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Résumé de l'article

La jurisprudence de la *Convention européenne de sauvegarde des droits de l'homme et des libertés fondamentales (1950)* (CEDH) a su pallier au défaut de ladite Convention de prévoir une protection spécifique des droits environnementaux en concevant une approche créative dans ce domaine, par le truchement d'une variété d'autres droits, notamment l'article 6 (droit à un procès équitable), l'article 8 (droit au respect de la vie privée et familiale) et l'article 1 du premier protocole de la CEDH (protection de la propriété). Bien que cette créativité ait contribué à protéger indirectement les individus en matière de droits environnementaux, elle a également exercé une pression additionnelle sur le système déjà engorgé de la CEDH. L'entrée en vigueur en 1998 de la Human Rights Act 1998 (loi sur les droit de la personne) au Royaume-Uni a rendu les droits prévus par la CEDH accessibles par l'intermédiaire du droit interne, engendrant du même coup une vague de conflits juridiques. Une des sphères les plus litigieuses concernait la poursuite des réclamations ayant trait à divers droits environnementaux. Au cours de la dernière décennie, l'application de la CEDH aux réclamations environnementales devant les tribunaux du Royaume-Uni a donné des résultats mitigés. Cette mosaïque de résultats découle, d'une part, de l'approche retenue par le régime de la CEDH relativement aux droits environnementaux, mais également de la nature de la relation entre la CEDH et le droit interne britannique, ainsi qu'aux contenus et éthos des deux régimes. Le présent article conclura avec une brève réflexion sur le rôle actuel du régime de la CEDH quant aux cas environnementaux à la lumière des développements dans ce domaine du droit depuis 1998, notamment dans le cadre de la Convention d'Aarthus.

After the Honeymoon: The Uneasy Marriage of Human Rights and the Environment Under the *European Convention on Human Rights* and in UK Law Under the *Human Rights Act 1998*[*]

KAREN MORROW[**]

ABSTRACT

The European Convention for the Protection of Human Rights and Fundamental Freedoms (1950) *(ECHR) regime has, in the absence of specific coverage of environmental rights, developed a "creative" approach in its jurisprudence in this area, pressing a variety of other rights, notably: Article 6 (the right to a fair hearing); Article 8 (the right to privacy and family life); and Article 1 to the First Protocol of the ECHR (the right to enjoyment of property) into service. This*

RÉSUMÉ

La jurisprudence de la Convention européenne de sauvegarde des droits de l'homme et des libertés fondamentales (1950) *(CEDH) a su pallier au défaut de ladite Convention de prévoir une protection spécifique des droits environnementaux en concevant une approche créative dans ce domaine, par le truchement d'une variété d'autres droits, notamment l'article 6 (droit à un procès équitable), l'article 8 (droit au respect de la vie privée et familiale) et l'article 1 du*

* This paper originated in a presentation at the Human Rights Research and Education Centre / Centre for Environmental Law and Global Sustainability Conference "Environmental Justice and Human Rights: Investigating the Tensions, Exploring the Possibilities," University of Ottawa, 8–10 November 2012. I wish to thank colleagues for the constructive and enriching discussion that took place at that event. Responsibility for any errors remains my own.

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creativity has achieved much in according indirect protection to individuals in this regard, but has also placed additional pressure on the already congested Convention system. The entry into force of the Human Rights Act 1998 *(HRA) made long-held rights under the ECHR directly accessible in domestic law in the United Kingdom. This naturally spawned a wave of litigation. One of the most prominently litigated areas concerned the pursuit of a variety of environment-based rights claims. In the intervening decade, the application of the ECHR to environmental claims in the UK courts has generated somewhat mixed results. This is in part a result of the "patchwork" approach that has developed toward environmental claims within the Convention regime itself, but it is also a product of the nature of the relationship between the ECHR and domestic law and the content and ethos of both regimes. This article will conclude by briefly considering the on-going role of the ECHR regime in environmental cases in light of subsequent developments in this area of*

premier protocole de la CEDH (protection de la propriété). Bien que cette créativité ait contribué à protéger indirectement les individus en matière de droits environnementaux, elle a également exercé une pression additionnelle sur le système déjà engorgé de la CEDH. L'entrée en vigueur en 1998 de la Human Rights Act 1998 *(loi sur les droits de la personne) au Royaume-Uni a rendu les droits prévus par la CEDH accessibles par l'intermédiaire du droit interne, engendrant du même coup une vague de conflits juridiques. Une des sphères les plus litigieuses concernait la poursuite des réclamations ayant trait à divers droits environnementaux. Au cours de la dernière décennie, l'application de la CEDH aux réclamations environnementales devant les tribunaux du Royaume-Uni a donné des résultats mitigés. Cette mosaïque de résultats découle, d'une part, de l'approche retenue par le régime de la CEDH relativement aux droits environnementaux, mais également de la nature de la relation entre la CEDH et le droit interne britannique, ainsi qu'aux*

law, notably under the Aarhus Convention.

contenus et éthos des deux régimes. Le présent article conclura avec une brève réflexion sur le rôle actuel du régime de la CEDH quant aux cas environnementaux à la lumière des développements dans ce domaine du droit depuis 1998, notamment dans le cadre de la Convention d'Aarthus.

Key-words: European Convention on Human Rights*, indirect environmental human rights,* human rights act*, individualism, public interest, other environmental rights instruments and approaches (the Aarhus Convention).*

Mots-clés : Convention européenne de sauvegarde des droits de l'homme et des libertés fondamentales*, droits indirects de l'homme en matière d'environnement, loi sur les droits de la personne, individualisme, intérêt général, autres instruments en matière de droits environnementaux (Convention d'Aarthus).*

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INTRODUCTION: THE NATURE OF THE ECHR

The *Human Rights Act 1998* (HRA), which entered into force in October 2002, was enacted to "bring home"[1] rights under the *European Convention for the Protection of Human Rights and Fundamental Freedoms (1950)* (ECHR)[2] to UK domestic law. This may seem somewhat peculiar, given that the UK had been instrumental in drafting the ECHR.[3] However, prior to the entry into force of the HRA, the Convention remained a typical international law instrument[4] with only limited impact in the domestic courts (where it could be used as an aid to interpretation when domestic law was unclear). Thus seeking determinations on matters involving Convention rights routinely required recourse to the European Court of Human Rights in Strasbourg. It was only after the HRA entered into force that UK litigants could expect the domestic

1. UK, HC, *White Paper*, "Rights Brought Home: The Human Rights Bill" CM 3782, in *Sessional Papers* (1997) online: The National Archives <http://www.archive.official-documents.co.uk/document/hoffice/rights/rights.htm> (note that all online references were accessed 20 May 2013).

2. Online: <http://www.echr.coe.int/NR/rdonlyres/D5CC24A7-DC13-4318-B457-5C9014916D7A/0/CONVENTION_ENG_WEB.pdf>, p 5–30.

3. See e.g. Michael Torrance, "Maxwell Fyfe and the Origins of the ECHR" *The Journal of the Law Society of Scotland* (19 September 2011), online: The Journal Online <http://www.journalonline.co.uk/Magazine/56-9/1010095.aspx>.

4. For a brief overview of this issue more generally, see JH Jackson, "Status of Treaties in Domestic Legal Systems: A Policy Analysis" (1992) 86:2 Am J Int'l L 310.

courts to determine questions involving Convention rights in most cases. Now, with a decade of litigation behind us, seems an ideal time to review how human rights-based litigation (in what can be loosely termed) "environmental" cases using the HRA route has fared in UK law. A number of interesting considerations have emerged from the case law. Some concern the more general nature of the relationship between the ECHR and domestic law, others the form and substance that environmental claims have taken under the ECHR regime and still more the nature of environmental rights themselves.

For present purposes, the core of the relationship between the Convention and domestic legal systems was pithily expressed by the European Court of Human Rights Grand Chamber in the airport noise complaint case of *Hatton v United Kingdom*[5] in which it reiterated the "fundamentally subsidiary" nature of role of the regime in a specifically environmental case context. The Convention, and in turn the European Court of Human Rights, essentially operates a limited or supervisory jurisdiction and generally takes a fairly deferential approach towards domestic law. Thus concepts such as the State's "margin of appreciation," allowing it a certain amount of latitude based on its superior knowledge of conditions on the ground and the need to achieve a "fair balance" between the individuals' rights and the interests of the community at large have risen to prominence in Convention jurisprudence. It is arguable that this general regard for domestic law and decision-making has particular significance in the environmental sphere, where on practical as well as jurisprudential grounds, a great deal tends to depend on knowledge of prevailing domestic conditions.

I. MILESTONES IN THE CRAFTING ECHR ENVIRONMENTAL JURISPRUDENCE

In the 1990s it became clear that an increasing number of applications under the Convention were seeking to raise environmental concerns as the basis of claims. The development is part of a wider recognition that environmental degradation

5. (Unreported), No. 36022/97, [2003] VIII ECHR 338, 37 EHRR 28 [*Hatton*].

can impair the ability to enjoy of a whole range of human rights,[6] including a number of those covered in the Convention. This too is symptomatic of broader and quite rapid advances in jurisprudence and law that have seen a pragmatic approach towards marrying human rights and environmental claims, ostensibly to their mutual advantage. A rich and diverse literature and praxis has developed in this area, including (to give a mere sample of the vast range): groundbreaking work by Dinah Shelton on combining human rights and environmental protection;[7] by Edith Brown-Weiss on therights of future generations;[8] and by Tim Hayward on procedural environmental rights.[9] An important manifestation of the extraordinary reach and appeal of the partnering of human rights and environmental concerns is demonstrated in David Boyd's recent global study of their now common presence in constitutional law.[10]

It is however worth observing at this point that adopting a human rights-based methodology in this context, while undoubtedly a favoured strategy and one that has some real advantages, is also controversial in a number of ways. First from an environmentalist perspective, the necessarily anthropocentric and instrumental paradigm that this assumes towards the environment is problematic in principle.[11] For preference many environmentalists would promote ecocentric

6. See e.g. the opening section of the *Australian Human Rights Commission*, Human Rights and Climate Change, Background Paper (2008), online: HREOC <http://humanrights.gov.au/about/media/papers/hrandclimate_change.html>.

7. See Dinah L Shelton, ed, *Human Rights and the Environment*, vol 1 and vol 2 (Cheltenham: Edward Elgar, 2011).

8. See e.g. Edith Brown Weiss, "Implementing Intergenerational Equity" in Malgosia Fitzmaurice, David M Ong & Panos Merkouris, eds, *Research Handbook on International Environmental Law* (Northampton, MA: Edward Elgar, 2010) 100; Edith Brown Weiss, "Intergenerational Equity, Entry" in Rüdiger Wolfrum, ed, *5 Max Planck Encyclopaedia of Public International Law* (Oxford: Oxford University Press, 2012) 287.

9. Tim Hayward, *Constitutional Environmental Rights* (Oxford: Oxford University Press, 2005).

10. See David R Boyd, *The Environmental Rights Revolution: A Global Study of Constitutions, Human Rights and the Environment* (Vancouver: University of British Columbia Press, 2012).

11. See e.g. Robert Elliot, ed, *Environmental Ethics* (Oxford: Oxford University Press, 1995).

or biocentric[12] approaches to the human/environment relationship that accord intrinsic value to the latter. The instrumental anthropocentric approach can also raise practical issues as, while specific human interests (notably of the underprivileged and exploited) may coincide with those of the environment, they do not necessarily do so. Additionally individualistic human rights claims can of course conflict with one another and (of particular importance in environmental cases) with those of the public at large. Furthermore this type of approach also places orthodox models of human rights under pressure—in the first place in arriving at an agreed definition of what will be covered by such claims. In consequence environmental human rights tend to be variously articulated and defined in different legal systems[13] indicating that their content, far from being universal, is highly debatable. As we shall see below this is very much a "live" issue in the attempt to fashion a more coherent approach towards environmental claims under the ECHR.

