

# **Environmental Justice in the UK: Uncertainty, Ambiguity and the Law**

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## **Abstract**

*This paper examines the concept of environmental justice with particular reference to its development in the UK. The paper analyses the empirical evidence behind environmental justice and argues that while the body of evidence is compelling it simultaneously highlights a number of limitations. Moreover, the paper offers an analysis of the multiple responses taken at official and NGO levels to environmental justice. The paper argues that often these responses are vague and diverse, and run the risk of rendering environmental justice as a concept, ineffective. Finally, the paper discusses what role the law may be able to play in shaping environmental justice debates in the UK.*

## **Introduction**

During the last decade, the concept of environmental justice has emerged on the UK environmental law and policy scene. Although multifaceted in nature, the main focus of environmental justice as a concept has been the perceived unequal distribution of environmental harms and access to environmental goods. The aim of this paper is to examine the meaning of environmental justice in the UK in the hope that it may spur a debate on the concept of environmental justice and the role of the law in addressing perceived environmental injustices. This paper argues that, in the UK, environmental justice has been interpreted broadly, potentially hampering the application of an otherwise constructive concept. Moreover, the paper argues that the responses by UK authorities to environmental injustice claims suffer from ambiguity and uncertainty due to the broad nature of the concept. Although this is to be expected, such ambiguity and uncertainty has the potential to render the concept ineffectual in the UK. Thus, Part 1 of this paper analyses, by way of background, the historical origin of environmental justice while briefly taxonomising the various meanings of environmental justice. Part 2 analyses environmental justice as it has emerged in the UK. This is done through an examination of some of the many environmental justice studies carried out

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in the UK. Part 3 seeks to assess how environmental justice as a concept has been embraced by authorities and civil society alike in the UK. Finally, Part 4 offers a tentative assessment of what role the law may play in environmental justice arguments, with the aim of spurring a debate on the future of environmental justice in the UK.

## 1. Environmental Justice

Historically, environmental justice emanated from the Deep South of the United States in the 1960s and 1970s, where policies of racial segregation served to underline unjust policies and cultures of deep-rooted racism. Following the successful campaigning for the 1964 Civil Rights Act and the 1965 Voting Rights Act, African-American communities started to direct their attention towards other areas where discrimination persisted.<sup>1</sup> These included the “environment” as some communities felt they were being short-changed when it came to enjoying the benefits of clean and healthy environments. This, in turn, led to a number of studies indicating a correlation between minority communities and environmental harms.<sup>2</sup>

Following these studies, the environmental justice movement started to gain momentum. In 1991, the landmark summit of National People of Color was held in the name of environmental justice in Washington, DC.<sup>3</sup> The summit gave birth to the 17 Principles of Environmental Justice, addressing a broad range of issues deemed relevant to environmental justice.<sup>4</sup> Environmental justice gained significant national recognition when President Clinton signed an Executive Order on environmental justice in 1994, instructing Federal agencies to make environmental justice part of their policies.<sup>5</sup> The Order, however, did not define

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<sup>1</sup> R. D. Bullard, *Dumping in Dixie, Race, Class, and Environmental Quality*, (Boulder: Westview Press, 2000) at 29. See also P. M. Hendrick, ‘The Theory of Relativity: Environmental Justice in the Context of Doctrinal Durability’ (2000) 32 *Tul. L. Rev.* 137 at 153, arguing that as the first civil rights fights focused on fundamental rights there was little energy to spare for the environmental issues.

<sup>2</sup> These studies include ‘Siting of Hazardous Waste Landfills and their Correlation with Racial and Economic Status of Surrounding Communities’ by the General Accounting Office, GAO/RCED-83-168 (1983) and ‘Toxic Waste and Race in United States: A National Report on the Racial and Socio-Economic Characteristics of Communities with Hazardous Waste Sites’ by the Commission for Racial Justice, United Church of Christ, Public Data Access, Inc. (1987). See also the more recent United Church of Christ Justice and Witness Ministries, ‘Toxic Wastes and Race at Twenty 1987-2007’ (2007).

<sup>3</sup> R. D. Bullard, *The Quest for Environmental Justice, Human Rights and the Politics of Pollution*, (San Francisco: Sierra Club Books, 2005) at 20.

<sup>4</sup> The principles can be found on <http://www.ejnet.org/ej/principles.html>.

<sup>5</sup> Executive Order 12898 of February 11, 1994, ‘Federal Actions to Address Environmental Justice in Minority Population and Low-Income Populations’. It is important to note, however, that the Order specifically refrained from creating any new rights or access to, for instance, judicial review for affected communities. Critics have asserted that due to the lack of enforceable rights, future administrations may be (and have perhaps been) able to ignore the Order without having to take any formal steps to repeal it. See R. Gregory Roberts, ‘Environmental

environmental justice, leaving the US Environmental Protection Agency (EPA) to adopt the following definition:

“Environmental Justice is the fair treatment and meaningful involvement of all people regardless of race, color, national origin, or income with respect to the development, implementation, and enforcement of environmental laws, regulations, and policies. Fair treatment means that no group of people should bear a disproportionate share of the negative environmental consequences resulting from industrial, governmental and commercial operations or policies. Meaningful involvement means that: (1) people have an opportunity to participate in decisions about activities that may affect their environment and/or health; (2) the public’s [sic] contribution can influence the regulatory agency’s decision; (3) their concerns will be considered in the decision-making process; and (4) the decision makers seek out and facilitate the involvement of those potentially affected.”<sup>6</sup>

Thus, in the US, environmental justice made a relatively quick ascent from grassroots to executive level. The concept, however, was to be subjected to a number of critical voices. Some critics asserted that connotations and allegations of racism were overblown, as some of the definitions adopted by the environmental justice movement were too wide making most actions affecting minorities an act of racism.<sup>7</sup> Furthermore, the empirical evidence which the environmental justice movement based its arguments upon was subject to criticism, as it was

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Justice and Community Empowerment: Learning from the Civil Rights Movement’ (1998) 48 *Am. U. L. Rev.* 229 at 265 and W. Hernandez, ‘Environmental Justice: Looking Beyond Executive Order 12’ 898, (1995) 14 *UCLA J. Envtl. L. & Pol’y* 181 at 200-208.

<sup>6</sup> See <http://www.epa.gov/compliance/basics/ejbackground.html> (last visited January 5th 2010).

See also the criticism levied upon the EPA by its own Inspector General for not offering a precise definition of environmental justice from the outset resulting in inconsistent approaches: EPA Office of Inspector General, ‘Evaluation Report: EPA Needs to Consistently Implement the Intent of the Executive Order on Environmental Justice’ (2004) Report No. 2004-P-00007.

<sup>7</sup> See L. J. Straw, ‘Environmental Justice: Racial Gerrymandering for Environmental Siting Decisions’ (1995) 14 *Va. Envtl. L. J.* 665. See, for instance, also L. Downey, ‘US Metropolitan-Area Variation in Environmental Inequality Outcomes’ (2007) 44 *Urban Studies* 953 and E. J. Krieg and D. R. Faber, ‘Not so black and White: Environmental Justice and Cumulative Impact Assessment’ (2004) 24 *Environmental Impact Assessment Review* 667-694, both arguing that the racial composition of an area is not necessarily the best indicator for the environmental status of that area. See also W. Block and R. Whitehead, ‘The Unintended Consequences of Environmental Justice’ (1999) 100(1) *Forensic Science International*, 57, arguing that environmental justice is from the outset ideologically charged.

pointed out that much of the research only dealt with a snapshot of particular communities at particular moments in time.<sup>8</sup> It was instead argued that environmental injustice was a result of multiple factors and that the initial siting of facilities was not racially motivated.<sup>9</sup>

It was similarly asserted that the mere exposure to a facility did not necessarily entail causality in relation to specific harms.<sup>10</sup> Critics of the environmental justice argument equally argued that the contested facilities often brought with them benefits in the form of jobs, a tax base and a boost to the local economy in general.<sup>11</sup> Moreover, a series of studies failed to find any correlation at all or argued that it was the lower-middle and working classes and not the least-well-off populations that faced most environmental harms.<sup>12</sup>

Partly alongside the development of environmental justice in the US, environmental justice arguments emerged in other countries too. One such place was South Africa where decades of racial segregation fostered a situation (not unlike the one in the US) where Africans were living under significantly worse environmental conditions than that of South Africa's white minority.<sup>13</sup> Following the breakdown of the Apartheid system, which had enforced a policy of strict segregation in terms of access to conservation areas and land ownership, environmental justice emerged as a campaign tool in the 1990s.<sup>14</sup> This increase in environmental justice awareness subsequently spurred a significant level of grassroots

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<sup>8</sup> V. Been, 'What's Fairness Got to do With it? Environmental Justice and the Siting of Locally Undesirable Land Uses' (1993) 78 *Cornell L. Rev.* 1001 and V. Been, 'Locally Undesirable Land Uses in Minority Neighborhoods: Disproportionate Siting or Market Dynamics?' (1994) 103 *Yale Law Journal* 1383.

<sup>9</sup> See for example, T. Lambert and C. Boerner, 'Environmental Inequity: Economic Causes, Economic Solutions' (1997) 14 *Yale J. On Reg.* 195, pointing towards the dynamics of the housing market as the main problem. This criticism has subsequently been subject to criticism itself and some studies have argued that host communities were predominantly made up of minorities even when the polluting facilities were sited. See M. Pastor, J. Sadd and J. Hipp, 'Which Came First? Toxic Facilities, Minority move-in, and Environmental Justice' (2001) 23(1) *Journal of Urban Affairs* 1 and R. Saha and P. Mohai, 'Historical Context and Hazardous Waste Facility Siting: Understanding Temporal Patterns in Michigan' (2005) 52(4) *Social Problems* 618.

<sup>10</sup> See W. M. Bowen and M. V. Wells, 'The Politics and Reality of Environmental Justice: A History and Considerations for Public Administrators and Policy Makers' (2002) 62(2) *Public Administration Review* 688.

<sup>11</sup> V. Been, 'Locally Undesirable Land Uses in Minority Neighborhoods: Disproportionate Siting or Market Dynamics?' (1994) 103 *Yale Law Journal* 1383, J. Siegler, 'Environmental Justice: An Industry Perspective' (1994) 5 *Md. J. Contemp. Legal Issues* 59 and L. E. Blais, 'Environmental Racism Reconsidered' (1996) 75 *N. C. L. Rev.* 74.

<sup>12</sup> V. Been and F. Gupta, 'Coming to the Nuisance or Going to the Barrios? A Longitudinal Analysis of Environmental Justice Claims' (1997) 24 *Ecology L. Q.* 1 and J. E. Milner and J. Turner, 'Environmental Justice' (1998-1999) 13 *Nat. Resources & Env't* 478, referring to a 1995 GAO study examining 295 municipal solid waste facilities finding that fewer than half of these had a higher percentage of minorities living within a one mile radius than outside the radius.

