluence and social power, it was decided to use this in the first round of the statistical analysis.

The variables that reflect other characteristics identified in the thesis as potentially influencing the propensity to object, include:

- *Population Density*
  Density, in the form of persons per hectare has been generated from the Small Area Population Statistics (SAPS) generated as part of the Irish Census 2002 and the area calculations for each DED provided as part of the GIS maps from the Ordnance Survey Ireland. This has been included as a potential variable following the suggestion from the postal survey (above) and some of the literature reviewed in Chapter 3, that there may be significant differences in appeals rates in areas with different density characteristics, such as urban and rural areas, giving the potential to differentiate highly urbanised DED's of central Dublin, with those that are predominantly rural on the periphery of Greater Dublin.

- *Rate of Development*
  It is suggested that in the absence of detailed planning application information or other indicators of development activity at a DED level, it may be reasonable to assume that those areas subject to the most positive *change in the deprivation index* between census dates may also be those that have witnessed the highest level of physical development. Therefore for the purposes of this analysis, the relative *change in the deprivation index* between 1996 and 2002 has been taken as a proxy for the relative level of physical development, which may also provide some explanatory value of the propensity to invoke TPRA, on the assumption that areas attracting higher levels of development would also attract higher levels of third party appeals.

[196] See http://www.permanenttsb.ie/footer/hpi.asp.

Indeed Kitchen (2003) has identified that while most of Dublin has experienced social stability, some areas such as the inner city and particular suburban areas, such as in South Dublin and Dun Laoghaire/Rathdown, have witnessed rapidly growing population and increases in persons with a professional designation.

- *Age*

  Results form the initial postal survey described in A.A.2 above suggests that older people are more likely to invoke TPRA than the rest of the population and as noted in Chapter 3, notes that the over 60s are more likely to object to local development than other age groups (Dear 1992). For this reason the *percentage of the total population over 60 years old* has been selected as a potential indicator to be included in the analysis, not necessarily as an indicator of power, but to relate to the theoretical considerations of "NIMBY"ism discussed in Chapter 3.

- *Community stability*

  An apparent factor in the propensity of people to object to local development is the stability of local community with more established communities more likely to object to local development (Lake 1993). The Census 2002 includes a number of potential measures of community stability and the following were selected to be tested against the propensity to object; *percentage of the population that have moved to the area in the last year* ("movers"); *the percentage of the population that were born outside the Republic of Ireland* ("other place"): and the *percentage of the population living in permanent accommodation*.

- *Owner occupation*

  "NIMBYism" has also been linked to the protection of an individual's property rights, which has led some commentators (e.g. Cox and McCarthy 1982) to note that degrees of community activism in the face of proposed development may be related to levels of owner occupation. For this reason, the *percentage of the population living in owner occupied accommodation* has been included in this analysis.

Table A.4.: Summary of variables and data sources used in regression analysis of propensity to appeal.

Variable	Statistical descriptives	Sample	Source
Dependent variable: Third party appeals per person	Mean: 0.0007 Min: 0 Max: 0.0076	Based on 715 appeals in 310 DEDs. The 12 DED's with a population of less than 1000 were excluded from this and all other variables.	Census 2002 (SAPS) and *Republic of Ireland 2002 TPA Database.*
Potential explanatory variable: Population density	Mean: 43.9 ppha Min: 0 pph Max: 168 pph	Based on 310 DED's.	Census 2002 (SAPS) and GIS area statistics from Ordnance Survey Ireland.
Potential explanatory variable: Change in deprivation index 1996-2002	Mean: -0.2 Min: -21.2% Max: 9.9%	Based on change of deprivation indices described above from 1996 and 2002 census, with a higher score relating to increased affluence in a DED.	Personal communication with Jonathan Pratschke, now in University of Naples. This data is fully described in Haase and Pratschke (2004).
Potential explanatory variable: Total unemployed as % of +15 population	Mean: 8.8% Min: 1.66% Max: 33.0%	Based on 310 DED's.	Census 2002 (SAPS)
Potential explanatory variable: Total retired as % of +15 population	Mean: 11.5% Min: 0.8% Max: 26.6%	Based on 310 DED's.	Census 2002 (SAPS)
Potential explanatory variable: Turnout for the 2002 general election	Mean: 55.8% Min: 28.0%0 Max: 72.9%	Based on turnout data for 310 DEDs	Personal communication with Adrian Kavannagh of University College Maynooth. This data is fully described in Kavannagh, Mills et al. (2004)
Potential explanatory variable: Deprivation index 2002	Mean: -4.8 Min: -28.7 Max: 30.9	Based on range of social attributes from the 2002 census, with a higher score relating to greater affluence and nationally take a normal distribution centred on 0	Personal communication with Jonathan Pratschke, now in University of Naples. This data is fully described in Haase and Pratschke (2004)
Potential explanatory variable: Total in work as % of +15 population	Mean: 54.4% Min: 212% Max: 77.4%	Based on 310 DED's.	Census 2002 (SAPS)
Potential explanatory variable: Social class	Population 15+ divided into 7 different social classes, each of which is expressed as a % of total 15+ population at the DED level.	Based on 310 DED's.	Census 2002 (SAPS)

Potential explanatory variable: Socio-economic Group	Population 15+ divided into 11 different socio-economic groups, each of which is expressed as a % of total 15+ population at the DED level.	Based on 310 DED's.	Census 2002 (SAPS)
Potential explanatory variable: +60 as % of Total pop	Mean: 57.6% Min: 45.1% Max: 67.0%	Based on 310 DED's.	Census 2002 (SAPS)
Potential explanatory variable: Other place of birth as % of total	Mean: 6.2% Min:0.1% Max: 28.6%	Based on 310 DED's.	Census 2002 (SAPS)
Potential explanatory variable: Movers as % of total pop	Mean: 9.9% Min: 1.9% Max: 34.7%	Based on 310 DED's.	Census 2002 (SAPS)
Potential explanatory variable: % of degrees for total +15	Mean: 5.7% Min: 0.2% Max: 13.8%	Based on 310 DED's.	Census 2002 (SAPS)
Potential explanatory variable: Permanent accommodation as % of total	Mean: 93.6% Min: 49.4% Max: 100.0%	Based on 310 DED's.	Census 2002 (SAPS)
Potential explanatory variable: Temp accommodation as % of total	Mean:0.3% Min: 0.0% Max: 16.7%	Based on 310 DED's.	Census 2002 (SAPS)
Potential explanatory variable % owner occupier of total	Mean: 69.2% Min: 212% Max: 77.4%	Based on 310 DED's.	Census 2002 (SAPS)
Potential explanatory variable: % rented of total	Mean: 30.8% Min: 2.7% Max: 93.5%	Based on 310 DED's.	Census 2002 (SAPS)

For the purposes of the analysis, each of these variables were subject to an initial simple correlation against the dependent variable, *appeals per person*, to give a correlation coefficient as shown in Table 7. 4. This facilitated a selection of those variables that were most likely to explain the propensity to appeal and these were then subject to multiple regression analyses as explained in Chapter 7.

A.A.7. Q-Sort of third party appellants in the Republic of Ireland

The final element of the RoI case study involved an analysis of more subjective factors, namely the attitudes and motivations of those invoking TPRA, as a way of generating insights into whether individuals see themselves as using rights as a tactic of protecting their narrow self-interest, or whether wider concepts of duty and

citizenship come into play. This was particularly prompted by questions raised in earlier conceptual Chapters.

