ราชอาณาจักรไทย

พระราชบัญญัติลิขสิทธิ์ พ.ศ. ๒๕๓๗

คำเตือน

เอกสารนี้ผลิตขึ้นและแจกจ่ายแก่ท่านตามนัยมาตรา ๓๒ และมาตรา ๓๓ แห่งพระราชบัญญัติลิขสิทธิ์ พ.ศ. ๒๕๓๗ (พระราชบัญญัติ)

เอกสารที่แจกจ่ายนี้อาจมีลิขสิทธิ์ตามพระราชบัญญัติ การที่ท่านผลิตหรือแจกจ่ายเอกสารนี้ต่อไปจึงอาจต้องปฏิบัติตามบทบัญญัติที่คุ้มครองลิขสิทธิ์ตามพระราชบัญญัติ

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KINGDOM OF THAILAND

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Paul Stookes, *A practical approach to environmental law, second edition* (Oxford, 2009), pp21-50.

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. SUSTAINABLE DEVELOPMENT

2.01 ıstainable development is one of the most important principles of environmental law. remains an unfamiliar concept to many, but at its simplest, means leaving the planet as e found it. There is, however, considerable debate as to its role and influence ranging from roviding a rationale for a deeply green agenda and a limit to growth (see eg Dobson, A, *Green olitical Thought* (Routledge, 2000)) to merely providing a role of stimulating debate (Jacobs, I, *Sustainable Development as a Contested Concept in Essays on Environmental Sustainability*

and Social Justice (OUP, 1999)). A helpful critique is contained in *Environmental Protection, Law and Policy* (2007) by Holder and Lee. The WCED report *Our Common Future* (1987) (the Brundtland Report) emphasized the needs of the world's poor explaining that sustainable development is:

> ... development that meets the needs of the present without compromising the ability of future generations to meet their needs. It contains within it two concepts: the concept of 'needs', in particular the essential needs of the world's poor, to which overriding priority should be given; and the idea of limitations imposed by the state of technology and social organisation on the environment's ability to meet present and future needs.

2.02 The Brundtland Report provided the backdrop for the Rio Earth Summit and subsequent Declaration on Environment and Development 1992. Global poverty and how it interrelates with the environment was highlighted at the Johannesburg Summit in 2002, 10 years after Rio. At a national level, the UK policy document, *Securing the Future* (2005) provides that:

> The goal of sustainable development is to enable all people throughout the world to satisfy their basic needs and enjoy a better quality of life, without compromising the quality of life of future generations. For the UK Government and the Devolved Administrations, that goal will be pursued in an integrated way through a sustainable, innovative and productive economy that delivers high levels of employment; and a just society that promotes social inclusion, sustainable communities and personal wellbeing. This will be done in ways that protect and enhance the physical and natural environment, and use resources and energy as efficiently as possible. Government must promote a clear understanding of, and commitment to, sustainable development so that all people can contribute to the overall goal through their individual decisions. Similar objectives will inform all our international endeavours, with the UK actively promoting multilateral and sustainable solutions to today's most pressing environmental, economic and social problems. There is a clear obligation on more prosperous nations both to put their own house in order, and to support other countries in the transition towards a more equitable and sustainable world.

2.03 The strategy states that the UK Government and devolved administrations will pursue the primary goal using the following five guiding principles:

- *Living within environmental limits* Respecting the limits of the planet's environment, resources, and biodiversity—to improve our environment and ensure that the natural resources needed for life are unimpaired and remain so for future generations.
- *Ensuring a strong, healthy, and just society* Meeting the diverse needs of all people in existing and future communities, promoting personal well-being, social cohesion and inclusion, and creating equal opportunity for all.
- *Achieving a sustainable economy* Building a strong, stable, and sustainable economy, which provides prosperity and opportunities for all, and in which environmental and social costs fall on those who impose them (polluter pays), and efficient resource use is incentivized.
- *Using sound science responsibly* Ensuring policy is developed and implemented on the basis of strong scientific evidence, whilst taking into account scientific uncertainty (through the precautionary principle) as well as public attitudes and values.
- *Promoting good governance* Actively promoting effective, participative systems of governance in all levels of society—engaging people's creativity, energy, and diversity.

evelopment within the Earth's environmental capacity

ıstainable development is often regarded as pursuing the three goals of: **2.04**

) social development;
) economic development; and
) environmental protection and enhancement.

ıese goals are consistent with the UK Government's five guiding principles set out above. owever, taken in isolation they can be misleading. First, consideration of the goals should ɔt be restricted to a balancing exercise between these apparently competing aims. For exame, if we want to achieve a particular social goal of providing homes for all, then this cannot : achieved in a sustainable way simply by subsidizing development and building a few parks ose to housing development. These balancing factors may assist but they should not be garded as successfully achieving sustainable development. Rather, when seeking to achieve :ertain aim, say homes for all, then economic and environmental development should be tegrated within the decision-making process taken. **2.05**

:hieving effective sustainable development will be difficult; and it is why legislation, which ;elf begins life as politics and policy, always works towards it, rather than making a comitment to securing it. Perhaps most important of all is that the pursuit of economic, social, · environmental development must be undertaken within the environmental capacity the earth. It requires rethinking how we all live our lives and not necessarily following ırrent patterns of economic growth, consumption, and travel. It means taking economic, ıcial, and environmental decisions within the carrying capacity (the environmental lim;) of the planet. It means building homes that, when occupied and used, do not have an ,erall adverse impact on the environment, whether through energy use, construction, loss open land, or waste arising. It means ensuring that travel patterns do not produce carbon nissions that cannot be wholly used up (sequestrated) by the earth itself. To put *sustainable* :velopment into perspective, by pursuing conventional economic development policy the est is presently using *three* planets' worth of resources (and generating the subsequent poltion) in the pursuit of progress and development. This cannot continue in the long term, ıd is therefore unsustainable. It is vital that, sooner rather than later, decision-makers begin ı tackle the problem. **2.06**

ıere are some tough and politically unpopular decisions to be taken if society is to make ıy significant progress in tackling some of the biggest environmental problems we now ce, such as climate change. And, whether it is a local community seeking to protect a vilge green or a large multinational company committing itself to an effective management ·stem that ensures compliance with the latest regulatory regime, environmental law will be the heart of this. **2.07**

ıstainable development in legislation

rticles 2, 3, and 6 of the EC Treaty incorporate sustainable development into EU matters, eg rt 6 provides that 'environmental protection requirements must be integrated into the defiıtion and implementation of the Community policies and with a view to promoting susinable development. Sustainable development was introduced into UK legislation in the **2.08**

Environment Act 1995, which, among other things, established the Environment Agenc and the Scottish Environment Protection Agency. Section 4(1) of the Act provides that:

> It shall be the principal aim of the Agency (subject to and in accordance with the provisions of this Act or any other enactment and taking into account any likely costs) in discharging its functions so to protect or enhance the environment, taken as a whole, as to make the contribution towards attaining the objective of achieving sustainable development . . .

2.09 It is encouraging to see that sustainable development is the Agency's principal aim, bu it is important to note that it is qualified by aspiration (. . . contributing towards attainin . . .) and the need to carry out cost-benefit analysis (. . . taking into account any likel costs . . .). The requirement to contribute towards achieving sustainable development i also contained in local government legislation. Section 4(1) of the Local Governmen Act 2000 provides that:

> Every local authority must prepare a strategy . . . for promoting and improving the economic, social and environmental well-being of their area and contributing to the achievement of sustainable development in the UK.

2.10 Further, s 39 of the Planning and Compulsory Purchase Act 2004 provides that local plan ning authorities (LPAs) in England and Wales must exercise the functions conferred by th Act with the objective of contributing to the achievement of sustainable development. Whil the inclusion of sustainable development into national legislation should be seen as a posi tive step, the UK's efforts may best be regarded as 'modest' and falling somewhat short of it enactment in other jurisdictions. For instance, Art 24 of the South African Constitution 199 states that everyone has the right to:

> (a) have an environment that is not harmful to his or her health or well-being;
> (b) an environment protected for the benefit of present and future generations, through reasonable legislative and other measures that—
>   (i) prevent pollution and ecological degradation;
>   (ii) promote conservation; and
>   (iii) secure ecologically sustainable development and use of natural resources, while promoting justifiable economic and social development.

2.11 In '*Why legislate for Sustainable Development?*' (2008, JEL), Andrea Ross concludes that:

> Sustainable development is appearing more often in UK and Scottish legislation. This reflects an acceptance of sustainable development as a policy tool and has been encouraged by devolution and the increased status of the concept at EC level. Likely due to its vague and evolutionary nature, none of the statutes studied attempt to define sustainable development. Instead, they rely on Government guidance to provide a consistent, yet flexible, approach. Sustainable development has not achieved the status of a *legal principle* as such in UK law; however, it does appear in a variety of legal forms including as duties, objectives and procedural requirements . . . .
>
> In conclusion, sustainable development provisions have a place in UK legislation. However, if a provision is to be more than simply symbolic, then ideally there should be some statutory (often formal) means to monitor and review compliance using administrative, political, legal or other mechanisms. At present, while some statutes do this, many do not. Where the sustainable development duty is intended to create a framework to aid decision-making, the legislation needs to be more explicit about this role to encourage the courts to recognize it.