<sup>13</sup> For an introduction to environmental justice in South Africa see in general D. A. McDonald (ed.), *Environmental Justice in South Africa* (Cape Town: University of Cape Town Press, 2002).

<sup>14</sup> See F. Khan, 'The Roots of Environmental Racism and the Rise of Environmental Justice in the 1990s' in McDonald (ed.) above n. 13 15-48.

activities focusing on environmental justice, which included constructions and siting of particular environmental harms.<sup>15</sup>

Another country in which environmental justice arguments historically enjoyed a strong presence was India, where high profile accidents like the Bhopal explosion highlighted perceived injustices in environmental settings.<sup>16</sup> Like in South Africa and the US, organised grassroots campaigns helped promoting environmental justice arguments in India.<sup>17</sup>

In spite of the criticism and sometimes heated debates over what environmental justice is and is not, environmental justice can be seen as entailing calls for procedural and distributive justice.<sup>18</sup> The former emphasises deliberation and calls for equal access to participation in decision-making procedures, while the latter calls for a fair distribution of polluting facilities.<sup>19</sup> Alongside these traditional notions of justice, environmental justice campaigners also frame their calls for justice in terms of “recognition”.<sup>20</sup> This approach seeks to achieve recognition of minority populations and underlying social conditions, alongside the more traditional distributive and procedural approaches. Furthermore, certain quarters of the environmental justice movement are pursuing what is considered “productive” justice, addressing not only the procedures under which decisions are taken but also the reasons behind the production of environmental harms.<sup>21</sup> Moreover, environmental justice campaigners emphasise the concept of “free informed consent” which addresses the concern that some communities often lack bargaining power to oppose a polluting facility.<sup>22</sup> Calls for

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<sup>15</sup> Ibid. at 28-29.

<sup>16</sup> See for instance, J. Jackson and M. McLoughlin, ‘Bhopal Disaster: Still Waiting for the Clean Up’ 406 *ENDS Report* (2008) 32.

<sup>17</sup> G. Williams and E. Mawdsley, ‘Postcolonial Environmental Justice: Government and Governance in India’ 37 *Geoforum* (2006) 660.

<sup>18</sup> For a critical appraisal of environmental justice see W. Block and R. Whitehead above n. 7, M. S. Greve, ‘Environmental Justice or Political Opportunism?’ (1994) 9 *St. John’s J. Legal. Comment.* 475 and J. Drummond, ‘What I Would Like to See Published in Environmental Justice’ (2008) 1(4) *Environmental Justice* 179.

<sup>19</sup> See for instance, R. D. Bullard, ‘Environmental Racism and ‘Invisible’ Communities’ (1994) 96 *W. Va. L. Rev.* 1037, at 1041 and L. A. Binder, ‘Religion, Race and Rights: A Rhetorical Overview of Environmental Justice Disputes’ (1999) 6 *Wis. Env’tl. L. J.* 1.

<sup>20</sup> D. Schlosberg, *Defining Environmental Justice: Theories Movements, and Nature*, (Oxford: Oxford University Press, 2007).

<sup>21</sup> R. W. Lake, ‘Volunteers, NIMBYs, and Environmental Justice: Dilemmas of Democratic Practice’ (1996) 28(2) *Antipode* 165 and D. Faber, ‘The Struggle for Ecological Democracy and Environmental Justice’ in D. Faber (ed.), *The Struggle for Ecological Democracy, Environmental Justice Movements in the United States*, (New York: Guildford Press, 1998) at 15.

<sup>22</sup> See D. C. Wigley and K. Shrader-Frchette, ‘Consent, Equity, and Environmental Justice: A Louisiana Case Study’ in L. Westra and P. Wenz (eds.), *Faces of Environmental Racism: Confronting Issues of Global Justice*, (Oxford: Rowman & Littlefield, 1995) and K. Shrader-Frchette, *Environmental Justice, Creating Equality, Reclaiming Democracy*, (New York: Oxford University Press, 2002) at 171-175. The principle is also

“free informed consent” can be seen as an attempt to address the siting of polluting facilities in what is referred to as “the path of least resistance”.<sup>23</sup>

More recent approaches to environmental justice emphasise a link to environmental benefits and improvements, taking environmental justice debates beyond discussions on distribution of harms only. Thus, increasing numbers of local environmental justice groups are starting to call for equal access to environmental benefits (or so-called goods). These include: green spaces, healthy food, clean energy, jobs, health care and housing.<sup>24</sup> Many environmental justice campaigners likewise consider environmental justice to be part of the wider context of sustainability and environmental enhancement with regard to, for instance, energy consumption, transport and waste production.<sup>25</sup> Additionally, environmental justice is increasingly being applied to contexts of gender, youth and across local and global scales.<sup>26</sup> An example of the application on the global scale is the frequently referred to notion of “climate justice”.<sup>27</sup> Beyond debates on equity, environmental justice is gradually being applied to contexts of local autonomy, emphasising usage of local knowledge and input in environmental decisions.<sup>28</sup> Finally, environmental justice is increasingly being linked with

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recognised in the 17 Principles of Environmental Justice where Principle 13 states: “Environmental Justice calls for the strict enforcement of principles of informed consent [...]”

<sup>23</sup> See R. G. Roberts above n. 5 at 249-250, A. Kaswan, ‘Environmental Justice: Bridging the Gap between Environmental Laws and “Justice”’ (1997) 47 *Am. U. L. Rev.* 221 at 271-273 and E. Gauna, ‘Federal Environmental Citizen Provisions: Obstacles and Incentives on the Road to Environmental Justice’ (1995) 22 *Ecology L. Q.* 1 at 31-34. “Free informed consent” is often taken to mean that four criteria should be in place: 1) the risk imposers must disclose all information about the risks; 2) the potential victims must be competent to evaluate the risks; 3) they must understand the risks and dangers; and 4) they must voluntarily accept it. See D. C. Wigley and K. Shrader-Frechette above n. 22 at 139.

<sup>24</sup> See for instance R. Gottlieb, ‘Where We Live, Work, Play... and Eat: Expanding the Environmental Justice Agenda’ (2009) 2(1) *Environmental Justice* 7, R. K. Sokas, ‘Environmental Justice and Work’ (2008) 1(4) *Environmental Justice* 171, T. W. Sanchez and M. Brenman, ‘Transportation Equity and Environmental Justice: Lessons from Hurricane Katrina’ (2008) 1(2) *Environmental Justice* 73, G. Walker, ‘Beyond Distribution and Proximity: Exploring the Multiple Spatialities of Environmental Justice’ (2009) 41(4) *Antipode* 614, J. Sze, ‘Race and Power: An Introduction to Environmental Justice Energy Activism’ in D. Pellow and R. Brulle (eds.), *Power, Justice and the Environment*, (Cambridge: MIT Press, 2005) 101, O. Williams, ‘Food and Justice: the Critical Link to Healthy Communities’ in Pellow and Brulle (eds.) 117 and Friends of the Earth and London school of Hygiene and Tropical Medicine, ‘Environmental Justice: Rights and Means to a Healthy Environment for All’ Special Briefing No. 7 (2001).

<sup>25</sup> See for a list of examples J. Agyeman, *Sustainable Communities and the Challenge of Environmental Justice*, (New York: New York University Press, 2005).

<sup>26</sup> S. Buckingham and R. Kulcur, ‘Gendered Geographies of Environmental Justice’, (2009) 41(4) *Antipode* 659 and K. Bickerstaff and J. Agyeman, ‘Assembling Justice Spaces: The Scalar Politics of Environmental Justice in North-east England’ (2009) 41(4) *Antipode* 781.

<sup>27</sup> J. Brunnée, ‘Climate Change, Global Environmental Justice and International Law’ in J. Ebbesson and P. Okowa (eds.) *Environmental Law and Justice in Context*, (Cambridge: Cambridge University Press, 2009). See also Schlosberg above n. 20 for an analysis of environmental justice in a global context.

<sup>28</sup> See D. G. Peña, ‘Autonomy, Equity, and Environmental Justice’ in D. Pellow and R. Brulle (eds.) above n. 24 131.

notions of eco-justice, whereby the environment and non-human entities are considered part of the justice equation, much to the contrary of traditional liberal theories of justice.<sup>29</sup>

From this brief analysis of the origin of environmental justice, we can establish that environmental justice is a multifaceted concept trying to address complex problems touching upon environmental, demographic, ethnic, social, epidemiological and legal issues, while relying on a series of more or less well-established perceptions of justice. Moreover, environmental justice as a concept is constantly developing and broadening in scope. With this in mind, this paper will now turn to environmental justice in the UK context.

## **2. Interpretation of Environmental Justice in the UK**

In spite of stark demographic and socio-economic differences between the countries where environmental justice initially emerged and the UK, environmental justice today forms a key part of environmental law and policy discussions in the UK. This part of the paper aims to scrutinise environmental justice as it has developed in the UK. This is done through an analysis of some of the relevant environmental justice research carried out in the UK as well as through an assessment of some of the political and legal initiatives launched in the name of environmental justice in the UK.

### **2.1. Environmental Justice Research**

The earliest calls for environmental justice in the UK were made in 1999 when Friends of the Earth (FoE) published the first detailed environmental justice research which indicated a correlation between household income and proximity to industrial facilities covered by the Integrated Pollution Control (IPC) regime in England and Wales.<sup>30</sup> The FoE study indicated that in the poorer areas, there were more IPC sites than would be predicted on the basis of their population (104 actual sites against 67.6 predicted sites) and that for the most affluent

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<sup>29</sup> Schlosberg above n. 20, K. Bosselmann, 'Justice and the Environment: Building Blocks for a Theory on Ecological Justice' in K. Bosselmann and B. Richardson (eds.), *Environmental Justice and Market Mechanisms, Key Challenges for Environmental Law and Policy* (The Hague: Kluwer Law, 1999), P. Wenz, *Environmental Justice* (Albany: State University of New York Press 1988).

<sup>30</sup> D. McLaren *et al*, 'The Geographical Relation between Household Income and Polluting Factories' Friends of the Earth, 1999.

areas there were fewer IPC sites than a “random” distribution would suggest (5 actual sites against 26 predicted sites).<sup>31</sup>

In light of this, a series of other investigations into the link between deprivation and exposure to various environmental harms were carried out.<sup>32</sup> For instance, a series of studies were carried out in relation to the links between industrial pollution and deprivation. One such study, from 2002 by the Environment Agency, echoed the findings from the FoE study, finding a greater density of IPC sites in the most deprived areas in England. The study relied on numbers of sites per square kilometre and found five times as many IPC sites in the most deprived ward as in the least deprived one (a density of 0.02 against 0.1).<sup>33</sup> Another study argued that there was “compelling evidence of a socially unequal distribution of IPC sites in England” whereas in Wales distribution of IPC sites showed “little relation to deprivation”.<sup>34</sup> The study noted that, for England, there were more than four times as many sites in the most deprived area (154 across all sectors), compared to the least deprived (36 across all sectors).<sup>35</sup> For Scotland, a 2005 study which examined the link between deprivation and proximity to sites governed by the industrial pollution prevention and control regime (IPPC), found that for the most deprived population group, 98,560 people lived within one kilometre of an IPPC site whereas for the least deprived group 28,137 people lived within one kilometre of an IPCC site.<sup>36</sup>

In addition to the subject of industrial pollution, studies have indicated a connection between deprivation and bad air quality. A 2001 study which examined four urban areas,

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<sup>31</sup> Ibid. The study likewise indicated that, when assessing IPC authorisations rather than sites, facilities with more than one authorised process were more frequent in poorer areas than in affluent areas. In addition, the study indicated that almost two-thirds of IPC facilities were located in postcode sectors of below average income.

