

ENVIRONMENTAL COURTS AND TRIBUNALS IN ENGLAND AND WALES – A TENTATIVE NEW DAWN

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Environmental courts and tribunals have been discussed and analyzed in the United Kingdom (UK) for over twenty years, yet real progress has been made only recently. As a result of recent institutional and legal changes unconnected with the environment, the prospects for a permanent environmental tribunal in England and Wales are better than ever in the near future. Indeed, an environmental tribunal has been established within the new 2010 tribunal system – admittedly one still in largely virtual form and with limited jurisdiction, but an important first step in an area which has long resisted reform.

Traditional arrangements

Traditionally, there have been no specialist environmental courts or tribunals in England and Wales. Prosecutions for environmental offenses are handled in the criminal courts before general criminal judges. Private civil actions for damages or other civil remedies arising out of environmental issues are heard in the ordinary civil courts. Public law cases, where the legality of a decision of a

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government body such as the Environment Agency is challenged, (whether by industry or by non-governmental organizations), are heard at first instance in the Administrative Court by High Court judges assigned to that division.¹

Decisions concerning which judges will hear environmental matters have been ad hoc and unsystematic. There is some informal specialization with some individual judges frequently hearing environmental cases and developing a detailed knowledge of this area of law.² Land-use planning controls, introduced comprehensively in the United Kingdom after the Second World War, were the precursor to modern environmental controls and in many ways remain a bed-rock of a preventative regulatory system in what is a densely-populated island.

Environmental assessment procedures for new projects, introduced formally in the UK in 1987, are largely located within the planning system. Rights of public participation were developed within the planning system well before environmental regulation incorporated equivalent rights. Within this system, one can identify the closest form the country has had to an environmental tribunal.

Most planning decisions are made by local government. Developers who are refused permission or are unhappy about conditions imposed on any permission have always had the right to appeal on the merits to central government. Appeals, including hearings, are heard by the Planning Inspectorate, an independent arm of the local government ministry, the Department of Communities and Local Government. Inspectors conduct hearings, evaluate evidence and, in controversial or high-profile cases, make recommendations to the secretary of state who has the final decision. In the vast majority of cases however, formal decision-making power has been delegated to the Planning Inspectorate. Modern environmental regulations involving consents and licenses often contain an

1. The Administrative Court was created in 2000 as part of the High Court specifically to hear claims for judicial review and other public law issues in England and Wales. Cases are normally heard before a single judge. At present 37 High Court judges have been nominated to sit in the Court.

2. Recently, and unusually, an Appeal Court judge with perhaps the leading experience in environmental law in the country was designated to sit in the High Court to hear a controversial and high profile judicial review concerning a proposed new runway at Heathrow Airport. *R on the application of London Borough of Hillingdon & Ors v. Secretary of State for Transport* [2010] EWHC (Admin) 626.

equivalent right of appeal on the merits to the Secretary of State. In practice, these decisions are often delegated to the inspectorate.³ In fact, some 99% of appeals are determined by the inspectors themselves with the remainder taking the form of recommendations to the secretary of state to take the final decision.⁴

The Planning Inspectorate resembles a form of land and environmental tribunal. The inspectorate, though part of the Department of Communities and Local Government, has considerable financial and operational autonomy. Inspectors are similar to Administrative Law Judges within the United States Environmental Protection Agency. Individual inspectors hear appeals, and generally have a professional qualification such as engineering, architecture, or planning. They are assigned appeals by senior management, chosen as best suits the particular case. Few inspectors are legally qualified. In contrast, more formal tribunals in England and Wales typically are comprised of a legally qualified chairman plus two non-legal members with specialized knowledge.⁵

Analysis but No Action: First Stage 1989-2000

The first public call for some form of environmental court was in a 1989 report by Sir Robert Carnwath, then a leading planning barrister and now a judge in the Court of Appeal and the senior judge of the new Tribunal Service. He was commissioned by the Secretary of State for the Environment to examine problems of enforcement of planning controls.⁶ Though much of his report concerned improving enforcement systems, Sir Carnwath made a tentative call for some new form of land and environmental court or tribunal:

3. Current examples include appeals under environmental liability regulations, environmental permitting, hazardous substance consents, and water abstraction consents.

