Going Green at the Gill Review?
The Potential Implications of the Scottish Civil Courts Review for Environmental Justice in Scotland

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Abstract

This article analyses the Scottish Civil Courts Review’s recommendations on standing for judicial review and funding public interest litigation, and their potential implications for environmental justice in Scotland, if implemented.

The methodology adopted is one of firstly analysing the concept of environmental justice to obtain a working definition and highlight the importance of the civil justice system to environmental justice in Scotland. Each of the two proposals are then examined individually; analysing the current law in both areas, reflecting on the environmental justice issues created by the status quo, and then investigating the proposed reforms and their potential implications for environmental justice. In the first instance, it finds that the current law relating to the standing requirements in Scotland is restrictive, antiquated and unclear; inhibiting access to the remedy of judicial review. It is suggested that adopting the recommended test of ‘sufficient standing’ will have an analogous effect to that seen in England (where it is also used); liberalising and clarifying the standing test, widening access to the remedy of judicial review and improving environmental justice in Scotland.

Secondly, the Review recommends that an express power be made whereby a court may grant a ‘protected costs order’, protecting litigants who act in the public interest from paying the other party’s expenses if they are unsuccessful. The threat of having to pay the opposing party’s costs can present a major hurdle to litigants in public interest environmental cases, acting as a deterrent against accessing legal remedies to environmental problems. It is found that, if definitional and jurisprudential problems surrounding the test which a court uses when deciding whether to grant a protected costs order can be resolved, the recommendation may represent a step forward for environmental justice. However, protected costs orders will not fully solve the predicament faced by those unable to meet the costs of litigation in Scotland.

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1. Introduction

The structural and functional flaws in the working of the Scottish civil courts prevent the courts from delivering the quality of justice to which the public is entitled. The Scottish civil courts provide a service to the public that is slow, inefficient and expensive. Their procedures are antiquated and the range of remedies that they can give is inadequate. In short, they are failing to deliver justice.¹

The Report of the Scottish Civil Courts Review (Gill Review) was carried out under the auspices of a perceived need from the Scottish Government to modernise the Scottish civil justice system.²

The Gill Review has not pulled its punches in carrying out its remit. Within two paragraphs Lord Gill makes clear of his opinion that Scotland’s civil justice system, ‘is seriously failing the nation. Reform is long overdue’.³ The review presents a wide raft of proposals to modernise the Scottish civil justice system.⁴ Lord Gill himself has described the proposals as ‘pragmatic’, not ‘revolutionary’,⁵ but some are of the opinion that if implemented, the Gill Review’s suggestions on the delivery of civil justice in Scotland could be radical in effect.⁶

The Gill Review has some, albeit slight, foundation in seeking to augment environmental justice in Scotland. The links between civil justice reforms and promoting environmental justice were recognised by the Scottish Executive prior to the Gill Review.⁷ It is of note that the aim of the review was to provide an examination into the provision of civil justice in Scotland generally; there was never an explicit environmental justice agenda behind the Gill Review.

Lack of specific motive aside, two of the recommendations of the Gill Review may have the potential to make significant contributions to environmental justice in Scotland. The proposals would see a change in the current rules on standing for judicial review, and a clarification of the

² The Scottish Executive’s plans for review were contained in a short policy document; *Modern Laws for a Modern Scotland - A Report on Civil Justice in Scotland* (Scottish Executive, February 2007). This contained the aspirations of improving access to civil justice, delivering proportionality and deriving ‘value for money’ from the civil justice system.
³ Gill Review at p. i para. 2.
⁴ It proposes, *inter alia*, making fundamental changes to the structure of the civil court system (Chapter 4), altering the case management system (Chapter 5), improving the arrangements for multi-party actions (Chapter 13) and making extensive changes to the requirements for standing and availability of funding for judicial review (Chapter 12).
⁵ J Forsyth, “Gill review a reminder civil justice is there to help public” *The Scotsman* (Edinburgh, May 5th 2009).
⁶ Ibid. D Armstrong argues also that the proposals would ‘represent a massive step forward for civil justice in Scotland’; D Armstrong, “Civil justice in Scotland could take giant leap with Gill report” *Legal Week* (London October 14th 2009).
Scottish Courts’ power to issue ‘protective cost orders’ (PCOs) to litigants acting in the public interest.\(^8\)