Sustainable development and the courts

2.12 In *Vellore Citizens Welfare Forum v Union of India* (1996) SC 2715 Kuldip Singh, J noted that the Indian Supreme Court had no hesitation in holding that sustainable development as defined by the Brundtland Report as a balancing concept between ecology and development had been accepted as a part of the customary international law. In *Rajendra Parajuli v Shree Distillery Ltd* (1996) Nepal 2 UNEP Compendia, the Supreme Court of Nepal held that a licence for industrial operations did not excuse an obligation to protect the environment, adding that in line with the principle of sustainable development 'every industry has an obligation to run its development activities without creating environmental deterioration' and that the environment should not be viewed in narrow terms. While in the case of *Contact Energy Ltd v Waikato RC* (2000) ECD A04/2000 the New Zealand Environment Court held that a modified proposal to build a geo-thermal power station would, overall, serve the purpose of sustainable management of natural and physical resources, and that consents should be granted subject to conditions imposed by the court.

2.13 The question of future needs was considered in the landmark case of *Minors Oposa v Sec of the Dept of Environment & Natural Resources* 33 ILM 174 (1994) in which the Supreme Court of the Philippines held that children had the right to sue on behalf of succeeding generations because every generation has a responsibility to the next to preserve the rhythm and harmony of nature for the full enjoyment of a balanced and healthy ecology. Further, the court held that 'as a matter of fact, those basic rights need not even be written in the Constitution for they are assumed to exist from the inception of humankind'. In the Australian cases of *Anderson v DG of the Dept of Environment & Conservation* (2006) 144 LGERA 43 and *Gray v Minister for Planning & DG* [2006] NSWLEC 720 recognized the principle of inter-generational equity and in *Gray* considered that this may be appropriate when considering cumulative impacts in EIA.

2.14 English and Welsh courts have considered sustainable development on a number of occasions. In *Fairlie v SSE & South Somerset DC* [1997] EWCA Civ 1677 the court dismissed an appeal by Tinkers Bubble Trust against a planning enforcement notice. The group had set up a permaculture farm to grow organic produce, rely on renewable energy, and cause little or no environmental impact. The enforcement action was for occupying seven tents without permission. Part of the appeal was because the Planning Inspector misunderstood the concept of sustainable development contained in former Planning Policy Guidance 1 (replaced by PPS1 see Chapter 10).

2.15 In *Goldfinch (Projects) Ltd v National Assembly for Wales* [2002] EWHC 1275 (Admin) the claimant challenged an inspector's decision dismissing an appeal against the refusal of planning permission for 23 homes. The inspector found that the proposal was objectionable on the grounds that it would not be well integrated with the existing pattern of settlement and was in conflict with the objectives of sustainable development. In his judgment, Scott Baker J defined sustainable development as 'development that meets the needs of the present without compromising the ability of future generations to meet their needs'. He then quashed the decision on the basis that the inspector had erred by elevating the seriousness of flooding and that by failing to give adequate weight as to why permission had originally been granted.

2.16 In *Sherburn Sand Co Ltd v 1st Sec of State & Durham CC* [2004] EWHC 1314 (Admin), the High Court dismissed a challenge to a planning inspector's decision, refusing permission to mine

56,320 tonnes of magnesium limestone and 288,800 tonnes of sand. In summary, the county's sand and gravel needs until 2016 could be met from existing permitted sources. See also *LB Bromley v Susanna* [1998] EWCA Civ 1444 and *Fagg v Secretary of State for Transport* [2002] EWHC 1327.

2.17 All legal activities have some element of sustainable development whether it is conveyancing, employment, family or another. The decisions and advice given will, perhaps indirectly, impact on other things. How a property is built and then sold, who may be employed and whether a particular job has adverse travel implications, the need for more homes etc. These are all aspects of sustainable development, which in the author's view, should be considered when providing legal advice and assistance. This is not as contentious as it may appear. The Legal Sector Alliance (www.legalsectoralliance.com) is an inclusive movement of law firms and organizations committed to working collaboratively to take action on climate change by reducing their carbon footprint and adopting environmentally sustainable practices, something discussed further in Chapter 5. However, not only should firms ensure the practices are sustainable, but also ensure that any advice given applies the principles of sustainable development. Communicating the principles and justification of sustainable development to the client, court, or any other party should be central to advising on environmental law matters.

2.18 Finally, it is one thing to express a commitment to sustainable development, even in legislation, it is another ensuring that commitment is kept. For example, s 127 of Government of Wales Act 1998 places a duty on the National Assembly for Wales to promote sustainable development and the Welsh Government is keen to highlight that it is the first duty of its kind contained in legislation. Yet the Welsh Assembly's track record is far from sustainable. See, for instance, the approval for the largest opencast coal mine in the UK situated just 36 metres from peoples' homes. In *R v National Assembly for Wales* [2006] EWCA Civ 1573), the Court of Appeal overruled a High Court ruling on bias by a Minister in favouring the opencast development. In 2007, the Welsh Assembly was then asked to revoke the permission and that in the light of the now stark evidence of climate change it should take decisive action. It declined. This should be highlighted as one of the worst examples of unsustainable development for a very long time with the local authority, the Government and the judicial system all collectively failing to protect the well-being of local community and the wider environment.

B PREVENTION, PRECAUTION, AND THE POLLUTER PAYS

2.19 There are a number of broad principles that apply in environmental law. Of these, four have been expressly incorporated into Art 174(2) of the EU Treaty (OJ C325/107) which provides that EU policy on the environment shall be based on the precautionary principle, that preventative action should be taken, that environmental damage should as a priority be rectified at source (the proximity principle), and that the polluter should pay. The principles do not provide free-standing obligations. For instance, a claim against a public body cannot be based upon a failure to take a precautionary approach and nothing more. However, once an obligation or duty to act is established, a failure to properly apply the precautionary principle when

:arrying out that duty will be relevant, eg Art 4(1) of the Waste Framework Directive provides hat Member States shall take the necessary measures to ensure that waste is recovered or disposed of without endangering human health and without using processes or methods which :ould harm the environment. This requirement is informed by Art 174(2).

The preventative principle

2.20 The prevention of environmental harm should be the primary aim when taking decisions or action with potentially adverse environmental effect. This principle is clear in the use of the environmental impact assessment for proposed development projects. If used well, proper assessment and then mitigation should avoid environmental harm. It has evolved at an international level over a number of years. In *Trail Smelter Arbitration (US v Canada)* 3 RIAA (1941) the tribunal held that no state had the right to cause injury by fumes to the territory, people, or property of another; in this instance that Canada should stop pollution entering the US. The principle has been recognized in international and national legislation. Article 2 of the Framework Convention on Climate Change 1992 states that: 'the ultimate objective is to achieve the stabilization of greenhouse gas emissions in the atmosphere to a level that would prevent dangerous anthropogenic interference with the climate system'. While s 1 of the Pollution Prevention and Control Act 1999 provides that regulations may make provision for regulating activities that are capable of causing any environmental pollution and otherwise preventing or controlling emissions capable of causing pollution.

2.21 The preventative principle is, to an extent, implied in private nuisance cases where an injunction may prevent the unlawful interference with the use or enjoyment of land: *Read v Lyons* [1947] AC 156. Although there should be caution in relying on a nuisance claim as a means of environmental protection, with the court's residual discretion to award compensation and allow the polluting activity to continue rather than grant injunctive relief to prevent it see eg *Dennis v Ministry of Defence* [2003] EWHC 793 (QB) and *Watson v Croft Promo-sport Ltd* [2008] EWHC 759 (QB).

The precautionary principle

2.22 The precautionary principle has a more recent history, arising from the German policy of *Vorsorgeprinzip* meaning 'prior worry or care' (see RCEP 12th Report Cm 310 1988). Principle 15 of the Rio Declaration provides that:

> Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.

The EU Communication on the Precautionary Principle, Com (2000)1 adopts Principle 15. The principle is also contained in the UK Government's sustainable development strategy, *Securing the Future* (2005) (see above) and other policy documents such as, PPS 25: *Development and Flood Risk* (2006) which provides that increased anticipated peak rainfall expressed as percentages may provide an appropriate precautionary response to the uncertainty about climate change impacts (para B9).

2.23 The UK courts were initially reluctant to recognize the precautionary principle. In *R v Sec of State for Trade & Industry ex p Duddridge* [1995] Env LR 151, the claimants contended that

regulations restricting electromagnetic fields from electric cables laid as part of the nationa grid should be issued when their adverse effects of were uncertain. The Court of Appeal hel that although there may be a need to regard environmental risk as a material considera tion in decision-making, the EC Treaty did not impose any obligation to do so and that th precautionary principle had no distinct legal effect in the UK. In *UK v Commission* [1998 Case C-180/96, the UK Government applied to annul Commission Decision 96/239/EC o emergency measures to protect against BSE. The ECJ held that the EU institutions could tak protective measures without having to wait until the reality and seriousness of those risk became fully apparent.

2.24 In *R (AMVAC Chemical UK Ltd) v The Sec of State for Environment, Food & Rural Affairs* [2001 EWHC Admin 1011 the court considered the precautionary principle in some detail. Crane referred to the precautionary principle as defined in The Rio Declaration 1992 and to the U Sustainable Development Strategy 1999 which provided that:

> The precautionary principle means that it is not acceptable just to say we can't be sure that serious damage will happen, so we'll do nothing to prevent it. Precaution is not just relevant to environmental damage—for example, chemicals which may affect wildlife may also affect human health.

2.25 Crane J then referred to the EU Communication 2000, the Cartagena Protocol on Biosafet 2000, and finally Art 174(2) of the EU Treaty. In conclusion, the judge found that the clain failed on the issues relating to the precautionary principle but nevertheless found th Respondent's decision procedurally flawed and made a quashing order.