Thus entertaining environment-based claims under the Convention regime posed some conceptual challenges. There was however a more practical challenge to be faced in accommodating such claims in the absence of explicit environmental coverage in the Convention. It was therefore necessary for Court to be "creative" in its interpretation of established Convention rights in order to do justice to the cases coming before it—but this has a cost, not least in terms of the conceptual integrity of those rights. This approach raised further challenges not least because the rights protected by the Convention are primarily first generation and civil and political in nature, with second generation social and economic rights playing a lesser role. Environmental rights are however usually regarded as third generation rights and these are absent from the Convention. The ECHR regime's receptive response to environment-based claims was, however, in line with its

12. See John Alder & David Wilkinson, *Environmental Law and Ethics* (Basingstoke: Macmillan, 1999).

13. For an overview of the rich variety of coverage, see Svitlana Kravchenko & John E Bonine, *Human Rights and the Environment: Cases, Law, and Policy* (Durham: Carolina Academic Press, 2008).

general strategy in regarding the Convention as an evolving, "living" instrument[14] (at the same time augmenting its own jurisdiction)[15] which was employed in this instance in developing institutional competence to address environmental claims indirectly. This was achieved by adopting a "patchwork" approach, constructing coverage for claims founded on environmental matters from the application of other established (predominantly civil and political, but also economic) rights, adapting their use to new scenarios. This approach was workable due to the instrumental nature of the many of the Convention rights that allows them to be pressed into service in a variety of contexts. Thus both procedural (in particular Article 6—the right to a fair hearing; and Article 13—the right to a remedy in domestic law); and substantive rights (notably Article 8—the right to privacy and family life; Article 10—freedom of expression, which includes the right to receive information, and Article 1 to the First Protocol—the right to enjoyment of property; and ultimately, in the most severe cases, Article 2—the right to life) feature prominently in environmental claims under the ECHR.[16] Most of these rights are qualified, meaning that state interference with them is permissible if it is: based in law; done to secure a permissible aim as specified in the article in question; and "necessary in a democratic society" (i.e. it fulfils a pressing social need and is proportionate to the end result sought).

By now numerous ECHR cases feature the environment, though here we will consider selected examples that reveal particularly important insights concerning the Convention's application in this regard. The first intimations of the Convention regime's willingness to entertain "environmental" claims appeared in the 1990 opinion issued by the European

14. See Alastair Mowbray, "The Creativity of the European Court of Human Rights" (2005) 5:1 HRLJ 57.

15. See Janneke Gerards, "The Prism of Fundamental Rights" (2012) 8:2 Eu Const L R 173.

16. Other Convention rights are also raised, though less frequently; see the European Network of Environmental Law Organizations, *Human Rights and Environment: The Case Law of the European Court of Human Rights in Environmental Cases*, Environmental Case Law Toolkit (2011), online: Justice and Environment <http://www.justiceandenvironment.org/_files/file/2011%20ECHR.pdf>.

Commission on Human Rights[17] in *S v France*.[18] Here the applicants complained that the construction of a nuclear power plant across the river from their house, with resultant noise and light pollution affecting what had previously been a rural setting, violated their right to property under Article 1 to the First Protocol. The Commission found that frequent and severe noise nuisance could affect the value of property and thus interfere with Convention rights but that, on applying the concept of "fair balance" between the applicants' rights and the wider public interest, the instant application was manifestly ill-founded. Although the claim in *S* proved unsuccessful, it did constitute a breakthrough in establishing that the Convention regime now recognised that environmental matters were mainstream social and legal concerns. Furthermore *S* indicated that environmental degradation could have an adverse impact on protected Convention rights and that the regime was willing and able to engage with claims prompted by it. The ECHR jurisprudence began to develop earnest in 1994 in the ground-breaking case of *Lopez Ostra v Spain*[19] which the Commission referred to the European Court of Human Rights. The Court found that the State's failure to protect an individual's house from "serious" pollution caused by smell and emissions emanating from a waste treatment plant that had operated for many years only a few meters away constituted a violation of Article 8, in failing to respect the applicant's home, private and family life.

Case law in this area began to gain momentum with respect to the States' role and responsibilities in environmental regulation. *Guerra v Italy*[20] for example, saw failure to provide the local population with adequate information about the risks posed by the operation of a nearby chemical factory and details of emergency procedures argued (albeit

17. This body was charged with assisting the European Court of Human Rights by deciding on the admissibility of applications. It operated between 1953 and 1998 when the Court was restructured on the entry into force of *Protocol No. 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms*, online: Council of Europe <http://conventions.coe.int/Treaty/en/Treaties/Html/155.htm>.

18. (1990), 65 Eur Comm'n HR DR 250.

19. (1994), 20 ECHR 46, (1995) 20 EHRR 277.

20. (1998), I ECHR 7, 26 EHRR 357.

unsuccessfully) as a breach of Article 10.[21] The same facts were however found to place the State, in consequence of its failure to fulfil its positive obligation to act effectively in a regulatory capacity, in breach of Article 8.

The case which brought perhaps the ultimate form of environmentally based human-rights claim to the fore was *Oneryildiz v Turkey*.[22] Here the State had allowed a shanty town to spring up adjacent to a landfill facility. Regulatory failures which resulted in a methane explosion that destroyed the applicant's home and killed nine members of his family were found to constitute a breach of Article 2,[23] Article 1 to the First Protocol and Article 13.

Taskin v Turkey[24] enhanced the jurisprudential framework applicable in environmental cases by ruling that it was not sufficient for the State to have legislated on the issues—effective enforcement was also a prerequisite to Convention compliance. In this case a gold mine that had been operating under a state permit was causing cyanide pollution. It had been subject to lengthy state review process and litigation which concluded that it should be closed down, but this was not done. The State's failure to comply with its own regulatory law was found to constitute a breach of Articles 8 and 6.

In *Kania v Poland*[25] the European Court of Human Rights reiterated its position with regard to the use of Article 8 in environmental cases. Specifically it underlined its commitment to allowing environmental claims to be disposed of under the Convention despite the continuing absence of coverage for "a clean and quiet environment." It also reiterated that Article 8 could be invoked in both cases of direct State

21. To entertain this argument would have constituted a rather radical development, as it would have placed the State under a positive/active obligation to supply information when Article 10 is actually drafted in a negative/prohibitory terms that are geared to prevent the State from restricting access to information provided by others. The State is however obliged to provide adequate procedures to enable the public to access environmental information; see *McGinley and Egan v United Kingdom* (revision), No. 21825/93 and No. 23414/94), (1999) 27 EHRR 1.

22. [GC], No. 48939/99, [2004] XII ECHR 657, (2005) 41 EHRR 20.

23. See also *Budayeva v Russia* (preliminary objections), No. 15339/02, 21166/02, 20058.02, 11673/02 and 15343/02, [2008] (20 March 2008).

24. No. 46117/99, [2004] X ECHR 621, (2006) 42 EHRR 50.

25. No. 12605/03 (21 July 2009).

action and failure to effectively regulate the activities of the private sector.

These cases saw the law develop in a relatively predictable and pedestrian fashion by extending core Convention values and approaches into a new subject area. However, despite the ECHR's decidedly limited environmental credentials, the Convention case law eventually began to incorporate more environment-specific and indeed cutting-edge thinking drawn from international environmental law and policy into its reasoning. An example of this appears in discussion of the application of the precautionary principle following an industrial accident, in *Tatar v Romania*.[26] This case, once again, involved cyanide contamination by a gold mine and associated technical and scientific uncertainty which required swift regulatory action by the State. This had not been forthcoming. The Court therefore determined that permitting activities that posed a "serious and material risk" to health and well-being placed the State under a duty to undertake risk assessment as a precautionary aspect of both initial and on-going regulatory processes and that failure to do this constituted a breach of Article 8.

Another potentially significant jurisprudential development was the expansive approach towards State responsibility to act to protect the environment adopted in *Hamer v Belgium*.[27] This case involved the forced demolition of a house that had been built without permission in a forest. Here, while once again acknowledging the absence of environmental rights in the Convention, the Court determined, quite radically given the anthropocentric nature of the ECHR, that the environment is "a value in itself in which both society and public authorities take keen interest."[28] Furthermore the Court stated that public authorities had a responsibility to act in order to protect the environment. Note though that, while the Court speaks of the environment as a "value in its

26. No. 67021/01 (27 January 2009).

27. No. 21861/03 (27 November 2007), [2007] V ECHR (extracts).

28. European Court of Human Rights Press Unit Factsheet, "Environment-Related Cases in the Court's Case Law" (December 2012) online: ECHR <http://www.echr.coe.int/NR/rdonlyres/0C818E19-C40B-412E-9856-44126D49BDE6/0/FICHES_Environnement_EN.pdf>.

own right," on closer examination, what is actually being articulated is not an intrinsic value or ecocentric approach towards the environment, but rather an additional dimension to an instrumental human rights stance. Interestingly and more unexpectedly given the individualistic nature of the rights protected under the Convention, the Court's approach here was explicitly founded on the need to protect the wider public interest in the environment. On further consideration though, this approach is in fact a necessary corollary of the Convention application of the concept of "fair balance" between individual right claims and the wider public interest, though it implicitly acknowledges that in environmental cases the latter must often prevail at the expense of the former. Given the nature of many environmental human rights claims, this is a recurring if somewhat underdeveloped theme in the Convention jurisprudence. This case is no exception on this point, as while it hints at the controversial idea that the collective entitlement to a good quality environment may potentially be articulated in terms of a right,[29] rather than as a mere interest, this is, disappointingly, not fully developed.

Băcilă v Romania[30] took the discussion on environmental rights under the Convention rather further. In this case the applicant lived close to a large industrial plant which was a major long-term source of pollution. Despite repeated attempts to get the State to act to curb the plant's emissions, the problems were not effectively addressed and ultimately the applicant's health was adversely affected. A violation of Article 8 was found based on the State's relative inaction, which was prompted by the economic need to keep the plant open. Significantly, the Court explicitly stated that the economic arguments should not have been allowed to prevail over the locals' "right to enjoy a healthy environment."

The comparatively muscular articulation of "environmental rights" suggested in *Băcilă* seems to have developed

29. See Francesco Francioni, "International Human Rights in an Environmental Horizon" (2010) 21:1 EJIL 41, for a discussion of the difficulties that ensue with the application of the prevailing individualistic models of rights in an environmental context.

30. No. 19234/04 (30 March 2010).

further still in *Di Sarno v Italy*, [31] rooted in the notorious Campania waste crisis. This case saw the Court, in a group of successful claims on Article 13, describe the infringement as relating to failures in ". . . safeguarding the right of those concerned to a healthy and protected environment." Though the terminology employed by the Court in the *Băcilă* and *Di Sarno* cases is, somewhat unhelpfully, not identical, it does share a strong anthropocentric core focusing on human health. The infringement of the recognised Convention right here seems to have been regarded as being founded not merely on a moral claim relating to environmental degradation but to an explicit judicial formulation of the right to a healthy and protected environment.

Lest it appear that the ECHR is consistently expansionist in its dealings with the environment, it is apparent that there are significant limits to the Convention's reach in this area. One of the most significant of these—the need for applicant's protected interest(s) to be directly affected by the interference complained of—came to the fore in *Kyrtatos v Greece*.[32] In this case the complaint related to invasive development for tourism that the applicants alleged had destroyed the physical environment of a swamp area that hosted protected species, eroding its scenic and habitat value and thus adversely affecting their private life. Their claim under Article 8 was not successful as it was determined that they had not shown that they were directly affected by these environmental changes. Even on anthropocentric terms this approach exhibits a narrow view of the ability of environmental degradation to adversely affect human well-being (the implication being that only impacts on health—seemingly limited to those that ultimately threaten the individual's physical well-being—will suffice). *Kyrtatos* is also retrograde in taking a purely instrumental approach to the environment and is not prepared to envisage granting the individual representative standing to protect it[33] under the ECHR regime.

31. No. 30765/08 (10 January 2012).

32. No. 41666/98, [2003] VI ECHR 242, (2005) 40 EHRR 16.

33. See e.g. Anna Grear, ed, *Should Trees Have Standing? 40 Years On*, Special Edition of the Journal of Human Rights and the Environment (Cheltenham: Edward Elgar, 2012).

II. Strengths and Weaknesses of the ECHR Environmental Jurisprudence

On balance, given its rather unpromising antecedents, the ECHR regime's embrace of environmental human rights has been quite enthusiastic and surprisingly far-reaching, in particular insofar as state regulatory responsibilities are concerned. The ECHR shows that, even in the absence of specific environmental rights that could be invoked directly, human rights regimes can, by viewing civil, political and economic rights as being impinged upon by environmental degradation, offer a degree of protection (albeit indirectly) to individuals affected by it.