<sup>32</sup> In addition to these empirical studies a number of desk studies have been carried out as well. These include: Economic and Social Research Council, ‘Environmental Justice – Rights and Means to a Healthy Environment for All’ (2001), Sustainable Development Research Network, ‘Environment and Social Justice: Rapid Research and Evidence Review’ (2004) and the Royal Commission on Environmental Pollution, ‘Study on Urban Environments, Well-being and Health’ (2004) and for Scotland A-M Slater and O. W. Pedersen, ‘Environmental Justice in Scotland’ Research Report for the Planning Exchange Foundation, School of Law, University of Aberdeen (2006) and S. Beck, ‘Environmental Justice in Scotland: How does the Healthy Environment Network Interpret this Concept and What is Happening in Scotland to Address Environmental Injustice?’ A Report for the Healthy Environment Network (2003).

<sup>33</sup> Environment Agency, ‘The Urban Environment in England and Wales a Detailed Assessment’ Bristol (2002).

<sup>34</sup> G. Walker, J. Fairburn, G. Smith, and G. Mitchell, ‘Environmental Quality and Social Deprivation Phase II: National Analysis of Flood Hazard, IPC Industries and Air Quality’ (2003) at 58-60. See also G. Walker, G. Mitchell, J. Fairburn and G. Smith, ‘Industrial Pollution and Social Deprivation: Evidence and Complexity in Evaluating and Responding to Environmental Inequality’ (2005) 10(4) *Local Environment* 361-377, reporting the findings.

<sup>35</sup> Ibid at 35.

<sup>36</sup> J. Fairburn, G. Walker, G. Smith, ‘Investigating Environmental Justice in Scotland: Links between Measures of Environmental Quality and Social Deprivation’ Scottish Executive (2005).

found higher concentrations of nitrogen dioxide (NO<sub>2</sub>) and fine particulates (PM<sub>10</sub>) in deprived areas for the cities of Greater London, Birmingham City, and Greater Belfast.<sup>37</sup> A study of Birmingham from 2002 found a “striking relationship between modelled emissions and poverty indicators and ethnicity”. The study indicated that for carbon monoxide (CO), exposure would increase from 1840 µm<sup>-3</sup> for the least deprived to 2840 µm<sup>-3</sup> for the most deprived population group and for nitrogen dioxide (NO<sub>2</sub>) concentrations would increase from 24 µm<sup>-3</sup> for the least deprived to 28 µm<sup>-3</sup> for the most deprived population group.<sup>38</sup> Another study from 2003 found a “clear positive linear relationship between deprivation and pollution” in that the 10 per cent most deprived wards experienced a mean annual NO<sub>2</sub> concentration 17 per cent above the national mean.<sup>39</sup> The study, however, also found that the primary indicator for exposure to bad air quality proved to be car ownership, in that areas with lower rates of car ownership suffered the most pollution compared to areas with higher rates of car ownership.<sup>40</sup> This trend applied across deprivation data although the study found that a minority of poor groups experienced high levels of air pollution while contributing very little to it.<sup>41</sup> Another study indicated that, although variations occurred according to pollutants, for England, it was “apparent that, overall, those wards which are most deprived are also those with highest pollutant concentrations”.<sup>42</sup> For example, benzene concentrations were 76 per cent higher amongst the most deprived groups than amongst people of average means, while nitrogen dioxide (NO<sub>2</sub>) concentrations were 41 per cent higher.<sup>43</sup> For Scotland, a similar study indicated that the situation was alike to that in England as “the most deprived decile has poorest air quality of all the deciles for four out of the five pollutants” experiencing concentrations of nitrogen dioxide (NO<sub>2</sub>) 1.8 times higher than those experienced by people of average deprivation.<sup>44</sup> For Wales, however, one study painted a different picture; it found

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<sup>37</sup> S. Pye, J. Stedman, M. Adams and K. King, ‘Further Analysis of NO<sub>2</sub> and PM<sub>10</sub> Air Pollution and Social Deprivation’ Department of Rural Affairs, The National Assembly of Wales and Department of the Environment in Northern Ireland (2001).

<sup>38</sup> J. S. Brainard *et al*, ‘Modelling Environmental Equity: Access to Air Quality in Birmingham, England’ (2002) 34(4) *Environment and Planning A* 695.

<sup>39</sup> G. Mitchell and D. Dorling, ‘An Environmental Justice Analysis of British Air Quality’ (2003) 35(5) *Environment and Planning A* 909.

<sup>40</sup> *Ibid* at 921-924.

<sup>41</sup> *Ibid*. The study noted that “[T]his exceptional group [...] appears to be living in a situation that is patently unjust.”

<sup>42</sup> G. Walker *et al*. above n. 34 at 101.

<sup>43</sup> *Ibid* at 73.

<sup>44</sup> G. Walker *et al* above n. 34 at 132. The five pollutants measured were nitrogen dioxide (NO<sub>2</sub>), fine particulates (PM<sub>10</sub>), sulphur dioxide (SO<sub>2</sub>), Carbon monoxide (CO<sub>2</sub>) and benzene.

that pollutant concentrations were “highest in the *least* deprived wards” although the difference was less clear than that observed for England.<sup>45</sup>

Other studies have examined the correlation between proximity to landfills and deprivation. Here, however, the links are less evident. For example, the 2002 study by the Environment Agency indicated that a greater area of landfill sites existed in the most deprived areas.<sup>46</sup> Similarly, a study from 2001 indicated that areas within two kilometres of a landfill site tended to be more deprived than those beyond the two kilometre area, although the relationship was not statistically significant.<sup>47</sup> However, a 2004 study, divided the data into urban and rural areas and indicated that in “wholly urban” areas, less deprived populations were the most exposed to landfills, whereas in “wholly rural” areas the most deprived populations faced the greatest exposure.<sup>48</sup> A Scottish study furthermore indicated that there was “no evidence to suggest that deprived populations are more likely than others to live near to landfill sites.”<sup>49</sup>

For the subject of flooding, the evidence of environmental injustice is less clear. One study found that the correlation between exposure to flooding and deprivation varied according to whether the flooding was fluvial or tidal.<sup>50</sup> The study noted that “fluvial floodplain populations show some weak bias for England towards the more affluent deciles”, but for the tidal floodplain there was “a clear relationship with deprivation with a more marked tailing off in the least deprived deciles” in England.<sup>51</sup> Another study found unclear evidence between deprivation and risk of exposure to flooding.<sup>52</sup> The study used two different methods in identifying the particular population at risk, each showing different outcomes. One method used was through enumeration districts, which indicated a negative correlation between deprivation and exposure to flooding.<sup>53</sup> The other method used so-called grid

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<sup>45</sup> G. Walker *et al.* above n. 34 at 103. Emphasis added. The study noted that the “greatest differential occurs with respect to NO<sub>2</sub> (least deprived decile has a ward mean concentration 58% above that for average deprivation decile, compared to only 38% for the most deprived decile).”

<sup>46</sup> Environment Agency above n. 33.

<sup>47</sup> P. Elliot *et al.* ‘Birth Outcomes and Selected Cancers in Populations Living Near Landfill Sites’ Report for the Department of Health (2001) at 3.

<sup>48</sup> B. W. Wheeler, ‘Health-Related Environmental Indices and Environmental Equity in England and Wales’ (2004) 36(5) *Environment and Planning A* 803.

<sup>49</sup> J. Fairburn *et al.* above n. 36 at 79.

<sup>50</sup> G. Walker *et al.* above n. 34 at 15-17. See Environment Agency, ‘Addressing Environmental Inequalities: Flood Risk’ SC020061/SR1 (2006) for a literature review.

<sup>51</sup> *Ibid* at 12.

<sup>52</sup> See J. Fielding and K. Burningham, ‘Environmental Inequality and Flood Hazards’ (2005) 10(4) *Local Environment* 379.

<sup>53</sup> *Ibid* at 387-390.

surfaces to establish populations and indicated that the populations at significantly increased risk were the most deprived ones.<sup>54</sup>

Other areas subject to empirical environmental justice research include the lack of green spaces, numbers of child pedestrians from poorer households killed and injured in traffic accidents and exposure to low river water quality. With regard to lack of green spaces, a 2005 study from Glasgow, which examined distances to green spaces across deprivation, found that the most deprived lived in greater proximity to green spaces.<sup>55</sup> The findings, however, differed when the distance to woodlands was measured, as it was then found that the most deprived groups were less likely to live in proximity (600 metres) to woodland.<sup>56</sup> The number of child pedestrians from poorer backgrounds injured and killed in traffic incidents was likewise highlighted as an environmental injustice.<sup>57</sup> This issue was linked to the problem of a lack of safe play areas for children in urban areas. Moreover, some correlation was found when it came to the issue of proximity to poor water quality, which in some instances pointed towards a more frequent distribution in more deprived areas.<sup>58</sup>

Finally, research revealed an interesting insight into public perceptions and environmental justice. This research indicated that communities would show the most concern in relation to local environmental factors and less interest in global environmental issues.<sup>59</sup> Likewise, a study from Scotland indicated that people were most concerned with so-called “street level” incivilities rather than more traditional environmental problems.<sup>60</sup> The

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<sup>54</sup> Ibid.

<sup>55</sup> J. Fairburn *et al* above n. 36 at 111.

<sup>56</sup> Ibid at 96.

<sup>57</sup> Sustainable Development Research Network, above n. 32 at 87-90 and D. White, R. Raeside and D. Barker, ‘Road Accidents and Children Living in Disadvantaged Areas: A Literature Review’ Scottish Executive (2000). See also Road Safety Analysis, *Child Casualties 2010; A Study into Resident Risk of Children on Roads in Great Britain 2004-08*, (2010).

<sup>58</sup> See Environment Agency above n. 33, J. Fairburn *et al* above n. 36, noting a “clear relationship between deprivation and proximity to class C and D rivers”, at 121. The latter study analysed river water quality in Scotland - class C and D refers to rivers deemed either “poor” or “seriously polluted” under the Digital River Network.

<sup>59</sup> See for instance K. Burningham and D. Thrush, ‘Rainforests are a Long Way from Here, the Environmental Concerns of Disadvantaged Groups’ Joseph Rowntree Foundation (2001). The study was conducted through a number of group-question sessions in which four areas were identified as representing four specific social groups. The areas were: Possilpark in Glasgow as the urban site; the Peak District as a rural site; Cefn Mawr in Wales as the site where people live close to a potentially polluting facility; and Bromley-by-Bow in East London as a site where people live close to busy roads.