2.26 In *Pfizer Animal Health SA v Council of the EU* [2002] T13-99 the EU Court of First Instanc affirmed that under the precautionary principle EU institutions are entitled to adopt, o the basis of as yet incomplete scientific knowledge, protective measures that may seriousl harm legally protected provisions, and that they enjoy a broad discretion in this respect In *Waddenzee v Staat van Landbow* [2005] C-127/02, the ECJ considered the principle whe applying the Habitats Directive. It held (at para 59) that public authorities were only t authorize certain potentially harmful activities, in this case mechanical cockle fishing, i they had made certain that it would not adversely affect the integrity of the nature site 'where no reasonable scientific doubt remains as to the absence of such effects'. In *Gray v Minister for Planning & DG* the precautionary principle has been held to be relevant to th question of EIA.

2.27 The precautionary principle does not attract universal support. For instance, in *Beyond th Precautionary Principle* (2003, 151, University of Pennsylvania Law Review) Sunstein argue that 'the principle only provides help if we blind ourselves to many aspects of risk-relate situations and focus on a narrow subset of what is at stake'. However, this assumes tha decision-makers are capable (and indeed are entitled) to take risks on behalf of others an other living things), which is not necessarily the case. An example of this is case of wast composting and the uncertainty of the health impact of bioaerosols that arise from thi process. The Environment Agency, the Health and Safety Executive, and local authoritie are all involved in some way with regulating waste compositing sites. It appears that the have relied upon uncertainty to enable such operations to proceed. In effect, the precaution ary principle in reverse. However, there is some reluctance to assess the operations for fea of finding adverse results and having to close these operations down, thus being a seriou

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low to obligations to reduce waste. It is contended that such an approach is incorrect in
1e UK. That the precautionary principle applies to waste matters was affirmed by the ECJ in
(Thames Water Utilities) v Bromley Magistrates' Court C-252/05 [2008] Env LR 3 at para 27:

> In this respect the verb 'to discard' must be interpreted in the light not only of the aims of Directive 75/442, that is, the protection of human health and the environment against harmful effects caused by the collection, transport, treatment, storage and tipping of waste, but also of Art 174(2) EC. The latter provides that 'Community policy on the environment shall aim at a high level of protection taking into account the diversity of situations in the various regions of the Community. It shall be based on the precautionary principle and on the [principle] that preventive action should be taken . . .'

1e polluter pays principle

1e polluter pays principle is a reaction to pollution and environmental harm rather than preventive mechanism implicitly accepting that pollution may arise, but that the polluter iould pay for this. It can be a financial incentive to operate more efficiently and a sanction r carrying on polluting activities. It should also operate as a deterrent to help ensure that ›llution is avoided in similar future situations. Importantly, it is not a polluter's charter to low those that can afford to pollute to do so with impunity. In international law, Principle ; of the Rio Declaration 1992 provides that: **2.28**

> National authorities should endeavour to promote the internalization of environmental costs and the use of economic instruments, taking into account the approach that the polluter should, in principle, bear the costs of pollution, with due regard to the public interest and without unduly distorting international trade and investment.

inciple 16 places the obligation on signatory states to ensure that the polluters within their risdiction pay the price of polluting. It recognizes the concept of internalizing the cost of ›llution, ie that the full cost of many polluting activities such as emissions to air and water : often paid by society as a whole, eg by suffering poor air and water quality. Any emissions pollution not fully covered by the cost of a polluting operation are regarded as external sts. Thus, a food processing factory that causes odours and noise nuisance to local residents avoiding or externalizing the cost of part of its processing operations, causing the local mmunity to pay the price of odour and noise abatement measures. Internalizing costs may achieved by introducing technology to reduce or eliminate emissions. It may be by pay- ; additional taxes to pollute, eg the climate change levy imposed by s 30 and Sch 6 of the 1ance Act 2000 which aims to encourage organizations to reduce energy use or transfer to nore environmentally friendly energy supply. **2.29**

the UK, the principle underpins the regulatory regimes such as the contaminated land ;ime under Pt 2A of the EPA 1990 (see Chapter 6) and by criminal sanctions. Many envi- 1mental sentences greatly exceed the maximum summary fines in s 37(2) of the Criminal :tice Act 1982: see further, Chapter 20. The opinion of Advocate-General Leger in *R v* *ETR ex p Standley* [1999] C-293/97 explains that there are two aspects to the polluter pays nciple: **2.30**

> It must be understood as requiring the person who causes the pollution, and that person alone, to bear not only the costs of remedying pollution, but also those arising from the implementa- :ion of a policy of prevention. It can therefore be applied in different ways. [I]t may be applied

either after the event or preventively before the harm occurs. In the latter case the point is to prevent a human activity from causing environmental harm. . . . The polluter pays principle may equally apply after environmental harm has occurred. The person responsible for the harmful effects will then be required to make good or bear the cost of that harm. . . . Finally, that principle may take one further form in which, in return for the payment of a charge, the polluter is authorised to carry out a polluting activity.

C ACCESS TO INFORMATION, PARTICIPATION, AND ACCESS TO JUSTICE

2.31 One of the significant legislative developments in recent years has been in relation to the UNECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters 1998 (the Aarhus Convention). The EU and UK Governments ratified the Convention in 2005 providing formal rights of access to information, public participation, and access to the courts. To secure compliance the EU enacted the Access to Environmental Information Directive 2003/4/EC and Public Participation Directive 2003/35/EC which have amended various other Directives, see eg Art 10A of the EIA Directive 85/337/EC providing review procedures for environmental impact assessment. The UK enacted the Environmental Information Regulations 2004 No 3391 (EIR 2004) to ensure compliance with the Convention and the AEI Directive 2003/4/EC. The Convention rights apply to either an individual or organization and afford minimum (rather than an optimum) standards. Articles 3(5) and (6) state that the Convention provisions:

> shall not affect the right of a Party to maintain or introduce measures providing for broader access to information, more extensive public participation and wider access to justice than required by [the Convention] . . . and shall not require any derogation from existing rights.

2.32 Since ratification the provision of environmental rights is no longer discretionary, something increasingly recognized by the court, eg *R v LB Hammersmith & Fulham ex p Burkett* [2004] EWCA (Civ) 1342 at para 74, *R (England) v LB Tower Hamlets & others* [2006] EWCA Civ 1742 and *Davey v Aylesbury Vale DC* [2007] EWCA Civ 1166. In *R (Greenpeace Ltd) v Sec of State for Trade & Industry* [2007] EWHC 311 Sullivan J noted (para 49) that in terms of the consultation requirements under Art 9(2):

> . . . Whatever the position may be in other policy areas, in the development of policy in the environmental field consultation is no longer a privilege to be granted or withheld at will by the executive. The United Kingdom Government is a signatory to . . . ('the Aarhus Convention') . . .

Access to information

2.33 Effective access to information is vital if the public are to be involved in environmental matters. Without this, the other procedural rights of public participation and access to justice will be less effective. Information provision comes in two forms: passive information under Art 4 of the Convention and active information under Art 5. Passive information provision is where a public body provides information on request. If no request is made then the information may not necessarily be put into the public domain. This should not

e seen as withholding information but rather that it requires a positive act to disclose it. An xample is making available the planning file in relation to a planning application. Article 4 f the Convention includes a requirement that public authorities make information available upon request and supply it, subject to exceptions, within set time limits. Active information provision is where a public body publishes and promotes information widely making it asily available for all; eg a 'state of the environment' report setting out how well a country, egion, or locality is performing in terms of the environment. Other important information s the digest of environmental statistics published on Defra's website, setting out general nformation on a range of environmental matters. Importantly, this information should be ctively promoted to help ensure that all members of the public are made aware of the environmental information available. Article 5 of the Convention requires public authorities to collect, possess, and disseminate environmental information including that on decision and policy-making.

The Environmental Information Regulations 2004

2.34 The EIR 2004 and the Freedom of Information Act 2000 (FoIA 2000) implement Arts 4, 5 and 9(1) of the Convention. The FoIA 2000 is relevant in that it provides for some definitions and the review procedures required under Art 9(1). Under reg 2(1) environmental information has a wide meaning including information in written, visual, aural, electronic, or any other material form on:

(a) the state of the elements of the environment such as air and atmosphere, water, soil, land, landscape, and natural sites including wetlands, coastlands, and marine areas, biological diversity and its components, including GMOs, and the interaction among these elements;
(b) factors, such as substances, energy, noise, radiation, or waste, including radioactive waste, emissions, discharges, and other releases into the environment, affecting or likely to affect the elements of the environment referred to in (a);
(c) measures (including administrative measures), such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect the elements and factors referred to in (a) and (b) as well as measures or activities designed to protect those elements;
(d) reports on the implementation of environmental legislation;
(e) cost-benefit and other economic analyses and assumptions used within the frameworks of the measures in (c); and
(f) the state of human health and safety, including the contamination of the food chain, where relevant, conditions of human life, cultural sites and built structures inasmuch as they are or may be affected by the state of the elements of the environment referred to in (a) or through those elements, by any of the matters referred to in (b) or (c).

2.35 In *R v British Coal Corpn ex p Ibstock Building Products Ltd* [1995] JPL 836, a case concerning the earlier EIR 1992, the court held that the name of someone providing information about the state of land was 'environmental information' on the basis that the information was necessary to assess the credibility of other information. In *R v Sec of State for the Environment and Midland Expressway Ltd ex p Alliance Against Birmingham Northern Relief Road* [1998] EWHC Admin 797, the court held that the test as to whether or not information was 'environmental information' was objective.

2.36 Regulation 3 of the EIR 2004 states that the regulations apply to public authorities. Regulatio 2(1) defines public authority as those bodies defined under the FOIA 2000 (ie governme departments or any organization carrying out a public function) plus 'any other body c other person that carries out functions of public administration; or any other body or perso that has public responsibilities relating to the environment, exercises functions of a publ nature relating to the environment; or provides public services relating to the environment This could include 'private contractors providing environmental services, consultancy c research for public bodies' as well as utility companies. It also covers the courts and inte ligence services.