Nonetheless, both direct and indirect human-rights based interventions will, at best, only offer incidental protection to the environment.[34] Any advances made on the ground in response to such litigation will be geared primarily towards human goals and any advances for the environment are contingent upon them coinciding with the former.

Furthermore for all of the positive claims that can be made on behalf of the creativity and responsiveness of the ECHR with regard to environmental claims, it must be acknowledged that its coverage is also inevitably, given the constraints under which it developed, ad hoc and partial, though perhaps arguably gaining a degree of coherence as the case law accumulates.[35] It is certainly the case that an impressive *corpus* of case law, at least by volume, if not necessarily in terms of jurisprudential rigor, has been built up in a relatively short period of time.[36] Nonetheless, while the jurisprudence has, very usefully, allowed the articulation of certain key concerns, in particular the links between environmental degradation and the efficacy of mainstream Convention rights such as the right to privacy and family life and the

34. See e.g. Karen Morrow, "Worth the Paper They Are Written On? Human Rights and the Environment in the Law of England and Wales" (2010) 1:1 J Hum Rts & Envt 66 [Morrow, "Worth the Paper"].

35. See Malgosia Fitzmaurice, "The European Court of Human Rights, Environmental Damage and the Applicability of Article 8 of the European Convention on Human Rights and Fundamental Freedoms" (2011) 13:2 Envtl L Rev 107.

36. See e.g. the Environmental Case Law Toolkit, *supra* note 16.

right to life, it remains very much the product of its anthropocentric parent document in terms of both coverage and emphasis. Even so, the inclusion of a range of environmental factors among the grounds upon which to impose positive obligations on states, notably under Article 8, has proved to be both a significant and an enduring development under the ECHR[37] and has contributed to achieving some improvements in environmental protection. That said the inherent restrictions imposed by the necessarily anthropocentric approach adopted under the ECHR are becoming more apparent in the context of the increasingly prominent debate over environmental rights in a wider sense. This, radically, espouses extending rights-based protection to the environment in its own right,[38] which goes well beyond the traditional and conservative ECHR approach. This is one response that is emerging to the failure of an anthropocentric world (and legal) view to engage effectively with an ecocentric reality in regarding the environment simply as the milieu upon which human welfare is secured. Arguably the "improvised" protection offered by employing the patchwork of rights under the ECHR compounds problems of this nature by pressing environmental claims in support of multifarious human interests. Thus while the European Court of Human Rights' activism in this area can, on the one hand, be viewed as a creative, innovative and above all pragmatic attempt to engage with an important emerging area of societal concern, it can on the other hand be argued that employing an adaptive approach to other human rights in the environmental claims is inherently limited and through its "arm's length" protection, raises more profound questions about what we are seeking to protect, why and how?

37. Jean-François Akandji-Kombe, "A Guide to the Implementation of the European Convention on Human Rights: Positive Obligations Under the European Convention on Human Rights," Human Rights Handbooks, No. 7 (Strasbourg: Council of Europe, 2007), at 47–48, online: ECHR <http://echr.coe.int/NR/rdonlyres/1B521F61-A636-43F5-AD56-5F26D46A4F55/0/DG2ENHRHAND072007.pdf>.

38. Michelle Maloney & Peter Burdon, eds, *Wild Law: In Practice* (London, UK: Routledge, forthcoming in 2014).

III. Other Institutional Drivers, the ECHR and the Environment

Hugely significant as the role of the judiciary and case law undoubtedly is in shaping the operation of the ECHR, it is of course not the only or even the prime force shaping the future of the Convention regime. Case law is also necessarily reactive and ill-suited to establish much-needed strategic direction in this regard—that steer needs to come from the political limbs of the Convention regime—primarily the powerful Council of Ministers and secondarily the Parliamentary Assembly of the Council of Europe (PACE). Insofar as environmental issues are concerned, the PACE has, particularly in the last decade, been a persistent advocate of including an "environmental right" (variously constituted at different times) in the ECHR. For example: PACE proposed adding an "environmental component" to the ECHR in 1999;[39] in 2003 it sought to invoke a right to a "healthy, viable and decent environment,"[40] and in 2009 it promoted the adoption of "the right to a healthy and viable environment."[41] All of these calls have however been decisively rejected by the Council of Ministers.[42] However, in response to its rejection of the 2003 PACE resolution, the Steering Committee for Human Rights (CDDH) did act, albeit in a much lower profile manner than the PACE had

39. Council of Europe, PA, *Future Action to Be Taken by the Council of Europe in the Field of Environment Protection*, Text Adopted, Rec 1431 (1999) notably para 8, online: COE <http://assembly.coe.int/Main.asp?link=/Documents/AdoptedText/ta99/EREC1431.htm>.

40. Council of Europe, PA, 2003 Ordinary Sess (Third Part), *Environment and Human Rights*, Doc 9791, Rec 1614 (2003), online: COE <http://assembly.coe.int/ASP/Doc/XrefViewPDF.asp?FileID=17131&Language=EN>.

41. Council of Europe, PA, 2009 Ordinary Sess (Fourth Part), *Drafting an Additional Protocol to the European Convention on Human Rights Concerning the Right to a Healthy Environment*, Doc 12003, Rec 1885 (2009) at para 10 (11/09/09) online: COE <http://assembly.coe.int/ASP/Doc/XrefViewPDF.asp?FileID=17777&Language=EN>.

42. Council of Europe, PA, *Reply from the Committee of Ministers*, Doc 8892 (15/11/2000) online: COE <http://assembly.coe.int/ASP/Doc/XrefViewHTML.asp?FileID=9111&Language=EN>; Council of Europe, PA, *Reply from the Committee of Ministers,* Doc 10041 (21/01/04) online: COE <http://assembly.coe.int/ASP/Doc/XrefViewHTML.asp?FileID=10403&Language=EN>; and Council of Europe, PA, *Reply from the Committee of Ministers*, Doc 12298 (16/06/10) online: COE <http://assembly.coe.int/ASP/Doc/XrefViewPDF.asp?FileID=12468&Language=EN> respectively.

desired, to prepare a "Manual on Human Rights and the Environment,"[43] which aimed to "increase the understanding of the relationship between the protection of human rights under . . . 'the Convention' and the environment . . ."[44] by collating the relevant ECHR case law. This move was not sufficient to satisfy the PACE, whose most recent resolution on this issue drew upon a number of strands of argument to support its call for to draft a new protocol to the ECHR "concerning the right to a healthy environment."[45] The supporting case incorporated references to evidence of increasing acceptance for the concept of a right to a healthy environment in international law, domestic law and regional law; the recognition that existing protection under the ECHR is "indirect and incomplete,"[46] the desirability of building on the Council of Europe's established credentials in international environmental law;[47] and the more rhetorical elements of the change being "a debt owed to future generations"[48] and a requirement to bring the Convention into line with both changes in society and an evolving notion of human rights.[49] While the PACE did acknowledge that defining the content of an environmental right would be problematic in some respects, it did not view this as presenting an insurmountable obstacle. This incarnation of PACE's conception of an environmental right envisaged it as comprising both (relatively straightforward) procedural[50] and (what is acknowledged as more testing but ultimately justiciable) substantive[51] elements.

Pressure for change has not been confined to the PACE; additional support has been garnered from elsewhere in the

43. Council of Europe, *Manual on Human Rights and the Environment: Principles Emerging from the Case-Law of the European Court of Human Rights* (Strasbourg: Council of Europe, 2006). A second edition of this document has recently been published; Council of Europe, *Manual on Human Rights and the Environment*, 2nd ed (Strasbourg: Council of Europe, 2012).
44. *Recommendation 1885*, *supra* note 41.
45. *Ibid*.
46. *Ibid* at paras 8–9.
47. *Ibid* at para 11, notably the Berne, Lugano and Strasbourg Conventions.
48. *Ibid* at para 12.
49. *Ibid* at para 13.
50. *Ibid* at para 20.
51. *Ibid* at para 21.

Council of Europe system.[52] Wider support for a new protocol to the ECHR to incorporate an environmental right has also emerged, from the United Nations[53] (notably the head of UNEP),[54] and some key players in the NGO community.[55] Furthermore the Council of Europe's CCDH appears to at least be willing to keep the subject under discussion within the Committee of Experts for the Development of Human Rights.[56]

Despite such wide-ranging support for change, the Committee of Ministers of the Council of Europe remains unmoved and rejected the latest PACE proposal.[57] There are a number of reasons for this, but it is at least in part because an expansionist environmental rights agenda runs contrary to the pressures to streamline the ECHR discussed below. In any event, the Council of Europe is presently disinclined to develop the Convention in this way. That said, given that this issue has been a live one for many years; the increasing traction gained by substantive environmental rights in domestic and regional international law; and the live and lively debate within the Council of Europe on this issue, it seems most unlikely that matters will rest here.

52. For example, from the Committee of Senior Officials of the Council of Europe Conference of Ministers responsible for Spatial/Regional Planning (CEMAT), and the Steering Committee for Cultural Heritage and Landscape (CDPATEP). See also Doc 12298, *supra* note 42, Appendix 5 and Appendix 6 respectively.

53. *Promotion of a Democratic and Equitable International Order*, UNGAOR, 64th Sess, UN Doc A/RES/64/157 (2010).

54. Letter from Achim Steiner to Ms Calmy-Rey (14 May 2010) online: Stand Up For Your Rights <http://sufyr.org/ip/uploads/downloads/UNEP%20Steiner%20calls%20for%20RightToEnvironment%20in%20ECHR%20www.sufyr.org%281%29.pdf>.

55. Notably the Stand Up For Your Rights Initiative, Right to Environment, which is in this campaign by Greenpeace International, IUCN The Netherlands, Friends of the Earth UK, the Club of Rome Erasmus Liga, the Dutch Section of the International Commission of Jurists (NJCM), the Northern Alliance for Sustainability (ANPED), The Small Earth Foundation and BothEnds online: <http://www.righttoenvironment.org/>.

56. Doc 12298, *supra* note 42, Appendix 1, para 4.

57. *Ibid*.

IV. THE ECHR—A SYSTEM UNDER PRESSURE

Of late there has been considerable public debate across the Convention's signatory states on the impact, status and future of the ECHR.[58] In the UK much of this discussion is prompted by the poor public image of the European Court of Human Rights, which is the product of the negative portrayal of a number of high-profile cases, for the most part concerned with criminal justice and terrorism. These have attracted widespread criticism in the tabloid press,[59] reports by pressure groups,[60] and reports and comments by successive Labour[61] and Conservative/Liberal Democrat governments.[62] This type of narrowly focussed coverage however most certainly fails to do justice to the broader operation of the Convention and actually detracts from a realistic appreciation of its role and importance.

Nonetheless, there are undoubtedly problems with the operation of the ECHR, some of which lie in its heavy and still-growing case load.[63] Arguably this particular problem is partly self-inflicted, through the evolving and expansionist approach that the Strasbourg Court has adopted towards its jurisdiction—including entertaining environmental cases. In

58. Gerards, *supra* note 15.

59. Discussed, for example, "Right to Rule: Parliament and the Judges", Editorial, *The Guardian* (17 February 2011), online: Guardian Unlimited <http://www.guardian.co.uk/commentisfree/2011/feb/17/right-to-rule-parliament-editorial>.

60. See e.g. Lee Rotherham, "Britain and the ECHR" (*The Taxpayers' Alliance*, 2010) online: TPA <http://www.taxpayersalliance.com/reports/2010/12/britain-and-the-echr.html>.

61. UK, Department for Constitutional Affairs, *Review of the Implementation of the Human Rights Act*, July 2006 online: TNA <http://webarchive.nationalarchives.gov.uk/> and Justice <http:/www.dca.gov.uk/peoples-rights/human-rights/pdf/full_review.pdf>.

62. See e.g. Patrick Hennessy, "Britain Challenges Power of Human Rights Court", *The Telegraph* (21 January 2012).

63. The backlog amounted to 152,800 cases in late 2011; see BBC, "Q&A: Reforming European Court of Human Rights" (23 April 2012) online: BBC News <http://www.bbc.co.uk/news/world-europe-17748313>. See also Gerards, *supra* note 15. The number of applications made each year has also doubled since 2004. See the *High Level Conference on the Future of the European Court of Human Rights: Brighton Declaration*, para 16 online: COE <http://hub.coe.int/20120419-brighton-declaration> [The Brighton Declaration]. These figures indicate the limited impact of reforms to date on this issue.

reality however the vast majority of this volume of case law can be ascribed to failures in certain signatory states to adequately safeguard Convention rights, prompting enormous numbers of individual petitions. Regardless of origin, the end result of the Court's spiralling case load is the same—lengthy delays in determining cases are the norm.

