Paper on Environmental Courts/Tribunals

Over the past 2 years, several papers have been published concerning practice and procedure in environmental law. DEFRA has commissioned most of the papers which have been published and states on its website that the papers are all on the broad topic of "justice and environmental matters".

The side reports which have been published in the past 2 years are as follows:-

- Using The Law : Access To Environmental Justice. Vires and Opportunities. Maria Adebowale, Capacity Global (2003).

- Environmental Civil Penalties. A More Proportionate Response To Regulatory Breach. Michael Woods and Professor Richard Macrory, UCL (2003).

- Modernising Environmental Justice : Regulation In The Role Of An Environmental Tribunal. Professor Richard Macrory and Michael Woods, UCL (June 2003).

- Trends in Environmental Sentencing in England and Wales. Claire Dupont and Dr Paul Zakkour, Environmental Resources Management Limited (November 2003).

- Environmental Justice. A Report By The Environmental Justice Project (ELF, Leigh Day & Co, WDF) (March 2004).

DEFRA's website states that DEFRA are currently undertaking a review of all of these papers, in association with the Department of Constitutional Affairs, with a view to developing "an holistic approach" to environmental justice.

UKELA is of the view that now might be the time to contribute to the debate on the possibility of an Environmental Court or Tribunal and has asked me to prepare a draft paper setting out briefly the findings of the various reports.

Only the Capacity Global report, the Richard Macrory report on Environmental Tribunals and the Environmental Justice Project report are relevant to the Environmental Tribunal/Court issue. The other two reports are concerned with civil penalties and environmental sentencing in criminal matters.

I will deal with each of the 3 relevant reports in turn and then provide a brief conclusion.

Using the Law : Access To Environmental Justice. Vires and Opportunities. Maria Adebowale, Capacity Global (2003).

This report is based on research carried out by Capacity Global. Capacity Global interviewed local community groups, NGOs, lawyers, Judges and Magistrates.

Unsurprisingly, each of the groups consulted raised different issues of concern regarding the current legal system for environmental issues in the UK.

Community groups raised the following issues:-

- Invisibility of and a lack of access to specialist legal advice and information on environmental law.

- A fear of costs both in gaining legal advice and in taking cases to Court.

- A lack of and a difficulty in gaining "legal aid" for funding of environmental cases.

- A need for specific assistance in areas of high social, economic and environmental depravation.

- The inequalities both in structural and resource terms that arises when members of the public take cases against companies or "the establishment".

The lawyers and NGOs raised the following issues as being of concern:-

- A lack of expertise within the ranks of the Judiciary and the Magistrates.

- A perceived bias of Adjudicators towards development and commerce.

- Problems with the rules of locus standi and problems with demonstrating direct interest.

- A need for better resources that allow appeals to be heard on merit, therefore reducing the pressure to use judicial review inappropriately.

- The winner takes all approach to costs.

- Several respondents identified a need for a specialist Environmental Court or Tribunal.

Interview with Judges or Magistrates found the following as issues of concern:-

- Environmental cases presented difficulties both in the nature of the cases and the way in which cases are presented to Court.

- The lack of expertise had been noted and that is why Magistrates now undergo training in environmental issues.

The report concludes that there are therefore numerous barriers which prevent the Court system from acting as a tool for environmental justice.

The report makes 8 recommendations for change to the legal system as follows:-

1. The delivery of public service provision and policies relating to environmental inequality and quality of life need to be developed and carried out across all Government departments.

2. The impact of environmental inequality on socially or economically excluded communities needs to be considered when deciding on shifts in legal policy and amendments to the current legal system. Geographic areas with high depravation indexes and environmental pollution should be

prioritised in the provision of free legal advice, representation and outreach support by the CLS.

3. The CLS website should be altered to make information on funding for environmental cases more readily available.

4. An environmental advice agency similar to the Environmental Defenders Office in Australia should be established. This organisation should have regional offices with a focus on economically and environmentally deprived areas.

5. Public funding should be provided for environmental cases with a public interest element. A separate budget must be created that allows for environmental cases to be given direct legal aid.

6. The CLS and the DCA need to review funding conditions for environmental cases (especially those of public interest) in order that unnecessary barriers can be removed.

7. The cost rules need reform. Losers should not bear their costs in non-vexatious public interest cases.

8. An Environmental Court or Tribunal should be established. However, the report emphasises that establishment of such a Court or Tribunal without the establishment of an independent, state funded, legal advice service and without earmarking a budget for the funding of public interest environmental cases and reform of cost rules, would be counter-productive.

Modernising Environmental Justice : Regulation In The Role Of An Environmental Tribunal. Professor Richard Macrory and Michael Woods, UCL (June 2003).

This report examines the way in which environmental provision has grown up in the English legal system. It considers the extent of availability of environmental appeal processes and points out that currently over 50 different appeal bodies deal with different aspects of environmental law.

The report identifies concerns held by practitioners that the abilities of Magistrates and the Planning Inspectorate are lacking when it comes to dealing with complex environmental matters. The report also acknowledges the concern that in a number of areas, judicial review is the only option and that as judicial review is not merit based, it is a poor method of examining failings in the law.

The report examines the following options to address the issues it identifies:-

1. No change.

   The report acknowledges that this is the cheapest option, but also asserts that to adopt this option would be foolhardy.

2. Adapt or improve existing structures.

   The report states that the Planning Inspectorate could be asked to ensure the availability of the Inspectors with greater legal and technical expertise in environmental law, and could also be asked to make Planning Inspectorate decisions more widely available.

The gaps in available appeal mechanisms could be filled, so that reliance on judicial review is reduced.

Contaminated land could be dealt with in the future by the Lands Tribunal.