2.37 Regulation 4 of the EIR 2004, requires a public authority to make environmental informatio that it holds progressively more available to the public by electronic means and take reasor able steps to organize the information with a view to the active and systematic disseminatio to the public of the information (ie active information provision).

2.38 Regulation 5 provides that a public authority shall make information available on reque (ie passive information provision). Under reg 5(2), public authorities have 20 working days t provide information. This period may be extended if an authority believes that the complex ity and volume of the information requested means that it is impracticable to comply with o decide to refuse the request within 20 days (reg 7). Public authorities may charge for costs rea sonably attributable to the supply of information, which is conditional on payment of an charge, although this is subject to exceptions such as when allowing access to public register or lists of information held by the public authority (reg 8(2)(a)). *The Guidance on the applica tion of the Freedom of Information and Data Protection (appropriate limit and fees) Regulation 2004* (www.justice.gov.uk) provides information on fees including, in para 3.4.5 that in mos cases, photocopying and printing would be expected to cost no more than 10 pence a copy. I authorities try to charge much more they should be referred to the Guidance. In *Markinson Information Commissioner* (28.3.06) EA/2005/0014, a Council charged Mr Markinson £6 for decision notice and 50p for each photocopy of documents contained in a planning file. Th Information Tribunal held that this was too high and that the Information Commissione in reviewing that decision had not applied the correct legal test to the facts. It noted that th Council in fixing its charges had failed to address, properly or at all, the test imposed on i and contained in the Guidance.

2.39 Regulation 9 provides that public authorities must reasonably provide advice and assistanc on information, eg under reg 9(2), where a request is too general the authority shall, withi 20 working days, ask for more detail about the request. The environmental informatio requested must then be disclosed unless one of the exceptions to disclosure under the EI 2004 applies. Regulation 12(1) provides that, subject to exceptions, a public body may refus to disclose information requested if:

(a) an exception to disclosure applies under paras (4) or (5); and
(b) in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information.

2.40 The reg 12(4) exceptions are procedural in nature and include that:

(a) the information is not held by the public body;
(b) the request is manifestly unreasonable;

:) the request is too general;
l) the information is still in the course of completion; or
:) the information relates to internal communications.

he reg 12(5) exceptions are more substantive in nature and can only be relied upon if the isclosure would adversely effect the following: **2.41**

ı) international relations, defence, national security, or public safety;
ı) the course of justice, the ability of a person to receive a fair trial or the ability of a public authority to conduct an inquiry of a criminal or disciplinary nature;
:) intellectual property rights;
l) the confidentiality of the proceedings of that or any other public authority where such confidentiality is provided by law;
:) the confidentiality of commercial or industrial information where such confidentiality is provided by law to protect a legitimate economic interest;
) the interest of the person who provided the information where there was no legal obligation to provide the information, that person has not consented to the disclosure, and but for the EIR 2004, there is no obligation to disclose; or
;) the protection of the environment to which the information relates.

owever, under reg 12(9) for matters relating to information on emissions, exceptions ?(5)(d)–(g) cannot be relied upon. Moreover, when considering a request for information ıe public body must weigh the public interest in refusing to disclose against the overridıg public interest of disclosure. Regulation 12(2) provides that there is a presumption in vour of disclosure ie the starting point should be that documents or information should : disclosed unless the public interest in refusing to disclose the information for the specific asons given to you overrides the interest of disclosure. Further guidance is available at ww.defra.gov.uk and the publications, *Guidance to the Environmental Information Regulations)04* and *Code of Practice on the Discharge of the Obligations of Public Authorities under the ıvironmental Information Regulations 2004*. In *A Guide to the Environmental Information :gulations* (Lawtext, 2004), Phil Michaels emphasizes the presumption in favour of discloıre by explaining that: 'in contrast to the FoIA 2000, there are no absolute exceptions under ıe regulations and an authority wishing to refuse to release information must satisfy itself to the balance of public interest'. The qualified exemption and public interest tests can be ıite stringent. In *Friends of the Earth v IC & ECGD* (20.8.07) EA/2006/0073 the Information ibunal upheld a request that the Government should have disclosed interdepartmental ›cuments relating to the Sakhalin oil and gas project, north of Japan noting that: **2.42**

> The Tribunal is simply not willing to accept in the absence of such evidence that disclosure of the 2003 inter-departmental responses in March 2005 was likely to pose a threat to the candour of further deliberations or that as at the time of the request was made in 2005, protective thinking time or space was required as a matter of overriding importance. There is simply no factual evidence to support the suggestion that time and space was required, let alone used, over the long period in question.
>
> The information requested in this case consists of a number of items of correspondence to ECGD from a number of the recipients [departments] of the notification. The Tribunal takes the view, having seen this information, that disclosure of at least one of the responses is highly unlikely to cause prejudice in terms of collective responsibility or candour when it comes to applying the public interest scales. On the contrary, the Tribunal feels most strongly that

> disclosure of the type of information in question in that particular exchange is, if anything, likely to improve the quality of the deliberative process. . . .

See www.informationtribunal.gov.uk/Decisions/foi.htm.

2.43 Unless the exceptions apply and, taking into account the public interest presumption i favour of disclosure, any failure to provide information may be subject to review and/o enforcement action. Under reg 11, the public authority must invoke its internal review pro cedure following a request for review, which must be made within 40 working days fron the date on which the applicant believes that the authority has failed to comply with th information request. The review process is free and an authority must notify the applicant o its review decision within 40 days of any request. Regulation 18 of the EIR 2004 then applie the enforcement and appeal provisions of the FoIA 2000. If the internal review decision i unsatisfactory, there is the opportunity to complain to the Information Commissioner (IC who will then investigate the complaint.

2.44 The complaint/appeal procedure is contained in Pts IV and V of the FoIA 2000. Any com plaint must be made in writing within two months of the public body's decision (or failur to decide). There is currently no fee for any complaint. The IC should be independent of th public body and then should investigate your complaint. He (and the IC's Office (ICO)) ha powers of entry and inspection relating to the information requested. During the investiga tion the Commissioner can issue an information notice requiring the public body to disclos any information that the IC decides is necessary. Following any investigation, the IC will issue a decision notice setting out his/her findings and whether or not the public body ha breached the freedom of information rules.

2.45 There is a right of appeal to the Information Tribunal against the IC decision. Any appeal must be made within 28 days of receiving the Commissioner's decision. Again, an appeal to the Information Tribunal is free of charge. However, you must complete a formal Notice of Appeal, which can be downloaded from the Information Tribunal website. The tribunal process is more like court proceedings with the appellant as one party and the IC as the other. The public body may also be joined as an Interested Party. The Tribunal will then hear argument from each party. There are procedural requirements and practice directions to comply with. It is essential to be familiar with the process when applying to appeal a decision. Details of how to complain or appeal together with the decisions can be found at www.ico.gov.uk and www.informationtribunal.gov.uk.

2.46 It is an offence to alter, deface, block, erase, destroy, or conceal any record held by the public authority, with the intention of preventing disclosure of all, or any part, of any disclosable information, with a maximum penalty of a £5,000 fine. The offence does not cover a government department and the prosecuting authority is the IC or the Director of Public Prosecutions.

2.47 There are a number of cases relating to the former EIR 1992. In the *Salisbury Bypass* case [1996] (unreported, considered in the *REC Handbook on Access to Justice* (2003)) Friends of the Earth asked the Department of Transport (DoT) for a copy of an 'induced traffic assessment report', which had been prepared on a proposed bypass and predicted how much extra traffic would be generated by building the new road. DoT refused the request arguing that, among other things, the report was not 'environmental information' within the meaning

f EIR 1992. Friends of the Earth applied for judicial review. Two weeks before the hearing ie DoT provided the report accepting that it was 'capable of falling within the scope of environmental information"'. While in *Bundes v Bundesrepublik Deutschland* (2006) VG 10 A 15.04, the claimants sought disclosure of information relating to climate change from the erman Economic Ministry under laws transposing EU and Aarhus Convention obligations. he *Birmingham Northern Relief Road* case concerned an agreement for the construction of a oll road scheme containing commercially confidential information. The court held that the greement was 'information relating to the environment' and although the agreement could ontain genuine commercially confidential information that could not prevent disclosure f the main body of the agreement. It also noted that the applicant's purpose in seeking the nformation was irrelevant. In *Maile v Wigan BC* [2001] Env LR 11, the High Court refused a eclaration for disclosure of a contaminated land database on the ground that the informa-on was in the course of completion.