Additionally, there are number of on-going concerns relating to more fundamental aspects of the ECHR regime, notably concerning the quality of some of its judges and in consequence, the standard of some of its determinations. In recent years efforts have been made by signatory states and Convention bodies (including the Court) to tackle some of these issues. While these have for the most part involved fairly uncontroversial procedural improvements, some more radical changes have been made.[64] The adoption of Protocol No. 14 to the Convention in 2004,[65] which finally entered into force in 2010, represents a landmark initiative in this regard. Amongst other things, the Protocol introduced stronger filtering mechanisms for cases, new admissibility criteria and measures for dealing with repetitive cases. Latterly, the adoption of a declaration[66] by the 47 state parties at a conference held in Brighton in April 2012 sets out a continuing reform agenda. Though presented by the UK government, which chaired the proceedings, as a "substantial package of reform,"[67] the politically and practically motivated Brighton Declaration for the most part reiterates the existing position, prioritising the need to make the regime's case-load more manageable. In service of this goal, but also as a political

64. Martha Moss & Martin Banks, "UK Government Criticised over Proposed ECHR Reforms", *The Parliament.com* (18 April 2012) online: The Parliament.com <http://www.theparliament.com/policy-focus/environment/environment-article/newsarticle/uk-government-criticised-over-proposed-echr-reforms/>.

65. Council of Europe, Treaties Series No. 194, 13 May 2004, *Protocol No. 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Amending the Control System of the Convention* (entered into force 1 June 2010) online: COE <http://www.conventions.coe.int/Treaty/EN/Treaties/Html/194.htm>.

66. The Brighton Declaration, *supra* note 63.

67. UK, Department of Justice, Press release, "UK Delivers European Court Reform" (20 April 2012) online: Justice <http://www.justice.gov.uk/news/press-releases/moj/uk-delivers-european-court-reform>.

statement that puts the Court firmly in its place, the Declaration recommends further amendment of the Convention to underline the importance of subsidiarity and the margin of appreciation[68] in the regime, stressing that primary responsibility for meeting ECHR requirements rests on its signatory states. To this end, throughout, the Declaration seeks to promote what may be termed the legal and societal enculturation of the ECHR regime in signatory states, underlining the need for prevention of violations by states in preference to cure by the Courts. Key elements mooted in the Declaration's reform package include: greater deference to national courts (an approach that already features prominently in much of the environmental case law); still more stringent admissibility criteria; shorter time limits for lodging applications; improved judicial selection and the development of "pilot judgments" to deal with repetitious cases. The Declaration also reiterates the commitment to continuing the review process from 2012–2015.[69]

While there are problems with the Convention regime these do not appear to be insurmountable. Nonetheless in the UK, some conservative politicians[70] and think-tank critics are calling for withdrawal from the jurisdiction of the Strasbourg Court if satisfactory changes are not made to its running and caseload management. Their favoured option is establishing the Supreme Court as the ultimate arbiter of human rights claims in the UK.[71] Further discontent with current human rights provision in the UK is indicated by the

68. The Brighton Declaration, *supra* note 63, recommends that the Preamble to the Convention be amended to include specific reference to these issues, n 5044, para 12.

69. *Ibid* at para 34.

70. Discussed in Colm O'Cinneide, *The Human Rights Act and the Slow Transformation of the UK's 'Political Constitution'*, Institute for Human Rights, Working Paper No. 1 (London, UK: UCL Institute for Human Rights, 2012), online: UCL <http://www.ucl.ac.uk/human-rights/research/working-papers/docs/colm-o_cinneide>.

71. Michel Pinto-Duschinsky, *Bringing Rights Back Home: Making Human Rights Compatible with Parliamentary Democracy in the UK*, ed by Blair Gibbs (London, UK: Policy Exchange, 2011) online: Policy Exchange <http://www.policyexchange.org.uk/publications/category/item/bringing-rights-back-home-making-human-rights-compatible-with-parliamentary-democracy-in-the-uk>.

current ruling coalition's pledge to set up a commission to examine the viability of developing a domestic bill of rights.[72]

V. UK "ENVIRONMENTAL" HUMAN RIGHTS LITIGATION— HIGHLIGHTS (AND LOW POINTS) FROM THE FIRST DECADE OF THE HRA

In considering the impact of the HRA in bringing home Convention rights in environmental cases in the UK, we must acknowledge that, with the beleaguered Convention system generally and the particular challenges posed by its jurisprudence in the area, the results were always likely to be "interesting." The complexity of the picture is of course compounded by the fact that the human rights-based coverage had to be grafted on to a system of environmental law that is already a living and evolving composite of regulatory and common law. Nonetheless the HRA would inevitably prove to be a game-changer in many ways, not least in requiring the domestic courts to engage with Convention rights in a more thoroughgoing fashion. The new accessibility to Convention rights that the HRA offered of course generated a wealth of litigation across a range of areas including the environment. The judicial response to this new stream of litigation, as the profession tests its application and presses its limits, has naturally been complex, featuring innovation in some areas, conservatism in others, but it has always prompted lively debate.[73] While in an article it is possible only to scratch the surface of the riches that have been generated in a decade of litigation and commentary[74] on environmental cases under

72. As envisaged in *The Coalition: Our Programme for Government* (London, UK: HM Government, 2010) at 11 online: Gov.uk <http://www.gov.uk/government/pulications/the-coalition-documentation>, though as proposed in this document, this would actually incorporate the ECHR, so represents no fundamental challenge to the Convention regime.

73. See e.g. Keith D Ewing, "The Human Rights Act and Parliamentary Democracy" (1999) 62:1 Mod L Rev 79; Dominic McGoldrick, "The United Kingdom's Human Rights Act 1998 in Theory and Practice" (2001) 50:4 ICLQ 901; David Feldman, "The Impact of Human Rights in the UK Legislative Process" (2004) 25.2 Stat L Rev 91.

74. In part, as envisioned in Justine Thornton & Stephen Tromans, "Human Rights and Environmental Wrongs. Incorporating the European Convention on Human Rights: Some Thoughts on the Consequences for UK Environmental Law" (1999) 11:1 J Envtl L 35.

the HRA, a thematic approach will be adopted that will attempt to isolate some of those issues that particularly merit further discussion.

In the first place it is worth pointing out that the implementation of the HRA 1998 has, in many ways, revitalised the common law. This was arguably inevitable given the inherent elasticity of the latter and its genius for assimilating new influences. This is elegantly explained by Scott L.J.'s *obiter dictum* in *Haseldine v C A Daw & Son Ltd.*:

> The common law of England has throughout its long history developed as an organic growth . . . in the last 100 years at an ever-increasing rate of progress, as new cases, arising under new conditions of society, of applied science, and of public opinion, have presented themselves for solution by the courts.[75]

In this regard the opportunities presented by the HRA, and through it the Convention jurisprudence, have simply provided the judiciary with another (though perhaps exceptional) opportunity to develop the common law in a way that in the words of Sedley L.J. is: ". . . consciously shaped by the perceived needs of legal policy."[76] Nonetheless, the cases that have arisen over the last decade have often seen litigants disappointed. That said, they have also, on occasion, most usefully, required the explicit articulation of fundamental legal issues that are often glossed-over in the context of the operation of modern environmental law. This has forced the courts and the academy to confront some of the most profound questions that we face in regulating the environment. While the case law has occasionally seen the courts trying to evade the more worrisome implications of some of these issues, it has also seen them on occasion take the opportunity the HRA has given to innovate and develop domestic law in new directions.

In the environmental sphere in particular, the HRA has repeatedly thrown into sharp relief the perennial problems posed by three major issues: determining the content of human rights claims in a given context (notably here in the law of nuisance); the need to accommodate the protection

75. [1941] 3 All ER 156 at 174.
76. *Douglas v Hello! Ltd. (No. 1)*, [2001] 2 All ER 289 at 109.

individual human rights-based Convention claims in the context of the wider public interest in regulation; and appropriate remedies.

A. "ENVIRONMENTAL" NUISANCE CLAIMS AND THE HRA

Discussion here will focus (primarily, though not exclusively) on the case law that the HRA has thrown up concerning the impact of claims in private nuisance inspired by links between human rights and environment. In so doing we will proceed from an understanding that while (in common with human rights-based claims) nuisance actions may prove capable of addressing environmental concerns,[77] they do so in a somewhat attenuated form, not least because here too any protection that they offer to the environment is contingent upon and incidental to actionable interference with human interests being found. In fact this characteristic is magnified in this context because the legal protection on offer in private nuisance is confined to a narrow range within the class of human interests: those of holders of proprietary rights in land (defined here as rights to exclusive possession of the affected land, restricted to freeholders, tenants and licensees).[78] The fact that the tort is therefore inextricably tied to land is quite logical where the interference complained of is the cause of physical damage to land/property. However, nuisance also extends to protect the claimant's use and enjoyment of land (i.e. intangible/non-physical interference). Action here is prompted by the claimant's personal experience of the impact of the behaviour complained of on the property and in such cases the rationale for an exclusively property-based approach is arguably less readily apparent and it is in this area in particular that some of the most hotly-contested human rights-based claims have emerged.

77. Discussed in Sean Coyle & Karen Morrow, *The Philosophical Foundations of Environmental Law* (Oxford: Hart, 2004).

78. Licensees here refer only to those in exclusive possession: a bare licence will not suffice. While those without title may sue, this will only occur in exceptional circumstances; see Lord Goff's speech in *Hunter v Canary Wharf*, [1997] 2 WLR 684 at 687–95 [*Hunter*].

Traditionally nuisance in respect of interference with use and enjoyment of land (also commonly referred to as loss of amenity) has been narrowly delineated. The question of the reasonableness of both the claimant's expectations and the impacts of the defendant's activities is however much less clear-cut in regard to this type of damage than it is where there is physical damage to property (which, if not *de minimis*, always constitutes an unreasonable interference). Some ground rules are however clear—the interference complained of must first be substantial as indicated in the classic statement in *Walter v Selfe*[79] that:

> . . . [it must] be considered in fact as more than fanciful, . . . as an inconvenience materially interfering with the ordinary comfort physically of human existence, not merely according to elegant or dainty modes and habits of living, but according to plain, sober and simple notions of . . . people.[80]

The complex considerations arising from the nature of the interference with use and enjoyment of land in nuisance go some way to explaining the brief diversion from orthodoxy with regard to the proprietary interest requirement in the majority Court of Appeal decision in *Khorasandjian v Bush*.[81] In that case the claimant had been harassed by phone calls made by an ex-boyfriend to her parental home. She was granted an injunction, essentially on the grounds having a "substantial link" with the property in question (founded on her occupancy of it "as a home") rather than a proprietary interest. This expansive approach effectively severed the tort from its juridically established moorings in property interests. The Court of Appeal adopted a similar approach in *Hunter v Canary Wharf Ltd. London Docklands Development Corporation*.[82]

79. (1851) 4 De G & Sm 315.
80. *Ibid* at 322.
81. [1993] QB 727. This decision followed the Canadian authority of *Motherwell v Motherwell*, (1976) 73 DLR (3d) 62, in which a wife lacking an proprietary interest in the matrimonial home was granted an injunction [in respect of nuisance phone calls made by her brother-in-law] based on occupancy.
82. [1996] 1 All ER 482.