This article will initially explore what is meant by ‘environmental justice’ to provide a theoretical basis for reviewing the recommendations of the Gill Review against its criteria. The main body of the study will then examine the two parts of the Scottish civil justice system which have been targeted by recommendations for change by the Gill Review of the most significance for environmental justice in Scotland (outlined above). The current law in both areas and the respective environmental justice issues arising from the *status quo* will be discussed first, followed by the recommendations for change suggested by the Gill Review and an analysis of their potential implications for environmental justice.

### 2. Environmental Justice

#### A. Origins of the Concept

Environmental justice is generally recognised to have been conceived during the tail end of the struggle for civil rights in the USA in the late 1970s and 1980s, amidst recognition of the lack of distributional equity of environmental pollutants and ‘locally undesirable land uses’\(^9\) amongst different racial groups. The original term used was ‘environmental racism’,\(^10\) reflecting its origins as a concern of institutionalised racism manifesting itself in the form of a higher level of environmental pollutants in ethnic communities in the USA.

Several studies recognised that poorer, black communities were being forced to bear an inequitable level of environmental burdens.\(^11\) Accusations of institutionalised racism combined with environmental concerns when the State of North Carolina decided to dump PCB-contaminated\(^12\) soil beside a predominantly non-white community in Warren County. This act saw the

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9 Such as hazardous waste facilities, solid waste disposal sites, heavy industries and contaminated industrial sites.

10 Said to have been coined by Benjamin Chavis, former head of the United Church of Christ’s Commission on Racial Justice, following his participation in the 1982 Warren County protests. This is referred to by both R Holyfield, ‘Defining Environmental Justice and Environmental Racism’ (2001) 22(1) Urban Geography 78, at p. 83, and C Foreman, *The Promise and Peril of Environmental Justice* (Brookings Institution Press, 1998) at p. 10.


12 Polychlorinated biphenyls (PCBs) are highly toxic man-made chemicals used in coolants, lubricants and in electrical insulation.
local community mobilise in opposition against the perceived injustice of locating such a facility beside an ethnic community, and is regarded as the ‘watershed moment’ which brought the notion of environmental justice into the wider American consciousness.\(^{13}\)

Environmental justice has grown in recognition from its early roots as a primarily radical issue. The movement blossomed in the late 20\(^{th}\) century in the USA, becoming an institutionally accepted concern as Bill Clinton signed a Presidential Executive Order to federal agencies to address environmental injustice.\(^{14}\)

The concept has also expanded theoretically. There has been an evolution from what began as a one-dimensional focus on ‘environmental racism’ to the contemporary definition of ‘environmental justice’; a more neutral, multi-faceted term. Environmental justice has evolved from its ancestry as a purely reactive, distributive paradigm.\(^{15}\) It was identified that there was a need to look towards the institutional and social processes which were the root of the distributional inequities, and the concept has evolved accordingly.\(^{16}\)

B. Attempting a Definition

Environmental justice encompasses a wide spectrum of interests, distant from its parochial beginnings.\(^{17}\) These include the human right to a healthy and safe environment, the right not to suffer disproportionately from environmental laws, policies and decisions and the right of access to information, participation and decision-making in environmental matters. The essence of the environmental justice movement is about changing institutional structures which cause inequitable patterns of distribution, by challenging the *status quo* and ensuring the empowerment and inclusion of those suffering environmental injustice. Low describes it as ‘both a creative leap and a challenge to the environmental movement’ in this regard.\(^{18}\) Torres

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\(^{13}\) R Bullard states that the Warren County protests, ‘marked the first time African Americans mobilized in such broad opposition to what they defined as environmental racism’; R Bullard, ‘Race and Environmental Justice in the United States’, (1993) 18 Yale Journal of International Law 319.

\(^{14}\) USA Presidential Executive Order 12898, 11/02/1994.