As briefly explained in Chapter 4, this part of the research was undertaken using Q-Methodology - a scientific approach to the study of human subjectivity (McKeown and Thomas 1988) which attempts to combine the qualitative study of attitudes with the statistical rigour of quantitative research techniques. It is named "Q-methodology" as a means of distinguishing it from the more familiar "R-methodology" that comprises "objective" research in the social science, such as surveys. Supporters claim that Q-methodology is not just another research technique, but represents a different philosophical approach to social science research as it avoids the pre-specification of concepts by the researcher and does not require large numbers of participants to produce valid results (Addams 2000). Indeed, although it involves a relatively small number of participants, this still provides a statistically relevant profile of appellants' attitudes because, unlike standard survey analysis, Q-Methodology establishes patterns within and across *individuals* rather than across *traits* such as gender, age etc. and is based on the assumption of 'finite diversity' in that there are generally not as many discourses as there are participants (Barry and Proops 2000). Its key strengths are identified by (Dryzek and Berejikan 1993) as being *"explicit, publicly constrained by statistical results, and replicable in its reconstructions and measurement of subjects' orientations, thus affording less interpretative latitude to the analyst."* (p.50).

Q-method has its origins in psychology research (e.g. Stephenson 1953) and despite being accused of having "*somewhat fugitive status*" within the social science community (McKeown and Thomas 1988, p.11), it has been successfully utilised in a wide range of research areas (Brown 2000) including environmental politics (Barry and Proops 2000). There are however, few examples of its use in planning research (e.g. Coke and Brown 1976, Swaffield and Fairweather 1996, Wolsink 2005), despite the claim by Focht and Lawler (2000) that it is an ideal tool for revealing stakeholder perceptions in environmental controversies.

It is important to note that the findings of Q-method are never claimed to be statistically representative of all populations (e.g. all third party appellants), but is an intensive analysis of a relatively small population – or more accurately, an intensive analysis of the discourses and attitudes of a small population and as such, provides sophisticated insights into the attitudes related to specific phenomena. It would therefore appear to be highly suitable for this part of the investigation into TPRA in the RoI.

The Q-sort undertaken as part of this study followed a standard approach (see McKeown and Thomas 1988; Brown, et al. 1999; Addams 2000), involving the following steps:

- The areas of discourse which are to be explored are identified, in this case prompted by discussion in earlier conceptual sections of the thesis – namely planning and third party appeals, concepts of rights and citizenship, concepts of community and public interest and environment/development.

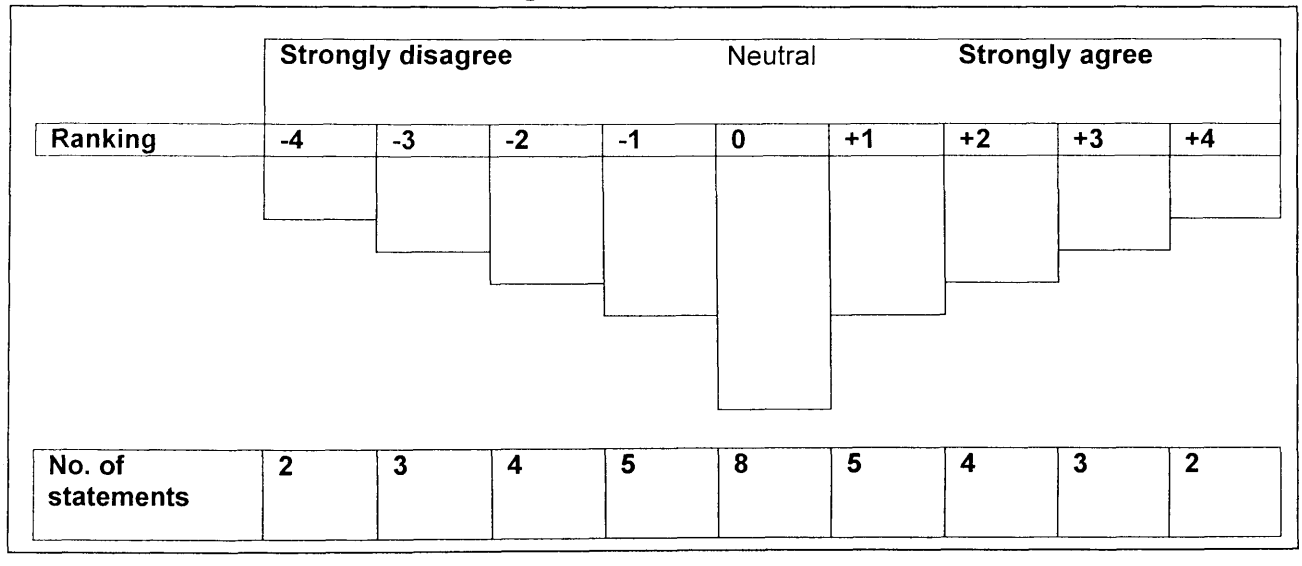
- 104 Statements (the concourse) around the areas of discourse were compiled, with sources of the statements being:
    - Survey of appellants, as noted in A.A.1 above.
    - Telephone interviews with ten recent appellants
    - Where there were not any statements from appellants on the areas of concern noted above, these were generated from secondary sources including articles in the Irish Times and previous academic research on environmental discourse, namely Dryzek and Berejikan (1993), Barry and Proops (2000) and Burningham and Thrush (2001).

  The first two sources contributed the majority of the statements, ensuring that as far as possible these were generated by those lodging TPRA, thus minimising researcher bias.

- The statements were then distributed according to a 4x4 cell structure similar to that used by Dryzek and Berejikan (1993)[197], covering the areas of concern noted above (see Table A.4) In order to reduce the number of statements to a manageable number, 36 statements (the Q-set, see Table 7.9) were then selected from the entire concourse and to ensure that these covered an appropriate range of issues, 2 were taken from each cell, plus an addition 4 from those issues that tended to be emphasised by third party appellants.

- 35 third party appellants were then sampled from the ABP website, using an online telephone directory (the Golden Pages) to identify the address of appellants. The appellants were first contacted by phone after they had lodged an appeal, but before they knew its outcome, so that the attitudes primarily reflect the motivations for making an appeal, not a reflection of the success or failure of an appeal. If agreeable to taking part in the research, the appellants were given a Q-sort pack in which they were asked to rank the 36 statements according to a scale ranging from +4 (strong agree) to –4 (strongly disagree), forcing participants to allocate their preferences against a normal distribution, so that the number of statements that could be given any particular rankings were limited, according to the following distribution:

Figure A.1: Distribution of rankings used in Q-sort



[197] This suggested 4 columns covering discourse elements of ontology; agency; motivations; and natural and columns covering types of claim, namely; definitive; designative; evaluative; advocative.

- Half of the sorts (those from Dublin) were conducted in the form of a face-to-face interview, with the researcher present to guide the participant through the sorting process and followed by a reflective interview to discuss the reasons for certain choices, which was then fed into the analysis of the results. To ensure a spread of participants from other parts of the Irish Republic, the remaining participants were sent the sorting material through post. Although using postal dispatch for Q-sorts faces a number of difficulties relating to the perceived complexities of participant tasks and the non-response bias that many other types of survey may suffer from, there is evidence that this is delivers sound results comparable to Q-sorts collected in face to face interviews (Van Turbergen and Olins 1979), as was the case in this research.