The primacy of proprietary rights as the basis of an action in private nuisance was however reinstated by a majority in the House of Lords in *Hunter v Canary Wharf*.[83] The case involved nuisance actions by several hundred local residents in respect of first, interference with television reception over a period of years by the Canary Wharf Tower in London and second, actions against the London Docklands Corporation in respect of nuisance caused by dust during the construction of the Limehouse Link Road. Many of the claimants were the spouses or children of those with proprietary interests in properties in the area, but lacked such interests themselves. Several arguments underpin the majority decision, but most cogent here is a deep unwillingness to expand a tort against land in such a way as to effectively transform it into tort against the person. Lord Goff, for example, cited Newark's seminal work on the essential character of nuisance,[84] describing it as "a tort directed against the plaintiff's enjoyment of rights over land."[85] He went on to draw out at length the necessary limitation on the right to bring a claim that this entails. Taking this approach to its logical conclusion, Lord Goff further considered (and Lords Lloyd and Hoffmann clearly stated) albeit *obiter* that the interests that are protected by private nuisance are restricted by virtue of their roots in property, thus excluding personal injury (the proper province of an action in negligence) and presumably also interference with personal comfort.[86] It has however been pointed out[87] that this fine legal distinction is not one that is readily communicable beyond the legal community. Certainly the distinctly atomistic approach adopted toward interference with use and enjoyment and personal injury adopted by the Law Lords here employs a conceptual dualism that may be difficult to justify in practice.

Lord Cooke's dissenting opinion in *Hunter* raises a number of useful points concerning the proprietary interest

83. *Supra* note 78.
84. FH Newark, "The Boundaries of Nuisance" (1949) 65 LQR 480.
85. *Ibid* at 482.
86. *Hunter*, *supra* note 78 at 707–08.
87. See e.g. Paula Giliker & Silas Beckwith, *Tort*, 3d ed (London, UK: Sweet and Maxwell, 2008) at 340.

issue. In its willingness to extend the ability to claim in nuisance beyond the confines of proprietary interests to cases where occupancy is established (at least insofar as complaints of interference with use and enjoyment are concerned), it is hugely significant that his speech[88] draws heavily not only on the law of other common law jurisdictions but also on human rights law, including Article 8 of the ECHR. He notes that the latter partially addresses nuisance, but does not require that the claimant enjoy a proprietary interest in order to bring an action. This may be so,[89] but Lord Cooke's argument, while highly persuasive, is not ultimately convincing at common law. This is in part because the scope of Article 8 extends well beyond what the common law recognises as nuisance and though the latter can be addressed under Article 8, this is only the case insofar as nuisance itself is made out; conversely other infringements may breach Article 8 without constituting actionable nuisance.

On balance one is reluctantly required to agree with the majority view in *Hunter*: As characterised in UK law, private nuisance is indeed most logically viewed as a tort that concerns land and must be treated as such. This is not merely of importance in principle; it is also of considerable practical significance. To do otherwise would rob nuisance of a significant and necessary aspect of its essential nature, taking it into what is clearly the province of the dominant and domineering tort of negligence in offering redress to the person for civil wrongs. While superficially attractive, the ultimate result of such a change would bring nuisance into direct conflict with negligence and in all likelihood undermine its arguably already precarious identity as a discrete tort.[90] This does not however preclude private nuisance from playing a role in the redress of environmental damage, but it does still require (and this does not necessarily follow) that the holder of a proprietary interest is both willing and able to seek a remedy. Furthermore, it is clear that this restriction severely curtails

88. *Ibid*, see especially at 711–19.

89. Amply demonstrated in the cases discussed above.

90. The essential nature of nuisance has already been compromised by the importing of negligence-based concepts, notably in *Cambridge Water v Eastern Counties Leather*, [1994] 2 AC 264.

the common law's role in respect of the broader class of rights and interests that may be affected by environmental interference. In this class of case, human rights law initially appeared to have rather more to offer,[91] though as we shall see below, it increasingly seems that this early promise will not be fulfilled.

It is certainly clear that claims under the ECHR do not represent a panacea in environmental cases as became apparent in *Khatun v United Kingdom*.[92] In this case, some of the unsuccessful claimants in *Hunter* made an application under the ECHR regime arguing under a number of heads, including Article 8, but their case was found (by a majority) to be inadmissible. The reasoning adopted calls into action many of the concepts typically employed by the Convention regime in environmental cases. Thus the interference that the claimants suffered (comprising exposure to dust and noise and interference with their television reception) was deemed not to be actionable as it was "in accordance with the law" and fell within the State's margin of appreciation. The latter allowed the State to determine a fair balance between the interests of those affected by the works and the broader public interest on the basis of what was "necessary in a democratic society" under Article 8(2) of the ECHR.

In domestic law *McKenna v British Aluminium*[93] provided an interesting early opportunity to examine the potential of the HRA to act as a "game-changer" in environmental claims. A group of children claimed in respect of noise, emissions and invasions of privacy arising from the operation of one of the respondent's plants. Insofar as the ability to claim in nuisance was concerned, the case obviously fell to be determined under the ruling in *Hunter*. The HRA however opened up a new avenue of argument, and the claim was fashioned to refer to a "common law tort analogous to nuisance"[94] which was alleged to have interfered with the claimants' rights

91. For an overview see, for example, Mark Wilde, "*Locus Standi* in Environmental Torts and the Potential Influence of Human Rights Jurisprudence" (2003) 12:3 RECIEL 284.

92. No. 38387/97 (1 July 1998).

93. [2002] Env LR 30.

94. *Ibid* at para 50.

under Article 8. The respondents sought to have the action struck out but the judge refused to do this, recognising claim needed to be examined by the courts in the context of the altered legal landscape.

A decade down the line, one may have perhaps reasonably have expected the question of what constitutes an appropriate approach to dealing with claims in respect of nuisance-type interference by those lacking a proprietary interest in the land in question to have been satisfactorily addressed. However this issue, if anything, seems to be becoming more complex, as is apparent from the Court of Appeal decision in *Dobson v Thames Water Utilities Limited*.[95] This litigation involved actions in private nuisance and under the HRA by a group of litigants in respect of environmental interference by one of the defendant's sewage treatment works. Some of the claimants enjoyed proprietary interests in the affected property and could therefore claim in private nuisance but others (notably children and lodgers) lacked the requisite interest to do so and their only viable route to a remedy lay in the HRA. The relationship between the two types of claim was central to the case and its relevance to the question of appropriate remedies is discussed below.

B. INDIVIDUAL RIGHTS *V* THE WIDER PUBLIC INTEREST IN ENVIRONMENTAL REGULATION

One area in which the rights model promoted by the ECHR regime generally encounters difficulty lies in the conceptual problems apparent in the attempt to reconcile the protection of the individual's rights with the interests of the community at large. This conflict is arguably particularly acute in environmental cases,[96] where individuals bear the brunt of pollution, often as the result of authorised activities that are carried out in the public interest, and in particular in the name of public health or economic development. As indicated above, a number of concepts have been developed in the Convention regime in order to address this type of sensitive

95. [2009] EWCA Civ 28 [*Dobson*].
96. Discussed in some detail in Francioni, *supra* note 29.

issue, notably the margin of appreciation, deferring to the State's knowledge of conditions on the ground and how best to respond to them and the concept of fair balance in adjudicating such claims. Precisely this issue arose in *Marcic v Thames Water Utilities*.[97] This case graphically illustrated the fact that the HRA had added an extra dimension to domestic environmental law claims that already involved the complex interaction of public law and private law. Marcic's home and garden had been repeatedly flooded by sewage because the Victorian sewers in the area, which were TWU's responsibility under the *Water Industry Act* (WIA) 1991, had become inadequate to meet current needs. TWU was not however in a position to address Marcic's problem, as it had limited resources and worse problems to tackle elsewhere. Thus Marcic's claims as an individual stood at odds with those of other members of the public, and indeed other TWU customers, who were even more adversely affected than he was.

The WIA gave Marcic a right of complaint to the Director General of Water Services but he instituted legal proceedings instead. He brought a multi-headed claim at common law, all aspects of which failed at first instance. He also argued, this time successfully, that TWU was in breach of section 6(1) of the HRA with respect to his rights under Article 8 and Article 1 to the First Protocol of the ECHR. Marcic was therefore awarded damages from the point in time when the HRA entered into force. The Court of Appeal upheld the HRA element of Marcic's claim and also found TWU liable in nuisance, thus entitling Marcic to damages for the full duration of the interference. The Court's rationale for this was explained by Phillips M.R. in the following terms:

> The flooding is a consequence of the benefit that is provided to those making use of the system. It seems to us at least arguable that to strike a fair balance between the individual and the general community, those who pay to make use of a sewerage system should be charged sufficient to cover the cost of paying compensation to the minority who suffer damage as a consequence of the operation of the system.[98]

97. [2003] UKHL 66 [*Marcic*].
98. *Marcic v Thames Water Utilities*, [2002] EWCA Civ 64 at para 113.

Furthermore the Court of Appeal found the WIA remedy unsuitable to address Marcic's needs. This aspect of the decision had potentially far reaching implications for regulatory law in that, in effect, it allowed the common law in combination with the HRA to effectively side-line the statutory regulatory regime that had been put on place to govern this situation. On appeal by TWU, the House of Lords gave this aspect of the Court of Appeal's decision short shrift. They held that the WIA regime was not only adequate to protect both the individual and TWU's other customers but that it was better placed than the courts to do so. Lord Hoffmann was very clear as to the wider ramifications of a case of this nature involving a statutory undertaker and took the view that it could not be regarded as a simple *inter partes* dispute. The implication was clear—while individual rights were undoubtedly being interfered with, the claim raised had to be looked at in the context of the wider public interest in using scarce resources where the environmental interference was most pressing and this had to be a major consideration in the Court's decision-making process.

Like the House of Lords decision in *Marcic*, the Court of Appeal decision in *Arscott v Coal Authority*[99] brings intersection between the common law and human rights concerns into focus. This case also involved flooding. A local authority (the second defendant) owned a recreation ground that was subject to flooding. In 1972 it agreed that the coal authority (the first defendant) could dump slag on the site in order to attempt to raise the ground level and so solve the problem. In 1998 a nearby river overflowed and, as a result of the defendants' works, the claimant's land was flooded. Their action was dismissed at first instance on the basis of the common law doctrine of common enemy (which allows a landowner to take action to avoid natural disasters even though this may have adverse implications for other landowners) and also following the approach in *Cambridge Water v Eastern Counties Leather*,[100] because damage to the claimant was not foreseeable at the time that the works were carried out. The

99. [2005] Env LR 6.
100. [1994] 2 AC 264.

claimant appealed on a number of grounds, including the need to take a narrow interpretation of the common enemy rule subsequent to the passing of the HRA. The appeal was dismissed—the Court decided that the HRA argument was irrelevant as the Act was not in force at the time that the events in question occurred. The Court went on to state *obiter* that the common enemy doctrine did not infringe the HRA, as it followed the basic balancing of conflicting interests requirements expressed in the law of nuisance, in the *Marcic* decision and in the jurisprudence on fair balance under the ECHR as expressed in *Sporrong & Lönnroth v Sweden*.[101] While it was undoubtedly the case that the Court's refusal to apply the HRA was justified on the facts, other aspects of the *Arscott* decision do give cause for concern. In particular, as the claimant's property was far removed from the waterline, the Court's expansive approach to the doctrine of common enemy is difficult to justify and one must query the application of fair balance here. The approach adopted in the instant case seems to suggest a general shift in favour of defendants. *Arscott* also has wider implications for the interpretation of "balancing interests" in nuisance cases. Furthermore the Court's failure to engage meaningfully with the relationship between the core concepts that operate in common law (balancing interests, "reasonable user," etc.) and human rights law ("fair balance," "proportionality," etc.) is symptomatic of a more profound lack of integration between the two legal regimes.

This question of conflict between individual rights and the public interest that had in the end dominated the decision in *Marcic* and how to address this in an environmental context arose once again and even more explicitly in the planning case of *Lough v First Secretary of State*.[102] In effect, this case gave the domestic courts an opportunity to rule on the nature of "environmental rights" under the Convention. While the public law planning regime functions in such a way as to preclude the majority of nuisance disputes, it does not entirely dispel conflict between neighbours and thus the common law

101. No. 7151/75 (29 June 1982), No. 7152/75 (23 September 1982).
102. [2004] EWCA Civ 905 [*Lough*].

of nuisance has a continuing residual but significant role in this regard. In *Lough* the claimants, representing local residents sought to challenge a grant of planning permission for the construction of a tower-block. They claimed in respect of threats to their privacy, light, view and television reception. The planning inspector decided that none of these constituted actionable interference under the HRA and on an initial appeal the Court accepted this position. The claimants contested this point, arguing before the Court of Appeal that the effects of the projected development were sufficiently grave to constitute an infringement of Article 8 of the ECHR and thus, following the approach in that had been adopted in *R (on the application of Samaroo) v Secretary of State for the Home Department*,[103] they required specific consideration. Under the *Samaroo* test this would require determining: first, whether the end in question could be achieved with less interference to the claimants' rights; and second arriving at a fair balance between that end and the applicable Convention rights. The claimants' argument failed. The crux of the matter was examined by Pill LJ, who explicitly considered the purpose and scope of Article 8 stating that:

> While it requires respect for the home, it creates no absolute right to amenities currently enjoyed. Its role though important must be seen in the context of competing rights, including rights of other landowners and of the community as a whole.[104]

In these comments Pill LJ gets right to the heart of the challenges posed by rights in their many and complex manifestations, identifying not only conflicting individual rights as being at issue but also, beyond these, collective public concerns. The Court went on to find that the *Samaroo* test, which was applicable in cases of direct interference by the State with individual rights, was not appropriate here, where what was involved was essentially characterised as a conflict between competing individual rights. In light of this the Court ultimately concluded that this aspect of the case fell without the scope of the Convention.