\(^{15}\) S Foster argued in the 1990s that evolution from the position of the distributive hypothesis as its *sine qua non* was critical to environmental justice’s survival, as a sole focus on the distribution element neglects other conditions required for justice; S Foster, ‘Justice from the ground up: distributive inequities, grassroots resistance and the transformative politics of the environmental justice movement’ (1998) 86 California Law Review 775.


\(^{17}\) The wide range of social and environmental aspirations sought by Environmental Justice is clearly seen in the *Principles of Environmental Justice*, drafted at the First National People of Colour Environmental Leadership Summit in Washington DC, in 1991.

\(^{18}\) N Low, *Global Ethics and Environment* (Routledge, 2000) at p. 3.
contends that it causes us to ‘examine our normative assumptions and perhaps lead us to conceive of new forms of justice’. 19

Dunion proposes a contemporary Scottish definition; environmental injustice exists where ‘authorities fail to afford or uphold rights; where people are unable to participate in the decision-making processes which affect them and where the means of redress are inaccessible’. 20

It is proposed that there are two key elements which underpin the concept. 21 The distributive element of environmental justice requires that environmental equity is secured on a local, national and international level to help ensure that everyone enjoys a clean, healthy environment regardless of where they live or their background.

Secondly, the procedural element of environmental justice requires procedural equity 22 in relation to the environment. 23 This necessitates access to the law to resolve environmental problems, uphold environmental laws and provide an opportunity for people to have a voice in relation to their environment. 24 The Environmental Justice Project describes procedural environmental justice as, ‘the ability for concerned citizens and public interest groups to: access the courts and judicial advice at reasonable cost; be provided with a fair and equitable platform for the treatment of environmental issues and; obtain adequate and effective remedies (including interdictive relief) for environmental offences’. 25

The Gill Review proposes reforms to the procedural remedies available to those seeking environmental justice. These reforms concern procedural, not distributive, issues of environmental justice. This article will

24 P Stookes, Civil law aspects of environmental justice (Environmental Law Foundation, 2003) at para. 7.
be purely concerned with the potential implications of its recommendations for procedural environmental justice.

C. Criticisms of Environmental Justice

Criticisms of environmental justice abound, perhaps largely due to it being an activist-created concept, avoiding academic scrutiny in its formative years. Two main criticisms can be made; a lack of definition and a parochial focus on the distributive element.

Firstly, environmental justice is notoriously difficult to define. The ‘Principles of Environmental Justice’ remain the closest which the movement has come to a definitive evocation. Foreman criticises these as ‘an unwieldy list of seventeen principles cobbled together’. They are vaguely worded, and wide ranging to the point of absurdity.

Szasz observes that environmental justice displays ‘an untroubled eclecticism, a coexistence of multiple political symbol systems that have little in common except that they can be mobilized to legitimate a position of radical critique and activism’. The absence of a robust definition leaves the concept open to interpretation, but equally it allows flexibility to combine support for a range of social and environmental aims.

Secondly, the interpretation of inequitable distribution patterns of environmental pollution amongst particular groups of society as demonstrating institutional prejudice within decision-making bodies suffers several flaws. Such a pattern may instead relate to a market failure; often environmental pollution will devalue land in an area, making it more likely that ‘environmental injustices’ are instead reflections of the fact that such land is cheaper for impoverished groups to live there. Determining that uneven patterns of environmental burdens evinced amongst certain social

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26 G Torres notes that environmental justice was ‘rooted in local activism’, meaning that it was ‘without regard to the methodological rigour demanded by scholars’; G Torres (n 19) at p. 601.

27 A common problem for most principles or concepts in environmental law. See N De Sadeleer, Environmental Principles: From Political Slogans to Legal Rules (Oxford University Press, 2002).

28 C Foreman, The Promise and Peril of Environmental Justice (n 10) at p. 112.


30 An analogy may be drawn with the concept of ‘social justice’, and the similar tendency of its proponents to reduce its meaning to the morally proper distribution of benefits and burdens amongst society’s members. See I Young (n 16).

31 W Block and R Whitehead argue that, ‘in a free market, they (polluting industries) will tend to be confined to poorer, (e.g. blacker) areas’; W Block and R Whitehead, ‘The unintended consequences of environmental justice’ (1999) 57 Forensic Science International 100 at p 63.