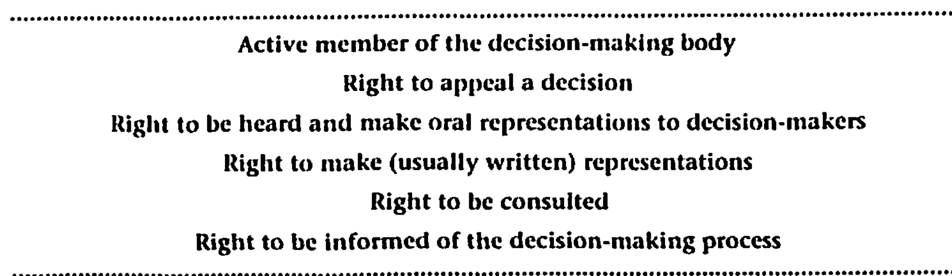
2.48 : is important to note that Regulation 1049/2001/EC provides access to information eld by the EU institutions, subject to exceptions such as public security and commer-ial interests and Regulation 1641/2003/EC provides similar provisions for information eld by the European Environment Agency. For information and guidance on how) apply for environmental information see further *Your Right to Know 2/e* (Pluto Press, 007) by Heather Brooke or *People Power* by Jon Robins and Paul Stookes (Lawpack, 2008).

ublic participation in decision-making

2.49 here are a number of levels of participation ranging from notional consultation to direct nvolvement in decision-making. This is illustrated in Figure 2.1. In *A Ladder of Citizen articipation* (1969) Sherry Arnstein is critical of lower or nominal forms of participation nd that it is only really consultation at the partnership, delegated power and citizen con-ol levels that has any real worth, below that public participation is either tokenism or for ffect. That is not necessarily so. Levels of participation may be nominal but nevertheless nfluential and effective. The relevant factors will not necessarily be what form of involve-nent the participation takes but the sincerity and commitment to the process allowed by ne decision-maker. However, it is conceded that it is all too easy for decision-makers to hear epresentations and then give them little or no weight under the wide discretionary powers onferred upon the decision-maker.

2.50 .rticles 6 to 8 of the Aarhus Convention require signatory states to provide for early ublic participation, adding that only when all options are open and effective can pub-c participation take place. Public participation is not defined, although the Preamble to he Convention suggests that the values central to participation are ensuring that there is means for the public to assert the right to live in an environment adequate for his or er health and well-being. Article 6 seeks to guarantee participation in decision-making hat may have potentially significant environmental impacts. Article 7 sets out the need o establish a transparent and fair framework for public involvement in plans and pro-rammes and Art 8 promotes participation in the preparation of law and rules that may have n environmental impact.

Figure 2.1 Levels of participation in decision-making


Active member of the decision-making body
Right to appeal a decision
Right to be heard and make oral representations to decision-makers
Right to make (usually written) representations
Right to be consulted
Right to be informed of the decision-making process

2.51 The UK Government considers that its present public participation provisions comply with the Aarhus Convention. Participation rights in environmental matters commonly arise in land use planning; Art 8 of the Town and Country Planning (General Development Procedure) Order 1995 No 419 states that a planning application shall be publicized. While Art 19, which provides that representations made to the LPA about applications shall be taken into account. This level of participation is at the lower end of the participation ladder but nevertheless complies with the Convention. That said, the level of participation conferred by LPAs often goes further than the minimum legislative requirements with many authorities allowing oral representations to be made. Further, under the EIA Directive 85/337/EEC any information gathered under Art 5 of the Directive must be made available to the public within a reasonable time in order to give the public concerned the opportunity to express an opinion before planning permission is granted. The judiciary have expressed their support for meaningful public involvement. In *Berkeley v Secretary of State for the Environment* [2000] 2 AC 603, the House of Lords emphasized that token participation was not enough and that the public should be properly involved in EIA-related decisions. See also Chapter 24.

2.52 The infringement of the participation rights of NABU, a German nature conservation group, was found to be unlawful in the case of *NABU Landesverband Sachsen-Anhalt v Fed Rep of Germany* (12 November 1997) file no 11 A 49/96. NABU were participating in the development stage of a rail track extension and were denied access to amended expert reports. The Federal Administrative Court held that the development permit issued following the planning proceedings was unenforceable and could not be rectified by holding supplementary proceedings.

2.53 The REC Handbook (p 27) suggests that there are three categories of procedural errors in public participation:

- failure to disclose all information to the public relevant to its participation;
- improper procedures for public participation, such as timely or adequate notice, opportunity to comment, timeframes, restrictions on 'administrative standing' or other conditions; and
- inadequate response to comments received (failure to take due account), or failure to reveal the reasons or considerations for the decision.

In *R v North & East Devon HA ex p Coughlan* [2001] 1 QB 213 the Court of Appeal at 258 neld that: **2.54**

> whether or not consultation of interested parties and the public is a legal requirement, if it is embarked upon it must be carried out properly. To be proper, consultation must be undertaken at a time when proposals are still at a formative stage; it must include sufficient reasons for particular proposals to allow those consulted to give intelligent consideration and an intelligent response; adequate time must be given for this purpose; and the product of consultation must be consciously taken into account when the ultimate decision is taken.

n *Greenpeace Ltd* a Government promise to the 'fullest public consultation' was not net and the court made a declaration that there was a breach of the claimant's egitimate expectation to fullest public consultation; that the consultation process was procedurally unfair; and that therefore the decision in the Energy Review policy document that nuclear new build 'has a role to play . . .' was unlawful. In his judgment Mr Justice Sullivan noted at para 48 that: **2.55**

> Given the importance of the decision under challenge—whether new nuclear build should now be supported—it is difficult to see how a promise of anything less than 'the fullest public consultation' would have been consistent with the Government's obligations under the Aarhus Convention.

There are also many examples of participation best practice. In 2002, IEMA published guidelines on participation in environmental decision-making, which aim to improve participation by offering advice and providing practical examples of what has been achieved eg the ocal community participation in the Crick bypass scheme, which involved a continuous consultation process over three years. **2.56**

There is an assumption, not least in the Aarhus Convention, that public participation is necessary, but it is not unanimously regarded as a benefit for all. If, for example, the public nterest is best served by public bodies and they are, in turn, governed by elected members voted into power by the public, then public participation may only be a distraction from effective decision-making; the argument being that public involvement is best carried on at he ballot box. Thereafter, the public should simply let those democratically elected persons and bodies take decisions on behalf of the electorate. This was the position of the House of Lords in *R v SSETR ex p Alconbury* [2001] UKHL 23 when considering a breach of Art 6(1) of he European Convention on Human Rights and the procedural right to an independent and mpartial tribunal. Lord Hoffman at para 69 noted that: **2.57**

> In a democratic country, decisions as to what the general interest requires are made by democratically elected bodies or persons accountable to them. . . .
>
> 70. There is no conflict between human rights and the democratic principle. Respect for human rights requires that certain basic rights of individuals should not be capable in any circumstances of being overridden by the majority, even if they think that the public interest so requires. Other rights should be capable of being overridden only in very restricted circumstances. . . . But outside these basic rights, there are many decisions which have to be made every day (for example, about the allocation of resources) in which the only fair method of decision is by some person or body accountable to the electorate.

2.58 This argument has some force. However, there are reasons why post-election democrac requires public involvement. First, poor electoral turnouts and voter apathy suggest th: society has lost confidence in the political system. Also, leaving matters to the elected repr(sentatives assumes that they are competent and capable of taking the best decisions for th local community without bias or unfairness. This is not always the case. For the democrati process and governance to work effectively and fairly it requires public involvement in ensu: ing that the checks and balances on state power operate effectively. It will most often be th public that bring claims to court to ensure the judiciary can exercise its constitutional role i: upholding the rule of law. This is recognized by Lord Hoffman in *Alconbury* at para 72, whe: he notes that when ministers or officials make decisions affecting the rights of individual: they must do so in accordance with the law. Without the participatory right of access t justice, the rule of law may break down. There are further concerns raised about potentia disadvantages of public participation. In *Environmental Protection, Law and Policy* (2007) Jan Holder and Maria Lee suggest that while participation in environmental decision-makin, is welcome, genuine dilemmas remain and in particular that participation might in fac enhance exclusion. They explain that:

> Creating institutions and situations in which meaningful public participation or deliberation can take place is the greatest challenge for those who advocate enhanced public participation in environmental decision making. We should be aware of who is allowed or willing to participate, and how the grounds of the debate might work to exclude some ideas and some people. Exclusion can be direct, by explicitly restricting access to the forum, for example by inviting only certain 'sensible' environmental groups, or only those physically affected by a particular development, to provide information or take part in debate. There are less obvious forms of exclusion. The institutions in which debate takes place may be physically remote or otherwise poorly accessible by those who lack insider knowledge—think, for example, of the obscurity of much EU decision making. The nature of the debate may also serve to marginalise certain positions: debates framed in overwhelmingly technical or scientific terms could limit the discussion of competing experts. It is not unusual to see limitations placed on what counts as 'legitimate' reasoning in environmental debate: most obviously, a narrow approach to 'sound science' or economic efficiency can mean that other concerns are dismissed as 'irrational' or 'NIMBYism' (not in my back yard)...

2.59 This concern is very real, tokenism in participation may often place a gloss on or legitimize decision-making when, in fact, there is little genuine participation taking place. One such example is where major developments or activities are required to establish liaison committees between developers and local residents. However, often these are controlled by the developers to such an extent that participation or involvement in improved operations is meaningless. Usually, the operator prepares the agenda, the minutes, and also decides who may or may not be on the liaison committee. However, what then is the alternative? Does weak or illusory participation provide the justification for excluding participation altogether?

2.60 Another legitimate question is whether public involvement can impede efficient and proper decision-making. Take, for instance, the development of a wind farm. During participation in the policy debate about renewable energy local residents may well support the use of wind farms as a means of cutting reliance on fossil fuels and reducing pollution. However, when participating in the siting of a wind farm locally residents may object to

ıe proposal and such opposition may result in the rejection of what appears to be an ɿvironmentally sound development. In effect, participation may have encouraged what ıay be regarded as the wrong environmental decision. This argument has some weight. owever, what participation should elicit is that if such a proposal is unacceptable, what the alternative? If it were the case that local residents were to be the sole beneficiaries f the energy produced by the wind farm would this influence the local community ıew? Possibly. In the circumstances, the opportunity for public involvement in decision-ıaking should not be restricted on the basis that such involvement may result in a decision ıat is not preferable to the majority or to others who do not otherwise experience the ɟverse consequences of that decision. Put another way, why should a local community ave to pay the price for the excess energy consumption of others that necessitates the need ır a wind farm in the first place?