<sup>60</sup> J. Curtice, C. Robertson and G. Allerdice, ‘Public Attitudes and Environmental Justice in Scotland’ The Scottish Executive (2005). See, however, H. Todd and C. Zografos, ‘Justice for the Environment: Developing a Set of Indicators of Environmental Justice for Scotland’ (2005) 14(4) *Environmental Values* 483, for a different outcome arguing that traditional pollution issues such as air quality and water pollution were more important than issues such as green space and visual pollution.

incivilities that caused most concern in everyday life were dog fouling, litter and rubbish, and uneven pavements, and the absence of safe places for children to play.<sup>61</sup>

Based on the rich amount of research available examining perceived environmental injustices in the UK, it would seem uncomplicated to claim that environmental justice is as much a problem in the UK as it is in other countries. Indeed, the already extensive amount of research pointing to inequality appears to be growing.<sup>62</sup> It is, however, relevant to make a number of observations. For instance, the studies linking deprivation with proximity to industrial pollution all deal with issues of geographical correlation. In this case, geographical correlation does not necessarily correspond to danger or risk of ill-health (although in cases of disasters/emergencies, people in close proximity to a facility are likely to suffer more as a result of such proximity). That is to say, none of the studies manage to establish a causal link between the geographical correlation and any possible ill-effects.<sup>63</sup>

At the same time, we may argue that the different studies merely represent a snapshot of a given period in time, thus failing to establish what the underlying reasons are for certain facilities occurring more frequently in deprived communities. Like the criticism from the US, we may assert that at the time when the harming facilities were sited, the composition of the area was different from what it is now. Hence, we may argue that if environmental injustices are to be addressed, the root causes behind geographical correlation and deprivation need to be examined more thoroughly.<sup>64</sup>

Although the evidence on air pollution comes across as compelling, it needs to be borne in mind that the issue of exposure to air pollution remains a very complicated matter. For instance, the exposure that a particular person faces depends on multiple factors. These include duration of exposure, time spent indoors and/or outdoors, building characteristics of housing and level of physical activity.<sup>65</sup> Thus, the particular level of exposure a person faces at his/her home (be it in a deprived or more affluent area) is just one factor that has to be held against the level of exposure that the person faces at his/her workplace (again, be it in a deprived or affluent area). In turn, this has to be held against the level of exposure which the person faces travelling to/from work. In addition, that there are higher levels of air pollution

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<sup>61</sup> Ibid at 1.

<sup>62</sup> See for instance J. Fairburn, B. Butler and G. Smith 'Environmental Justice in South Yorkshire: Locating Social Deprivation and Poor Environments Using Multiple Indicators' (2009) 14(2) *Local Environment* 139-154.

<sup>63</sup> See G. Walker, G. Mitchell, J. Fairburn and G. Smith, above n. 24 at 372-373.

<sup>64</sup> To this FoE have, however, argued that "whatever the direction of the link, the injustice is real." D. McLaren *et al* above n. 30.

<sup>65</sup> See G. Mitchell and D. Dorling above n. 39 at 914.

in urban areas is likely to be known to people moving to cities and there is likely be a certain level of acceptance of such risks as people try to maximise overall welfare by living or working in urban areas.<sup>66</sup>

Another point of discussion is the issue of whether certain facilities bring with them any benefits.<sup>67</sup> Do the IPC sites, for instance, create jobs for the local population and a tax base for the local authorities? Such questions would seem not to have formed part of debates in the UK. One reason for this may be the recognition that affected populations may effectively have little choice when it comes to physically relocating. However, in their research into attitudes to environmental issues by disadvantaged groups, Burningham and Thrush note that in one particular community, the residents feel a certain level of loyalty towards the industrial facility in their village “because of its past employment record and the investment it had made in village life”.<sup>68</sup> A similar point is the fact that deprived populations “cluster” in and around certain facilities is an expression of a series of different and complicated factors.<sup>69</sup> This discussion, however, has been largely absent from environmental justice debates in the UK. It could likewise be asserted that the deprived populations living in the most polluted areas are “compensated” through cheaper house prices and thus stand to “gain” from living in proximity to a facility. Again, bearing in mind limits of choice for the affected populations, such arguments have been absent from environmental justice debates in the UK. In light of these observations, we will turn attention to how UK authorities and NGOs have responded to claims of environmental injustice.

### 3. Environmental Justice Responses

In 1999, following some of the early environmental justice research, Friends of the Earth Scotland (FoES) launched a campaign for environmental justice in Scotland.<sup>70</sup> The campaign was aimed at highlighting the perceived injustices of, *inter alia*, high levels of poverty in Scotland compared to other parts of the UK, decline in industrial activities for urban areas, as

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<sup>66</sup> Ibid at 925.

<sup>67</sup> See above n. 11.

<sup>68</sup> K. Burningham and D. Thrush above n. 59 at 13. See, however, Todd and Zogrofos arguing that “often the surrounding community suffers from the environmental costs but does not directly benefit from the development” without, however, offering any empirical evidence for the claim, H. Todd and C. Zogrofos, above n. 60 at 488.

<sup>69</sup> See above n. 9.

<sup>70</sup> See E. Scandrett, K. Dunion and G. McBride, ‘The Campaign for Environmental Justice in Scotland’ (2000) 5(4) *Local Environment* 467.

well as arcane land tenure regimes, such as the feudal land tenure system in rural areas.<sup>71</sup> In an attempt to alleviate perceived incidents of environmental injustice, FoES set out to assist communities, such as at Greengairs, Lanarkshire, which found themselves on the receiving end of polychlorinated biphenyl (PCB) contaminated soil from across the UK.<sup>72</sup>

Alongside the campaigning in Scotland, a number of grassroots organisations and NGOs in England and Wales now focus on environmental justice issues. These include Friends of the Earth England and Wales (FoE), Capacity, the Black Environment Network (BEN), the Women's Environmental Network (WEN) and the London Sustainability Exchange. The work of these groups varies significantly, but they all, in one way or another, work within an environmental justice remit.<sup>73</sup> For instance, FoE and Capacity facilitate environmental justice training sessions for community groups. In addition, through its *Ten Project*, Capacity employs a number of trainees from minority groups and seconds them to other environmental organisations in an attempt to promote representation of minority groups within environmental organisations.<sup>74</sup> Moreover, the BEN and WEN actively promote, through debates and training sessions, the participation of minority groups and women in environmental issues both locally and nationally.<sup>75</sup>

Thus, a core group of environmental, social justice organisations and NGOs now embrace environmental justice as a central concept in their campaigning and work. In this, they rely upon inspiration from the US while trying to apply environmental justice to what they perceive as unique UK problems. This is, for instance, seen in the application of environmental justice arguments to the problem of fuel poverty (where a household is estimated to spend at least ten per cent of its income on household fuels).<sup>76</sup> Environmental

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<sup>71</sup> Ibid and E. Scandrett, 'Community Work, Sustainable Development and Environmental Justice' 2000 Vol. 6 Spring *Scottish Journal of Community Work and Development* and K. Dunion and E. Scandrett, 'The Campaign for Environmental Justice in Scotland as a Response to Poverty in a Northern Country' in J. Agyeman, R. D. Bullard and B. Evans (eds.) *Just Sustainabilities: Development in an Unequal World*, (London: MIT Press, 2003).

<sup>72</sup> For an account of environmental justice in Scotland see A-M Slater and O. W. Pedersen 'Environmental Justice; Lessons on Definition and Delivery from Scotland', (2009) 52(6) *Journal of Environmental Planning and Management* 797.

<sup>73</sup> See O. W. Pedersen, 'Transatlantic Movements of Justice: A Story of Inspiration and Diversity', (2009) 2(1) *Environmental Justice* 35.

<sup>74</sup> See in general Capacity's website on environmental justice <http://www.capacity.org.uk/research/environmentaljustice.html> (last visited January 5th 2010).

<sup>75</sup> See S. Neal and J. Agyeman, 'Remaking English Ruralities: Processes of Belonging and Becoming, Continuity and Change in Racialised Spaces' in S. Neil and J. Agyeman (eds.) *The New Countryside: Ethnicity, Nation and Exclusion in Contemporary Rural Britain*, (Bristol: Policy Press, 2006) and website of BEN on <http://www.ben-network.org.uk/index.htm> and WEN on <http://www.wen.org.uk/> (both last visited January 5th 2010).

<sup>76</sup> Economic and Social Research Council above n. 32.

justice arguments are likewise applied to the context of special needs for disabled people. Here, it is, for instance, argued that lack of access to particular facilities and amenities for disabled people needs improving, just as it is argued that environmental organisations need to engage more with special needs groups.<sup>77</sup>

At this point, it is worth taking note of the fact that, unlike in the US, the issues of race and ethnicity play a minor role in shaping the concept of environmental justice in the UK. There is, however, one exception to this. In the UK, the issue of race and accusations of institutional exclusion are put forward in the context of access to countryside areas for ethnic minorities. It is argued that an “indifference to difference” is prevalent within the UK environmental movement, effectively leading to the exclusion of ethnic minorities from the UK countryside.<sup>78</sup> As was the case in the US and South Africa, critics argue that the UK environmental movement is pursuing its aim of environmental protection without any reference to human equality.<sup>79</sup> In the same vein, an unpublished study commissioned by FoE notes that the mainstream environmental movement operates with “a narrow definition of ‘the environment’, one defined by white, middle class people” while concluding that “ethnic minority people are under-represented in the environmental movement as a whole”.<sup>80</sup> The work by Capacity seeking to address the problem of under-representation is thus an important step in the right direction. It is worth, however, bearing in mind that the accusations of environmental racism in the US and South Africa took place in a context where overt institutional and systematic discrimination was the norm for a prolonged period of time – even within certain environmental organisations.<sup>81</sup> This overt and systematic discrimination does not appear to have been in place within the UK environmental movement.

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<sup>77</sup> London Sustainability Exchange, ‘Environmental Justice in London’ (2004). See also A. Charles and H. Thomas, ‘Deafness and Disability - Forgotten Components of Environmental Justice: Illustrated by the Case of Local Agenda 21 in South Wales’ (2007) 12(3) *Local Environment* 209.

<sup>78</sup>J. Agyeman, ‘Ethnic Minorities in Britain: Short Change, Systematic Indifference and Sustainable Development’ (2001) 3(1) *Journal of Environ. Policy and Plann.* 15 and J. Agyeman, ‘Constructing Environmental (in)Justice: Transatlantic Tales’ (2002) 11(3) *Environmental Politics* 31, where Agyeman argues that the UK countryside represents an exclusive ecological and white space. See also the collection of essays in S. Neal and J. Agyeman above n. 75.

<sup>79</sup> See also London Sustainability Exchange above n. 77, noting that “[T]he lack of direct racism does not dilute the crucial need to review disproportionate impacts on BME [black and minority ethnic] groups and should not be lost in a general discussion of social inclusion” at 12.