32 W Block and R Whitehead further contend that the poor bring environmental injustices upon themselves, ‘When offered a choice between a cheap dwelling with few environmental amenities, and an expensive one with many, they tend to choose the former’. ibid at p. 65.
groups are causally synonymous with active discriminatory processes, without research into the processes which cause such patterns, is methodologically flawed.\textsuperscript{33}

Achieving an exactly equal distribution of environmental burdens sought by the proponents of environmental justice may be extremely difficult, if not impossible. Nichols argues that a failure by proponents of environmental justice to accept that some environmental pollution is inevitable, and the subsequent reluctance to set priorities based on levels of risk can worsen the inequities experienced by minority or otherwise disadvantaged communities.\textsuperscript{34} Foreman contends that this reliance on a ‘nobody should suffer’ position can have perverse effects.\textsuperscript{35}

Can environmental justice ever be fully achieved? The aspiration of seeking equity in the distribution of environmental burdens may well prove an impossible goal. Achieving procedural environmental justice may be a more realistic aspiration than its distributional counterpart; and the procedural element may facilitate its distributive equivalent also.\textsuperscript{36}

If it cannot be achieved, then why seek to promote environmental justice? Adherence to the concept of environmental justice can change the traditional decision-making processes which affect the environment; empowering communities so that unfair burdens are not imposed on any one area or class of society as the consequence of institutional bias or exclusion.

D. Environmental Justice in Scotland

Environmental justice has not achieved the special status within Scotland that it has been accorded within the USA; however it has received some degree of institutional recognition and strong support from environmental non-governmental organisations (NGOs).\textsuperscript{37} In a 2002 speech, the then First Minister Jack McConnell gave Scotland’s first official recognition of environmental justice, committing the Scottish Executive to its agenda: \textsuperscript{38}

\begin{itemize}
  \item \textsuperscript{34} See A Nicholls, ‘Risk-Based Priorities and Environmental Justice’ in A Finkel and D Golding (eds), \textit{Worst Things First?: The Debate over Risk-Based National Environmental Priorities} (RFF Press, 1995) at p. 268.
  \item \textsuperscript{35} “…[H]onestly confronting the reality that no environmental amenity (with the possible exception of planetary gravity) is equally distributed may help make citizens more likely to ask hard questions about which equities matter most.”; C Foreman (n 10) at p. 119.
  \item \textsuperscript{36} D Schlosberg (n 22) at p. 13. A Slater and O Pedersen also note that ‘Environmental justice is also regarded as a procedural mechanism that aims to make the process of environmental decision making open and inclusive and thereby, avoiding environmental injustice; A Slater and O Pedersen (n 23) at p. 799.
  \item \textsuperscript{37} Friends of the Earth Scotland have adopted environmental justice as one of their aims, currently manifested in the ‘Access to Justice’ campaign, see <http://foe-scotland.org.uk/access-to-justice-about>.
  \item \textsuperscript{38} Jack McConnell, “Environmental Justice” \textit{Dynamic Earth} (Edinburgh, February 18\textsuperscript{th} 2002).
\end{itemize}
The people who suffer most from a poor environment are those least able to fight back, and I believe government is about standing up for them and changing that situation... I believe the biggest challenge for the early 21st century is to combine economic progress with social and environmental justice.

This watershed moment for Scottish environmental justice was followed by several academic and governmental studies on the level of environmental justice within Scotland. Research revealed a differing Scottish narrative from that seen in America; portraying a pattern of distributional environmental injustice based on social deprivation, not race. Several policy changes were then made by the Scottish Executive to take account of this new aim. However, academic opinion on the effect of the changes made has been that they are mainly cosmetic, and that many of the changes...

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40 Investigating environmental justice in Scotland: links between measures of environmental quality and social deprivation (SNIFER, 2005), found strong links between deprivation and exposure to industrial pollution, derelict land, river water quality and air quality in Scotland. See executive summary at p. 14. Public Attitudes and Environmental Justice in Scotland (Scottish Executive, 2005) found that those living in deprived areas in Scotland reported a much higher level of 'environmental than those in the least deprived areas. See p. 28, para. 3.27.

