

ENVIRONMENTAL INJUSTICE

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Environmental justice can mean two things; securing access to the courts in order to resolve environmental problems, and that everyone should enjoy a healthy and clean environment regardless of their means, where they live or their background. The first meaning has been recognised as an environmental right in recent international legislation such as the Aarhus Convention 1998¹ and recent amendments to the EIA and IPPC Directives.² Environmental justice in its broader sense may more simply be referred to as environmental equity, including equity among society and between generations.

Perhaps of more concern than any distinction or definition is that the UK is failing, quite significantly, to secure environmental justice in both senses. In 2007, this is inexcusable. There is the understanding, the means, the technology, the legislative process and the capability to ensure that there is effective environmental justice. What is absent is government commitment at a local and national level. There is also a lack of corporate and personal conviction to place our self-interest and conventional economic values to one side. Instead there is rhetoric and excuse. There is no clearer message than the publication of Government Planning White Paper, which is once again placing the pursuit of economic development above other components of sustainable development and in doing so stepping back 20 years to a free-market land use planning system, designed along capitalist rather than community ideals.

Quality of life

The quality of our lives is one measure of environmental justice. The Environment Agency research paper *Environmental Quality and Social Deprivation*³ affirmed that deprived communities are likely to experience disproportionate levels of pollution and other forms of environmental degradation compared to more affluent areas. It analysed environmental equity and how environmental bads (such as pollution) and goods (such as access to green open space) are distributed across society. The report concluded that there was substantial evidence that a greater burden of potential environmental impact is borne by deprived populations than by the more affluent. It recommended that there should be targeting of regulatory attention on IPPC sites in deprived areas, giving attention to cumulative pollutant impacts associated with site clusters, working with planning authorities on potential siting implications, and developing equity appraisal techniques.

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¹ The Aarhus Convention is discussed further below.

² EIA Directive 85/337/EEC(as variously amended), IPPC Directive 96/61/EC and as amended by the Access to Information Directive 2003/4/EC and Public Participation Directive 2003/35/EC.

³ Dr Gordon Walker *et al* (2003). Environment Agency: Bristol

To attempt to resolve environmental inequity government must create and implement effective national policy. However, it also has to take some tough decisions which resists lobbying and corporate pressure for short-term quick-fix perceived economic gain. A striking example of current thinking is the Aviation White Paper 2003 which encourages the dramatic increase in aviation but will do nothing to improve the quality of life of the millions of people living in and around airports. Any benefit of airport expansion will be limited to the affluent who can afford frequent flying trips (and the associated costs of travel such as accommodation etc), passengers using airports to change flights and the aviation companies. The benefit will not be borne by the communities living around the airports due for expansion. As the skies above our airports cannot cope with such intensification, any increase in flights is likely to be by night flying and expansion away from existing areas.

In *Hatton v UK* [2003] 26022/97, the European Court of Human Rights had to consider whether noise caused by night flights from Heathrow breached the human rights of those living around airports and adversely affected by them. It concluded that there had to be a balance between the economic well-being of the country and the protection of rights and freedoms of others and that government has a 'margin of appreciation' to work within. At present, that margin of appreciation is weighed heavily towards conventional understanding of economic development and the assumption that social improvement can only accrue if economic progress is pursued. One of the tough decisions for government then is to review any margin of appreciation and decide in favour of its people rather than of business partners.

Despite what may be regarded as economic progress over the last 10-15 years, there are few signs that quality of life has actually improved. Indeed, in terms of disquiet and the need for judicial intervention in environmental matters, the problem has never been so bad. Progress as measured by the adverse impact of transport, the liberalisation of liquor licensing the ever increasing number of leisure activities and centres and the high levels of waste generated all suggest that quality of life is deteriorating. Even if some people can afford to fly more frequently, the gain and personal satisfaction is arguably nominal. The cheap price of poor quality food is paid for by offensive odours emanating from intensive farming and unsavoury food processing factories. The need to deal with waste is resulting in other invidious air pollutants such as bio-aerosols and toxins which disperse into the local community.⁴

Government bodies such as Parliament, local Councils and the Environment Agency appear to have a vested interest in sustaining what is ultimately unsustainable. If there was genuine commitment to sustainable development, there would be a collective rethink and radical change. This is quite possible, but involves shifting conventional and vested interests.