<sup>80</sup> Friends of the Earth, ‘Ethnic Minority People and the Environment’ (1996) cited in J. Agyeman above n. 78 at 16.

<sup>81</sup> See C. Jordan and D. Snow, ‘Diversification, Minorities, and the Mainstream Environmental Movement’ in D. Snow (ed.) *Voices from the Environmental Movement: Perspectives for a New Era* (Washington: Island Press, 1992) at 75-78, noting that some of the Sierra Club’s Californian chapters explicitly prohibited membership by racial minority individuals up until the 1950s.

From the early responses to the environmental justice argument made on the NGO level, it is perhaps no surprise that the approach to environmental justice at governmental and official levels seem to be playing catch-up with the many NGO initiatives. For instance, the first official recognition of the issue in Scotland was the 2002 speech by then First Minister Jack McConnell.<sup>82</sup> However, in England the authorities appeared to get off the mark earlier in their recognition of environmental justice when, in 2000, the Environment Agency hosted debates on environmental equality. The Agency's then chairman, Sir John Harman, recognised that "a small number of people tend to pay most of the price for production in terms of pollution. It is true that access to environmental benefits depends substantially on income."<sup>83</sup> The recognition of the problem by the Environment Agency is considered to be the first step in a "three step" process embarked upon by the Environment Agency.<sup>84</sup> The second step was taken in 2001 when the Agency, together with Capacity, sponsored the event "Mapping Common Ground", where approaches to environmental equality were discussed. The third step was the facilitating of some of the early studies into the issue, starting with *The Urban Environment in England and Wales: a Detailed Assessment*.<sup>85</sup> Since then, the Environment Agency has on a number of occasions reiterated its commitment to "environmental equality".<sup>86</sup>

Arguably the most articulate recognition of environmental justice from official side in the UK is found in the UK Government's and the devolved administrations' approach to sustainable development. In this context, environmental justice is generally seen as an integral part of sustainable development which is considered wider and broader in focus.<sup>87</sup> The main reason for the link is found in the original definition of sustainable development as defined by the World Commission on Environment and Development (WCED) in 1987. This definition, which combined the three components of economic growth, social equality and environmental protection widely influenced sustainable development thinking in the UK. Hence, environmental justice can be seen as neatly fitting the part of sustainable development which

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<sup>82</sup> Speech by then First Minister Jack McConnell's of February 18, 2002 held at the Dynamic Earth, Edinburgh.

<sup>83</sup> See H. Chalmers and J. Colvin, 'Addressing Environmental Inequalities in UK Policy: An Action Research Perspective' (2005) 10(4) *Local Environment* 333-360.

<sup>84</sup> Ibid.

<sup>85</sup> Environment Agency above n. 33.

<sup>86</sup> Environment Agency, 'Addressing Environmental Inequalities' Position Statement (2004) and Environment Agency, 'Creating a Better Place, Corporate Strategy 2006-2011' (2006).

<sup>87</sup> See for a comparison between sustainable development and environmental justice A. Dobson, *Justice and the Environment Conceptions of Environmental Sustainability and Dimensions of Social Justice* (Oxford: Oxford University Press, 1998), J. B. Ruhl, 'The Co-Evolution of Sustainable Development and Environmental Justice: Cooperation, then Competition, then Conflict' 9 *Duke Env'tl. L. & Pol'y F.* 161 (1998) and O. Pedersen 'Environmental Principles and Environmental Justice' (2010) 11(1) *Environmental Law Review* 1.

emphasises social equality and fairness. The link between environmental justice and sustainable development is most strongly emphasised in the Scottish context (see below) where the influence of some environmental NGOs on previous administrations helped forge a strong focus on environmental justice.<sup>88</sup>

In 1999, the UK Government published its UK-wide strategy for sustainable development, *A Better Quality of Life*, which identified four objectives as the main points behind the strategy.<sup>89</sup> One of these objectives was “social progress”, which argued that “everyone should share in the benefits of increased prosperity and a clean and safe environment”.<sup>90</sup> The 2005 sustainable development framework, *One Future – Different Paths*, jointly written by the UK Government and the devolved administrations, likewise has “ensuring a strong, healthy and just society” as one of its central principles.<sup>91</sup> Moreover, in 2005, the UK Government published its third sustainable development strategy, *Securing the Future*, acknowledging the problem of environmental inequalities and specifically linking inequalities to the aim of facilitating sustainable communities.<sup>92</sup> Within the devolved administrations, the vision of a sustainable Wales from the Welsh Assembly Government notes that a sustainable future for Wales is based on social justice, particularly seeking to assist disadvantaged communities.<sup>93</sup> The strategy for sustainable development for Northern Ireland observes that a truly sustainable society must support environmental justice, while placing it in the context of public participation in planning matters.<sup>94</sup> The emphasis was perhaps most elaborately articulated in the strategy for sustainable development promulgated by the previous Scottish Labour administration. Here an entire chapter was dedicated to environmental justice, putting environmental justice in a global as well as local context,

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<sup>88</sup> A-M Slater and O. W. Pedersen above n. 72. Friends of the Earth Scotland (FoES) has on numerous accounts asserted that sustainable development is not attainable without environmental justice. See E. Scandrett, K. Dunion and G. McBride, ‘The Campaign for Environmental Justice in Scotland’ *Local Environment*, 5(4) (2000) 467.

<sup>89</sup> Department for the Environment Transport and the Regions, ‘A Better Quality of Life: A Strategy for Sustainable Development in the UK’ (1999).

<sup>90</sup> Ibid para 1.8. Likewise, the Scottish Executive stated in its 2002 statement on sustainable development, *Meeting the Needs*, that “sustainable development is about combining economic progress with social and environmental justice”, The Scottish Executive, ‘Meeting the Needs... Priorities, Actions and Targets for Sustainable Development in Scotland’ The Scottish Executive (2002).

<sup>91</sup> UK Government, Scottish Executive, Welsh Assembly Government and Northern Ireland Office, ‘One Future – Different Paths: The UK’s Shared Path for Sustainable Development’ 2005 at 8.

<sup>92</sup> HM Government, ‘Securing the Future - Delivering UK Sustainable Development Strategy’ HM Government (2005) at 134 and 143.

<sup>93</sup> Welsh Assembly Government, ‘One Wales: One Planet’ Welsh Assembly Government (2009) at 5 and 60.

<sup>94</sup> Northern Ireland Government, ‘First Steps Towards Sustainability’ Northern Ireland Government (2006) at 6 and 125. See also S. Turner, ‘Laying the Foundations for a Sustainable Northern Ireland: The Review of Environmental Governance’ (2007) 58(4) *Northern Ireland Legal Quarterly* 422 at 446-450.

emphasising the need to lower Scotland's overall environmental impact and the need to improve environmental conditions in local communities.<sup>95</sup> In light of the subsequent political changes in Scotland, the relevance of the strategy is, however, extremely limited. Tellingly, the current Scottish administration utilises a definition of sustainable development which emphasises economic progression highlighting the volatility of environmental justice as a political priority.<sup>96</sup>

Nevertheless, while these strategies are at best vague on implementation and lack concrete initiatives, they portray central government policy objectives indicating how the UK Government and the devolved administrations plan to tackle the problem of environmental injustice.<sup>97</sup> However, the merging of the two policy objectives has not been spared criticism. For instance, FoES criticised the Scottish Executive for “smuggling” environmental justice onto the sustainable development agenda “with little or no demand on altering targets, priorities and funding-schemes”.<sup>98</sup>

Thus, while the UK Government and the devolved administrations are paying attention to environmental justice as a concept, this is arguably done in a vague and unstructured fashion. For instance, research from Scotland looking into the usage of the phrase “environmental justice” in the Scottish Parliament indicated that it was used in a wide range of connections including: the use of GMO crops; spreading of sewage sludge; environmental courts; climate change; specific road constructions in Glasgow; testing of depleted uranium weapons at Dundrennan; EU's Common Agricultural Policy; and smoke free public places.<sup>99</sup>

The research from Scotland moreover highlights the fact that environmental justice has different connotations across the UK. In England and Wales, where most of the empirical environmental justice work has been carried out, environmental justice has numerous implications ranging from access of ethnic minorities to countryside areas and implementation

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<sup>95</sup> Scottish Executive, ‘Choosing Our Future’, Scottish Executive (2006) at 40.

<sup>96</sup> See Sustainable Development Commission Scotland, *Sustainable Development: A Review of Progress by the Scottish Government*, 2008 at 12.

<sup>97</sup> See for example A. Ross, ‘Why Legislate for Sustainable Development? An Examination of Sustainable Development Provisions in UK and Scottish Statutes’ (2008) 20(1) *Journal of Environmental Law* 35 and A. Ross, ‘The UK Approach to Delivering Sustainable Development in Government: A Case Study in Joined-Up Working’ (2005) 17(1) *Journal of Environmental Law* 27.

<sup>98</sup> See W. Maschewsky, ‘Environmental Justice in Scotland: Just Words? A View from the Outside’ Friends of the Earth Scotland (2005).

<sup>99</sup> A-M Slater and O. W. Pedersen, ‘Workshop Paper: Devolved Scotland and Environmental Justice’ unpublished conference paper presented at the Stockholm Conference on Environmental Law and Justice, Stockholm Environmental Law and Policy Centre, Stockholm, 6-9 September 2006.

of the Aarhus Convention to the correlation between income and proximity to pollution. In Scotland, environmental justice has been placed in a context of historical injustices associated with land ownership and the feudal land tenure system in Scotland.<sup>100</sup> This historical context does not seem to have formed part of environmental justice deliberations in other parts of the UK. In Northern Ireland, environmental justice has received very little attention compared to the rest of the UK.<sup>101</sup> Despite appreciation of social inequality in Northern Ireland, such agendas are yet to be linked to environmental issues to the same extent as in England, Wales and Scotland. Instead, environmental justice concerns have been raised primarily along procedural lines, for instance, in relation to public participation in development control.<sup>102</sup> One reason for the difference in prominence of environmental justice across the UK is likely to be the relatively strong environmental NGO community, which is particularly present in England, Wales and Scotland. Here, as noted above, groups like FoE and FoES have played an important role in shaping environmental justice debates. Another factor is that, for many years environmental issues have played a relatively minor role in Northern Irish politics due to the Troubles.<sup>103</sup>

In light of this, critics may assert that the difference in focus at best makes environmental justice too broad while at worst making it entirely inapplicable as practically every social ill can be made to fit the description of environmental justice. Here it is worth recalling the US environmental justice movement which was criticised for suffering from diffuse conceptualizations of environmental justice due to a proliferation of causes.<sup>104</sup>

On the other hand, it may just be that the broadness of environmental justice as a concept is not only inevitable but desirable. Imprecision and vague terminology is partly to be expected when trying to merge agendas of environmental improvements and social justice.<sup>105</sup>

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<sup>100</sup> See n. 71 above.