4. See [Planning-inspectorate.gov.uk](http://www.planning-inspectorate.gov.uk), The Planning Inspectorate Agency Information, http://www.planninginspectorate.gov.uk/pins/agency_info/index.htm (last visited Nov. 7, 2010).

5. Specialized tribunals have been developed under different laws in the United Kingdom over many years, where it was considered that the greater degree of specialism, together with less formal and cheaper procedures, was preferable to using the courts. In 2006 the tribunals were brought together under a new Tribunal Service to provide greater coherence and administrative efficiency and flexibility. See <http://www.tribunals.gov.uk/> (last visited Nov. 7, 2010).

6. ROBERT CARNWATH ENFORCING PLANNING CONTROL (HMSO 1989).

I can see a case for a form of tribunal which is able to encompass the whole range of planning appeal and enforcement work, including the levying of penalties. Alternatively, there may be a case for reviewing the jurisdiction of the various courts and tribunals which at present deal with different aspects of what might be called “environmental protection” (including planning) and seeking to combine them in a single jurisdiction.⁷

Three years later, then Lord Chief Justice, Lord [Harry Kenneth] Woolf, gave an annual environmental law lecture under the provocative title, “Are the Judiciary Environmentally Myopic?”⁸ Part of his analysis concerned the role of an unelected judiciary in dealing with politically-sensitive environmental cases, and he concluded that the British judiciary had rightly refrained from becoming over-involved in policy-making which was best left to the politically accountable. He noted that one distinctive feature of environmental law is the possibility of a single pollution incident giving rise to many different types of legal actions in different forums — a coroner’s inquest if deaths are involved; criminal prosecution, civil actions, and judicial review if public authorities are involved. Under such circumstances, Lord Woolf concluded that there was a strong case for a single environmental court — which might deal with all the legal con-sequences arising from an environmental incident or problem.

Lord Woolf’s vision, therefore, was not just for a court or existing tribunal under another name, but something quite radically different. He explained: “It is a multi-faceted, multi-skilled body which would combine the services provided by the existing courts, tribunals, and inspectors in the environmental field. It would be a ‘one-stop shop’ which should lead to faster, cheaper, and more effective resolution of disputes in the environmental area.”⁹

The Environment Ministry next commissioned Malcolm Grant — then a leading legal academic at Cambridge University who made his name in land-use planning law and developed a high profile in environmental law — to examine environmental courts in other jurisdictions and to consider possible models that might be applicable in England and Wales. Grant’s final report was comprehensive, detached, analytical, and lacked a simple politically attractive

7. Harry Woolf, *Are the Judiciary Environmentally Myopic?* 4 J.ENVTL. L. 1, 12 (1992), (quoting Sir Robert Carnwath).

8. Woolf, *supra* note 1.

9. *Id.* at 14

message. The report laid out two main choices: a “big bang” approach establishing a major new judicial institution, or a more incremental policy that worked with existing institutions and adapted them to the new environmental climate.¹⁰

The government made no firm response, but a debate on the need for an environmental court was initiated in the House of Lords.¹¹ The government minister rejected the need for any immediate action:

The government welcomes the opportunity to debate this issue. We are not persuaded of the need for an environmental court, certainly not on its possible shape. Our discussions today have been part of a wide-ranging debate about the mechanisms necessary for countries to ensure effective environmental protection and enforcement, not least the role of courts and tribunals in this process.¹²

The Second Period of Analysis 2001-2004

From 2001 to 2004, there was growing discussion of how environmental courts and tribunals might be introduced in England and Wales including three key reports designed to influence the policy and political agenda.

First, in 2002, the Royal Commission on Environmental Pollution published its twenty-third report, “Environmental Planning.”¹³ Much of the report concerned improving linkages between the land-use planning system and the demands of the environment and sustainability. It largely focused on institutional structures and analytical tools. An important section of the report focused on improving public confidence and participation in the system. The commission called for extension of rights to appeal decisions of local authorities or regulators. In this context the report made a case for

10. MALCOM GRANT, DEP'T OF THE ENV'T, TRANSPORT & THE REGIONS, ENVIRONMENTAL COURT PROJECT: FINAL REPORT, 2000. The Government expressly asked Professor Grant to analyze options but not to identify preferences.

11. 617 PARL. DEB., H.L. (5th ser.) (2000) 86. (Initiated by Lord Brennan.)

12. 617 PARL. DEB., H.L. (5th ser.) (2000) 100.