⁴ See e.g. the high level of opposition to the proposed Newhaven incinerator in East Sussex, for which the Environment Agency have granted an IPPC permit and the Council have granted planning permission but which is contrary to the principles of EU waste management and the hierarchy of waste disposal.

Environmental rights

Basic rights are key to access to justice. There are explicit environmental rights in the UK. They are procedural rather than substantive rights and are contained in the UNECE Convention on Access to Information, Public Participation in Decision Making and Access to Justice in Environmental Matters 1998. The Convention was ratified by the UK in February 2005 and contains three primary rights; the right to information, the right of public participation and the right of access to justice. The UK Government considers it is compliant with the Convention. Others believe that the UK is failing to meet its international obligations, particularly with regard to access to justice.⁵

The UK's right to environmental information is provided through secondary legislation underpinned by an Information Commissioner and Tribunal.⁶ Access to environmental information is broader in scope than access to other information under the Freedom of Information Act 2000. In general, the provision of environmental information may be regarded as reasonably effective, although there remains some reluctance with government disclosure. However, this is due to ignorance or obstruction rather than a defective system.⁷

The Government confers the right of public participation in terms of nominal forms of consultation. It is limited to the right to be informed and the right to make representations as the extent of such participation.⁸ This is public participation at an elementary level and should be regarded as at the lower end of the public participation spectrum,⁹ it must nevertheless be fully provided when required i.e. if consultation is to be embarked upon it must be carried out properly.¹⁰ Similarly, if active participation is to be offered, for example, such as making representations at public inquiries, then this should be effective and secured in a manner whereby all parties can properly participate in the decision-making process, for example by having legal and expert representation and in circumstances, where all parties are on an equal footing.

In terms of access to justice, the key concern is that for many communities and individuals the right of access to the courts is prohibitively expensive. Public funding is rarely available. Further, the cost of legal proceedings involves not only the cost of employing legal representation but also the risk of paying the other side's costs if a challenge is ultimately unsuccessful.¹¹ There are signs that the

⁵ See e.g. the recent complaints to the EC challenging lack of access to justice, the position of the Coalition on Access to Justice for the Environment.

⁶ Environmental Information Regulations 2004 (SI 2004/3391).

⁷ For example, local authorities are continuing to charge the public over a £1 or more for photocopy one A4 document. This has been held to be excessive and that a reasonable copying charge is 10 pence per copy: *Markinson v Information Commissioner* (2006) EA/2005/0014

⁸ For example, Article 8 of the Town & Country Planning (General Development Procedure) Order 1995 (SI 1995/419).

⁹ Stookes, P (2003), *Getting to the real EIA in Journal of Environmental Law*. OUP: Oxford.

¹⁰ See e.g. *R v North & East Devon HA ex p Coughlan* [2001] 1 QB 213 and *R (Greenpeace Ltd) v Sec of State for Trade and Industry* [2007] EWHC 311 (Admin).

¹¹ Part 44.3(2) of the Civil Procedure Rules 1998 provides that the general rule is that the unsuccessful party will be ordered to pay the costs of the successful party.

Courts could be willing to depart from this general principle by granting a Protective Costs Order to a litigant of limited financial means and when the matter is one of general public importance.¹² However, there is still a general reluctance to make such orders and with the present criteria being set in a way that is unduly restrictive.¹³

In terms of substantive environmental rights, these may be regarded as rights that confer a right to a healthy environment. According to the UNEP Judges Guide 2005, almost every national constitution adopted or revised since 1970 provides for some form of substantive environmental right.¹⁴ The UK does not. The nearest thing is the analogous rights contained in the European Convention of Human Rights including Article 2: the right to life, Article 8: the right to respect for private and family life and Article 1 of Protocol 1: the right to the peaceful enjoyment of possessions. Article 2 is a near-absolute right. In *Oneryildiz v Turkey* [2004] 48939/99 the Grand Chamber held that Article 2:

... does not solely concern deaths resulting from the use of force by agents of the State but also ... lays down a positive obligation on States to take appropriate steps to safeguard the lives of those within their jurisdiction.