<sup>101</sup> See S. Turner, 'Transforming Environmental Governance in Northern Ireland. Part One: The Process of Policy Renewal' 18(1) *Journal of Environmental Law* (2006) 55 and S. Turner, 'Transforming Environmental Governance in Northern Ireland. Part Two: The Case of Environmental Regulation' 18(2) *Journal of Environmental Law* (2006) 245, for a critical appraisal of environmental justice in Northern Ireland. Turner notes that "a lack of resources has also excluded the [Northern Ireland] Department [of the Environment] from the important debate ongoing in Great Britain concerning environmental justice".

<sup>102</sup> Turner, 'Part One' above n. 101.

<sup>103</sup> See S. Turner, 'Devolution as a Barrier to Environmental Reform' (2009) 11(3) *Environmental Law Review* 150, for an analysis of Northern Irish environmental governance.

<sup>104</sup> R. Benford, 'The Half-Life of the Environmental Justice Frame: Innovation, Diffusion and Stagnation' in D. Pellow and R. Brulle (eds.), above n. 24 at 46.

<sup>105</sup> M. R. Poirier, 'Environmental Justice/Racism/Equity: Can We Talk?' (1994) 96 *W. Va. L. Rev.* 1083 at 1104. See A. Layard, 'Environmental Justice: The American Experience and its Possible Application to the United Kingdom' in J. Holder and D. McGillivray (eds.), *Locality and Identity: Environmental Issues in Law and Policy* (Aldershot: Ashgate, 1999), for a similar point in relation to the Executive Order.

Ultimately, this may go some way in explaining the relative success of environmental justice as a concept.<sup>106</sup> Likewise, it may simply afford flexibility which allows us to address a number of perceived injustices that are perhaps otherwise difficult to conceptualise. While this is partly true, it should be borne in mind that there must be limits as to how wide environmental justice campaigners ought to cast their nets if they wish to maintain the urgency and effectiveness of environmental justice as a concept.<sup>107</sup> Too broad a focus simply renders the concept unworkable. Some of the greatest victories of the US environmental justice movement relate to individual campaigns against particular activities or facilities. Thus, the strength of the environmental justice argument arguably lies in its specific application to concrete contexts. This may be worth bearing in mind for UK environmental justice campaigners who seek to promote the concept – a more tangible and narrow conception of environmental justice applied to a limited number of perceived injustices (such as for instance fuel poverty) is likely to serve environmental justice best.

At the same time, the differences in terminology between the various authorities further adds to an already murky picture. For instance, the Environment Agency appears to prefer the term “environmental equality” in its research and reports, and has consistently done so since it first recognised the problem. One explanation for this may be that the Agency is recognising the empirical evidence indicating social inequality without necessarily embracing the more contentious discussions on whether this is unjust or not.

Here parallels can be drawn to the initial responses in the US where the EPA preferred the phrase “environmental equity” to the more divisive “environmental racism”. The approaches taken in Scotland, however, all address the issue of “environmental injustice”, while the Environment Agency has conceded that “[T]here are currently no standard definitions of ‘cumulative’ or ‘multiple’ impacts; nor are there standard approaches to their measurement” making the definition of “environmental justice” even more hard to pin down.<sup>108</sup> Again, it is worth recalling some of the criticism levied on the US authorities for not maintaining a clear vision or plan for how to address environmental injustice; lack of clarity

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<sup>106</sup> See for instance, R. Holifield, ‘Defining Environmental Justice and Environmental Racism’(2001) 22(1) *Urban Geography*, 78, noting that the vagueness might hamper its application on national level but instead it helps making it effective as a populist rhetorical tool at 82.

<sup>107</sup> See D. Pellow and R. Brulle, ‘Power, Justice, and the Environment: Toward Critical Environmental Justice Studies’ in D. Pellow and R. Brulle (eds.) above n. 24 at 16, arguing that too broad a focus runs the risk of diffusing the movement’s aim.

<sup>108</sup> Environment Agency ‘Using Science to Create a Better Place’ (2007) at v.

directly affects the efficiency of any official measure taken to address environmental injustices.<sup>109</sup>

As a consequence of the vague nature of environmental justice, it is worth recalling that any theory or idea of environmental justice must be realistic in order that it does not become outright utopian.<sup>110</sup> If environmental justice remains too broad, vague and all-inclusive, it risks losing its practical relevance as a normative concept. In light of the concept's egalitarian focus this would be regrettable.

Accordingly, applications and understandings of environmental justice as a concept vary across the different administrations and regions in the UK (although strong similarities exist between England, Wales and Scotland). As we have seen how environmental justice has been applied across the UK in a wide set of circumstances it now becomes a pertinent question to ponder what role the law can play, if any at all, in addressing environmental injustices.

#### **4. What next for environmental justice? Any role for the law?**

This section of the paper will discuss the role of the law in addressing environmental injustices, with the aim of facilitating a debate on the question as to what role the law may play in future environmental injustice debates. The discussion is not designed to provide a complete overview of legal questions arising out of environmental justice questions as this would take up too much space.

In an attempt to answer the question of what role the law may play in addressing environmental injustices it is worth looking at how legal responses to environmental justice have been utilised in the US.<sup>111</sup> In the US courtrooms, claims of environmental injustice have, by and large, been unsuccessful, as plaintiffs have found it difficult to prove intent in relation

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<sup>109</sup> Above n. 16.

<sup>110</sup> T. Nagel, *Equality and Partiality*, (Oxford: Oxford University Press, 1991) at 21. See also J. Rawls, *A Theory of Justice*, (Cambridge: Belknap Press of Harvard University, 1971) at 145, who notes that "If a conception of justice is unlikely to generate its own support, or lacks stability, this fact must not be overlooked. For then a different conception of justice might be preferred".

<sup>111</sup> A number of environmental justice bills have been presented before US lawmakers throughout the last fifteen years although none have so far been successful. These include attempts by Senator Al Gore of Tennessee (S. 2806, 102<sup>nd</sup> Cong. (1992)) and by Representative John Lewis of Georgia (H.R. 5326 102<sup>nd</sup> Cong. (1992)) calling for a moratorium on siting of new hazardous waste facilities in what was proposed as 100 "high-impact areas". See R. G. Roberts, (n. 5) at 239-240. Since then further attempts have been made throughout the 1990s and most recently in 2005 with the Environmental Justice Act of 2005 (H.R. 427 (Rep. Udall, D-Co)) seeking to require federal agencies to develop and implement policies and practices that promote environmental justice.

to racial discrimination.<sup>112</sup> Lack of private title to sue has likewise proven a serious stumbling block for minority communities.<sup>113</sup> In this light, environmental justice advocates in the US have labelled it a “great myth” that environmental justice communities need lawyers, arguing instead that the problem is one of “political and economic power”.<sup>114</sup> Is it true though that there is no role for the law to play at all?

Initially, the answer to this question would seem to depend on what definition of environmental justice applicants favour the most. If environmental justice campaigners prefer a definition encompassing eco-justice, the law clearly has its limits. Such definitions encompassing responsibility towards nature have proven difficult to implement in legal settings.<sup>115</sup> On the other hand, where environmental justice campaigners favour a radical approach leaning towards redistribution (as some activists have called for),<sup>116</sup> there may be an argument in favour of utilising regulation and tax systems as a way of obtaining a more equitable distribution.<sup>117</sup> Likewise, where environmental justice campaigners seek restitution for alleged damages and tort, there may be a role to play for litigation (more about this below).

As a precursor, it may be asserted that a focus on the role of law ought to take into account advocacy work aimed at introducing comprehensive legislative environmental justice initiatives, as these have been pursued in the US.<sup>118</sup> Here such work is taken to include

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<sup>112</sup> See for instance *Harrisburg Coalition against Ruining the Environment v. Volpe*, 330 F.Supp. 918 (M.D. Pa. 1971) and *Bean v. Southwestern Waste Management Corp.*, 482 F.Supp. 673 (S.D. Texas 1979). In the latter it was noted “[A]t this juncture, the decision of TDH [Texas Department of Health] seems to have been insensitive and illogical. Sitting as the hearing examiner for TDH, based upon the evidence adduced, this Court would have denied the permit. But this Court has a different role to play, and that is to determine whether the plaintiffs have established a substantial likelihood of proving that TDH’s decision to issue the permit was motivated by purposeful discrimination in violation of 42 U.S.C. s 1983 as construed by superior courts.” at 681. See also in general K. Smith, ‘How the Legal System has Failed the Environmental Justice Movement’ (1996-1997)12 *J. Nat. Resources & Envtl. L.* 325.

<sup>113</sup> *Alexander v. Sandoval* 532 U.S. 275 (2001) and *Gonzaga v. Doe*, 536 U.S. 273 (2002).

<sup>114</sup> See L. W. Cole, ‘Environmental Justice and the Three Great White Myths of America’, (2008) 14 *Hastings W. –Nw. J. Envt’l L. & Pol’y* 573.

<sup>115</sup> In support for extending legal rights to the environment Stone’s seminal essay remains one of the most compelling ones; C. Stone, *Epilogue: “Trees” At Twenty-five*, in *Should Trees have Standing? And other Essays on Law Morals and the Environment* (New York: Oceana Publications, 1996).

<sup>116</sup> See for instance R. Benford, ‘The Half-Life of the Environmental Justice Frame: Innovation, Diffusion and Stagnation’ in D. Pellow and R. Brulle above n. at 24.

<sup>117</sup> R. W. Gordon, ‘Some Critical Theories of Law and Their Critics’ in D. Kairys (ed.) *The Politics of Law: A Progressive Critique*, (3<sup>rd</sup> ed. New York: Basic Books, 1998). See also C. Sunstein, *Laws of Fear: Beyond the Precautionary Principle* (New York: Cambridge University Press, 2005) at 168-169, noting that although redistribution is best done through a tax system, where this fails, regulation (as the much cruder tool) may be used. See also A. Layard above n. 105 at 180-186.

<sup>118</sup> See above n. 111 as well as American Bar Association and Hastings College of the Law, ‘Environmental Justice for All, a Fifty State Survey of Legislation Policies and Initiatives’ American Bar Association, 2004 <http://www.abanet.org/irr/committees/environmental/statestudy.pdf>.

campaigning for legislative or policy initiatives in the name of environmental justice, such as general environmental justice laws and regulations making environmental justice a statutory priority. Such approaches would, however, run into the ubiquitous problem of vagueness. Environmental justice simply appears too wide to address under one heading. To this may be added that such comprehensive approaches to environmental justice have, in the US, led to mixed outcomes. Some US States' environmental justice initiatives have been judged to have led to too few substantive improvements due to difficulties of implementation.<sup>119</sup>

Looking at the changes made to the law in the UK in the name of environmental justice, certain initiatives are worth noting. For instance, much emphasis has been afforded to what may be termed the procedural side of environmental justice, through the promulgation of freedom of information law in general and access to environmental information law in particular. Such initiatives are important from an environmental justice point of view insofar as they aim at securing the involvement of all social groups. Moreover, full access to environmental information makes it easier to achieve the aim of "free informed consent", which is central to environmental justice.<sup>120</sup> Although these initiatives derive mainly from EU and international law and formed part of Labour's election commitments, detailed legislation allowing anyone access to environmental information held by public bodies is now in place in the UK.<sup>121</sup> Such approaches may go some way in facilitating environmental justice.