Changes could be made to enable District Judges to be used more frequently in Magistrates Courts and for Magistrates to receive more frequent and higher quality training in environmental law.

Finally, costs associated with judicial review could be reduced by costs capping in judicial review actions.

The report recognises that this option may be more acceptable to Government, as it is not as far reaching as the Environmental Court or Tribunal option. However, the report considers that this option does not dispel most of the problems identified with the current provision of environmental decision taking in the UK.

3. A specialist Environmental Tribunal within a unified Tribunal system.

This is the report's recommended approach.

A single Tribunal similar to the Lands Tribunal would be established. The Tribunal would have expert members and legal members. The Tribunal would be based in London, but could sit outside of London if required. The Court could not be a Court on record with a status equivalent to that of the High Court. The Tribunal would not handle private party disputes or appeals from other Tribunals.

The initial jurisdiction of the Environmental Tribunal would be appeals from specialised environmental agencies such as English Nature and the Environment Agency, appeals regarding industrial processes regulated by local authorities (IPC, IPPC), appeals in respect of contaminated land and appeals regarding statutory nuisance abatement notices.

Criminal offences for non-compliance of notices (for example statutory nuisance abatement notices), would remain in the Magistrates.

In the future, it might be possible that other matters could be transferred to the Tribunal.

The advantage of this approach is that it is cheaper to establish than a full Environmental Court, but would provide much needed clarity and streamlining of the environmental decision making process in England.

Environmental Justice. A Report By The Environmental Justice Project (ELF, Leigh Day & Co, WDF) (March 2004).

The Environmental Justice Project surveyed several respondents, including Solicitors, Barristers and NGOs concerning civil and criminal provision for environmental issues within the UK.

The criminal issues raised by the Environmental Justice Project mainly concern sentencing and the capacity/ability of Magistrates and Criminal Judges. I do not intend to examine the criminal aspects of the report in great detail.

97% of those surveyed believe that the civil law system fails to provide environmental justice in England and Wales.

Costs was identified as the single biggest impediment to the bringing of environmental cases. Many respondents stated that judicial review cases simply did not go ahead, despite the fact that they were arguable, because their clients could not afford the expense of Court proceedings.

Respondents were also concerned that the judiciary demonstrated a lack of understanding on environmental issues. However, it was noted that there was a distinction in this arena between private claims relating to property damage and nuisance, which seemed to receive a fair hearing from the Courts, and private law claims in relation to environmental personal injury and public law claims, which seemed to be discriminated against by the judiciary.

Over a quarter of respondents raised the limited scope of judicial review as the problem. The fact that judicial review could not review a decision on its merits was a big issue for a lot of respondents.

Respondents were also concerned at the relative difficulty in obtaining interim injunctive relief and the issues related to standing.

Finally, the absence of public funding for third parties in Planning Inquiries was perceived as a problem.

The report presents 3 realistic options for addressing the current problems with the provision of environmental decision making in England and Wales as follows:-

1. Environmental Court.

   The EJP proposal is that the Court would hear all environmental cases, including judicial review, statutory applications and appeals to the High Court. EJP suggests that Judges could be appointed from beyond the bar to represent a wider range of interests. It is suggested that Judges in the Environmental Court should have the power to certify whether a case falls within the scope of Aarhus or is otherwise in the public interest. If Judges so decide, a case could be proceeded subject to special costs rules. Finally, EJP suggests that judicial review should be revised so as to encompass both issues relating to both procedural and substantive legality (including merits).

2. Environmental Tribunal (The UCL Model).

3. Amendments to the CPR and Practice Directions.

   Several respondents stated that they were of the opinion that an Environmental Court or Tribunal would be detrimental to the status of environmental law in England and Wales. They were concerned that if environmental interest issues were removed from the mainstream, they would continue to be perceived as secondary to financial and social interests.

The CPR and associated Practice Directions could be amended so that public interest cases would enjoy special status. Judges would be empowered to certify that a case was in the public interest. Thereafter, the revised costs regime would apply to such cases and/or there would be a presumption against the requirement to provide an undertaking on costs, to get injunctive relief.

The EJPs recommended option is a full Environmental Court.

In their opinion, environmental decision taking will not be given the precedence it requires within England and Wales until it is separated out from other issues. Environmental protection and enhancement are a fundamental part of sustainable development and so should enjoy special treatment within an Environmental Court.

Equally, environmental laws are based on scientific and technical issues and so require special treatment.

The provision of an Environmental Court would simplify the structure and procedure of claiming environmental relief for Claimants.

The EJP comment that it need not be prohibitively expensive to form a special Environmental Court. Rather, the Court could be a specialist arm of the High Court in much the same way as the Technology and Construction Court is.

The EJP would recommend that the Planning Inspectorate should retain its jurisdiction over the environmental matters it currently handles, but would not support a Court or Tribunal which was as limited in remit as the Tribunal proposed by UCL.

Conclusions.

Unsurprisingly, the following issues arise as being of central concern to the respondents in all of the above reports:-

1. Costs.

2. Standing.

3. Technical knowledge/competence of Magistrates/Judiciary.

4. Complexity of current processes.

5. The pressure on judicial review and the limited scope of judicial review.

6. Bias of adjudicators towards development and commerce. The Capacity Global report was the only one which interviewed community groups rather than lawyers and/or the judiciary. Although they are also concerned about costs, they seem most dismayed by the lack of access to specialist legal advice and information about environmental cases, and the possibility of environmental redress within England and Wales.

Perhaps the strongest argument for the establishment of an Environmental Court or Tribunal is that it will be more visible to those community groups who feel "lost" in

the present system. However, it is clear that the establishment of an Environmental Tribunal or Court without also dealing with costs, standing and technical issues would be pointless.

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