2.61 ne final argument against participation is simple; why should certain people participate in hat may be regarded as private matters and, when allowing participation, results only in ɔst and delay? This argument is particularly prevalent in land use planning matters where ɜvelopers may often fail to see why their rights as landowners should be fettered or regu-ted by the land use planning system and the public involvement in that system. In *The 'eologies of Planning Law* (Pergamon Press, 1981) Patrick McAuslan explored the competing ıterests in public decision-making when assessing aspects of the land use planning system. e suggested that there were three main competing interests: those seeking to protect private :operty and rights including, typically, developers, landowners and operators; the interests :omoted by public bodies and agencies; and the interests of others, ie third parties that ɔuld be involved through public participation. McAuslan considers these interests as three ɔmpeting ideologies of law explaining:

> ... firstly, that the law exists and should be used to protect private property and its institutions; this may be called the traditional common law approach to the law. Secondly the law exists and should be used to advance the public interest, if necessary against the interest of private property; this may be called the orthodox public administration and plan approach to the role of law. Thirdly, the law exists and should be used to advance the cause of public participation against both the orthodox public administration approach to the public interest and the common law approach of the overriding importance of private property; this may be called the radical or populist approach to the role of law.

2.62 cAuslan then explains briefly how each ideology evolved:

> Planning's historical origins lay in the need to do something about the horrendous living conditions of the new urban working classes in the mid nineteenth century. This involved taking powers to control and regulate the use of property—land and houses. To property-owners in urban areas, this was a new and unwelcome use of governmental power sanctioned by law, and their reaction was to seek the aid of courts and lawyers to protect them against these intrusions, as they saw them, of governmental power. ... The principles developed by the courts in the late nineteenth and early twentieth centuries to provide some protection for the urban land-owner against government action form the basis of the common law strand, the private property ideology. ...
>
> The second competing ideology is what I have called the ideology of public interest. ... [It] is translated into laws which confer wide powers on administrators to do as they see fit and which either provide no redress or appeal. Special provisions may be made for the land-owner

> within this system but this is as much because experience has shown that to do so will lessen the chances of judicial interference or make more plausible provisions purporting to deny access to the courts, . . .
>
> The third competing ideology (that law is a vehicle for the advancement of public participation) can claim as equally respectable a philosophical ancestry as the other two ideologies; that of J S Mill. It is, however, the most recent and least developed of the ideologies in practice, . . . It is none the less an ideology of equal importance to the other two. It sees the law as the provider of rights of participation in the land use planning process not by virtue of the ownership of property but by virtue of the more abstract principles of democracy and justice. These in turn come down to the argument that all who are likely to be affected by or who have, for whatever reasons, an interest or concern in a proposed development of land or change in the environment should have the right of participation in the decision on that proposal just because they might be affected or are interested. This ideology, like the public interest ideology, denies the property-owner any special place in participation; such an interest is merely one of a great number to be considered in the democratic process of decision-making and by no means the most important, particularly when it is in conflict with the majority view; e.g. the tenants of a building have an equal if not greater moral claim to participation than the landlord, public or private, present or absentee. This ideology differs, however, from that of public interest by denying that the public interest can be identified and acted upon by public servants on the basis of their own views and assumptions as to what is right and wrong.

2.63 For McAuslan, the rights of those affected can be as important, if not more so, than those with a private interest in the development or the general public interest.

Access to justice

2.64 Environmental justice has at least two meanings. The first involves access to the law and the courts in order to resolve environmental problems and to ensure that communities and individuals have the same rights and remedies as corporate and state organizations. Environmental justice in its broader sense may be referred to as environmental equity, which means ensuring that everyone, regardless of means, where they live, or their background, enjoys a clean and healthy environment. Environmental equity includes equity between nations and between generations. Access to justice under the Aarhus Convention takes the first, more direct, definition. It provides the checks and balances for the procedural rights of information and participation. It should also provide a right of review of more substantive rights such as a right to healthy environment. Securing environmental equity will almost certainly rely on providing effective access to justice in its direct form.

2.65 Articles 9(1) and (2) of the Aarhus Convention provide review procedures for any breach of the information and participation provisions contained in Arts 4 and 6 respectively. Article 9(3) requires signatory states to ensure that:

> members of the public have access to administrative or judicial procedures to challenge acts and omissions by private persons and public authorities which contravene provisions of its national law relating to the environment.

2.66 The principle of *actio popularis* whereby anyone can sue the government when it acts unlawfully, regardless of whether they have standing in a strict sense, is said to be consistent with

Art 9. Yet, one of the critical aspects of the Convention, and an area that has been the subject of concern in the way the UK has approached compliance (see the CAJE Briefings 2004) is the need to provide a fair review process. Article 9(4) provides that:

> the procedures referred to in [Art 9] shall provide adequate and effective remedies, including injunctive relief as appropriate, and be fair, equitable, timely and not prohibitively expensive. Decisions under this article shall be given or recorded in writing. Decisions of courts, and whenever possible of other bodies, shall be publicly accessible.

2.67 Although Art 9(3) of the Convention expressly includes challenges against private individuals (ensuring that private civil claims fall within its scope) the UK Government relies upon judicial review as its main mechanism for Aarhus compliance. Either way, the judicial process in the UK causes some difficulty in offering effective injunctive relief (a necessary element of environmental protection) and a review procedure that is not prohibitively expensive, as required by the Convention. In *R v SSE ex p RSPB* [1997] Env LR 431 the House of Lords refused an interim injunction while the claim was referred to the ECJ without a cross-undertaking in damages by the RSPB to protect the developer against any economic loss that could have arisen in circumstances where the decision had not ultimately been quashed but the development had suffered delay. Ultimately, the ECJ ruled that the UK was not entitled to take economic requirements into account when designating a Special Protection Area under the Wild Birds Directive. However, 12 months had elapsed between the application for interim relief and the ECJ ruling, during which time the site, the Lappel Bank mudflats in Kent, had been turned into a car park. However, see *R v Durham CC ex p Huddleston* (1999) (unreported) discussed further in Chapter 18.

2.68 In terms of prohibitive expense, there are a number of factors to consider; the Claimant's own costs (although this can to some degree be controlled), the Defendant's costs (these are less certain) and, finally, the costs of any Interested Party. It is often the Interested Party that places costs pressure on a Claimant to back down. The starting point is that while judicial review is a discrete form of civil procedure under Pt 54 of the Civil Procedure Rules 1998, the general rule as to costs under Pt 44 applies, subject to exception. Further, costs threats by interested parties are frequent albeit that it is only in exceptional circumstances that they should be paid by a claimant. The case of *Shirley v Sec of State for Transport Local Government & the Regions* [2002] CO/4505/2001 highlights this difficulty when the Interested Party informed the applicant that if the matter went to hearing and she lost, she would face a costs bill of £126,000. Despite this, the case continued and the High Court quashed the Secretary of State's decision. Similarly, in *Friends of the Earth v Environment Agency* [2003] EWHC 3193 Admin, the Interested Party served a Schedule of Costs of just over £100,000 for a one-day preliminary hearing. Again, Friends of the Earth were successful and were not required to pay those costs. Finally, in *R (Littlewood) v Bassetlaw DC* [2008] EWHC 1812 (Admin) the defendant Council claimed an estimated £135,000 in costs for a two-day hearing. The cases of *Shirley, Friends of the Earth*, and *Littlewood* were each referred to the European Commission who is investigating the question of costs and prohibitive expense.

2.69 The funding concern has been raised by the legal profession on a number of occasions including the reports, *Civil Aspects of Environmental Justice* (ELF, 2003) and *Environmental Justice* (EJP, 2004). The judiciary have also commented on the issue. The article *Environmental Litigation, A Way through the Maze?* (OUP, 1999) by Lord Justice Carnwath suggested that

you had to be either very poor or very rich to use the courts to protect the environmer Yet even this proposition is now tenuous with the funding criteria for public fundir having the potential to exclude even the very poor. LSC Funding Code 5.4.2 on Alternati Funding provides an option for refusing funding when there are reasonable prospec of success and the potential claimant is financially eligible. Code 5.4.2 provides that a application for public funding may be refused if alternative funding is available to tl client (through insurance or otherwise) or if there are other persons or bodies, includir those who might benefit from the proceedings, and who can reasonably be expected to brir or fund the case. This may be reasonable if the matter is being pursued by a local communit group or residents' association, but can operate unfairly if other local residents are unwillin to get involved even though there is a reasonable case for action.

2.70 In 2002, Lord Justice Sedley expressed similar concerns to the Aarhus Convention Conferenc in London (ELF, 2002). More recently the paper by Brooke LJ, *Environmental Justice: The Co Barrier* (ELF, 2006) referred to *Civil law aspects* and noted that:

> The author analysed hundreds of potential claims that did not make it to court. He concluded that in 31% of these cases it was the cost of pursuing a legal action which was the main reason why the challenge was not advanced. The clients had been advised that they had a reasonable case, but they abandoned it when told about the likely costs. The study also revealed that only 30 solicitors' firms in England and Wales had a full LSC franchise for public law. And because of the perceived lack of profit in environmental law, UK lawyers in general had little interest in it.