Another relevant procedural aspect which has received attention under the environmental justice heading is that of access to the courts.<sup>122</sup> This has mainly related to the cost of judicial review which remains high in the UK. Sir Robert Carnwarth's comment that: "litigation through the courts is prohibitively expensive for most people, unless they are either poor enough to qualify for legal aid, or rich enough to be able to undertake an open-ended commitment to expenditure running into tens or hundreds of thousands of pounds" remains

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<sup>119</sup> See for instance, N. Targ, 'The States' Comprehensive Approach to Environmental Justice' in D. Pellow and R. Brulle (eds.) above n. 24 171.

<sup>120</sup> See above n. 22 and accompanying text.

<sup>121</sup> Most recently the Environmental Information Regulations 2004, SI 2004 No. 3391 and Environmental Information (Scotland) Regulations 2004, SSI 2004 No. 520. See also 2003 Directive 2003/4/EC of the European Parliament and of the Council of 28 January 2003 on public access to environmental information and repealing Council Directive 90/313/EEC (OJ 2003 L41 26).

<sup>122</sup> See R. Macrory, 'Modernising Environmental Justice: Regulation and the Role of an Environmental Tribunal' University College London (2003), M. Adebowale, 'Using the Law: Access to Environmental Justice – Barriers and Opportunities' Capacity (2004) and Leigh Day and Co Solicitors and WWF UK, 'The Environmental Justice Project' (2004).

valid.<sup>123</sup> Consequently, the Sullivan Report by the Working Group on Access to Environmental Justice found that the current law on costs in England and Wales is not in line with the Aarhus Convention's Article 9(4) requiring that remedies must be "fair, equitable, timely and not prohibitively expensive".<sup>124</sup> More recently, the Jackson Review recommended that "qualified one way cost shifting" would be the most obvious way for the UK to comply with the Aarhus Convention.<sup>125</sup> Tellingly, recent empirical research into judicial review of environmental decisions highlights that many valid challenges never make the courts as a result of the high costs.<sup>126</sup> The authors of the research conclusively argue that "the UK is forced to give serious consideration to the reform of legal costs structures and that, as this plays out, considerations of environmental justice play a central role".<sup>127</sup>

In spite of these problems, a number of decisions which hold environmental justice lessons have made it to the courts. These decisions can shed light on how the UK courts are likely to entertain environmental justice cases. In one such case, FoE sought to challenge the Secretary of State's application of the Warm Homes and Energy Conservation Act 2000 under which the Secretary of State is obliged to ensure "that as far as reasonably practicable persons do not live in fuel poverty".<sup>128</sup> The primary duty arising out of the Act is to prepare and publish a strategy, and subsequently to take the appropriate steps to implement the strategy. The claimants argued that the Secretary of State had failed to implement the strategy (without challenging any specific decision on *Wednesbury* grounds). With reference to the "as far as reasonably" wording of the Act and in light of evidence pointing to the immense costs associated with eradicating fuel poverty across England as a result of significant increases in fuel prices, Kay L. J. found that the Secretary of State had fulfilled the statutory duties as the "essential legal obligation is correctly described in terms of effort and endeavour."<sup>129</sup>

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<sup>123</sup> Sir Robert Carnwarth, 'Environmental Litigation – a way through the Maze?' (1999) 11(1) *Journal of Environmental Law* 3. Sir Robert Carnwarth's assertion was largely echoed in Lord Justice Brooke's paper 'Environmental Justice: The Cost Barrier' (2006) 18(3) *Journal of Environmental Law* 341.

<sup>124</sup> Working Group on Access to Environmental Justice, 'Ensuring Access to Environmental Justice in England and Wales' (2008). The Working Group found that the costs litigants face include not merely formal court fees but also the total exposure to costs, i.e. the risk of being ordered to pay costs for other parties and requirements of cost undertakings for, say, an interim injunctive relief. See also *Morgan and Baker v. Hinton Organics* [2009] EWCA Civ 107, where the Court of Appeal found against the High Court's order of an interim cost order noting that the Aarhus Convention did as such not form part of UK domestic law.

<sup>125</sup> Lord Justice Jackson, 'Review of Civil Litigation Costs: Final Report' (2010) at 310.

<sup>126</sup> The Environmental Law Foundation and BRASS, *Costs Barriers to Environmental Justice*, 2010.

<sup>127</sup> R. Lee and R. Stech, 'Access to Environmental Justice in England and Wales: Funding Representation for Court Reviews of Administrative Actions' in J. Steele and W. Van Boom (eds), *Mass Justice: Challenges of Representation and Distribution* (Cheltenham: Edward Elgar, 2011) forthcoming.

<sup>128</sup> *Friends of the Earth v Secretary of State for Business Enterprise and Regulatory Reform*, [2010] Env. L.R. 11 and s. 2 Warm Homes and Energy Conservation Act 2000.

<sup>129</sup> *Ibid* at 198.

Although the claimants' arguments were not phrased in terms of nor relied on environmental justice grounds, the environmental justice relevance of the decision can be found in the vagueness of the statutory aims. As noted above with reference to the US, statutory definitions of environmental justice are often vague and have little actual impact as a result of this. The fuel poverty decision falls along these same lines and any statutory definition of environmental justice would, as far as it would be deemed justiciable, likely endure the same balancing of costs and benefits.

This does not mean that environmental justice litigation should be entirely discouraged. Instead of phrasing prospective complaints in terms of "environmental justice", claimants may be better off using what we may term "contingent avenues", which may be taken to mean traditional private and public nuisance claims based on land use or public and administrative and human rights laws. This could, for instance, be relevant where a claimant (or a group of claimants) consider a particular polluting activity to be an unreasonable interference with the enjoyment of their property and thus a nuisance.<sup>130</sup> The requirement of unreasonable land use, however, may, in environmental injustice cases, represent problems for prospective claimants. A factor in deciding whether the use of the defendant's property is unreasonable is the locality rule, which specifies that the nuisance must be assessed in accordance with where and in which environment it takes place.<sup>131</sup> In *Murdoch v Glacier Metal*, the claimants' arguments that the noise from a nearby factory went beyond noise levels set by the World Health Organization (WHO) were dismissed by reference to the characteristics of their house, which was situated close to a noisy road.<sup>132</sup> Accordingly, it may be that a group of claimants seeking to challenge polluting activities in their local community find that they are forced to accept yet higher levels of pollution as their local environment is already polluted. Such outcomes would fly in the face of environmental justice as a concept and the extent to which this would indeed be the outcome is not clear. For instance, in *Wheeler v JJ Saunders*, a claimant in an agricultural area obtained damages for nuisance as a result of smells from a pig farm.<sup>133</sup> In *Dennis v Ministry of Defence*, where the claimant complained about the noise caused by the training of fighter jets, it was noted that future

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<sup>130</sup> *Miller v Jackson* [1977] QB 966.

<sup>131</sup> *Sturges v. Bridgman* (1879) L.R. 11 Ch. D. 852 at 865. See also *Gillingham BC v Medway (Chatham Docks) Co Ltd* [1993] QB 343.

<sup>132</sup> *Murdoch and Murdoch v Glacier Metal Company Limited* [1998] Env. L.R. 732.

<sup>133</sup> *Wheeler v JJ Saunders* [1995] Env. L.R. 286.

training with even noisier jets could found a new claim of nuisance, in spite of the area already being blighted by severe noise.<sup>134</sup>

On the other hand, the decision by Justice Akenhead in *Corby Group Litigation v Corby District Council* may provide ground for optimism for environmental justice campaigners basing their claims on public nuisance.<sup>135</sup> The claimants argued that the birth defects from which they suffered were a result of mismanagement by the Council in its dealings with reclamation of land formerly used by British Steel.<sup>136</sup> Finding that the rate of birth defects in Corby was statistically significant and that the contamination from the relevant sites in Corby where the Council was carrying out its activities was capable of being the cause of such birth defects, Akenhead J found that the Council was liable in public nuisance, negligence due to breach of duty of care as well as for breach of statutory duty (relating to the duty of care for handling of waste in s. 34 of the Environmental Protection Act 1990). Notwithstanding the exceptional circumstances of the case, and despite overt environmental justice arguments being absent from the case, the decision may prove an inspiration for environmental justice campaigners. The point to be made in relation to environmental justice is that judicial support is arguably easier to achieve where claims are based on narrow grounds of liability or civil wrongs rather than on challenges to public decision-making relating to distribution of resources.

As *Friends of the Earth* and *Corby* indicate, the judiciary is arguably likely to be more receptive to narrower complaints of liability. Although the claimants in *Friends of the Earth* did not explicitly refer to environmental justice arguments, it can be asserted that similar cases are likely to fare the same way. Where the subject matter relates to budgetary decisions or allocations of resources, as many general environmental injustice arguments do, and claimants cannot prove irrationality or illegality, adjudication may not be the most suitable redress. To some extent, this highlights the shortcomings of the procedural aspects of environmental justice remedies, while it also underscores the vulnerability of environmental justice as a concept. To some, the procedural tools fail to deliver what an environmental injustice claimant perceives a substantive, just outcome.

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<sup>134</sup> *Dennis v. Ministry of Defence* [2003] Env L.R. 34. See also *Rushmer v Polsue and Alfieri Ltd* [1906] 1 Ch. 234 and *Maquire v Charles M'Neil Ltd* [1922] SC 174.

<sup>135</sup> *Corby Group Litigation v Corby District Council* [2009] EWHC 1944 (TCC).

<sup>136</sup> For commentary on the judgement see D. Hart, J. Jolliffe and R. Marcus, 'Contaminated Land in Corby and Sandridge: Historic Liabilities' 3 *Env. Liability* (2009) 102 and B. Lee, 'Old Iron: Birth Defects Litigation and the Corby Steelworks' Reclamation' 25(4) *Journal of Professional Negligence* (2009).

This, however, may not be the end of environmental justice as a legally relevant concept. Outside litigation, important research by Mark Poustie has argued that, for Scotland, the Scottish Environmental Protection Agency (SEPA) must have regard to environmental justice as a concept on grounds of the Environment Act 1995 and its subsequent guidance as well as SEPA's general obligation to take account of the policies of the Scottish Government.<sup>137</sup> This is in itself significant, as SEPA, being the main actor in Scotland in terms of environmental licensing and enforcement activities, can play a key role in addressing perceived injustices. Further evidence of this can be found in SEPA's *Vision for Regulation*, which explains the core functions of SEPA. The *Vision for Regulation* describes how SEPA considers the principle of proportionality a central tenet of its policy, as SEPA sees itself as being committed to ensuring fairness in its regulatory processes.<sup>138</sup> SEPA's *Enforcement Policy* similarly emphasises the need to secure that legal obligations are complied with and where this is not the case, appropriate enforcement action is taken.<sup>139</sup> This is echoed in the Environment Agency's enforcement policy which emphasises prevention of environmental harm as a primary aim. These policies have environmental justice implications insofar as they appreciate that agency decisions have wider societal fairness implications. The actual enforcement of existing environmental laws can facilitate environmental justice where such enforcement leads to higher levels of environmental protection in general. Equally, the obligations of SEPA to take account of environmental justice policies would seem to be equally applicable to the Environment Agency. In fact, environmental justice considerations do already influence the Environment Agency's activities. The Agency's corporate strategy for 2010-2015 highlights how the Agency seeks to work with local communities in order to improve the quality of local environments.<sup>140</sup> This is, however, done within the existing statutory frameworks, which do not necessarily make any explicit references to environmental justice.