13. ROYAL COMMISSION ON ENVIRONMENTAL POLLUTION, 2002, Cm 5459. The Royal Commission on Environmental Pollution was established in 1970 as an expert body providing high level advice to Government across a range of environmental issues. The Commission generally determines its own subject matter for investigation and publishes a detailed report about every 18 months, covering such matters as transport, energy, waste, and genetically manipulated organisms. Its Reports are not binding on government but have generally been very influential. In 2010, the new Coalition Government announced that as part of general spending cuts the Commission would be abolished in 2011.

establishing some new form of environmental tribunal to determine environmental appeals:

Establishing an environmental tribunal would be a significant contribution to a more coherent and effective system of environmental regulation. We envisage such a tribunal would consist of a legal chairperson and members with appropriate specialized expertise. It would rapidly develop the authority and understanding needed to handle complex environmental cases.¹⁴

The commission recognized that eventually it might be sensible to combine the jurisdiction of an environmental tribunal with land-use planning appeals handled by the Planning Inspectorate. At the same time the inspectorate recommended against doing so immediately to avoid overwhelming the new tribunal with the large number of land-use appeals.¹⁵

The establishment of an environmental tribunal was not a primary focus of the Royal Commission study. Therefore, part of the Environment Ministry's response was to commission the present author to conduct a more detailed review of the case for such a tribunal.¹⁶ The report concluded that a "one stop shop" environmental court covering criminal, civil, and public law issues was unconvincing in principle and unlikely to be realized politically, not least because of the costs involved. After examining over fifty sets of environmental regulations, the report highlighted the enormous range of appeal forums — the Secretary of State, the High Court, Magistrates' Courts and the Planning Inspectorate among others and pointed out that there seemed little underlying principle in the choice of appeal routes.

The report advocated establishment of a tribunal as a focal point for environmental appeals and recommended that criminal environmental law cases continue to be heard in the ordinary criminal courts. The report suggested further that the proposed tribunal not be

14. *Id.* at ¶5.37.

15. There are around 20,000 land-use planning appeals in England each year, compared to around 50 appeals based purely on environmental legislation. Many land-use planning appeals may have significant environmental implications so it is not easy to draw a hard and fast line. See PLANNING INSPECTORATE, STATISTICAL REPORT: ENGLAND 2008-9, (Planning Inspectorate 2009).

16. RICHARD MACRORY & MICHAEL WOODS, UNIV. COLL. OF LONDON, MODERNIZING ENVIRONMENTAL JUSTICE: REGULATION AND THE ROLE OF AN ENVIRONMENTAL TRIBUNAL (2003).

responsible for handling judicial reviews. In line with normal tribunal practice, the proposed tribunal would likely have a legal chair together with more technically qualified members, thereby giving its decisions more authority than the haphazard arrangements in effect at the time.

There was considerable support among the judiciary and other professionals for this proposal. Lord Justice Carnwath, who chaired the report project's steering committee, noted in the foreword:

[T]he report provides a practical and workable "road-map" for the development of a new Environmental Tribunal structure. The authors show how (if we concentrated for the moment on the regulatory and civil aspects of public environmental law), we can devise a structure which would be manageable and economical, and would build on the best features of current practice.¹⁷

At about the same time, the Department for Environment, Food and Rural Affairs, commissioned a parallel study of environmental law issues by a coalition of non-governmental organizations.¹⁸ The Environmental Justice Project report highlighted problems of access to environmental justice caused by high costs of litigation in the United Kingdom, and especially the risk of adverse costs orders should cases be lost. The report rejected the model of an environmental appeals tribunal as failing to address the more serious problems:

We do not, however, believe that a tribunal of such limited scope as identified in the UCL Report is, in itself, sufficient to achieve access to environmental justice. Moreover, we are concerned that the establishment of a tribunal limited to regulatory appeals could fill the "window of opportunity" to improve access to environmental justice at a time when more fundamental reform is clearly necessary.¹⁹

The Environmental Justice Project report advocated a more radical approach, urging establishment of a specialist forum, i.e., a separate environmental court or tribunal, with the jurisdiction to hear all civil law claims with a significant environmental component.²⁰

Faced with competing models from environmental law experts,

17. *Id.* at 4.

18. ENVIRONMENTAL JUSTICE PROJECT, A REPORT (2004).

19. *Id.* at 12.