Articles 8 and 1 of Protocol 1 are qualified rights whereby the rights invoked must be balanced with other interests.

Environmental justice in action

Environmental justice can be pursued in a number of ways. For instance, environmental impact assessment (EIA) has a key role to play in helping to secure environmental justice. It should, if implemented correctly, ensure that the procedural rights of access to information and public participation (albeit that these may be consultation alone) are secured in a meaningful and effective way.¹⁵ It should also ensure that the potential adverse affects on peoples' lives are highlighted and thereby ensuring that decision-makers are properly informed.¹⁶

Continuing concerns with EIA and recourse to the courts is not so much with misapplication but with a failure to apply the EIA provisions at all and the reasons (or not) for not doing so. This is frequently the position in land use planning. It is also the position in PPC matters. At present, the Government and the Courts take the view that PPC permitting does not fall within the EIA Directive. However, there is nothing in the Directive that states this. This is particularly so, when a PPC application is determined prior to a planning application or when an associated planning permission has not been sought.

¹² The criteria are set out in the case of *R (Corner House Research) v Sec. of State for Trade & Industry* [2005] EWCA Civ 192.

¹³ See e.g. *R(England) v LB of Tower Hamlets*

¹⁴ para 2.69 Stookes, P (2005). *A Practical Approach to Environmental Law*. OUP: London. Whether or not the rights are breached is for future debate.

¹⁵ *Berkeley v SSETR* [2001] Env LR 16 at page 316

¹⁶ *Berkeley v SSETR (No. 2)*[2002] Env LR 14 at pp 398-9

If we are ever going to get to the point of taking better decisions that more properly incorporate the principles of sustainable development and all the significant adverse impacts of a proposal or activity, then a robust and non-restrictive approach to EIA must be taken. To achieve this planners must recognise the key potential adverse impacts and what they mean for the communities and individuals that must live with those impacts once the developer has moved on to its next development. Government bodies must also continue to remind themselves who they are deciding for; is it their residents and communities in the long term or is corporate bodies whose primary purpose is to make a profit?

Environmental injustice

In April 2005, the National Assembly for Wales approved what will be the largest coal opencast coal extraction scheme in the UK, if not Europe. It will cover an area of over 400 hectares on largely, greenfield common land called Ffos-y-fran; just above the town of Merthyr Tydfil, South Wales and at the foot of the Brecon Beacons. The development will last for at least 22 years and involve the extraction of over 16 million tonnes of coal.

The site boundary will be less than 37 metres from residents' homes. Excavation will be around 75 metres from homes. The disturbance of former waste sites with unknown quantities of toxic waste will be around 150 metres from homes. Within 500 metres there are 3 schools and over 200 homes. Merthyr town centre will be less than 1.5 km away. The site has nature conservation interest and ancient monuments. The site boundary adjoins the Trecatti landfill, one of the largest open waste sites in Wales, and which is itself the cause of continuing noise, dust and odour problems.

Open cast coal extraction is a noisy, dirty and highly polluting activity. There will be complications caused by the large quantities of unknown toxic waste and hazardous landfill next door. Moreover, the coal being extracted is destined for Aberthaw power station and, when burnt, will emit significant quantities of carbon dioxide.¹⁷ The extraction process itself will emit large levels of methane. Not only will the local residents suffer from the proposal. It will be large enough to cause a significant dent in the UK's attempts to reduce its greenhouse gas emissions

In November 2003, the Assembly called the matter in. Merthyr Tydfil County Borough Council approved the application. It would enable them to pay off over £2 million of debt. It could also avoid liability for toxic waste illegally dumped on Ffos-y-fran by, among others, the Council. The Assembly's call-in report was clear that, contrary to the planning application which placed emphasis on land reclamation, the development was for coal extraction i.e.; but for the coal extraction, any purported land reclamation would not take place. The Assembly's call-in report also confirmed that Mineral Planning Policy for Wales was relevant and that that policy requires buffer zones to be provided around mineral workings

¹⁷ Aberthaw is being fitted with desulphurisation flues which increase CO₂ emissions over and above those already emitted from coal-fired power stations.

in order to prevent conflict resulting from impacts of noise, dust and vibration from blasting affecting sensitive development.