- A total of 35 completed sorts were received. Seven of the participants were female, nineteen were male and twelve had a third level educational qualification. Sixteen of the participants had only ever made one third party appeal, a further nine had made up to five appeals and one had made up to ten appeals. Nearly 60% of participants had stated household income over €56,000 p.a. and the lowest stated income of €14,000 p.a. Twenty-one of the twenty-six participants fell into the professional or managerial class, nineteen were in full employment, four were retired and the remaining three were housewives. On the basis of previous research (Ellis 2001a), it is suggested that the participant group is generally representative of third party appellants in the RoI.

- The Q-sorts were then processed using the *PQMethod* software (see http://www.rz.unibw-muenchen.de/~p41bsmk/qmethod/).This calculates a correlation matrix for the responses, in this case using Principal Components Analysis and then rotates the factors using varimax to simplify the factors for interpretation. The final step is to produce a table of factor arrays that represent idealised Q-sorts representing distinct attitudes. In this case five separate idealised types were extracted, which, collectively explain 68% of the variance of all the responses received. These findings are then interpreted by the researcher in an attempt to explain the factor array, including focusing on any internal inconsistencies. In this case it was supported by reference to notes from the interviews. Typically, the interpretation results in a label that helps identify the strongest salient characteristics associated with the factor (Addams 2000).

The results of the Q-method are given and discussed in Chapter 7, where they are related to the theoretical issues raised in earlier Chapters of the thesis.

Table A.5: Matrix of total statements for Q-methodology

DISCOURSES OF PLANNING AND THIRD PARTY APPEALS	ONTOLOGY (Sets of entities recognised as existing – individuals, states, interests)	AGENCY (degrees of agency of these agencies)	MOTIVATIONS (i.e. self-interest, public spiritedness)	NATURAL/UNNATURAL RELATIONSHIPS (taken for granted relationships)
DEFINITIVE (meanings of terms)	*Appeals should only be made by people who are local and totally identifiable* *Town planners tend to be scruffy, unprofessional individuals who know more about rules and regulations then they do about common sense* *Appeals are public participation*		*Third party appeals are a way of securing the proper planning and development of an area.*	*The proposed development did not fit in with where it is.*
DESIGNATIVE (issues of fact)	*The planning systems has too much red tape* *People who make third party appeals are disaffected with life, left on the shelf, bitter and evil.* *The planning authority had not fully considered the implications of the proposed development.* *The proper procedures had not been followed for the proposed development.*	*Third party appeals slow down development* *An Bord Pleanala has too much power* *Third party appellants are powerless against a pro-development planning system.*	*Penalties should be imposed for abuse of the appeals system.* *Third parties' costs should be reimbursed if they are successful.*	*The planning system favours the well-off* *Local councillors support developers.* *The planning system is biased in favour of professionals* *Planners and local authorities see things from the developers point of view.* *The proposed development would have completely ruined the local area.*
EVALUATIVE (expressions of worth)	*Fees for appeals should be increased to stop people from appealing unless they are really concerned about the development* *Appealing is a stressful, horrible process* *Local planning decisions are inconsistent.* *Planning is like the law, an ass.*	*Appeals would be unnecessary if planners were well qualified with sufficient resources.*	*Many third party appeals are made on non-planning grounds* *Local authority resources are wasted on appeals.* *The local council's decision depended more on the political situation than a technical evaluation of the proposed development.*	*The planning system is corrupt to the core.*
ADVOCATIVE (whether something should exist or not)	*Appeals should only be allowed when there is more than one person appealing* *Appeals should only be considered only if they are based on proper planning grounds* *Third party appeals should only be used for very large development*	*Local councillors and party politics should have a very small influence on planning decisions.*	*Appellants should have to prove their genuine interest and how a development would effect them personally.* *Appellants should only be allowed to make constructive criticisms of developments.* *I made an appeal because of the lack of detail included in the planning application.*	*There is a need for mediation between the objector and the developer* *The planning system is fair as long as you have a right of appeal.*

Table A.5: Matrix of total statements for Q-methodology (Cont'd)

DISCOURSES OF PLANNING AND THIRD PARTY APPEALS	ONTOLOGY (Sets of entities recognised as existing – individuals, states, interests)	AGENCY (degrees of agency of these agencies)	MOTIVATIONS (i.e. self-interest, public spiritedness)	NATURAL/UNNATURAL RELATIONSHIPS (taken for granted relationships)
DEFINITIVE (meanings of terms)	*Appeals should only be made by people who are local and totally identifiable* *Town planners tend to be scruffy, unprofessional individuals who know more about rules and regulations then they do about common sense* *Appeals are public participation*		*Third party appeals are a way of securing the proper planning and development of an area.*	*The proposed development did not fit in with where it is.*
DESIGNATIVE (issues of fact)	*The planning systems has too much red tape* *People who make third party appeals are disaffected with life, left on the shelf, bitter and evil.* *The planning authority had not fully considered the implications of the proposed development.* *The proper procedures had not been followed for the proposed development.*	*Third party appeals slow down development* *An Bord Pleanala has too much power* *Third party appellants are powerless against a pro-development planning system.*	*Penalties should be imposed for abuse of the appeals system.* *Third parties' costs should be reimbursed if they are successful.*	*The planning system favours the well-off* *Local councillors support developers.* *The planning system is biased in favour of professionals* *Planners and local authorities see things from the developers point of view.* *The proposed development would have completely ruined the local area.*
EVALUATIVE (expressions of worth)	*Fees for appeals should be increased to stop people from appealing unless they are really concerned about the development* *Appealing is a stressful, horrible process* *Local planning decisions are inconsistent.* *Planning is like the law, an ass.*	*Appeals would be unnecessary if planners were well qualified with sufficient resources.*	*Many third party appeals are made on non-planning grounds* *Local authority resources are wasted on appeals.* *The local council's decision depended more on the political situation than a technical evaluation of the proposed development.*	*The planning system is corrupt to the core.*
ADVOCATIVE (whether something should exist or not)	*Appeals should only be allowed when there is more than one person appealing* *Appeals should only be considered only if they are based on proper planning grounds* *Third party appeals should only be used for very large development*	*Local councillors and party politics should have a very small influence on planning decisions.*	*Appellants should have to prove their genuine interest and how a development would effect them personally.* *Appellants should only be allowed to make constructive criticisms of developments.* *I made an appeal because of the lack of detail included in the planning application.*	*There is a need for mediation between the objector and the developer* *The planning system is fair as long as you have a right of appeal.*

Table A.5: Matrix of total statements for Q-methodology (Cont.d)