20. *Id.* at 11.

the government adopted a minimalist approach, which was to do nothing.

New Alignments

The momentum for establishing any new form of environmental court or tribunal appeared to have run its course by 2005. However, three recent institutional and legal changes suggest that the opportunity for change has arisen again: the reform of regulatory sanctions, the international pressure to expand access to environmental justice, and the reorganization of the tribunal system.

Reform of Regulatory Sanctions

In 2005, the Cabinet Office initiated a review of regulatory sanctions covering sixty-one national regulators as well as local authorities and dealing with areas such as workplace safety, trade descriptions, food safety, and consumer protection. The review, conducted by the present author, resulted in a final report entitled “Regulatory Justice – Making Sanctions Effective” (Macrory Report).²¹ It followed Philip Hampton’s “Reducing Administrative Burdens: Effective Inspection and Enforcement” (Hampton Report) published earlier that year which examined generally the relationship between regulators and businesses, and concluded that too many regulators had adopted a “tick box” mentality towards the enforcement of regulations, forgetting their underlying purpose.²²

The Macrory Report endorsed the Hampton Report approach that the best way of securing compliance by business was through persuasion and advice.²³ It advocated a flexible system of sanctions as a vital element of any regulatory system. In nearly all areas of regulatory law in the United Kingdom, outside the field of modern competition and economic regulatory law, the long-standing custom has been to use the criminal law as the core sanction of last resort. License breaches and other failures to comply with regulatory requirements are made into specific criminal offenses, normally couched in strict liability terms, meaning that no intention or

21. RICHARD MACRORY, REGULATORY JUSTICE: MAKING SANCTIONS EFFECTIVE (Cabinet Office, London 2006).

22. PHILIP HAMPTON, REDUCING ADMINISTRATIVE BURDENS: EFFECTIVE INSPECTION AND ENFORCEMENT (HM Treasury, London 2005).

23. RICHARD MACRORY, REGULATORY JUSTICE: MAKING SANCTIONS EFFECTIVE (Cabinet Office, London 2006).

recklessness need be proved. Companies are criminally liable for actions carried out by their employees in the course of their employment.

The Macrory Report recognized that criminal law would remain an important element of any regulatory system, but advocated that regulators should have access to a wider range of sanctions that would better reflect the breadth of circumstances in which regulations are breached. On the one hand, it seemed overly costly and inappropriate to prosecute a company in the criminal courts where the regulatory breach was caused by an oversight or unexpected breakdown of equipment. On the other hand, the consequences of even an unintentional breach may be serious, and no sanction at all, or a mere warning, would be an equally inappropriate response.

Central to the Macrory Report was the call for a range of civil sanctions, including financial penalties, which could be imposed by a regulatory agency without the need to go through the courts. The regulator would choose the most appropriate sanction in the light of the sanctions principle and its own published enforcement policy.

One feature of the proposed system which distinguishes it from equivalent systems in other jurisdictions is the close integration of criminal and civil regulatory structures. No new offenses are created under the proposed system, but the same offense could give rise to either a criminal or civil response. Furthermore, the report advised that a regulator who imposes a civil sanction must be able to prove the case to criminal standards beyond all reasonable doubt. This requirement is now reflected in legislation.²⁴

The purpose of the proposed new system was not to facilitate easier convictions, but to provide more appropriate sanctioning routes. Investigation of potential breaches would continue to be governed by criminal procedures. Only after the regulator decided there is sufficient evidence to secure a conviction would the most effective and suitable sanction route be determined.

The proposed new civil sanctions system would include a right of appeal on the merits to an independent judicial body both as to the

24. See 42 Regulatory Enforcement and Sanctions Act 2008; in relation to environmental offenses, see Environmental Civil Sanctions (England) Order 2010 No 1157, Schedule 2, para 1(2), which provides that before service notice of a civil sanction the regulator "must be satisfied beyond reasonable doubt that the person has committed the offense."

existence of the breach and as to the amount of the penalty. This is both a matter of fairness to those subject to the new regime and a guaranteed legal right under the European Convention of Human Rights to which the United Kingdom is a party.²⁵ The report recommended that criminal and civil sanctions be closely linked, and concluded that any appeal should be heard before a specialized-administrative tribunal rather than revert back to the ordinary courts. Under the proposal, once a civil sanction is imposed, all procedures remain within the administrative system rather than within criminal courts. When the report was issued, the Tribunal Service was being reorganized and this reorganization provided a relatively easy route for a new appeals tribunal to be established.