2.71 Lord Justice Brooke gave the leading judgment in the case *R (Burkett) v Hammersmith & Fulhai LBC* [2004] EWCA 1342, stating at para 80 that:

> If the figures revealed by this case were in any sense typical of the costs reasonably incurred in litigating such cases up to the highest level, very serious questions would be raised as to the possibility of ever living up to the Aarhus ideals within our present system. And if these costs were upheld on detailed assessment, the outcome would cast serious doubts on the cost-effectiveness of the courts as a means of resolving environmental disputes. . . . An unprotected claimant in such a case, if unsuccessful in a public interest challenge, may have to pay very heavy legal costs to the successful defendant, and this may be a potent factor in deterring litigation directed towards protecting the environment from harm.

2.72 Most recently, the report *Ensuring access to environmental justice in England and Wales* (WWI 2008) (the Sullivan Report) made recommendations relating to access to justice in environ mental matters including, among others, that a bespoke approach to Protective Costs Order (PCO) be adopted in environmental cases to which the Aarhus Convention applies and tha where a PCO is made that it secures compliance with the Convention's obligation to ensur proceedings are not prohibitively expensive: see Chapter 22.

D SUBSTANTIVE ENVIRONMENTAL RIGHTS

2.73 Substantive environmental rights set clear objectives and may be secured without reference to other rights, eg the right to a clean and healthy environment, and the right to clear drinking water. These could also be regarded as human rights. The *Judicial Handbook on Environmental Law* (UNEP, 2005) notes that more than 100 state constitutions refer to a

right to a clean environment, impose a duty on the state to prevent environmental harm, or mention the protection of the environment or natural resources. For example, s 4 of the National Environment Statute 1995 of Uganda provides that:

(1) Every person has a right to a healthy environment.
(2) Every person has a duty to maintain and enhance the environment including the duty to inform the Authority or the local environment committees of all activities and phenomena that may affect the environment significantly.

2.74 Substantive rights can also be found in various legislative texts from international treaties to local laws with many incorporating the protection of wildlife as well as human rights, eg the Convention on Illegal Trade in Endangered Species of Wild Fauna and Flora 1973 (CITES), which aims to regulate international trade in endangered species, and the Wildlife and Countryside Act 1981 (as amended), which provides protection for specific species in England and Wales. The UNEP guide points to the regional German law of Thuringen, which provides that: 'Animals are to be respected as living beings and fellow creatures. They will be protected from treatment inappropriate to the species and from avoidable suffering.' The UK does not confer a substantive environmental right. However; it may be argued that the preamble to the Aarhus Convention 1998 provides some substance to what appear to be purely procedural rights by recognizing that:

> adequate protection of the environment is essential to human well-being and the enjoyment of basic human rights, including the right to life itself; [and] that every person has the right to live in an environment adequate to his or her health and well-being, and the duty, both individually and in association with others, to protect and improve the environment for the benefit of present and future generations.

2.75 Does the preamble then confer substantive environmental rights? Not explicitly, but without recognition of the essential adequate protection of the environment or that every person has the right to live in an environment adequate to his or her health and well-being it could arguably be that the express procedural rights are meaningless.

E HUMAN RIGHTS AND THE ENVIRONMENT

2.76 The European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (ECHR) provides a number of basic human rights and freedoms. The Human Rights Act 1998 (HRA 1998) gives 'further effect to the rights and freedoms' guaranteed under the ECHR, while not formally incorporating the Convention into domestic law or restricting parliamentary sovereignty. Nevertheless, the Convention is persuasive, and the European Court of Human Rights (ECtHR) has provided redress for UK citizens for some time. The *Guide to the Human Rights Act 1998* (2006) explains that the HRA 1998 works in three ways:

(1) It requires legislation to be interpreted and given effect as far as possible compatibly with the ECHR. Where this is not possible, a court may quash or dis-apply secondary legislation and make a declaration of incompatibility for primary legislation.

(2) It makes it unlawful for a public authority to act incompatibly with the Conventic and allows for a case to be brought in a UK court or tribunal against the authority it does so.

(3) UK courts and tribunals must take account of the ECHR in all cases that come befo them. They must also develop the common law compatibly with the Convention ar take account of ECtHR case law.

2.77 The HRA 1998 does not create any new, free-standing, rights but allows the Convention ı govern relationships between the state and individuals. Section 6(1) of the Act makes it unla ful for public authorities to act in a way that is incompatible with an ECHR right; s 6(3) stat that a public authority includes a court and tribunal and that it will act unlawfully if it fails ı develop the law in line with the Convention. However, *Blackstone's Guide to the Human Righ Act 1998* explains that if a claimant wishes to use a Convention argument in a case against private defendant, then the claimant must find an existing private law argument on which ı hang the Convention argument or, alternatively, focus the action on a public body that h. failed to protect the claimant's rights from being violated by the defendant. Human righ legislation draws on a number of administrative law concepts including qualified rights, tl margin of appreciation, and proportionality. Chapter 21 outlines ECtHR procedure.

General principles

Environmental human rights are qualified

2.78 The Convention is a mix of absolute and qualified rights. Absolute rights include the pr tection from torture (Art 3) and the near-absolute right to life (Art 2). Qualified rights a restricted in application or provide exceptions when the right does not apply. The righ and freedoms relied upon in environmental matters (Arts 8, 10, 11, and Art 1, Protocol are qualified. The qualifications are found in the Convention's text often after the right itsc has been established, eg Art 8(1) provides the right to respect for private life; Art 8(2) allov interference 'as is necessary in a democratic society'.

Margin of appreciation in balancing competing interests of society

2.79 Qualified Convention rights allow a balance to be struck between competing interests i society so that public authorities enjoy a 'margin of appreciation' when exercising their fun tions. The ECtHR recognizes that national authorities are better placed to make decisioı about the merits of a case than a court. The margin of appreciation was considered in *Hattc & ors v UK* [2003] 36022/97 and is discussed below.

Proportionality

2.80 When considering the qualification of a right, public authorities must act in a way that proportionate to the legitimate aim pursued. In *R (Daly) v Secretary of State for the Hon Department* [2001] UKHL 26 (a prisoner's rights case) Lord Steyn noted that the princip of proportionality was familiar and that the approach of the Privy Council in *de Freitas Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing* [1999] 1 AC (should be followed in deciding whether a limitation is arbitrary or excessive. The cou should ask itself whether:

a) the legislative objective is sufficiently important to justify limiting a fundamental right;
b) the measures designed to meet the legislative objective are rationally connected to it; and
c) the means used to impair the right or freedom are no more than is necessary.

2.81 The ECHR does not provide an explicit right to a clean and healthy environment, although case law is defining the extent to which the Convention and its Protocols can be relied upon to provide some form of environmental protection and a means of redress. The following rights and freedoms have been found to be relevant in environmental matters.

Article 2: right to life

2.82 Article 2 of the Convention provides that everyone's right to life shall be protected by law. This is qualified slightly in the event of a court sentence and if death results from the use of necessary force. For the most serious environmental concerns, the right to life may be at issue. In *Oneryildiz v Turkey* [2004] 48939/99, the applicant claimed a breach of human rights under Articles 2, 6, 8, 13 (the right to an effective remedy), and Art 1 of Protocol 1 when a council-run rubbish tip exploded causing a landslide and the death of 39 people, including nine members of the applicant's family. The ECtHR held that there had been a violation of Art 2 on account of the deaths and the ineffectiveness of the Turkish judicial machinery. The Grand Chamber, which heard the final appeal, noted that:

> the Court reiterates that Article 2 does not solely concern deaths resulting from the use of force by agents of the State but also . . . lays down a positive obligation on States to take appropriate steps to safeguard the lives within their jurisdiction.

2.83 In *Gbemre v Shell Petroleum Nigeria* (2005) Suit No FHC/B/CS/53/05, a claim outside the European jurisdiction but relating to the right to life, the High Court of Nigeria held that the flaring of gas in a Niger Delta community was a gross violation of the constitutionally-guaranteed right to life and dignity. The flaring exposed residents to an increased risk of premature deaths, child respiratory illnesses, asthma, and cancer, while contributing to significant greenhouse gases emissions.

Article 6: right to a fair trial

2.84 The right to a fair trial under Art 6(1) is a procedural and qualified right, providing that:

> In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.

2.85 In *Zander v Sweden* (1993) 18 EHRR 175 the claimant's land was adjacent to a waste tip which had polluted the local water supply. Approval to dump more waste was given and the claimant appealed on the basis that any permit to dump waste must be subject to precautionary measures to avoid further pollution. The appeal was dismissed and the matter referred to the ECtHR which held that there was a breach of Art 6(1) awarding damages of Kr30,000 (£5,000). However, in *Balmer-Schafroth v Switzerland* [1997] ECHR 46 the ECtHR held that the claimants had failed to show that the operation of the power station exposed them to a

danger that was serious, specific, and imminent. The connection between the governmen decision and the Art 6(1) right was regarded as too remote.

2.86 In *Alconbury* the House of Lords reviewed Art 6(1) in relation to land use planning. The Lord found that administrative matters such as planning could involve the determination of civi rights and that there could be protection under Art 6. However, on the facts the Secretar of State had not claimed to be acting as an independent or impartial tribunal and the avail ability of judicial review of any decision satisfied the Convention obligations. However, ii *R (Kathro) v Rhondda Cynon Taff CBC* [2002] Env LR 15 the court held that whether judicia review was adequate for the purpose of challenging a decision could only be assessed ii the light of the actual decision and by the reference to the grounds of any challenge and i was impossible to say whether factual disputes could ever be cured by judicial review. In *I (Vetterlein) v Hampshire CC* [2001] EWHC Admin 560 the court held that the opportunity tc make detailed representations during a public consultation process and to address a plannin committee satisfied Art 6(1).