DISCOURSES OF COMMUNITY AND THE PUBLIC	ONTOLOGY (Sets of entities recognised as existing – individuals, states, interests)	AGENCY (degrees of agency of these agencies)	MOTIVATIONS (i.e. self-interest, public spiritedness)	NATURAL/UNNATURAL RELATIONSHIPS (taken for granted relationships)
DEFINITIVE (meanings of terms)		*Community means people who interact at a personal level, have shared identity values and traditions and possess the power to make decision about their common values.*	*The public interest is defined by economic needs.*	
DESIGNATIVE (issues of fact)	*The people are the power.* *My neighbours see things in a different way than I do .*	*Manipulative individuals make third party appeals* *Third party appeals are the only way the public can influence planning* *People should take things into their own hands and not rely on the government to make the best decision.*	*Most third party appeals are lodged by residents for self-interest.* *Everybody should do something to help society.* *Community pressure prevents people from making full use of their rights.*	*Councils should be independent from vested interests.* *Councillors are democratically elected – let them make the difficult decisions*
EVALUATIVE (expressions of worth)		*The most important thing in planning is who you are, or who you know*	*Appeals are in the general interest as they are not motivated by profit.* *Councillors just don't listen to your point of view, so what's the point in having them?*	*If your are linked to a local official or politicians , it can effect the way a planning application is considered.*
ADVOCATIVE (whether something should exist or not)				*Power should be shifted from the government to the community.*

Table A.5: **Matrix of total statements for Q-methodology** (Cont.d)

DISCOURSES OF"RIGHTS"	ONTOLOGY (Sets of entities recognised as existing – individuals, states, interests)	AGENCY (degrees of agency of these agencies)	MOTIVATIONS (i.e. self-interest, public spiritedness)	NATURAL/UNNATURAL RELATIONSHIPS (taken for granted relationships)
DEFINITIVE (meanings of terms)	*Appeals are sensible alternatives to courts action.* *Democracy means my right to choose what's best for me and the public at large.*	*Enforcing your rights is difficult for those on limited incomes.*	*Citizenship means having and using your democratic rights.*	*An Irishman's home is his castle.*
DESIGNATIVE (issues of fact)	*If planning was fair and concerned with the public interest, there would not be a need for third party appeals*	*If someone has a legal right, they should exercise that right or have it taken away.* *The rights of individuals adds up to majority rule.* *Environmental organisations like Friends of the Earth fight for all our rights.*	*It is your duty to make an appeal against poor development if you want to make Ireland a better place for your children.* *Rights have been restricted in Ireland for the benefit of the economy.*	*The rights of third parties are more protected than a developer's rights.* *The planning system should protect a houseowners investment.*
EVALUATIVE (expressions of worth)		*Technical experts should have a bigger say in planning decisions.* *If you don't have a degree or letters after your name you can't get yourself heard.*	*I'm interested in protecting my house and job not crappy issues like human rights*	*Privacy is very important to me.*
ADVOCATIVE (whether something should exist or not)	*Justice should be defined in terms of human rights.*	*People are entitled to develop their own land, but not when it infringes on other people's interests.*		

Table A.5: Matrix of total statements for Q-methodology (Cont.d)

DISCOURSES OF ENVIRONMENT AND DEVELOPMENT	ONTOLOGY (Sets of entities recognised as existing – individuals, states, interests)	AGENCY (degrees of agency of these agencies)	MOTIVATIONS (i.e. self-interest, public spiritedness)	NATURAL/UNNATURAL RELATIONSHIPS (taken for granted relationships)
DEFINITIVE (meanings of terms)	*I can't understand how we effect the globe – the key thing is how the local environment is protected.*	*Individuals face severe speculative forces*	*Our duties towards the environment should come before our rights to property.*	*The cause of the ecological crisis is greed and money.*
DESIGNATIVE (issues of fact)	*Ireland is full of example of very poor planning decisions* *I am not very concerned about the environment.* *I would describe myself as a "radical environmentalist".* *Environmental problems can be overcome by technological advances.* *The environment is better now than it was 100 years ago..* *We face a major global environmental catastrophe*	*People shouldn't feel concerned about global issues as they are beyond their control.* *People just think about short term gains, not long term impacts of their actions.* *Corporations are the biggest threat to our environment.* *Entrepreneurs can suddenly change your whole way of life.*	*National governments are more concerned with the environment than at a local level.* *I do not normally object to development, but sometimes it goes over the top.*	*There are a lot of environmental cover ups.* *You can't just think about the development next door – as all development affects the global environment.*
EVALUATIVE (expressions of worth)	*Development is the future* *People who object to development are portrayed as anti-industry and employment.* *Development has no benefit to he community* *Technology is progress*	*Greenpeace and other eco-warriors are just extremists.*	*The rainforests are a long way from here, they are not affecting me at the moment, so I don't think about them.*	*Developers are essential to the economy and create local jobs* *The most important environmental challenges are global, such as climate change.* *We need to tackle local environmental problems such as litter, dog mess and vandalism before saving the world.*
ADVOCATIVE (whether something should exist or not)		*The most important thing planners can do is protect the environment* *The government should protect the environment more through regulation*	*The proposed development would not effect the overall area, but does spoil the enjoyment of my property.*	

APPENDIX B: SOURCE TEXTS FOR RHETORICAL ANALYSIS OF DISCOURSES OF THIRD PARTY RIGHTS OF APPEAL

A.B.1. Protagonist Discourse: Friends of the Earth (Scotland), "*Briefing on the Introduction of a Third Party Right of Appeal in Scotland*" (2004)

Briefing on the Introduction of a Third Party Right of Appeal in Scotland

March 2004

Friends of the Earth Scotland

Summary

Friends of the Earth Scotland welcomes the Scottish Executive's consultation on widening rights of appeal in planning. We support the introduction of a third party right of appeal (TPRA), limited to specific circumstances, within the context of wider planning reform. The introduction of TPRA, in conjunction with other changes, will help to level the playing field in a planning system which is currently weighted in favour of developers over individuals and communities. TPRA is an essential aspect of environmental justice, a central aim of this government, and we believe it will lead to increased public confidence in planning and improved standards of applications and decisions.

What is TPRA?

Despite the extensive rights of participation which already exist in Scotland, the focus of Scotland's planning system remains on the relationship between local authorities and developers, rather than with community groups and individuals. This imbalance is reflected in the planning appeal process.

In planning, the 'first party' is the proposer of the application, the 'second party' is the planning authority and an individual or community who objects to the application is referred to as the 'third party'. Where permission is refused, the developer can appeal the decision to the Scottish Executive. However, third parties do not have the right to appeal against the granting of permission, even when the decision is a departure from the democratically-adopted development plan. Currently, the only option for third parties is to apply for a judicial review, but this an expensive procedure which can only look at the legal arguments rather than examining the merits of the case.

Why is TPRA a current issue?

In the 2003 Partnership Agreement, the government promised to consult on widening the right to appeal, and the Scottish Executive will soon be launching a consultation leading up to a new Planning Bill in 2005. Friends of the Earth Scotland (FoES) has long campaigned for the introduction of a limited TPRA in Scotland as part of a widescale review of the planning system. In addition, an independent report by Green Balance[1] strongly made a legal case for TPRA within limited circumstances. TPRA is not a new idea – it exists in many other European planning systems, including the Isle of Man, the Channel Islands and the Republic of Ireland, as well as in Australasia.

Why do we need TPRA?

TPRA would help to address current inequities within the planning system. Third party rights are also essential for environmental justice and for promoting sustainable development. FoES has worked with many communities around Scotland who have had no recourse against unjust planning decisions, except by campaigning for a costly and confrontational public local inquiry (PLI), or a judicial review, where the odds are stacked against them. Environmentally degrading developments such as opencast mines, landfills and major roads are often clustered in disadvantaged communities. These

[1] Green Balance et al (2002). *Third Party Rights of Appeal in Planning*. London: Council for the Preservation of Rural England

communities, and indeed all members of the public, need to be able to participate on an equal footing with developers. TPRA would have helped communities in cases like those listed below:

- St Andrews Bay hotel and golf course development at Kingask opened in 2001 despite objections from, among others, the local Community Council, Scottish Natural Heritage and Historic Scotland. It was a departure from the development plan and one local councillor described the development as "a monstrous plook" which overlooked the town and spoiled the landscape setting.