41 Scottish Labour Party and Scottish Liberal-Democrats coalition agreement, A Partnership for a better Scotland (The Scottish Government, 2003), contained an explicit commitment to environmental justice at p. 5. An environmental justice fund was created by the Scottish Executive, however this operated only in 2007-2008, offering grants totalling £2 million to fund community projects tackling environmental injustice. Land use policy has been strongly affected by the concept: SPP 16 has been amended to reflect the aims of environmental justice and the Planning Act 2006 reflects an environmental justice agenda; E Scandrett argues that its mechanisms to increase greater community involvement ‘provides probably the most significant opportunity for the provision of environmental justice; E Scandrett ‘Environmental justice in Scotland: policy, pedagogy and praxis’ (2007) 4(2) Environmental Research Letters 045002 at p. 3. SEPA has had its statutory responsibility to environmental justice clarified by ministerial guidance: Statutory Guidance to SEPA made under s. 31 of the Environment Act 1995, (December 2004, Paper 2004/21, Scottish Executive). The Scottish Executive’s sustainable development strategy, Choosing our Future, now contains a section focused on environmental justice; Scottish Executive, Choosing our Future: Scotland’s Sustainable Development Strategy (Scottish Executive, 2005) Section 8.

42 W Maschewsky is critical of the Scottish Executive’s approach to environmental justice, stating that, ‘The Scottish Executive, central and local authorities seem not to have a clear strategy - let alone "masterplan" - for EJ. See W Maschewsky, Environmental justice in Scotland - just words? A view from outside (Friends of the Earth Scotland, 2005) at p. 25. E Scandrett is of the opinion that the Scottish Executive displays an ‘econocentric’ attitude to environmental justice, asserting that a ‘policy division between entrepreneurial growth and more socially equitable interpretations of environmental justice lie at the heart of its progress through policy. E Scandrett, ibid at p. 3.
made were due to international obligations rather than a coherent environmental justice strategy from the Scottish Executive.43

Most of the research on environmental justice in Scotland has focussed on distributional issues.44 By contrast, the status of procedural environmental justice in Scotland remains poorly understood, with limited academic work on the subject.45 McCartney comments that, ‘there has been no comprehensive review of how the system of environmental regulation provides opportunities for participation’.46

In England and Wales, various wide-ranging academic studies have created awareness of the ways in which the legal system affects environmental justice.47 It is submitted that a wide scale review of the legal system is imperative for the evolution of procedural environmental justice in Scotland.

E. Relationship between Civil Justice Reforms and Environmental Justice

Adebowale has proposed that the system which is adopted by a state in its provision of civil legal justice is fundamental in promoting environmental justice; as it offers ‘a tool for recognising environmental citizenship. . . the ability to participate in civil, political and administrative structures’,48 but that it is only effective if universally accessible. Conditions for universal accessibility include provisions for payment of legal costs, sufficient provision of information on legal remedies for environmental issues and a lack of restrictions on standing to have a case heard.

The manner in which civil justice is delivered has wide-reaching consequences for procedural environmental justice. Ostensibly benign schemes of rules of legal practice, legal rights and procedure can serve to

43 A Slater and O Pedersen, state that, ‘the actual translation of policy to legislative change has in fact been rather small. Those that have been implemented have, with a few exceptions, been due to international commitments rather than a grassroots approach to reform by the Scottish Executive’; A Slater and O Pedersen (n 23) at p. 809.

44 Two reports have concluded that there is a lack of distributional environmental justice amongst the Scottish population, with those living in poverty also living in the worst quality environments. See (n 40).


Going Green at the Gill Review

justify the status quo, concealing oppression and domination within society whilst establishing formidable barriers to social change.\textsuperscript{49} Identifying and addressing barriers on access to the courts for environmental matters can ensure that Scottish citizens have a means of redress to combat environmental injustices.


The Gill Review’s recommendations to improve the Scottish civil justice system are numerous and far reaching.\textsuperscript{50} In the interests of brevity, only those changes of the greatest importance to environmental justice will be analysed.

Firstly, the potential effects of the recommendations to change the rules on standing for judicial review will be examined. Secondly, the possible ramifications of the proposal to clarify the power of the courts to make PCOs for ‘public interest’ litigants will be investigated.