2.87 In *Steel & Morris v UK* (2005) No 68416/01, the principal complaint was that the applicant: were denied a fair trial during the *McLibel* litigation. The ECtHR held that:

> the question before the court was whether the provision of legal aid was necessary for a fair hearing to be determined on the basis of the particular facts and circumstances of each case and depended *inter alia* upon the importance of what was at stake for the applicant in the proceedings, the complexity of the relevant law and procedure, and the applicant's capacity to represent him or herself effectively.

The ECtHR held that there had been a violation of Art 6(1) and Art 10 (freedom of expression) of the Convention. The Court then awarded €35,000 plus costs to the applicants undei (Art 41 of the Convention.

Article 8: right to respect for private and family life

2.88 Article 8 provides that:

> (1) Everyone has the right to respect for his private and family life, his home and his correspondence.
> (2) There shall be no interference by a public authority with the exercise of this right except such as is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of rights and freedoms of others.

2.89 The main purpose of Art 8 is to protect against public interference in private matters. It imposes positive obligations on public bodies to take measures to secure the rights conferred and negative obligations that restrain interfering action. Article 8(2) limits the rights conferred by Art 8(1). The approach as to whether there may be a breach of Art 8 is:

(a) To decide whether there is, in principle, a right protected under Art 8(1). The definitions of private life, family life, and home are broad and include the indirect intrusion from pollution and environmental harm, see eg *Hatton & ors v UK* where although, ultimately, the ECtHR found against the applicants this has been based upon the qualifications of the Art 8 right, not on its initial scope.

(b) If a right exists under Art 8, then consider whether there has been any state interference with that right.

:) If there has been interference, is it legitimate? Does it pursue a legitimate aim? And, is it necessary in a democratic society?

2.90 he right is often relied upon in environmental matters and a common concern is noise. In *owell and Rayner v UK* (1986) 12 EHRR 335, the court found that interference of private life om aircraft noise was justified. The problem was revisited in *Hatton & ors v UK* in which the CtHR Grand Chamber considered an appeal from the lower ECtHR Third Chamber by the K Government. The Court held that the Government's night flights policy at Heathrow airort did not violate the Art 8 right to respect for private life. Both courts considered that there 'as a balance between competing interests in society. The lower court found in favour of the pplicants, the Grand Chamber tended towards more general economic interests adding that uthorities, when balancing interests, were afforded a 'margin of appreciation' noting that:

> The Court must consider whether the Government can be said to have struck a fair balance between [the interests of the economic well-being of the country and for the protection of the rights and freedoms of others] and the conflicting interests of the persons affected by noise disturbances, including the applicants. Environmental protection should be taken into consideration by Governments acting within the margin of appreciation and by the Court in its review of that margin, but 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.

2.91 elying on the Art 8(2) qualification the Grand Chamber held that it was legitimate for the ;overnment to have taken the economic interests of the airline operators etc, and those of ıe country as a whole when developing policy. However, while the ECtHR found that the ;overnment was not in breach of Art 8, it held the scope of the review by the domestic courts 'as not sufficient to comply with Art 13 (the right to an effective remedy before a national uthority) and awarded some compensation to the applicants.

2.92 ı *Lopez Ostra v Spain* (1994) 20 EHRR 277 the applicant complained that a nearby waste 'eatment plant emitting fumes, noise, and strong smells made her family's living conditions nbearable and were causing serious health problems. Mrs Lopez Ostra had tried numerous ivil and criminal actions in domestic law, all of which had failed. The ECtHR found a breach f Art 8 and awarded the applicant four million pesetas (around £20,000) in damages. It held ıat, despite the margin of appreciation, the state had not struck a fair balance between the ıterests of the town in having a waste treatment plant and the applicant's enjoyment of her ome and her private and family life. *Guerra & ors v Italy* (1998) 26 EHRR 3577 concerned the ıilure to provide a community with information about risk and how to proceed in the event f an accident at a nearby chemical factory. The Court held that the potential effect of toxic missions meant that Art 8 was applicable. The applicants had complained of an omission by ıe state in its failure to act, rather than positive interference.

2.93 ı *Chapman v UK* (2001) 33 EHRR 18 the ECtHR found that the interference of rights to rivate life by a LPA's enforcement of planning controls was expressed primarily in terms of nvironmental policy and that the LPA was pursuing the legitimate aim of protecting the ights of others' through the environmental protection measures.

2.94 ı *Fadeyeva v Russia* (2005) No 55723/00, the ECtHR held that the concentration of air polıtants emitted from a steel plant near the applicant's home exceeded safe levels and was otentially harmful to the health and well-being of those exposed to it. Moreover, Russian :gislation defined the zone, where the applicant's house was situated, as unfit for human

habitation. The court considered that even assuming that the pollution did not cause ar quantifiable harm to the applicant's health, it inevitably made her more vulnerable various diseases as well as adversely affecting her quality of life at home. It accepted that tl actual detriment to the applicant's health and well-being was sufficient to bring it within tl scope of Art 8 and that, despite the wide margin of appreciation left to the respondent state, had failed to strike a fair balance between the interests of the community and the applicant effective enjoyment of her right to respect for her home and her private life. The Court coı cluded that there had been a violation of Art 8.

Article 10: freedom of expression

2.95 Article 10 provides that:

> everyone has the right to freedom of expression, which includes holding opinions, receiving and imparting information. The right may be restricted by a licensing regime or any restrictions or penalties necessary in a democratic society.

2.96 The right to freedom of expression may be relevant where environmental activists ar prosecuted for carrying out protesting activities. In *Percy v DPP* [2001] EWHC Admin 1125 a protestor who defaced a US flag in front of servicemen was convicted of causin harassment, alarm, or distress under s 5 of the Public Order Act 1986. The claiman challenged the conviction relying on Art 10 (holding an opinion). The Divisional Cour held that the conviction was excessive and that peaceful protest may cause affront, whicl is not criminal. The conviction was quashed having failed to give sufficient weight to th defendant's Art 10 right. However, in *Persey v SSEFR* [2002] EWHC 371 (Admin) the deci sion to hold private rather than public inquiries into the Foot & Mouth outbreak was helc not to breach Art 10 and the right to receive information. The court noted that Art 1(imposed no positive obligation on government to provide, in addition to existing means o communication, an open forum to achieve yet wider dissemination of views. In *Steel & Morris v UK* the ECtHR held that in relation to Art 10 the central issue that fell to be determined was whether the interference with the applicants' freedom of expression had been 'necessary in a democratic society':

> The Government had contended that, as the applicants were not journalists, they should not attract the high level of protection afforded to the press under Article 10. However, in a democratic society even small and informal campaign groups, such as London Greenpeace, had to be able to carry on their activities effectively. There existed a strong public interest in enabling such groups and individuals outside the mainstream to contribute to the public debate by disseminating information and ideas on matters of general public interest such as health and the environment.

Article 1 of Protocol 1: protection of property

2.97 Article 1, Protocol 1 provides that:

> Every natural person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to conditions provided by law and by the general principles of international law.

The preceding provisions shall not, however, impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.

2.98 ıe term 'possessions' referred to in Art 1, Protocol 1 is broad and includes land and other operty. It may also include the maintenance of a licence: *Tre Traktorer v Sweden* (1989) 13 ıRR 309, and a permit to exploit a gravel pit: *Fredin v Sweden* (1991) 13 EHRR 784. However, ɔossession does not extend to a regulatory approval for the production of chemical pesti-ɟes: *R (Amvac) v SSEFR* [2001] EWHC Admin 1011.

2.99 *Aston Cantlow v Wallbank* [2003] UKHL 37 Lord Hope stated at para 67 that there were three les within Art 1, Protocol 1:

) the right to peaceful enjoyment of possessions as set out in the first sentence is of a general nature;
) there are then two forms of interference; the deprivation of possessions that it subjects to conditions, and the control of the use of property in accordance with the general interest.

2.100 : added that:

) In each case a balance must be struck between the rights of the individual and the public interest to determine whether the interference was justified. These rules are not unconnected, as before considering whether the first rule has been complied with, the court must first determine whether the last two rules are applicable.

2.101 *Sporrong v Sweden* (1982) 5 EHRR 35, the ECtHR found that Stockholm Council had inter-:ed with the applicants' right to enjoyment of their possessions by imposing development strictions in an area where they owned property. In the case of *Chassagnou & ors v France* 999] ECHR 22 the Grand Chamber considered the objections by small landowners to a unicipal hunting association requiring rights of hunting across all land in the region. The urt found that:

compelling landowners to transfer hunting rights over their land so that others can make use of them in a way which is totally incompatible with their beliefs imposes a disproportionate burden which is not justified under the second paragraph of Article 1 of Protocol 1.

2.102 also held that there had been a violation of Art 1, Protocol 1 in conjunction with Art 14 of e Convention (the enjoyment of rights and freedoms without discrimination) and Art 11 ıe right to freedom of peaceful assembly and association). The Grand Chamber considered alleged violation of Art 9 (the right to freedom of thought, conscience, and religion), t found that it was unnecessary to conduct a separate examination from that standpoint. ɔwever, Judge Fischbach, in a separate opinion stated that he took the view that:

'environmentalist' or 'ecological' beliefs come within the scope of Article 9 in so far as they are informed by what is a truly societal stance. They are closely bound up with the personality of each individual and determine the decisions he takes about the type of life he wishes to lead. Moreover, it is undeniable that the question of preservation of our environment, and of wild animals in particular, is now a much-debated one in our societies.

2.103 *R (Langton & Allen) v Defra and Derbyshire CC* [2002] Env LR 20 the enforcement of a notice ıder the Animal By-Products Order 1999 by the local authority after a failure to adequately

dispose of maggot waste justified the interference under Art 1, Protocol 1 rights becau matters of public and animal health required prompt action.

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