The Macrory Report recommendations are incorporated into the Regulatory Enforcement and Sanctions Act of 2007 which provide the core framework for the new civil sanctions. The report recommended that these new powers should be drawn down to individual regulators by ministerial order as and when appropriate.

In practice, the first movers have been in the environmental field with the passing of an order in April 2010 granting these new sanction powers to England's two core national environmental regulators, the Environment Agency and Natural England.²⁶ Following consultation, the Environment Agency plans to publish its statutory guidance concerning the new penalties in the autumn of 2010 with the first sanctions being applied probably in early 2011.²⁷ The first appeals

25. European Convention on Human Rights art. 6, Nov. 4, 1950, 213 U.N.T.S. 221 (provides that "[i]n the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law." Case law of the European Court of Human Rights indicates that large penalties, even if described as civil or administrative, within a national jurisdiction may still be treated as criminal in nature under the Convention. It is likely that in this context some of larger, so-called "variable" penalties within the new civil sanction will indeed be treated as criminal under the Convention but the right to a hearing before an independent court or tribunal applies to both civil and criminal matters).

26. Environmental Civil Sanctions (England) Order, 2010, S.I. 2010/1157. The Environment Agency is primarily responsible for regulating industrial pollution including waste. Natural England is responsible for nature conservation, including the protection of designated sites. In practice, much of Natural England's focus is concerned with the agricultural community.

27. The Agency consulted on its proposed use of civil sanctions in early 2010. See ENVIRONMENT AGENCY, FAIRER AND BETTER ENVIRONMENTAL ENFORCEMENT, (Consultation Paper 2010). Its actual Enforcement Policy following the consultation is planned for publication in autumn 2010. See <http://www>.

against imposition of the new sanctions will be heard by the new Environment Tribunal in 2011.

International Pressure to Expand Access

The United Kingdom is a party to the 1998 UNECE Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, adopted in June 1998 in the Danish city of Aarhus, generally referred to as the Aarhus Convention. The first two parts of the Aarhus Convention concern access to environmental information and public participation in environmental decision-making. Most commentators agree that the United Kingdom is compliant with these obligations.

The third so-called “pillar” of the Aarhus Convention concerns access to justice, and gives rights to members of the public as well as non-governmental organizations to challenge the legality of decisions by public authorities as well as other acts or omissions of national laws relating to the environment. Over the last thirty years, United Kingdom courts have generally adopted a liberal approach toward standing to bring a case for judicial review.²⁸ In that sense, current practice meets the Aarhus Convention requirements concerning the right of access of the public and non-governmental bodies.

Article 9(4) of the Aarhus Convention also requires that the procedures be “fair, equitable, timely, and not prohibitively expensive.” Early on, it was thought that the “not prohibitively expensive” requirement referred to court fees for lodging a judicial review, which were modest. Increasingly, however, it has been recognized that “not prohibitively expensive” includes legal costs, including the exposure to adverse costs.²⁹ Environmental judicial review claims have followed Britain’s standard “cost in the cause” principle, which requires that the losing party pay the winning party’s legal costs. Given the “cost in the cause” principle, an ordinary individual who is neither poor enough to be entitled to legal aid nor

environment-agency.gov.uk/business/regulation/116844.aspx. At the time of writing, Natural England’s timetable for implementation was less clear though it is likely to follow a similar pattern.

28. The basic requirement is that the claimant must have “sufficient standing,” but both local and national environmental groups have passed this test, as have individual citizens with no property interest.

29. Adverse costs may be assessed against a party to cover the adverse parties’ court proceeding costs, including fees and expenses.

rich enough to pay for litigation costs outright, is likely to be deterred from taking action, as would a non-governmental organization with limited resources.