In addition to this, it is worth also pointing to recent changes made to planning law and guidance across the UK. Planning guidance on sustainable development states that, apart from contributing to the aim of sustainable development, development plans should promote development that creates socially inclusive communities and seeks to reduce social

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<sup>137</sup> M. Poustie, 'Environmental Justice in SEPA's Environmental Protection Activities: A Report for The Scottish Environmental Protection Agency' 2004.

<sup>138</sup> SEPA, 'Protecting and Improving the Environment through Regulation: SEPA's Vision for Regulation' 2005 at 20.

<sup>139</sup> SEPA, 'Enforcement Policy' Policy No. 5 (2008).

<sup>140</sup> See Environment Agency, 'Creating A Better Place 2010-2015: Our Corporate Strategy' 2010.

inequality.<sup>141</sup> Planning guidance on sustainable waste management likewise notes that, in deciding which sites to identify for waste management facilities, planning authorities should assess their suitability against the cumulative effect of previous facilities and the well-being of the community.<sup>142</sup> Further scope for taking environmental justice considerations into account exist under the sustainability appraisal regime established under the Planning and Compulsory Purchase Act 2005.<sup>143</sup> When drawing up plans, planning authorities must have regard to national policies and guidance (as exemplified above), which include national and devolved strategies on sustainable development with their emphasis on environmental justice.<sup>144</sup> Planning authorities have to carry out a sustainability appraisal of each plan which in addition to environmental assessments entail appraisal of social and economic impacts.<sup>145</sup> While sustainability appraisal has been criticised for ignoring environmental consideration, it nevertheless offers a specific tool for identifying adverse social effects and thus possible environmental justice impacts of local and regional plans.<sup>146</sup> As the sustainability appraisal procedure likewise requires authorities to identify other types of appraisals and policies, there is further scope for the inclusion of equality impact assessment to be taken into account. Although these measures are vague, they highlight that environmental justice-like considerations can be taken into account for the purposes of planning decisions on both local and regional levels. One problem, however, with the planning guidance and policy statements is that these are merely “material considerations” for the purposes of s. 70 of the Town and Country Planning Act 1990. Thus, the courts have ruled that such documents are not necessarily binding on planning authorities, although they should “observe them” and only depart from them “if there are clear reasons”.<sup>147</sup> The courts have moreover found that statutory obligations to have due regard to the elimination of racial discrimination and the promotion of good relations between minority groups under the Race Relations Act 1976 are

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<sup>141</sup> Office of the Deputy Prime Minister, ‘Planning Policy Statement 1 (PPS1) Delivering Sustainable Development’ (2005).

<sup>142</sup> Office of the Deputy Prime Minister, ‘Planning Policy Statement 10: Planning for Sustainable Waste Management’ (2005).

<sup>143</sup> Planning and Compulsory Purchase Act 2005.

<sup>144</sup> Ibid s. 19. In Scotland, planning authorities are equally under an obligation to exercise any functions with the objective of achieving sustainable development. See Planning etc. (Scotland) Act 2006 s. 3E(2).

<sup>145</sup> Ibid s. 19 and 39 for local planning authorities and s. 5(4) for revision of regional spatial strategy

<sup>146</sup> See in general Office of the Deputy Prime Minister, ‘Sustainability Appraisal of Regional Spatial Strategies and Local Development Documents’ 2005. See also T. Jackson and B. Illsley, ‘An Analysis of the Theoretical Rationale for Using Strategic Environmental Assessment to Deliver Environmental Justice in the Light of the Scottish Environmental Assessment Act’ 27(7) *Environmental Impact Assessment Review* (2007) 607 and S. Connelley and T. Richardson, ‘Value-Driven SEA: Time for an Environmental Justice Perspective?’ 25(4) *Environmental Impact Assessment Review* (2005) 391.

<sup>147</sup> *Carpets of Worth Ltd v Wyre Forest DC* (1991) 62 P. & C.R. 334 per Purchas LJ at 339 and 342. See also *E.C. Gransden & Co. Ltd. v Secretary of State for the Environment and Gillingham B.C.* [1986] J.P.L. 519.

not necessarily result orientated.<sup>148</sup> In other words, the relevant obligations which a planning authority is subject to do not give rise to a duty to eliminate racial discrimination or to achieve good relations between minorities as such, but merely a duty to have due regard to the need to achieve these goals.<sup>149</sup> Similarly, planning authorities do not need to explicitly carry out additional equality impact assessment if it can be proved that they had due regard to the racial, social, and cultural impacts of a plan or development by way of other less explicit procedures.<sup>150</sup>

Another relevant legal avenue for groups seeking to address environmental justice concerns could be that of utilising human rights law. Although on the face of it this has little to do with environmental conditions and social issues, a vast body of jurisprudence from the European Court of Human Rights (ECtHR) relating to the environment has developed.<sup>151</sup> This case law is relevant for environmental justice for a number of reasons.<sup>152</sup> Firstly, the case law from the ECtHR operates as an extra level of enforcement where the manifest disregard for domestic environmental standards by national authorities constitutes a clear injustice. Secondly, the ECtHR's case law dealing with procedural safeguards has the potential to add impetus to international and domestic developments, facilitating access to environmental information and public participation furthering environmental justice. In *Öneryıldız v. Turkey*, the Grand Chamber noted that “public access to clear and full information is deemed to be a basic human right”<sup>153</sup> and in *Brândușe*, the ECtHR found that lack of access to environmental information amounted to an Article 8 violation, although the applicant had not actually suffered any ill-health effects.<sup>154</sup> As noted above, these procedural mechanisms can play an important role in facilitating environmental justice.

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<sup>148</sup> See s. 71 of the Race Relations Act 1976 stipulating that bodies subject to the statute shall have due regard to the need (a) to eliminate unlawful racial discrimination; and (b) to promote equality of opportunity and good relations between persons of different racial groups.

<sup>149</sup> *R. (On the Application of Baker) v Secretary of State for Communities and Local Government* [2008] EWCA Civ 141 per Dyson LJ at 31.

<sup>150</sup> See *R. (On the Application of Janet Harris) v London Borough of Haringey* [2009] EWHC 2329 Admin.

<sup>151</sup> See in general O. W. Pedersen ‘European Environmental Human Rights and Environmental Rights: A Long Time Coming?’ (2008) 21 *Georgetown International Environmental Law Review* 73.

<sup>152</sup> See mainly *López Ostra v. Spain*, decision of 9/12-1994 (Appl. no. 16798/90), *Fadeyeva v. Russia*, decision of 9/6-2005 (Appl. no. 55723/00) and *Öneryıldız v. Turkey*, decision of 30/11-2004 (Appl. no. 48939/99). For a discussion of environmental rights and environmental justice see A. Layard, above n. 105 at 171-175 and H. M. Osofsky, ‘Learning from Environmental Justice: A New Model for International Environmental Rights’ (2005) 24 *Stan. Envtl. L. J.* 71.

<sup>153</sup> *Öneryıldız v. Turkey* above n. 152 at 56.

<sup>154</sup> *Brândușe v. Romania*, decision of 7 April 2009 (Appl. no. 6586/03).

From an environmental justice point of view it is moreover relevant that the ECtHR has relied on the financial plight of applicants suffering from particularly bad environments when finding in their favour. In *Fadeyeva*, the ECtHR noted that, contrary to the claims of the Russian government, relocation of the applicant would be almost unfeasible as she relied only on her meagre State pension.<sup>155</sup> As noted by Hilson, the ECtHR thus acknowledges that choice is partly determined by economic ability. From an environmental justice point of view, this is significant as affected populations may effectively have little choice when it comes to physically relocating. However, one limitation associated with utilising human rights law in environmental justice arguments is that the UK courts so far have shied away from accepting that bad environmental conditions necessarily lead to a breach of the Human Rights Act 1998.<sup>156</sup>

In this light, we may argue that Cole's "great myth" argument cited in the opening of this section holds true for certain aspects of the law but not for others. It would seem that, as far as litigation goes, environmental justice campaigners would be better off seeking remedies through more traditional legal avenues. At the same time, there is clearly an environmental justice role to play for the regulatory agencies. This is potentially significant in light of the wide discretion afforded such agencies. Given, however, the relative novelty of environmental justice in UK legal debates, it remains to be seen exactly what role the law may play in environmental justice discussions.

## 5. Conclusion

Considerations of justice are becoming more prominent in environmental decision-making and policy. In the UK, this is becoming evident from the increase in focus on environmental justice. Despite the concept's original focus on racial equality in the area of healthy environments, environmental justice has been embraced by environmental organisations, grassroots groups and governments alike in the UK. The rush to address environmental injustice has, however, come at a heavy price. In between them, governments, NGOs and community groups have taken a broad approach to environmental justice, covering many issues, while, at the same time, approaching the concept under different terminologies. This

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<sup>155</sup> *Fadeyeva v. Russia* above n. 152 at 121.

<sup>156</sup> See *Marcic v Thames Water Utilities Plc*, [2004] Env. L.R. 25. See also M. Stallworthy, 'Whither Environmental Human Rights' (2005) 7 *Environmental Law Review* 12.

represents a significant problem if authorities, NGOs and the UK as a society are to address perceived environmental injustices. A vague, broad and all-embracing focus potentially renders environmental justice irrelevant as it may lose any central meaning. In this respect, the increase in focus on environmental justice has, to some extent, arguably amounted to “killing the concept with kindness”. At the same time, the body of research seemingly underlining the argument that environmental justice is a problem in the UK is constantly growing, highlighting the need for coherent policies to address the issue. In turn, however, some of this research highlights its own shortfalls, underlining the need for further research looking into the core reasons behind the perceived injustices. In other words, to avoid policy and legal measures being based on ideological and special interests, firmer evidence is needed.<sup>157</sup> Meanwhile, it is clear that the role of the law in the attempt to address perceived injustices is currently one of uncertainty. While this is not surprising, the increase in attention afforded environmental justice may change this.

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<sup>157</sup> See K. Sexton ‘Socioeconomic and Racial Disparities in Environmental Health: Is Risk Assessment Part of the Problem or Part of the Solution?’ (2000) 6(6) *Human and Ecological Risk Assessment* 551.