- Benderloch sand and gravel quarry in Argyll & Bute was based on a disputed EIA and was a departure from the structure plan. It was strongly objected to by the local community but was given approval in July 2003.

- Dunblane and Bridge of Allan communities in Stirling are currently fighting the second proposal in 12 years for a golf course development on green belt land at Park of Keir, which would be a departure from the development plan.

- Greengairs in North Lanarkshire, dubbed "dustbin village" by the press, is surrounded by 9 opencast mining and landfill sites. The opencast mine at Boglea & Cameron Farm was approved in 1996, despite the recommendation for refusal by planning officers, and a substandard EIA. The community understandably feel they have no means of opposing forthcoming applications without TPRA.

It should not be assumed that the public will always oppose development. In Shetland, TPRA was granted in the ZCC Act 1974 for appeals against work licences in the coastal zone, and representatives of the local communities have used the existence of TPRA to strengthen their hand in negotiations with aquaculture operators and to improve conditions. In 2002 in the Republic of Ireland only around 7% of all planning decisions were appealed and of those appeals 52% were brought by a third party[2]. In these cases, more third party appeals resulted in a revised decision (54%) rather than an outright refusal of permission (45%), giving evidence that third party appeals were successful in upholding the rights of the community, rights that are not available in Scotland.

How would having TPRA help?

We believe that TPRA would enhance the planning system in the following ways:

- It would help to create a level playing field between the public and developers, providing a foundation for trust and cooperation, and a disincentive for developers to produce repeat, twin-tracked or poor quality applications.
- It would increase local authority accountability, since there would need to be reasons given for a decision, and thus improve the quality of planning decisions.
- It would enhance the status of a development plan if one of the criteria for third party appeals were to be departures from the development plan, and may act as an incentive to councils to make sure plans are up to date.
- It would enable the cumulative impact of decisions to be challenged, especially in areas which have a high number of negative developments.
- The lack of TPRA is not consistent with the spirit and objectives of the Aarhus Convention on environmental rights, and may also be pertinent to the European Convention on Human Rights, Article 6. These links are being investigated.

What are we recommending?

It is recognised that TPRA would probably increase the total number of applications appealed if it were introduced within the planning system as it now stands. However, FoES is calling for a long-overdue reform of the planning system with TPRA as one

[2] Ellis G. School of Environmental Planning, Queens University Belfast. Briefing paper for Scottish Parliamentary seminar: The case for a Third Party Right of Appeal. 4th February 2004

element within a more participative system with greater corporate and government accountability. TPRA would thus create an incentive for developers to undertake pre-application consultation with communities and help improve the standards of planning applications and decisions. It could be used against the entire application or to modify the proposal with conditions. FoES therefore suggests the introduction of a limited TPRA for applications falling within the following criteria:

I. where the planning decisions is a departure from the development plan;
II. where the local authority has an interest in the planning application;
III. where the application is a 'major development', defined as those which fall under either Schedule 1 or 2 of the Environmental Impact Assessment regulations;
IV. where the planning officer has recommended refusal of planning permission to the council.

It is recommended that a **fee** should be levied for third party appeals, perhaps in the region of £30-60 – in Ireland the cost is currently €200. **Time limits** for lodging appeals are recommended, and we suggest 28 days. There should also be targets for handling appeals to avoid any backlog and undue delay. We believe that the **use of mediation services** should be investigated, as these informal proceedings can lead to improved applications and decisions, and to public and private cost savings. **Greater corporate responsibility** is also an important feature of avoiding the need for third parties to appeal, and the adoption of mechanisms such as Good Neighbour Agreements can help to create channels of communication between developers and communities. There needs to be **greater accountability** by local authorities over the decisions they make, as developments can have an electoral impact, and also authorities need to give reasons for both approval and rejection of applications in order to enhance transparency. **PLI reform** is also encouraged to help communities engage more equitably in the process. For example, costs are high and legal representation expensive for local community groups. FoES also recommends an **education component** to new legislation on both the existence and appropriate use of TPRA, aimed at communities and individuals.

The arguments against TPRA

Opponents of TPRA raise some concerns which merit serious consideration, but overall we believe the benefits outweigh any costs. These arguments are countered below:

Myth 1: TPRA would add significantly to delays in the planning system
Truth: Although some applications would take longer, many others should be speeded up by the greater advance community consultation TPRA would encourage, and the disincentive it would provide to submit proposals departing from the development plan. Moreover, tight time limits would ensure rapid determination. Most appeals could be dealt with by written representations, as in Ireland where 98% of appeals are by written submission. Overall, if resourced sufficiently, TPRA would help rebuild public trust and confidence in the planning system - especially if accompanied by new mediation provisions - thus making it possible to speed up the majority of planning applications.

Myth 2: TPRA would add to the cost of the planning system
Truth: By using written representations, and by helping to reduce or avoid the cost of PLIs, TPRA should not add significantly to the costs of the planning system. At the discretion of inspectors, costs awards could be made to ensure that the costs borne by developers were reasonable. TPRA may well be seen to add to costs within the context of the current planning system, with a need for greater staffing in the reporter's unit and more training. Yet many of these costs would be offset by the other changes, and by the reduced number of cases proceeding to appeal.

Myth 3: TPRA would create a 'meddler's charter'.
Truth: This is not the case in Ireland and it is unlikely to be the case in Scotland. Rights to appeal would be limited and only open to original objectors to the proposal. Rules to deter frivolous and vexatious appeals could be easily put in place, such as cost awards

against such appellants, and the power of the Reporter to summarily dismiss appeals (subject only to legal challenge).

Myth 4: TPRA would be used to block needed development and investment
Truth: As noted above, TPRA would be limited to certain types of application, with a clear role to protect the public interest. Most importantly, evidence from Ireland suggests TPRA has served mainly to improve the conditions placed on developments, thus enhancing their public benefit, and not to block them.

Myth 5: TPRA would undermine local democracy
Truth: TPRA would enhance local democracy by increasing the direct accountability of planning authorities to their citizens. Although appeal decisions would be made by independent reporters, this is no more undemocratic than developers' appeals being heard by independent reporters as at present, nor can councillors be expected to actively represent all interests within a community.

Myth 6: TPRA would create an unmanageable administrative burden
In the past, numbers of planning appeals in England and Wales have been as high as double the current level, without overwhelming the authorities. Over the past 5 years in Scotland, the number of cases dealt with by the reporters unit has stayed relatively stable. Any administrative burden would be made more manageable through the use of written representations, and potentially by providing powers for summary decisions.

Myth 7: The supporters of TPRA are unrepresentative of communities, fundamentally opposed to change, and would object to any development
Truth: Only a tiny fraction of permissions have been appealed by third parties in Ireland, and many appellants seek only to change the conditions of the development rather than prevent it. Community representatives and local residents would be the main users of TPRA.