Pressure on the government to move away from this principle has come from various sources. The Aarhus Convention Compliance Committee set up under the convention may hear complaints from individuals and non-governmental organizations concerning alleged failings by parties to the convention.³⁰ Access to justice issues have formed the basis of a number of complaints and the most wide-ranging UK complaint is likely to be determined during 2010.³¹

The Aarhus Convention contains no formal sanctions for non-compliance. More problematic for the UK are two key European Community Environmental Directives: the 1985 Directive on Environmental Assessment and the 1996 Directive on Integrated Pollution and Prevention Control, which were both amended in 2003 to include specific reference to the Aarhus Convention provisions on access to justice. Accordingly, the requirement that procedures must not be prohibitively expensive is now a legal obligation under European Community law giving the European Commission the right to bring an infringement proceeding against a member state for non-compliance. In March 2010, the European Commission issued the United Kingdom with a reasoned opinion concerning costs in environmental cases.³² This is the final stage before action is taken in the European Court of Justice. Environment Commissioner Janez Potočnik noted at the time:

When important decisions affecting the environment are taken, the public must be allowed to challenge them. This important principle is established in European law. But the law also requires that these challenges must be affordable. I urge the UK to address

30. See UNECE Compliance Committee: Background, <http://www.unece.org/env/pp/ccBackground.htm> (last visited Nov. 8, 2010).

31. See Aarhus Convention, Compliance Committee: Communications from the Public, <http://www.unece.org/env/pp/pubcom.htm> (last visited June 20, 2010). The main complaint concerning access to justice in the UK is 2008/33. See Access to the courts: an introduction, <http://www.clientearth.org/the-case-for-access-to-the-courts> (last visited Nov. 8, 2010). In August 2010, the Committee issued its draft findings holding the UK to be in breach of the Convention, a decision likely to be confirmed at its September meeting. See UNECE Compliance Committee: Meetings, <http://www.unece.org/env/pp/ccMeetings.htm> (last visited Nov. 8, 2010).

32. Europa, *Commission Warns UK About Unfair Costs of Challenging Decisions*, Mar. 18, 2010, <http://europa.eu/rapid/> (Search by reference IP/10/312).

this problem quickly as ultimately the health and well-being of the public as a whole depends on these rights.³³

Judges in a number of cases have expressed concern about the cost of access, questioning the narrow interpretation of the Aarhus Convention advocated by the government.³⁴ In 2008, the working group on Access to Environmental Justice, chaired by a High Court judge, and including experienced environmental law practitioners and academics, published a report entitled “Ensuring Access to Environmental Justice in England and Wales,” (Sullivan Report) expressing doubt as to whether current practice was consistent with the Aarhus Convention and recommending significant changes to current costs rules³⁵ in environmental cases falling within the Aarhus Convention.³⁶ The courts have recognized the problem of cost exposure in public interest cases and, within the limits of judicial discretion, some have attempted to modify the principle in cases raising issues of high public interest.³⁷ However, courts are reluctant to develop a special set of principles for environmental cases, preferring instead that any new approaches be applicable to all types of judicial review.³⁸ The final outcome of these developments is, as yet, unknown.

The most recent contribution to the debate has been the

33. *Id.*

34. *See, e.g.*, R on the application of *Burkett v London Borough of Hammersmith and Fulham* [2004] EWCA Civ 1342 (“If the figures revealed by this case were in any sense typical of the costs reasonably incurred in litigating such cases up to the highest level, very serious questions must be raised as to the possibility of ever living up to the Aarhus ideals within our present legal system”; *Morgan v. Hinton Organics*, [2009] EWCA (Civ) 107 (Eng) (“The requirement of the Convention that costs should not be ‘prohibitively expensive’ should be taken as applying to the total potential liability of claimants, including the threat of adverse costs orders.”).

35. *See* WORKING GROUP ON ACCESS TO ENVIRONMENTAL JUSTICE, ENSURING ACCESS TO ENVIRONMENTAL JUSTICE IN ENGLAND AND WALES, (Centre for Law and the Environment, UCL 2008) (the SULLIVAN REPORT). The Sullivan Report recommended that for judicial reviews falling within the scope of Aarhus, judges should always issue an order before trial that, whatever the result, the person bringing the case will not be exposed to paying the costs of the other side.

36. *Id.*

37. The development started from the Court of Appeal decision in the 2005 *Corner House* case, which was a general public interest case and did not involve Aarhus or environmental issues: *R (Corner House Research) v. Secretary of State for Trade and Industry* [2005] 1 WLR 2600.

38. *See* *Morgan v. Hinton Organics*, *supra* note 34. *See also* *Compton v. Wiltshire Primary Care Trust*, [2008] EWCA (Civ) 749 (Eng).

publication in January 2010 of a major report on civil litigation costs by Lord Justice Jackson.³⁹ Jackson, while recognizing the significance of the Aarhus Convention, proposed a set of principles which would cut across all types of judicial review, and recommended a solution he characterized as “qualified one-way costs shifting.” In other words, he suggested that there should be a presumption that whatever the outcome of the case, each party would be responsible for its own costs. The government is now considering its response to Jackson.