A. Standing for Judicial Review

(i) Introduction to judicial review

Judicial review is a procedure whereby the exercise of a delegated discretionary power is subjected to judicial oversight, to ensure that the power has been exercised for its lawful purpose. Judicial review has evolved in Scotland based on the principle that ‘every wrong must have a remedy’\textsuperscript{51} an expression of the nobile officium\textsuperscript{52} of the Court of Session.

Judicial review allows an applicant to challenge the procedural legality of an administrative act or decision, but not the substantive basis of a decision.\textsuperscript{53} O’Neill compares the Court of Session’s role to that of a ‘schoolmaster who does not tell his pupils the answers to a problem but instead advises them they have got it wrong’.\textsuperscript{54}

\textsuperscript{50} See (n 4).
\textsuperscript{51} Lord Clyde, “Public Law in Scotland” (Address to the Murray Stable Public Law Group, November 10\textsuperscript{th} 2008).
\textsuperscript{52} The inherent equitable power of the Court of Session to provide a remedy where no other exists.
\textsuperscript{53} The scope of judicial review was summarised by Lord Clyde in R v Secretary of State for Scotland 1999 SC (HL) 17 at 41. D Hope notes that judicial review is not solely restricted to the decision making of public bodies, it extends to private bodies as well; D Hope, ‘Mike Tyson comes to Glasgow - a question of standing’ (2001) Public Law 294 at p. 297.
\textsuperscript{54} A O’Neill, Judicial Review in Scotland, A Practitioner’s Guide (Butterworths, 1999) at p.4, para. 1.09.
Democracy and Judicial Review

A fundamental unease surrounds the notion of an unelected judiciary reviewing the decisions of an elected body or its representatives. Peiris contends that the use of judicial review creates the danger of legitimising a surrogate political process.\(^{55}\) Waldron argues that judicial review conflicts with democracy as it accords greater weight to individual opinions than would be afforded by electoral politics.\(^{56}\) Hutchison notes the existence of a troubling paradox at the root of judicial review; the aim of judicial intervention is to avoid a monopoly of power with its tendency to corrupt and curtail individual freedom, but in so doing, judges open themselves to the criticism that they are merely fortifying their own monopolistic position and power.\(^{57}\)

Proponents of judicial review argue that although the remedy does not offer a perfect democratic solution, inherent institutional democratic imbalances necessitate its use. Waldron concedes that, ‘in the real world, the realization of political equality through elections, representation, and legislative process is imperfect. Electoral systems are often flawed. . . and so are legislative procedures’.\(^{58}\) Lever argues that the legacy of inequality and undemocratic government will plague politics for a long time; inequalities of wealth and power taint the idealistic assumption that democratic elections provide unquestionable legitimacy.\(^{59}\) Judicial review provides another route to political participation out with the traditional political sphere, circumventing the inequalities which may exist in access to the original political debate.\(^{60}\)

Standing for Judicial Review

The law assumes that remedies are correlative with rights, and so only those whose own rights are at stake are eligible to be awarded legal remedies.\(^{61}\) This is an assumption of constitutional significance; at its heart is the

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\(^{57}\) A Hutchison, ‘The Rise and Ruse of Administrative Law and Scholarship’ (n 49) at p. 294.

\(^{58}\) J Waldren, ‘The Core of the Case Against Judicial Review’ (n 56) at p. 1389.


\(^{60}\) C Hilson and I Cram, ‘Judicial Review and Environmental law - is there a coherent law of standing?’ (1996) 16 Legal Studies 1 at p. 6.

question of whether the primary function of the court’s supervisory role is based on redressing individual grievances, or maintenance of the rule of law.\textsuperscript{62}

Few jurisdictions allow citizens unrestricted access to judicial review.\textsuperscript{63} Various types of restrictive tests are applied; Legere notes four different types of standing tests which apply in English law alone.\textsuperscript{64} Whilst this approach may be suitable for private law, in public law it may be criticised as inadequate as it disregards the public interest. Public authorities have wider public duties, particularly in the environmental sphere such as planning, where if permission is granted improperly it does a wrong to the public interest.\textsuperscript{65} If no-one has standing to call it to account, a public authority may disregard the law with impunity.