Myth 8: Other improvements in the planning system are more important that TPRA and should be pursued instead.
Truth: Other improvements should be, and are being, pursued alongside TPRA. In fact many reforms would be mutually reinforcing, such as improved neighbour notification. But TPRA is a critical link in re-establishing public trust, and raising standards in the system, and its success will be measured by how little it needs to be used.

Conclusions

For the vast majority of planning applications, the system works well in Scotland. However, for a significant minority of applications, decisions have been made which have not taken into account the community's justifiable opposition to a development. While some of these cases have been heard at a PLI, communities are disadvantaged on grounds of expense, time or expertise. In any case, local residents should be able to initiate an appeal themselves, rather than petitioning the Scottish Executive to raise the issue. FoES believes that TPRA would improve the whole planning system, especially leading to better pre-application consultations, which would mean fewer appeals overall in the long term. The lessons from Ireland and other jurisdictions show that TPRA can assist, rather than hinder, the decision-making process, that it does not have to introduce prohibitive additional costs, and that in general it is accepted as a positive mechanism in the planning process.

FoES believes that TPRA – developed and introduced in good faith – could be expected to increase public confidence in planning, improve the standards of applications and decisions, and enhance justice by balancing the developers' right to appeal. The Scottish Executive is making a genuine effort to undertake meaningful consultation on wider rights of appeal. All the stakeholders should engage with this process in good faith.

A.B.2. Antagonist Discourse: Confederation of British Industry(Scotland)'s response to Scottish Executive's Consultation paper on "Rights of Appeal in Planning" (2004)

CBI
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CBI Scotland's Response To The Scottish Executive's Consultation -

"Rights of Appeal in Planning"

1 **Introduction**

1.1 The Scottish Executive's top priority, as set out in the Partnership Agreement, and endorsed by the Scottish Parliament, is to increase the long-term growth rate of Scotland's economy. CBI Scotland very much supports this objective and its order of priority and wishes to see evidence of this objective becoming embedded in all policy areas.

1.2 The Scottish Parliament and Executive have considerable powers to improve the supply side of Scotland's economy, including planning. To help achieve the economic growth essential for Scotland to prosper in a global economy, we need a planning system which actively promotes the investment Scotland needs. We need to see a greater urgency and certainty to help deliver investment.

2 **CBI Scotland's position on Rights of Appeal in Planning**

2.1 CBI Scotland is implacably opposed to extending rights of appeal in Scotland's planning system to third parties. However, we are in favour of improving public consultation in the development planning process and have expressed this in our response to the Scottish Executive's consultation "Making Development Plans Deliver". CBI Scotland firmly believes that the legitimate concerns raised by those who favour third party rights of appeal can be addressed by improved participation and consultation at the time development plans are prepared and updated.

2.2 The introduction of a third party right of appeal into Scotland's planning system would create considerable risk of compromising developments in business, transport, health and other much needed social infrastructure. Individuals, businesses and pressure groups should not be permitted to add huge costs, by delaying development, onto business. Such a move would not create a level playing field and would undoubtedly cost thousands of jobs in our cities and rural communities.

2.3 Such a move would also be a backward step, escalating the degree of uncertainty and delay in an already slow and uncertain system. Given that the UK Government has ruled out a third party right of appeal in England, it would put Scotland at a competitive disadvantage in attracting investment. It would undermine both commercial developments and a wide range of public sector investments. Many of the public sector investments that would be vulnerable

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would be the very investments at the heart of much of the Executive's environmental and social agendas.

2.4 Further concerns are that a third party right of appeal would overload the planning authorities and create more uncertainty, not just for developers, but also for communities. It would also undermine the role of councillors, who are elected to make decisions on behalf of the community as a whole. The limited rights of appeal being consulted on, if adopted by the Scottish Executive, would still have the unwelcome characteristics of ambiguity and complexity and cause major difficulties in terms of the business, economic, health and social agendas.

2.5 Many of those who support the introduction of third party rights of appeal believe that the present system is unbalanced and that a David and Goliath situation exists in the planning system, i.e. well resourced businesses able to press home their proposals against the wishes of individuals in the community. This view is a distortion of reality because the introduction of third party rights of appeal could give rise to appeals by businesses against businesses (small and large), individuals against individuals, businesses and individuals against each other, and various parties against health and social developments.

2.6 The answers to the questions below are based firmly on the belief by CBI Scotland's members that social exclusion and poverty in our communities can only be overcome by the creation of good, well-paid jobs in a thriving economy. The introduction of a third party right of appeal into Scotland's planning system will put this at risk.

3 **Questions raised in the Consultation document and CBI Scotland's Answers**.

Q1. **Paragraphs 3.3.1 to 3.4.9 have identified arguments made to us previously both for and against a third party right of appeal. Do you think they accurately reflect the arguments? Are there other arguments not covered here which you wish to raise?**

A1. We agree that paragraphs 3.3.1 to 3.4.9 accurately reflect the arguments both for and against a third party right of appeal. However, these paragraphs need to be considered in the light of the consultation's regulatory impact assessment, which we believe amplifies the costs and risks associated with the introduction of third party rights of appeal. Also, while we accept, as the regulatory impact assessment points out, that there are considerable difficulties in determining the effects on business and the Scottish economy of the introduction of third party rights of appeal, more work should be carried out by the Scottish Executive to quantify these direct and indirect costs. We strongly believe that the Scottish Executive and Parliament should not introduce far-reaching changes of the kind being consulted on without fully and accurately quantifying the effects on the Scottish economy.

Q2. **Do paragraphs 3.5 to 3.14 accurately reflect what supporters of a third party right of appeal are seeking in a new appeal process?**

A2. We accept that paragraphs 3.5 to 3.14 reflect what supporters of a third party right of appeal are seeking in a new appeal process. However, we believe that insufficient weight has been given in the document to a desire to overturn decisions. Whilst a number of individuals and bodies may have concerns as set out in the consultation, we believe that the main objective of many is to

curtail development adjacent to, or near, their own properties. Whilst in an individual sense, this may be understandable, to allow a third party right of appeal to address this issue is not in the interest of Scotland as a whole. The Scottish Ministers and the Scottish Parliament should not support and encourage NIMBYism.

Q3. **If the right of appeal were to be extended to third parties, do you think it should be restricted to all or some of the four categories identified in the *Partnership Agreement?* Please give reasons to support your views. *Your response to this question will not prejudice any view you express on the principle of widening the right of appeal.***

A3. CBI Scotland is implacably opposed to the introduction of any third party rights of appeal in the planning system and believes that public confidence in the system should be addressed by making improvements to the development planning and approvals process. In framing our answer to this question, we are not prepared to accept the premise that the right of appeal might be extended to third parties and, therefore, express a view on the restriction being applied to all or some of the four categories.

With regard to:-

Cases where the local authority has an interest. The existing system recognises the importance of probity in decision making and contains sufficient safeguards to deal with the main issues arising.

Cases where the application is contrary to the local plan. There are already sufficient safeguards in place to deal with significant departures from the local plan. These safeguards will be strengthened by the introduction of Local Development Plans, which will have very limited, or no, scope to depart from the Reporter's recommendations.

Cases where planning officers have recommended rejection. The existing system is transparent in that officials' recommendations and the Council's decisions are in the public domain. The new system of Councils providing clear reasons for their decisions will strengthen the system and assist in removing doubts about probity.

Cases where an environmental impact assessment is needed. The existing system deals with these cases adequately, and the inclusion of this category has not been accompanied by any case in support. It is difficult to see why this category has been included in the consultation.