The proposal went to public inquiry. In a legal agreement between the Council and the developer, entered into immediately before the inquiry, the Council agreed to underwrite up to £800,000 of the developers planning costs. The local community objecting to the coal extraction scheme were not provided any financial support. They could not afford legal representation. Merthyr Tydfil is one of the most deprived communities in the UK.

The Planning Inspector approved the proposal. The National Assembly agreed with the Inspector's report. Local residents challenged the Assembly's decision. The High Court quashed the decision on the grounds that there was apparent bias on behalf of the Assembly's Minister for the Environment. The Court of Appeal reversed that decision and the House of Lords has since refused permission to appeal on the grounds that the bias involved was not of general public importance.

The planning application had an environmental statement in support. It failed to refer to the homes just 37 metres in distance from the site boundary. It failed to recognise the adverse impact of either extracting or burning coal.¹⁸ The environmental statement did however, make frequent reference to a 'recommended' buffer zone of 200 metres for such development, although the developer, the Planning Inspector, and the National Assembly have all since denied that this then required a buffer zone.

The principles of environmental justice and environmental equity are relevant in this case. The lack of representation for residents at the planning inquiry was criticised by the High Court judge noting that:

... there is something to be said for the inequality of arms that was argued as a feature of the case at an earlier stage. The objectors did not have legal representation at the inquiry but the developer did have. ... At the inquiry the local authority, Merthyr Tydfil, had the services of its own planning officer and staff. The objectors had no legal representation. By the time it came to me, Mrs Condrón had the benefit of being able to instruct leading counsel, Mr George, and junior counsel. But even then, there were four counsel ranged against them, ...¹⁹

What has become clear during the legal proceedings is that political bias, greed and self-interest has stood firmly in the way of environmental justice. The Assembly was politically biased towards the development. It had received pressure from Westminster that the scheme should go ahead. There was greed to

¹⁸ This is contrary to judgments in other common law jurisdictions see e.g. *Gray v The Minister for Planning* [2006] NSWLEC 720 which held that the greenhouse gas impacts of burning coal must be taken into account in the environmental impact assessment of new coal mines in New South Wales. *Australian Conservation Foundation v Minister for Planning* [2004] VCAT 2029 and *Friends of the Earth et al. v. Mosbascher and Merrill* US (30.3.07)

¹⁹ *R (Condrón) v National Assembly for Wales* [2005] EWHC 3316 (Admin)

get to the coal and pursue the application at any price, including the health and lives of children and residents in the locality. There was self interest from the Council that was keen to find a way out of debt and its own liability for dumping unknown quantities of toxic waste in its own backyard.

It is now open for residents to apply human rights principles to the proposal in that the Welsh Government has failed to have regard to, for example, the right to life under Article 2. In terms of environmental equity, sustainability and the wider world the decision to dig up 16 million tonnes of coal is also of concern.

The Welsh Assembly Government now has a choice. It can continue to condone what will be one of the most polluting activity being carried out in Wales since devolution, or it can review its original decision. In doing so it has to properly take into account concepts such as environmental equity, long-term sustainability and the environmental rights of the local community including the children of Merthyr Tydfil who will grow up with a huge opencast coal site, literally in their backyards. It must also take into account the impact on the wider world. It should also have one eye clearly focussed on one of its fundamental constitutional provisions and a legislative commitment to sustainable development. It is hard to see how continuing to support the Ffos-y-fran coal extraction scheme meets that commitment.

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