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103. [2001] EWCA Civ 1139. This case involved immigration law.
104. *Lough*, *supra* note 102 at para 41.

In terms of the role of the State in this case, the Court referred to the margin of appreciation allowed to the State to accommodate conflicting interests described by the European Court of Human Rights in *Hatton v United Kingdom*.[105] It referred to the Grand Chamber's statement in that case that:

> There is no explicit right in the Convention to a clean and quiet environment, but where an individual is directly and seriously affected by noise or other pollution, an issue may arise under Article 8.[106]

The Court went on to apply the Convention jurisprudence as espoused in *Hatton* on the key concepts of fair balance and the margin of appreciation—significantly the latter was found to apply to matters of environmental protection and the Court explicitly stated that:

> . . . it would not be appropriate for the Court to adopt a special approach in this respect by reference to a special status of environmental human rights. In this context the Court must revert to the question of the scope of the margin of appreciation available to the State when taking policy decisions of the kind at issue.[107]

As intimated by Pill LJ's remarks above, the Court took the view that in reaching its decision it had to consider the interests of the affected individual, other individuals, and the community as a whole. It was also of the opinion that the margin of appreciation in environmental/planning cases is a wide one and is dependant in part on local knowledge and conditions. Further, it determined that, in the new legal context, Article 8 issues now form a material consideration in planning law, thus forming an integral part of the decision-making process.[108] Above all, the Court was of the view that the planning system generally operated in accordance with the HRA and that in the instant case procedural probity had been satisfied and substantive consideration given to striking

105. *Supra* note 5.
106. *Ibid* at para 96.
107. *Ibid* at para 122.
108. *Ibid* at para 48.

an appropriate balance between the claimants' rights and the development project.

The decision in *Lough* does however leave us with some significant questions—not least that of the interpretation which it accorded to the role of the State and the extent to which the domestic courts are willing to exercise supervisory jurisdiction over it. In the instant case, what was involved was arguably not merely a straightforward conflict between two sets of individual rights (those of the claimant/residents and the project developer) as would be the case in a typical private nuisance scenario at common law. Instead, the State was, through the planning system, both augmenting the defendant's rights (by allowing them to develop) and then authorising the exercise of those rights in such a way as to interfere (in a new way/to a greater degree) with the rights/interests of the claimants. Thus it would appear that the situation here while not analogous to that in *Samaroo*, was not accurately categorised as a simple dispute between individual rights either—the State here has an indirect role that requires consideration and in that light the requirements of "interference in accordance with the law" under Article 8(2) of the ECHR must be satisfied.[109]

C. REMEDIES IN "ENVIRONMENTAL" NUISANCE CLAIMS UNDER THE HRA

The HRA has also prompted the need to reconsider what constitutes an appropriate remedy for interference in those "environmental" rights claims that are argued in nuisance. At common law in the UK, the normal remedy in private nuisance is an injunction, though this is not awarded as of right but at the Court's discretion. Damages may be awarded in lieu of an injunction, provided that the requirements outlined in *Shelfer v City of London Electric Lighting Co.*[110] are satisfied.

109. Furthermore there would be no guarantee that subsequent interference would be actionable in nuisance, depending on the Court's application of the approach adopted to the impact of planning permission on the character of a locality in *Gillingham BC v Medway (Chatham) Dock Co. Ltd.*, [1993] QB 343 and (in contrast) *Wheeler v JJ Saunders*, [1995] 2 All ER 697.

110. [1895] 1 Ch 287 (CA Div Civ.) (19 April 1894).

In effect this means that damages are only an option in cases where the interference experienced is relatively mild. In contrast minor interference would not even be actionable under the Convention regime and the HRA. For those cases that do fall within the remit of the HRA, under section 8 of the Act declaratory relief is the norm. While damages are available in principle under the HRA as "just satisfaction" for infringements, this too is at the Court's discretion, and in practice it is regarded as a secondary remedy which is not routinely awarded.

The role of damages in this area appears to be in the process of being refashioned by the HRA as demonstrated in the nuisance case of *Dennis v Ministry of Defence*.[111] In this case a (substantial) damages award of £950,000 was made covering past and future loss of capital and interference with the use of the claimants' property, caused by activities originating from a neighbouring RAF training facility. Interestingly, Buckley J deemed this award appropriate both at common law and as just satisfaction under the HRA. Taking another angle on this issue, Lord Nicholl in his speech in *Marcic v Thames Water Utilities*[112] (discussed above) took the view that, in cases where an individual suffers an adverse impact due to the delivery of a public service, effectively losing out in the cause of the wider public interest, the most appropriate remedy is compensation.[113]

The question of compensation arose once again, in a rather different guise, in *Dobson v Thames Water Utilities Limited*[114] (discussed above). At first instance the claimants accepted that a nuisance award was a matter to "be taken into account" in most "just satisfaction" awards that would be made to other claimants under the HRA,[115] though they successfully argued to have this concession withdrawn before the

111. [2003] Env LR 34 (16 April 2003).

112. *Supra* note 97.

113. *Ibid* at para 45, discussed in Karen Morrow, "The Rights Question: The Initial Impact of the Human Rights Act on Domestic Law Relating to the Environment" 2005 JPL 1010 [Morrow, "The Rights Question"].

114. *Supra* note 95.

115. *Dobson v Thames Water Utilities Ltd.*, [2007] EWHC 2021 (TCC) at paras 190 and 203 [*Thames Water*].

Court of Appeal.[116] This was to prove hugely significant as the case ultimately hinged on the ramifications of the undoubtedly close relationship between nuisance and Article 8 rights. The essential question here being, does the overlap between the two classes of interference necessarily mean that a damages respect award in nuisance inevitably subsumes claims for damages as just satisfaction under the HRA?

The first instance decision in *Dobson*, broadly rooted in the approach adopted in *Hunter* (discussed above), concluded that damages awarded in private nuisance to those with a proprietary interest in the affected property could (and usually would) suffice to both address their own claims under the HRA and (controversially) to deny any further recovery under the HRA to those resident in the same property[117] but lacking the requisite proprietary interest to sue in nuisance. This certainly reflects the orthodox understanding of private nuisance as connected to land rather than personal interests, but arguably fails to engage fully with a key issue relating to the scope of legal protection available to both classes of litigant, namely does the HRA offer additional redress in respect of adverse effects on personal interests. In the Court of Appeal in *Dobson* the question arose as to whether an award of damages in nuisance automatically constitutes "just satisfaction" for a breach of Convention rights experienced by those who have a proprietary interest in the affected land or whether a "top up" award is also required. The Court of Appeal, perhaps fearing "double counting" of damages, concluded that an additional award of this nature would be "highly improbable if not inconceivable."[118] Thus, in effect for this class of claimant protection for their human rights is subsumed in that accorded to their common law rights in nuisance. It does however remain to be seen whether this approach is actually adequate to satisfy the demands of the ECHR for those who can claim in nuisance as it conflates property interests with distinct human rights interests in privacy and family life (the claim was after all made in respect of Article 8 of the ECHR, not

116. *Dobson*, *supra* note 95 at paras 14–15.
117. *Thames Water*, *supra* note 115 at paras 209–11.
118. *Supra* note 95 at para 50.

Article 1 to the First Protocol under which such an approach may be justifiable).

The approach adopted in the Court of Appeal in *Dobson* did however represent something of an improvement on that at first instance, in that it at least acknowledged in principle that damages under the HRA played a different role from those in private law. Waller LJ, delivering judgement for the Court, concluded that damages awarded in nuisance to those with a proprietary interest in the affected property would be "relevant" to the considering whether to order damages to those lacking such an interest in the same under the HRA. This approach then at least leaves open the possibility of a discrete award for "just satisfaction" to this class of claimant under the HRA, though only in exceptional cases. Disappointingly though the opportunity was not taken to fully articulate and develop this crucial point which goes to the rationale for awards in both areas and this was to have important ramifications for the eventual resolution of the case. In the end, *Dobson* itself did not qualify as one of the "exceptional" cases where a discrete award would be made to provide just satisfaction of a HRA claim. In *Dobson v Thames Water Utilities Ltd.*, Ramsey J determined that, an injunction not being appropriate on the evidence,[119] damages would be an apt remedy. However he went on to decide that, damages having been awarded in nuisance to those with proprietary interests in the affected properties, no damages were necessary to provide just satisfaction for those lacking such an interest and claiming under the HRA as the nuisance award "reflected the loss of amenity of the whole family." Those claiming under the HRA were to be satisfied by the fact that a declaration of rights had been made and should pursue other statutory remedies.[120] It has to be said that it is questionable whether this approach is adequate to satisfy the requirements of the ECHR for a number of reasons. Ramsey J's approach is first problematic in principle, as damages in nuisance relate to compensating for injured interests in the affected property

119. [2011] EWHC 3253 (TCC) at para 1121 (8 December 2011); there was insufficient evidence that the problems complained of were continuing at the time that the case went to trial.

120. *Ibid* at para 1124.

(here loss of amenity) leading to diminution in its value; awards in respect of just satisfaction of claims under the HRA on the other hand are properly concerned with personal impacts of the interference. The latter may be included in loss of amenity in nuisance but they are not necessarily synonymous with it, as the personal interference experienced will vary with the individual's perception and the interference experienced by other household members cannot therefore be assumed to be subsumed by the amenity claim in nuisance of the individual who fortuitously happens to be the holder of a proprietary interest of the property in question.

Part of the difficulty encountered in this area lies in the improvised nature of the environmental rights that have been cobbled together by the necessity for creative interpretation of the ECHR, and in particular Article 8, in light of the lack of explicit environmental rights in the Convention regime that have been considered above. While the content of environmental human rights may be hotly contested, it may ultimately be the case that, if the Convention regime cannot deal with this issue head on, it will be condemned to provide only flawed and partial protection to individual interests in this area.

To sum up, the HRA has indeed had an impact on environmental claims in the UK, as illustrated by the case of nuisance, though this has been somewhat uneven. The judiciary has, on the whole, taken a measured approach towards its interpretation of the HRA making judicious use of the margin of appreciation and the concept of fair balance—which reflects the supervisory nature of the ECHR regime. While the core issue—articulating the precise relationship between human rights and nuisance claims has not been fully addressed, this is becoming clearer. The issue is a complex one and reflects the difficulties with adding human rights-based legal protection on to well established regulatory and common law regimes—the interface of which is relatively under-articulated and convoluted in its own right. Nonetheless, in other respects the HRA litigation is pushing the common law forward and arguably making it more fit for purpose in the twenty-first century. This is particularly so in the Courts' use of the concept of fair balance to change the

approach to remedies in this area, with damages now playing a more prominent (if in some respects problematic) role than hithertofore. This development is particularly important in environmental cases where the courts need to do justice not only to the claimant but also to other affected individuals and to the interests of the public at large and the usual "all or nothing" nature of an injunction is ill-suited to achieving this.