Harlow describes the need for restricted access to judicial remedies as one of maintaining the legitimacy of the legal system.\textsuperscript{66} She depicts the political process as a ‘freeway’,\textsuperscript{67} to which all citizens have access; whereas the legal system is different. Judicial decisions are reached by impartial arbitrators based on reasoned proof. The objective of the judicial system is the protection of legal interests, so access is restricted to those who can prove the existence of such interests.

There is also the fear that opening access to judicial review will ‘open the floodgates’ and swamp the courts with unmeritorious challenges. Restrictive standing rules thus conserve both administrative and judicial resources from such claims. However, Scott has argued that the notion of ‘a litigant who litigates for a lark, is a spectre which haunts the legal literature, not the courtroom.’\textsuperscript{68} Other safeguards exist which deter parties from bringing unmeritorious claims; particularly the time and effort required to litigate and the costs of doing so.

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\textsuperscript{62} H Woolf, J Jowell and A Le Sueur, \textit{De Smith’s Judicial Review} (Sweet and Maxwell, 2007) at p. 70, para. 2-003.
\textsuperscript{63} Unrestricted access to judicial review is known as an ‘actio popularis’, or ‘citizen action’. This allows unrestricted access to the courts for those purporting to act in the public interest. See De Sadeleer \textit{et al}, \textit{Access to Justice in Environmental Matters} (CEDRE, 2002) at p. 22. In Portugal, broad access is given to NGOs to review decisions and to claim compensation on behalf of the aggrieved party in order to preserve the environment (Art. 52(3)(a) of the Portuguese Constitution). De Sadeleer \textit{et al} notes that this ‘seemingly unrestricted right is in fact qualified in Art. 2 of the Portuguese Popular Action Law with requirements that environmental associations have to fulfil in order to be allowed to initiate proceedings before the courts’.
\textsuperscript{64} These are the tests of ‘sufficient interest’ for judicial review, ‘person aggrieved’ for making challenges under s. 288 of the Town and Country Planning Act 1990, ‘victim’ for those seeking to rely on European Human Rights Convention provisions and ‘direct and individual concern’ for those seeking annulment of an EU legal act; E Legere, ‘Locus Standi and the Public Interest: A Hotchpotch of Legal Principles’ (2005) 10 Judicial Review 128 at p. 128, para. 1.
\textsuperscript{65} \textit{ibid}.
\textsuperscript{67} \textit{ibid} at p. 2.
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A balance must be struck between maintaining the legitimacy of the judicial system, preventing a malicious or frivolous use of litigation; and ensuring that access to justice to challenge illegal administrative acts is not unreasonably impeded.\(^{69}\)

(ii) The relationship between access to judicial review and environmental justice

Judicial review allows the application of judicial oversight to administrative decisions where there is no other procedure available.\(^{70}\) Access to the remedy can often be the only way to challenge an executive act or omission which may cause environmental injustice. Judicial review allows a petitioner to challenge otherwise unfettered administrative discretion to ensure that the rule of law is adhered to for the benefit of people and the environment.

De Sadeleer argues that offering wider access to judicial review in environmental matters offers two further benefits which are of significance to environmental justice.\(^{71}\) Firstly, challenging administrative acts through judicial review can effect a broad change in general administrative practice. Benson \textit{et al} cites the advantage of ‘embarrassment potential’ in this regard.\(^{72}\) Environmental judicial review litigation can consequently ensure better enforcement of environmental law by an administration. Secondly, there are wider democratic aspects of increasing access to judicial review. High profile litigation can raise public awareness of a particular environmental injustice, having a public educational effect.