Q4. **Which planning decisions do you think should be capable of appeal to the Scottish Ministers?**

A4. We do not believe that any planning decisions should be capable of appeal by third parties to the Scottish Ministers.

Q5. **If the right of appeal were to be extended, which third parties should be able to appeal and in what circumstances? Please give reasons for your answer and also, where relevant, explain why you think any of the third parties identified above should not qualify for a right of appeal. *Your response to this question will not prejudice any view you express on the principle of widening the right of appeal.***

A5. CBI Scotland does not believe that any third parties should be able to appeal in any circumstances. The four categories of potential appellants in themselves illustrate how complex this question is and its impact on the planning system.

Q6. **Do you support, in principle, the introduction of a wider right of appeal in the planning system? Please give reasons to support your views.**

A6. CBI Scotland is implacably opposed, in principle and in practice, to the introduction of a wider right of appeal in the planning system. We believe that the arguments against a third party right of appeal, set out on pages 9 and 10 of the consultation document, and in this response, taken together with the very clear costs and risks set out in the regulatory impact assessment, support our views.

Q7. **How do you feel the planning service at both planning authorities and the Scottish Executive would be placed to manage the likely increase in workload?**

A7. The consultation document indicates that appeals could increase from 1,000 per annum to 2,600 per annum – an increase of 160%. It is difficult to see how the planning service at both planning authorities and the Scottish Executive would be able to cope with such an increase. The Scottish Executive Inquiry Reporters Unit would need to recruit experienced planners as Reporters and these would almost certainly need to be drawn from local authority staff. This would place even more obstacles in the way of development and severely compromise Scotland's economic prospects. Many of CBI Scotland's members believe that the number of appeals could be greater than the consultation anticipates.

Q8. **Do you think there would be any implications for the attractiveness of planning as a career if there were to be a significant increase in the appeal caseload? Please give reasons for your answer.**

A8. We believe that the impact of third party right of appeal would make working as a planner in the public sector less attractive as the planners would find themselves involved in an increasingly complex and tiresome degree of objections and this would put increasing pressure on an already stretched profession. Conversely, this would impact differently on the private sector where there would be an increased interest in serving a new and lucrative "appeals industry". It would in any case certainly take some years to train, qualify and increase the number of professional planners needed to deal with third party appeals.

Q9. **Should a fee be payable to object to a planning application and/or to lodge an appeal against a planning decision? If so, what do you think would be an appropriate level of fee?**

A9. We do not believe that a fee should be payable to object to a planning application and/or to lodge an appeal against the planning decision. However, we believe that where a third party appeal fails, the developer's costs of defending the appeal should be awarded against the appellant.

Q10. **Should the Scottish Ministers retain their role in deciding particular planning appeals, or should SEIRU decide all appeals?**

A10. It is vital that the Scottish Ministers retain their role in deciding particular planning appeals. Inevitably, some major business, industrial and social developments will involve political decisions in the public interest, which should only be determined by Ministers.

Q11. **Would the introduction of mandatory public hearings in defined circumstances increase public confidence in planning authorities' decisions?**

A11. CBI Scotland's firm preference is for Model 2 – continuing with the ongoing programme of modernisation of the planning system without introducing a new appeal system. We would be concerned about the costs and potential delays arising from any introduction of mandatory public hearings in defined circumstances. However, we are keen to see an increase in public confidence in planning authorities' decisions and might reluctantly accept the introduction of mandatory public hearings in defined circumstances if that could be achieved.

Q12. **Would extending the circumstances in which the Scottish Ministers are notified, to include all development plan departures, sufficiently address concerns about decisions being made by planning authorities against the terms of development plans?**

A12. The extension of circumstances in which the Scottish Ministers are notified, to include all development plan departures, might address some concerns about decisions being made by planning authorities against the terms of development plans and would be a better solution than allowing third parties to appeal. However, this needs to be weighed against the departure from the current principles of notification and reasoning for Ministerial calling and the costs involved and risks to development and Scotland's economy.

Q13. **Would it be appropriate to introduce a screening process for planning appeals? Please let us have your comments on relevant screening criteria.**

A13. CBI Scotland is implacably opposed to the introduction of a third party right of appeal and, therefore, is totally opposed to the introduction of a screening process for planning appeals.

Q14. **Are there circumstances in which any right to appeal against planning decisions should be withdrawn? Please give details.**

A14. If third party rights of appeal where to be introduced, there could be circumstances in which any right to appeal against planning decisions should be withdrawn. However, this would be a highly contentious and complex matter to be determined through the development plan and provides further evidence to support CBI Scotland's total opposition to the introduction of third party rights of appeal.

Q15. **(a) Please give us your views on each of the models outlined in section six.**

A15 (a) CBI Scotland only supports Model 2, which, together with other

Planning change proposals, offers significant improvements to the planning system. We are in implacably opposed to the introduction of third party rights of appeal and cannot support Models 1, 3 and 4.

(b) Can you think of any alternative package of changes to the planning system to ensure a system which is both fair and effective.

A15 (b) We believe that our response to the Scottish Executive's consultation on "Making Development Plans Deliver" supports changes to the planning system to ensure that it is both fair and effective.

(c) How would each of these models (and any other packages you suggest) impact on the resources and objectives of you or your organisation?

A15 (c) The regulatory impact assessment, accompanying the Rights of Appeal In Planning consultation, sets out the impact on the resources and objectives of Scotland's business community and the economy in respect of Models 1, 3 and 4. The introduction of any of these models, or variants, would be highly damaging to Scotland's future economic growth and compromise the Scottish Executive's number one priority of raising the long-term growth rate of Scotland's economy.

Q16. **Please let us have any additional comments you wish to make, if any, on relevant matters not addressed in this paper.**

A16. As made clear in this response to consultation, CBI Scotland is implacably opposed to the introduction of third party rights of appeal. If, against the advice of business, Ministers and/or the Scottish Parliament decide to proceed with the introduction of third party rights, we believe that such rights must not be introduced into the planning system as it currently stands. The Scottish Executive's other proposals for improving the planning system would need to be put in place and be working satisfactorily prior to any extension to rights of appeal being introduced. Also, resources to deal with the undoubted increased caseload at local authorities and the Scottish Executive would need to be in place first.

We have no additional comments we wish to make other than to express the hope that the Scottish Executive, with the support of the Parliament, will reject any extension to rights of appeal in planning.

June 2004

A.B.3. Government Discourse: Department of Transport, Local Government and the regions: Planning: Delivering a Fundamental Change (2002)

6.16 Some call-in decisions will always take a significant length of time to decide. These include many of the biggest and most controversial developments proposed anywhere in the country.

6.17 We have set ourselves the target of cutting in half the average time taken from the close of the inquiry to issue of the decision to the applicant. Following a comprehensive review by independent consultants of Government Office, Planning Inspectorate and DTLR procedures, we are going to establish new management arrangements to deal with these cases. This will deliver dramatic improvements in the way in which we handle call-ins and recovered appeals. The Government will also consider, and would welcome views about whether we should set ourselves statutory targets for delivering decisions on call-ins and recovered appeals, subject to exception arrangements for the most difficult cases.