VI. Other Environmental Rights Approaches and the Implications for the ECHR

The ECHR is not the only instrument that accords human rights coverage to the environment that is accessible in the UK legal system. Other regimes also play a significant role in this regard at least insofar as procedural rights are concerned. The instruments that introduce these rights, unlike the ECHR, have the advantage of being purpose-made and reflect modern understandings of what is required to construct workable environmental rights. They include the UNECE's 1991 *Convention on Environmental Impact Assessment in a Transboundary Context* (the Espoo Convention)[121] and its 1994 *Protocol on Strategic Environmental Assessment*[122] (the Kiev Protocol).[123] Most significant in this new generation of environmental rights instruments however is the 1998 UNECE *Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters* (the Aarhus Convention).[124] The Aarhus Convention has also spawned a 2003 *Protocol on Pollutant Release and Transfer Registers* which echoes the strong

121. Espoo (Finland), 25 February 1991, 1989 UNTS 309, 30 ILM 802 (1971) (entered into force 19 September 1997), online: UNECE <http://www.unece.org/fileadmin/DAM/env/eia/documents/legaltexts/conventiontextenglish.pdf>.

122. Kiev (Ukraine), 21 May 2003, UN Doc ECE/MP.EIA/2003/2 (entered into force 11 July 2010), online: UNECE <http://www.unece.org/fileadmin/DAM/env/eia/documents/legaltexts/protocolenglish.pdf>.

123. For a discussion of the key aspects of these instruments, see Karen Morrow, "Public Participation in the Assessment of the Effects of Certain Plans and Programmes on the Environment. Directive 2001/42/EC, the UNECE Espoo Convention and the Kiev Protocol" (2004) 4 YB Eur Envlt L 49.

124. Aarhus (Denmark), 25 June 1998, 2161 UNTS 447, 38 ILM 517 (1999) (entered into force 30 October 2001), online: UNECE <http://www.unece.org/fileadmin/DAM/env/pp/documents/cep43e.pdf>.

participatory rights ethos of its parent instrument.[125] Discussion here will however focus on the most generally applicable of these regimes, that of the Aarhus Convention itself. The "three pillars" of the Aarhus regime: access to information, participation and access to justice take much of their approach from international human rights law. In common with the HRA, the Aarhus Convention has already proved a fertile subject of litigation in UK law and we will consider one of the most significant cases that has arisen from it thus far in order to illustrate the operation of Aarhus rights and their interaction with common law concepts such as fairness. First though it is necessary to look briefly at the status of the Aarhus regime in UK law. This is a complex area, as the Convention actually has what may be described as a split legal personality. At one level, it is obviously an international instrument that has not been incorporated into domestic law and can therefore only be used as an aid to interpretation where domestic law is unclear. This much was confirmed by the Court of Appeal in *Morgan v Hinton Organics (Wessex) Ltd*.[126] However there is an additional element that requires consideration here—the fact that the EU is a signatory[127] to the Aarhus Convention is of considerable significance to the status of the regime in UK law and to the ability to access rights under the regime in the UK courts. This is because the EU has legislated in respect of some Aarhus obligations and, where it has done so, it may be the subject of litigation in the UK courts and may, under the EU law doctrine of direct effect, provide rights that individuals can seek to pursue in the domestic courts.[128]

125. Kiev (Ukraine), 21 May 2003, online: UNECE <http://www.unece.org/fileadmin/DAM/env/pp/prtr/Protocol%20texts/PRTR_Protocol_e.pdf>.

126. [2009] EWCA Civ 107 (2 March 2009).

127. In contrast, the EU is not yet a signatory to the ECHR. Although accession negotiations have been ongoing since the latter part of the 1970s and the legal basis for it to accede was finally created by the Lisbon Treaty and Protocol 14 to the ECHR, this has yet to be finalised. See Council of Europe, "ECHR: Accession of the European Union" online: COE <http://hub.coe.int/what-we-do/human-rights/eu-accession-to-the-convention>.

128. For a much fuller discussion of this, see Morrow, "Worth the Paper," *supra* note 34.

What was to become a veritable saga began in *Edwards v Environment Agency.*[129] *Edwards* was the nominal claimant in an appeal against a refusal to grant relief in a judicial review claim in respect of a pollution prevention and control permit (PPC) issued to Rugby Ltd. in 2001 pursuant to the *Pollution Prevention and Control Act 1999*.[130] At the same time Rugby sought to change the fuel for its kiln to waste tyres. As a result, public health concerns were raised during the lengthy consultation process. The Environment Agency (EA) requested further information from Rugby and asked its internal experts to review it. Its experts issued a report in November 2002 raising concerns about dust from the plant, but not about emissions from the proposed tyre burning. This was not made public, though the information upon which it was based was broadly in the public domain. A second, shorter, report was produced in January 2003, following which the EA announced that it had reviewed the information provided but gave no details. In February 2003 the EA refused a request by a member of the public to disclose the material that it had considered, on the basis that to do so would prejudice its permitting decision.

The permit was issued in August 2003 with conditions attached requiring a trial of the tyre burning and imposing limits for dust emissions. A claim for judicial review, initially focussed on the tyre burning issue, was instituted by Edwards and others in October 2003. During the litigation of this claim the second expert report was finally disclosed in March 2005 but the first was only made public a day or two before the hearing. As a result the claimants changed the emphasis of their argument to the dust issue and Lindsay J allowed them to reformulate their case. While the case could have been viewed as raising access to information and related participation issues under Aarhus through EU law, Lindsay J disposed of the issue using common law, determining that non-disclosure of the reports infringed the common law duty of fairness by impeding fully informed consultation. Nonetheless he found that this had not proved significant and refused

129. [2006] EWCA Civ 877.

130. This implemented EU Directive 96/61/EC concerning Integrated Pollution Prevention and Control in the UK OJ L 257 (10.10.1996).

to exercise his discretion to grant relief. The claimants appealed (with Edwards dropping out and a Mrs Pallikaropoulos being added as the applicant at this stage) and the case went to the Court of Appeal under a protective costs order (PCO) (discussed below) that capped the applicants' potential liability for fees should they lose, at £2,000. The Court upheld the first instance decision.

On a further appeal by Mrs Pallikaropoulos, an additional PCO was refused. The House of Lords upheld the Court of Appeal decision, in *Regina (Edwards) v Environment Agency*,[131] as the IPPC Directive only required that information be provided to the public in cases involving new installations or undergoing a substantial change. This case fell into neither category and thus the letter of the law, if not its spirit, had been satisfied.

While interesting in itself on access to information and participation, *Edwards* also raised important issues on access to justice with regard to costs. The case eventually reached the (new) Supreme Court on this issue as *R (Edwards) v Environment Agency*.[132] The claimants had been ordered to pay costs on losing the appeal to the House of Lords. The EA sought £55,810 and the Secretary of State for the Environment £32,290. The costs officers found that the costs were due and this was challenged on the basis that Article 10a of the Environmental Assessment Directive, Article 15a of the IPPC Directive, and Article (4) of the Aarhus Convention which requires parties to: ". . . provide adequate and effective remedies . . . [that are] fair, equitable and timely and not prohibitively expensive." This matter was subsequently referred to the Supreme Court which then made a request for a preliminary ruling from the European Court of Justice in Case C-260/11 *Edwards v Environment Agency*,[133] Advocate General Kokott's opinion on this case was delivered on 18 October 2012. Having referred to the relevant Aarhus Convention provisions as transposed in the IPPC Directive, the AG found that the law allowed considerable (but not

131. [2008] UKHL 22.
132. [2010] UKSC 57.
133. Online: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62011CC0260:EN:HTML>.

unlimited)[134] discretion to the domestic courts in this area and that the issue of prohibitive cost is case-specific[135] but also that the concept requires an ECJ interpretation in order to ensure consistency in its application across the EU.[136] The AG added that the fact that the claim had gone ahead even when a PCO had been refused[137] could be taken into account when making a subsequent order for costs. The judgement of the Court delivered on 11 April 2013 was broadly in line with the opinion of the AG, though it took the view that the claimant's decision to proceed was not determinative of reasonable costs[138] and that the test to be applied as to whether or not costs were prohibitive mixed objective and subjective elements. The approach seemed to be very favourable to claimants in stating that:

> . . . the cost of proceedings must neither exceed the financial resources of the person concerned nor appear, in any event, to be objectively unreasonable.[139]

Interestingly though, the Court also provided for enhanced control mechanisms in stating that the factors to be considered here extended beyond financial matters and included: the relative situations of the parties; "realistic" prospects of success; the complexity of the law; what was at stake for the individual and the environment; legal aid provision, etc. and the need to deal with frivolous claims.[140]

VII. The Practicalities of Pursuing Claims—The Aarhus Factor

Whether one is considering environmental rights-based claims under the ECHR or the Aarhus Convention, or indeed

134. *Ibid* at para 23.
135. *Ibid* at para 24.
136. *Ibid* at para 25.
137. *Ibid* at para 62.3.
138. Judgement of the Court at para 43 online: <http://curia.europa.eu/juris/document/document.jsf?docid=136149&mode=1st%pageIndex=1&dir=&occ=first&part=1&text=&doclang=EN&cid=3084747>.
139. *Ibid* at para 40.
140. *Ibid* at para 42.

under any other legal regime, one can only agree with the point made by Michael Mansfield QC in typically pithy fashion:

> There is no point in enacting endless conventions and covenants promoting and protecting . . . rights if the means of enforcement and redress are denied to the ordinary citizen because it cannot be afforded. The problem has become more acute as the economic recession takes a grip, [and] as environmental deterioration accelerates . . .[141]

Thus the question of what amounts to excessive cost in respect of litigation has become the subject of more intense scrutiny than ever before in signatory states.[142] This is certainly an area in which the UK system is open to criticism—as indicated not only in the *Edwards* litigation above but also in the fact that the UK has often been brought before the Aarhus Compliance Committee on this issue.[143]

In the UK, while court fees tend to be low, legal costs routinely run to tens of thousands of pounds, putting litigation well beyond the reach of most people, and the spectre of having to pay the other side's costs, which is usual for the losing side, compounds this. The broad discretion accorded to the courts on costs under the Civil Procedure Rules adds an additional dimension of uncertainty to the costs issue. These factors combine to make litigation an off-putting prospect. Furthermore, while public funding (formerly known as civil legal aid) in this area does now extend to public interest cases (in part to meet the demands of the Aarhus Convention),[144]

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141. Michael Mansfield, "A Fresh Vision" in Jon Robins, ed, *Closing the Justice Gap: New Thinking on an Old Problem* (London: Jures/Young Legal Aid Lawyers BPP/Solicitors Journal) 8 at 9, online: Jures <http://www.jures.co.uk/whitepapers/EqCGINP3_Closing%20the%20Justice%20Gap.pdf>.

142. See e.g. the UNECE, 2008, 3rd Mtg, UN Doc ECE/MP.PP/2008/4 (2008) online: UNECE <http://www.unece.org/fileadmin/DAM/env/documents/2008/pp/mop3/ece_mp_pp_2008_4_e.pdf>.

143. Findings and Recommendations of 24 September 2010, *Morgan and Baker v United Kingdom* (ACCC/C/2008/23, UNECE, 2010, 29th Mtg, UN Doc ECE/MP.PP/C.1/2010/6/Add.1 at para 49); *Cultra Residents' Association v United Kingdom* (ACCC/C/2008/27, *ibid* at paras 44–45); *ClientEarth v United Kingdom* (ACCC/C/2008/33, UNECE, 2010, 39th Mtg, UN Doc ECE/MP.PP/C.1/2010/6/Add.3 at paras 128 et seq.), and of 30 March 2012, *DOF v Denmark* (ACCC/C/2011/57, UNECE, 2012, 38th Mtg, UN Doc ECE/MP.PP/C.1/2012/7 at paras 45 et seq.).

144. See the Legal Services Commission, Funding Code Criteria, online: Justice.gov.uk <http://www.justice.gov.uk/legal-aid>.

it is in reality only available to the very poor. The public funding resource is already massively over-stretched and thus, as explicitly noted by the Court of Appeal in *R (Burkett) v Hammersmith (No. 2)*,[145] not equipped to meet the additional demands placed upon it by Aarhus litigation.