In the context of environmental law, two aspects of the current debate on access to justice are striking. First, whatever its response to Jackson’s proposal and the longer-term revision of costs rules in civil litigation, the government is likely to respond positively in the environmental field earlier than in other fields because of international and European community pressures. Second, the debate has raised the question of whether costly judicial review procedures before the High Court provide the most appropriate forum for resolving environmental disputes in cases other than those that are legally or factually complex. Indeed, many countries in Europe have much less costly procedures, such as local tribunals, to address environmental challenges.

The Aarhus Convention vision of wider access to courts and tribunals puts into doubt whether the UK can continue to provide a gold-plate standard of judicial review before the High Court in all cases. The Sullivan Report recognized this possibility, noting that each year there are approximately twenty judicial environmental law reviews before the Administrative Court. While Sullivan acknowledged that if costs rules were modified to reduce the risk of exposure, then the numbers might increase. Such increase would likely be modest since judicial review would remain a matter of last resort. Moreover, as the Sullivan Report further noted, inasmuch as the new Upper Tribunal has the power to handle judicial reviews and adopt its own rules concerning costs and procedures, “If there was a substantial rise in environmental judicial review applications then it may be that the Upper Tribunal would provide a suitable forum for

39. RUPERT JACKSON, REVIEW OF CIVIL LITIGATION COSTS: FINAL REPORT (TSO Dec. 21, 2009), *available at* <http://www.judiciary.gov.uk/publications-and-reports/reports/civil/review-of-civil-litigation-costs/civil-litigation-costs-review-reports>.

reducing an unacceptable overload on the Administrative Court.”⁴⁰

Reorganization of the Tribunal Service

In 2000, the government commissioned a senior Court of Appeal judge to conduct a wholesale review of the tribunal system in England and Wales. ⁴¹ His report advocated complete reorganization of the system, urging establishment of a new unified tribunal system that would “re-engineer processes radically, so that just solutions can be found without formal hearings at all.”⁴²

The Tribunal Courts and Enforcement Act 2007 implemented the key recommendation of the “transforming public services” report, setting up a single tribunal service including both a lower and an upper tier.⁴³ Under the new system, new tribunals can be set up when needed without new legislation. The aim is to provide a responsive and flexible tribunal service.

The lower tier level is being organized into six chambers: Social Entitlement; Health, Education and Social Care; War Pensions and Armed Forces Compensation; Tax; Land, Property and Housing; and finally, a General Regulatory Chamber which incorporates a wide number of tribunals that do not readily fall within the other categories. Many existing tribunals have been transferred to these new chambers, and the process will continue. Establishing wholly new tribunals is relatively straightforward within this structure. Indeed, earlier this year, a new environmental tribunal was established within the General Regulatory Chamber to hear appeals of new environmental civil sanctions.

At the time of this writing, the new environmental tribunal remains an untested body. Appointments have been made with a panel of ten, mainly existing, judges and twenty lay members. The tribunal will be operational by the time first appeals are made, probably in 2011. Appeals forms already appear on the website, and rules of procedure have been adopted.⁴⁴

40. SULLIVAN REPORT, *supra* note 35, at ¶ 107.

41. SIR ANDREW LEGGATT, REPORT OF THE REVIEW OF TRIBUNALS, 2001, available at <http://www.council-on-tribunals.gov.uk/consultation/374.htm>.

42. DEPARTMENT OF CONSTITUTIONAL AFFAIRS, TRANSFORMING PUBLIC SERVICES: COMPLAINTS, REDRESS AND TRIBUNALS, 2004, Cm 6243, at ¶ 6.4.