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6.18 At the moment, we state the reasons for calling in a planning application for the Secretary of State's decision and place on the DTLR planning web site both copies of letters calling in applications and notifying applicants of Ministers' final decision. We have not given reasons for not calling in a planning application. In the interests of greater transparency, we will now, as from today, give reasons for not calling in individual cases and to put copies of these letters on the Department's web site.

Third Party Rights of Appeal

6.19 Some people believe that there should be a right for third parties to appeal to the Secretary of State against a decision by a local authority to grant planning permission. 'Third parties' in this context means people who have views about a planning application, whether or not they are directly affected by it. It is argued that this would give people who feel disadvantaged by a planning approval a comparable form of redress to those whose planning application is rejected but who have a right of appeal.

6.20 The contrary viewpoint is that such a right would not be consistent with our democratically accountable system of planning. Elected councillors represent their communities – they must take account of the views of local people on planning matters before decisions are made and justify their decisions subsequently to their electorate.

6.21 Proponents of a third party right of appeal themselves recognise that it could not be unlimited because there must be some mechanism to prevent frivolous appeals. The situations in which advocates of third party rights suggest that they might be exercisable are as follows:

departures from the plan. The difficulty with this proposal is that a considerable number of development proposals could contain minor departures from the detail of a plan or, under our new proposals, from the Local Development Framework. In practice, proponents of third party rights have in mind only significant departures. But defining what is and is not 'significant' is not straightforward and is ultimately a matter of judgement exercised by local authorities. We believe that the end result of such an approach would be a stream of court

cases debating which approvals can be appealed. This would make planning more uncertain, legalistic and confrontational. This is precisely what we are seeking to avoid and we therefore do not believe that the planning system can operate efficiently in such a climate;

- major projects. This links with a separate proposal that third party rights should be exercisable to challenge projects that require an Environmental Impact Assessment. These are normally larger projects. The problem with either proposal is that it would further delay investment in major developments that will already have received particularly thorough and careful scrutiny by a local planning authority following consultation with local people. We are separately proposing in a companion consultation document new Parliamentary procedures for planning for major infrastructure projects of national significance; (see page 49);

- where officers' recommendations to reject an application are overturned by the elected councillors. Again this proposal goes straight to the heart of the democratic process. Elected members must be allowed to reject their officers' advice: it is the councillors, not the officers, who are answerable to their electorate. We are proposing that local authorities should now give reasons for approving a planning application as well as for refusing it (see para 5.60);

- where a local authority grants planning permission to itself. There are around 5,000 cases a year in which local authorities have an interest in land to which they grant planning permission. Sometimes these are town centre sites, often they involve regeneration. Local authorities are very often in the position of taking decisions on issues in which they have dual interests (for example, social services policies may bear directly on residential care provided directly by the authority) and they operate under strict rules to deal with possible conflicts and avoid any impropriety.

6.22 None of these approaches adds up, in our view, to a case for a third party right of appeal. It could add to the costs and uncertainties of planning. We cannot accept that prospect.

6.23 We believe that the right way forward is to make the planning system more accessible and transparent and to strengthen the opportunities for community involvement throughout the process. We have set out our proposals in this consultation document to achieve this objective. In addition, we have explained the safeguard provided by the Secretary of State's powers to call in planning applications for his own decision which is underpinned by statutory requirements to notify him of:

- departures from plans;

- large proposed greenfield housing developments; and

- large retail developments.

APPENDIX C: ARGUMENTS MADE FOR AND AGAINST TPRA UNDER DIFFERENT DISCOURSES

Table A.6: Arguments made for and against TPRA under different discourses.

	Protagonist argumentation	Antagonist argumentation
Legal Discourse	Absence of some form of TPRA is incompatible with ECHR (Arti. 6 & 14) and Aarhus Convention. Judicial review is no option for TPRA as related costs creates an effective barrier to justice, is difficult to apply as no reasons currently given for awarding permission and is unfair as it has to be made within 6 wks of a decision, compared to 6 mnths for a 1st party planning appeal. The absence of TPRA reinforces a legal presumption of development, and therefore incompatible with the precautionary principle An appeal would allow a more accessible and comprehensive review of a planning permission than the current avenues of judicial review or complaint to the Ombudsman The lack of balance of rights of appeal between those proposing and those opposing a development, which could be seen as failing the test of equality before the law. TPRA would help tackle environmental injustice as damaging developments are often concentrated in poor areas. In terms of rights, the British planning system is entirely one sided. Existing distribution of rights are "in arrears", reflecting 1940s assumptions about the relationship between property, and the state and is not compatible with the expectations of a democracy in the 21st century.	Absence of TPRA not conclusively incompatible with ECHR. Developments with the greatest impacts are already adequately regulated via EIAs and call-in procedures. There is currently sufficient power of review of any planning decision by the courts via judicial review. Legal case is based on not just opportunity for appeal or review, but earlier process, particularly in relation to fact finding.

Communicative discourse	TPRA provides ex-ante improvements in the planning system by encourage applicants to consult local community and take more care in development proposals. TPRA provides greater post-hoc accountability, being a safeguard to unreasonable decisions being made in favour of development The absence of TPRA may be contrary to the Aarhus Convention as judicial review does not provide for a substantive review of the case and does not adequately provide for access to environmental justice. Third parties have as much at stake in a planning decision as the applicant. TPRA enhance the legitimacy and acceptance of planning decisions. TPRA can give voice to communities otherwise ignored by the planning system. Absence of TPRA prioritises the right to and that local authorities will speak for and protect the public interest. In creating equality between the public and developers, it would enhance trust and co-operation in the planning system. TPRA can reinvigorate the public interest ethos of the planning system. TPRA would increase the status of, and adherence to, democratically debated policy.	TPRA will not contribute to social justice as those likely to make an appeal are those that already have privileged access to the planning system. TPRA are incompatible with the democratic system of planning. Those making TPRA may not be representative of the wider community.

Economic/managerial discourse	TPRA would result in better quality development, more in line with the public interest.. TPRA are a normal part of many other planning systems, so why not in the UK? TPRA are a general antidote to management failure in the planning system.	TPRA would make the jurisdiction less economically competitive. TPRA would discourage inward investment. TPRA would introduce additional delay in the planning system, as development could not proceed until appeal period had lapsed. TPRA is open to abuse from "cranks" or serial appellants seeking pecuniary gain. TPRA would increase costs to developers as they would introduce mandatory public inquiries in many cases. TPRA would increase uncertainty that development would be permitted and thus increase costs and discourage investment Cumulative affect of costs, delay and uncertainty is that "thousands" of jobs are lost. It is not possible to adequately define the limitations to TPRA; therefore it is an unsuitable system. TPRA is a meddler's charter and would primarily be used by NIMBYs. TPRA would undermine the flexibility of the current system, based on discretionary judgement of a local planning authority. As the vast majority of applications result in approval, opening all such decisions to challenge could overload the entire system into disrepute. Many of the objectives of establishing TPRA could be achieved by other reforms to the planning system. Impact of TPRA on the economy are not yet fully understood- proceed at caution! TPRA are contrary to the well-established principle of a presumption in favour of development in the planning system. TPRA would require increased financial and human resources for planning authorities and/or divert resources from other key salutatory functions of the planning system. Owners of property have a special right in natural justice to be protected from government intervention. The current system has sufficient safeguards to protect against abuse or unreasonable decisions by local planning authorities or its officers. TPRA would make public sector planning a less attractive career, hence result in a shortage of local authority planners.