In light of this the courts have attempted to use their discretion on costs to address the affordability issue, notably through the use of Protective Costs Orders (PCOs) (as demonstrated in *Edwards* above). PCOs reduce a litigant's exposure to liability for costs by capping the amount that an unsuccessful claimant will have to pay towards the defendant's costs—though they often see a reciprocal cap placed on a successful claimant's ability to recover costs. The leading authority in this area is the Court of Appeal decision in *R (Corner House Research) v Secretary of State for Trade and Industry*[146] which requires, amongst other things, that, for a PCO to be instituted: the public interest requires the resolution of the issues; it is fair and just (considering the financial resources of the litigants) to make an order; and without it the claimant would probably discontinue the litigation and would be acting reasonably in doing so. PCOs have been used in a number of environmental cases, but it is worth pointing out that, while they are important in principle, and raise a number of interesting legal issues, they are employed (as indeed they were always intended to be) only in exceptional cases.[147] Thus while applications for PCOs in environmental cases increased in popularity after *Cornerhouse*, success has remained comparatively rare.[148] Nonetheless, despite their shortcomings, PCOs did attract favourable comment in terms of securing compliance with the Aarhus Convention by AG Kokott in the *Edwards* case (discussed above).[149]

145. [2004] EWCA Civ 1342.

146. [2005] EWCA Civ 192 (1 March 2005).

147. *Ibid* at para 72.

148. Working Group on Access to Environmental Justice, *Ensuring Access to Environmental Justice in England and Wales* (the Sullivan Report), 2008, online: WWF <http://www.wwf.org.uk/filelibrary/pdf/justice_report_08.pdf> [Sullivan Report].

149. *Supra* note 133 at para 53.

When reporting on the initial implications of implementing the Aarhus regime, the UK government,[150] while trumpeting its successes to date, did not really engage with the costs issue, though civil society has been considerably less reticent. Notable criticism from this quarter was expressed in the *Liberty Report of the Working Group on Facilitating Public Interest Litigation (FPIL): "Litigating the Public Interest*;"[151] the DEFRA funded Environmental Law Foundation led study: *Environmental Justice: A Report by the Environmental Justice Project* (EJP);[152] and the *Report of the Working Group on Access to Environmental Justice: "Ensuring Access to Environmental Justice in England and Wales"* (the Sullivan Report).[153] Furthermore the judiciary, as we have seen above, has actively expressed concern about the issue of excessive cost. In light of these views, the government eventually came to grapple with the question of excessive costs under the Aarhus Convention, albeit indirectly, in the *Review of Civil Litigation Costs* (the Jackson Review).[154] This subsequently gained the support of the senior judiciary,[155] and genuinely sought to address the very real problems of affordability (or the lack of it) in civil litigation reviewing the broad area of costs and recommend reforms to "promote access to justice at proportionate cost." Costs in environmental cases warranted a brief mention in the preliminary report stage of the Jackson Review,[156] courtesy of consideration accorded to the relevant provisions of the Aarhus Convention.[157] Through the consultation process, however, it became clear that the both the

150. Department for Environment, Food and Rural Affairs (DEFRA), *UK Aarhus Convention Implementation Report*, 2008 online: DEFRA <http://archive.defra.gov.uk/environment/policy/international/aarhus/pdf/compliance-report.pdf>.

151. (2006), online: Liberty <http://www.liberty-human-rights.org.uk/policy/reports/litigating-the-public-interest-july-2006.pdf>.

152. (2004), online: UKELA <http://www.ukela.org/content/doclib/116.pdf>.

153. Sullivan Report, *supra* note 148.

154. *Review of Civil Litigation Costs: Final Report* (Norwich, UK: The Stationery Office, 2010) [Jackson, "Report"].

155. *Review of Civil Litigation Costs*, 21 December 2009, online: <http://www.judiciary.gov.uk/JCO%2fDocuments%2fReports%2fjackson-final-report-140110.pdf> [Jackson, "Review"].

156. *Review of Civil Litigation Costs: Preliminary Report Volumes One and Two* (Norwich, UK: The Stationery Office, 2010) [Jackson, "Preliminary Report"].

157. Online: UNECE <http://www.unece.org/env/pp/documents/cep43e.pdf>.

rights-based approach advocated by the Convention and the range of specific rights contained in it actually raised issues of considerable wider import. This is doubly so if, as Jackson (and the courts more generally) have long insisted:[158]

> There is a strong case for saying that non-environmental judicial review claims should be treated in the same way as environmental judicial review claims.[159]

Thus, if environmental cases are not to be accorded special treatment, then implementing the Aarhus Convention requirements in relation to prohibiting excessive costs in litigation in UK law necessarily requires that such costs are avoided in all claims. As a result of these considerations, the coverage that environmental litigation (and in particular the Aarhus requirements) gained in the Final Report stage of the Jackson Review,[160] notably in Chapter 30, turned out to be fairly significant. There are both general and specific recommendations in that are relevant to the matter in hand. General recommendations that are of particular interest here include those relating to conditional fee arrangements (CFAs).[161] The Jackson Review proposed ending the recoverability of success fees in CFAs (in future, such monies would have to be paid from a successful claimant's damages.) This recommendation proved most unpopular with the legal profession, who viewed it as, amongst other things, having a negative impact on access to justice for "the vast majority, who can't afford to bring cases of this nature to Court."[162]

A further interesting general proposal recommended qualified (depending on parties' conduct and resources) one way costs shifting,[163] discussed in detail in Chapter 30.4. This essentially means that the claimant need not pay the defendant's costs if the case is unsuccessful, but that the defendant must pay the claimant's costs if the latter wins.

158. *Ibid*.
159. Jackson, "Preliminary Report", vol one, *supra* note 156 at para 4.2.
160. Jackson, "Review", *supra* note 155.
161. Jackson, "Report", *supra* note 154 at para 2.2.
162. *Repealing Access to Justice Act 1999* (UK), 1999, c 22, s 29.
163. Jackson, "Report", *supra* note 154 at para 2.6. Already used in JR cases in Canada and before the ECtHR and effectively what happens in legally aided claims.

One way cost shifting was discussed in the Preliminary Jackson Review[164] which pointed to its featuring in cases raising matters of "real public importance," for example *R (on the application of Greenpeace Ltd.) v SS for the Environment, Food and Rural Affairs*,[165] and *Friends of the Earth & Help the Aged v SS for Business, Enterprise and Regulatory Reform*.[166] It is worth noting that the term "real public importance" is not taken here to be synonymous with public interest. Several of the reasons suggested by Jackson for adopting this recommendation were firmly rooted in environmental law and the need to comply with the Aarhus Convention: indeed, it would be fair to say that, far from being a peripheral issue, here, environmental law is setting the tone for more general developments.

The Review also made a number of recommendations that pertain specifically to environmental cases, notably stating in respect of judicial review that: "Qualified one way costs shifting would ensure compliance with the Aarhus Convention in relation to environmental judicial review claims."[167] Aarhus considerations also featured in Chapter 31 on Nuisance Cases. While these may raise Aarhus issues,[168] as was the case, albeit *obiter*, in the Court of Appeal decision in *Morgan v Hinton Organics (Wessex) Ltd.*,[169] not all such cases raise a sufficiently public component to allow Convention rights to be invoked. However, the Jackson Review's assumption that the approach adopted in *Morgan* necessarily means that: "Only a small proportion of private nuisance claims will engage the UK's obligations under the Aarhus Convention" would seem to be questionable[170] as a reading of the generous terms in which the Convention is drafted, sees it as being potentially relevant in any case with a strong

164. Jackson, "Preliminary Report", *supra* note 156 at Chapter 36, Environmental Claims.

165. [2005] EWHC 2144 (Admin).

166. [2008] EWHC 2518 (Admin) at para 36.4.2.

167. Jackson, "Report", *supra* note 154 at para 5.8 [note omitted].

168. The Jackson, "Review", *supra* note 155 cites with approval Gerrit Betlem, "Torts, a European *ius commune* and the Private Enforcement of Community Law" [2005] 64:1 CLJ 126 on this issue, at para 31.1.3.

169. [2009] P & CR 4 (2 March 2009).

170. Jackson, "Review", *supra* note 155 at para 41.4.1.

"environmental element." However, if the Jackson Review's recommendations in regard to nuisance are fully followed through, then infringements of Aarhus requirements on affordable recourse to the courts are likely to decrease. These favour greater use of statutory nuisance proceedings and an expansion in the use of before the event (BTE) insurance[171] to cover expenses in private nuisance litigation.

Furthermore, Jackson considered the potential of one way costs shifting in private nuisance claims, though the fact that such cases do not necessarily feature ill-resourced claimants litigating against well-resourced defendants means that this may not be the most appropriate course.[172] Instead, given the fact that most claimants are property owners, Jackson's preferred solution to funding nuisance litigation is to promote additional use of BTE insurance as an add-on to household insurance (though he recognises that the current normal limit of £50,000 would need to be doubled to allow a safe margin for funding most cases).[173] The underpinning rationale here lies in the fact that householders routinely insure against other risks to their property and that nuisance should be no different.[174] Under the recommendations, CFAs would still be available in the absence of BTE insurance but success fees would have to be funded from the successful claimant's damages award. Jackson recommends a 10% increase in such damages awards as adequate to cover this in most cases.[175]

Many of Jackson's recommendations have found favour with the government, some of the necessary changes require legislation but others are being pursued through policy developments, both of which are currently on-going.

Concluding Thoughts

Whatever view one takes of the ultimate desirability of human rights approaches to the environment, the ECHR

171. Jackson, "Report", *supra* note 154 at para 5.9. See also Chapter 8.
172. *Ibid* at para 31.3.7–8.
173. *Ibid* at para 31.3.9–13.
174. *Ibid* at para 31.3.10.
175. *Ibid* at para 10.5.6.

regime, in particular given its unpromising initial position in this regard, has, while not without its problems, done a great deal to advance them. Still, it is arguable that without the political will to progress the Convention in this area the Court may have gone as far as it can.

While the HRA has undoubtedly "brought home" Convention rights in the UK, in a whole range of ways, it seems arguable that, at least insofar as environmental claims are concerned, the pace and impact of this initial flurry of litigation will not be sustained into the next decade. There are a number of reasons for this; first the novelty of the HRA will wear off. Second many of the initial fault lines between the common law and the HRA have now been at least partially negotiated, but as the steady stream nuisance litigation that this has prompted makes clear, it remains imperative to reconsider the rationale for nuisance raising broadly "environmental" concerns and to articulate a clear identity for this tort in the twenty-first century and beyond in light of the invocation of human rights law-based claims. This is a logical and necessary step to the other crucial task of delineating the relationship between the law of nuisance and emergent cogent human rights norms in this area. While the adaptability and flexibility of nuisance and the ever-expanding applicability of human rights law mean that both can feasibly be pressed into service to address environmental problems, if this is to be achieved, it must be done in a consistent and coherent matter. The difficulty of this task is compounded as it involves attempts to graft additional concerns onto the dominant regulatory law in a rather ad hoc fashion. This type of approach is however unlikely to deliver a clear and principled approach. The fact that the Jackson Review's recommendations in this area, if fully followed through, are likely to make increased litigation in this field, a real possibility only serves to make this task more urgent. Third there have been other significant developments in environment based human rights claims in the decade since the HRA entered into force, notably, as we have seen, the Aarhus Convention, that makes provision which is more "fit for purpose" to pursue at least procedural environmental rights claims. Even the latter development does not necessarily represent a culmination

of rights based approaches to the environment—they may yet prove but another stage in a much wider expansionist rights project. This extends beyond a strictly human rights approach, attributing rights to the natural world. This has long been a subject of discussion amongst theorists and activists[176] and is increasingly prominent as we come to understand the significance of planetary boundaries.[177] Such approaches also often emerge in tandem with appeals to indigenous cosmologies and these are becoming a legal reality, in particular in South America.[178] Whether this revolutionary application of rights based approaches proves viable in the longer term is one of the most fascinating and important topics in modern environmental law.

176. See e.g. Cormac Cullinan, *Wild Law: A Manifesto for Earth Justice*, 2nd ed (White Rivers Jct (USA): Chelsea Green Publishing, 2011); Peter Burdon, ed, *Wild Law: The Philosophy of Earth Jurisprudence* (Kent Town (South Australia): Wakefield Press, 2011).

177. See e.g. the work of the Stockholm Resilience Centre, online: <http://www.stockholmresilience.org/research/researchnews/tippingtowardstheunknown/thenineplanetaryboundaries.4.1fe8f33123572b59ab80007039.html>.

178. See e.g. Cristiano Gianolla, "Human Rights and Nature: Intercultural Perspectives and International Aspirations" (2013) 4:1 J Hum Rts & Envt 58; Sam Adelman, "Rio+20: Sustainable Injustice in a Time of Crises" (2013) 4:1 JHRE 6.