43. *See id.*

44. Tribunal Services, *Forms and Guidance*, <http://www.tribunals.gov.uk/Environment/FormsGuidance/HowtoAppeal.htm> (last visited Jun. 20, 2010). The Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules,

Sir Andrew Leggatt's "Report of the Review of Tribunals," (Leggatt Review) considered existing appeals routes haphazard and called for a single Upper Tribunal which will have equivalent status to the High Court and deal primarily with errors of law of first-tier tribunals.⁴⁵ The new Upper Tribunal is considered a "court of superior record" and its decisions are binding on tribunals and public authorities below. Section 15 of the Tribunals, Courts and Enforcement Act 2007 also gives the Upper Tribunal power to hear judicial reviews instead of the High Court. Individual judicial reviews may be referred to the tribunal if a High Court judge considers it "just and convenient to do so."⁴⁶ Alternatively, the Lord Chief Justice may transfer classes of judicial review to the Upper Tribunal. It is unlikely that many judicial reviews will be heard by the Upper Tribunal, but it could prove a significant forum in the environmental context in the future.

The Future

The first chairman of the United Kingdom Royal Commission on Environmental Pollution once argued there were two preconditions for effective reform in environmental policy and law — a robust and detached analysis of the underlying issue coupled with some form of "ignition" event such as a major pollution episode or some equivalent scandal.⁴⁷ Yet, ignition events are perhaps not the only precondition for reform. Sometimes, unexpected alignments produce the opportunity for major reform.⁴⁸

After over twenty years of debate and political inaction, an environmental tribunal was established in England and Wales in 2010 with little fuss or fanfare. Admittedly its jurisdiction remains modest, being confined to hearing appeals concerning new civil sanctioning powers given to the core national environmental regulators. Nevertheless, this new tribunal may form the nucleus of a more substantial institution which will hear many types of environmental

2009, S.I. 2009/1976 (L.20).

45. See LEGGATT, *supra* note 41.

46. Supreme Court Act, 1981, c. 54 § 31A, amended by Tribunals, Courts and Enforcement Act, 2007, c. 15 § 19.

47. See generally ERIC ASHBY, RECONCILING MAN WITH THE ENVIRONMENT 14-29 (1977).

48. RICHARD MACRORY, REGULATION, ENFORCEMENT AND GOVERNANCE IN ENVIRONMENTAL LAW 18 (Hart Publishing 2010).

appeals. In many ways, the approach is typically British – cautious, pragmatic, learning from experience, yet containing elements of a radical vision. The key is that the principle of an environmental tribunal has now been accepted, and, indeed, implemented. How can one explain this dramatic change in approach?

Paradoxically, the two main drivers for change providing the opportunity for establishing the environmental tribunal were not environmental factors. Rather, the new tribunal system was established as a result of a general recognition that the existing tribunal system could be run more efficiently and with greater flexibility. The new civil sanctions and rights of appeal to a tribunal are derived from a review of regulatory sanctions cutting across all areas of business regulation.

In contrast, the UCL Report on the need for an environmental tribunal, for example, argued a case for the special features of environmental law which justified a distinct tribunal.⁴⁹ This argument has not always proved wholly convincing.⁵⁰ Under the recent developments, the case for civil sanctions and the need for appeals to go to an administrative tribunal were justified on general regulatory grounds rather than distinctive environmental needs.

The Environmental Tribunal has been established because it was the environmental regulators who first secured the new civil sanction powers. In the future, if few environmental appeals are made but occur in other regulatory areas, then the tribunal can adapt and appeals will change its focus. Alternatively, the new tribunal may secure other environmental rights of appeal including those concerning environmental permitting and other aspects of environmental regulation.⁵¹ This seems the more likely course and

49. MACRORY & WOODS, *supra* note 18.

50. See, e.g., the response of the Scottish Government: “We acknowledge the special characteristics listed by Macrory and Woods and accept that they are features of environmental law. However, we are not persuaded that these features, or indeed this combination of features is unique to environmental law and it could be argued that similar statements could be made equally about other areas of law such as health, health & safety and employment none of which have specialist courts/jurisdiction.” SCOTTISH GOV'T, ENV'T AND RURAL AFFAIRS DEP'T, STRENGTHENING AND STREAMLINING: THE WAY FORWARD FOR THE ENFORCEMENT OF ENVIRONMENTAL LAW IN SCOTLAND, ¶ 2.99, (2006), available at <http://www.scotland.gov.uk/Resource/Doc/155498/0041750.pdf>.

51. At present these statutory appeals under various environmental regulations tend to go to a range of different bodies including magistrates courts, the planning inspectorate, and individual lawyers appointed by the Secretary of

one that would at last firmly embed the idea of an environmental tribunal within the British judicial system.

State. There is little rhyme or reason in the disparate arrangements other than historical accident.