An example of the importance of access to judicial review for environmental justice may be seen in the English \textit{Lappel Bank} case.\(^{73}\) The RSPB challenged the Secretary of State for the Environment’s decision to exclude an area from designation under the EU Birds Directive because this would have restricted local economic development. Although the appeal was a failure in not preventing the area concerned from being developed due to the absence of interim relief, it elicited a landmark judgement from the ECJ on the implementation of European nature conservation legislation and the strict interpretation which this was to be given. Judicial review brought a legal precedent which ensured that only ornithological criteria

\(^{69}\) H Woolf, J Jowell and A Le Sueur argue that the conflict may be resolved by developing principles which determine who is entitled to bring proceedings; if satisfactory they should prevent only those litigants with no reason for bringing proceedings from doing so; H Woolf, J Jowell and A Le Sueur (n 62) at p. 69-70, para. 2-002. See also J St Clair and N Davidson, \textit{Judicial Review in Scotland} (Green and Son, 1986) at p. 65, para 5.03. and \textit{I.R.C. v National Federation of Self Employed and Small Businesses Ltd.} [1982] AC 617 per Lord Fraser.

\(^{70}\) T Mullen \textit{et al} describe judicial review as the remedy available to the citizen, ‘who wishes to challenge actions and decisions of government where no other procedure is available’; T Mullen \textit{et al}, \textit{Judicial Review in Scotland} (John Wiley and Sons, 1996) at p. 1. See also A O’Neill (n 54) ch. 1, ‘The Uses of Judicial Review’.

\(^{71}\) N De Sadeleer (n 63) ch. 3.

\(^{72}\) W Benson \textit{et al}, \textit{The Effectiveness of Enforcement of Environmental Legislation} (DEFRA, 2006).

\(^{73}\) \textit{R v Secretary of State for the Environment, ex parte RSPB} (Case C-44/95).
were to be taken into account when designating protected areas under the Birds Directive.

(iii) Standing for judicial review in Scotland

To apply for judicial review in Scotland a petitioner must meet a two-part legal test; displaying both title and interest to sue. Although frequently used in conjunction, title and interest are two separate legal concepts. These two tests will now be examined individually.

**Title to sue**

The requirement of proper title is intended to ensure that the litigant is the ‘proper person’ to initiate judicial review proceedings. The classic formulation of the test for title to sue was given in the *D & J Nicol* case, with Lord Dunedin stating that the applicant, ‘must be party (using the word in its widest sense) to some legal relation which gives some right which the person against whom he raises the action either infringes or denies’.

This approach has been affirmed recently. Lord Clarke confirmed that a petitioner seeking judicial review must show that, ‘having regard to the scope and purpose of the legislation, or measures, under which the act is performed, or the decision is made, he or they have had such a right conferred upon them by law, either expressly or impliedly’.

**Interest to Sue**

The test for interest to sue is used in Scotland to ensure that judicial review is only sought by those with some form of material interest in the issue at stake, in order to prevent interference from a ‘busybody’. Lord Arwall has explained that the interest test ensures that:

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74 It is of note that this does not apply for ‘public interest interventions’. Rule 58.8A of the Court of Session provides that a person who is not a party to a judicial review petition to seek leave to intervene on the basis that the proceedings raise a matter of public interest, the propositions to be advanced by the applicant are relevant and likely to assist the court, and the intervention will not prejudice the rights of the parties. See S Blair and S Martin, ‘Judicial Review 20 Years on - Where are we now?’ (2005) 31 SLT (News) 173 at p. 176.

75 J St Clair and N Davidson (n 69) at p. 64, para 5.01.

76 *D & J Nicol*, 1915 SC (HL) 7, as per Lord Dunedin at 12.

77 Rape Crisis Centre v Secretary of State for the Home Department, 2000 SC 527 as per Lord Clarke.

78 *Swanson v Mason*, 1907 SC 426, as per Lord Arwell at 429. A comment may be made on the above quotation in reference to the actual current state of Scots law; the reference to a ‘pecuniary right or status’ is not to be regarded as a complete, or exhaustive, definition of the type of interest required. There is also the issue of the lack of distinction between whether the issue is a material one and the question of whether the petitioner has an interest to sue.
(1) the law courts of this country are not used for the purpose of deciding academic questions of law, but for settling disputes where any of the lieges has a real interest to have a question determined which involves his pecuniary right or his status; and (2) that no person is entitled to subject another to the trouble and expense of litigation unless he has some real interest to enforce or protect.

The courts have deemed the interest which the party is seeking to protect must be a matter of ‘real or immediate concern’ which will be prejudiced by the decision complained of. The Independent Broadcasting Authority case further elucidated that an economic interest was not necessary to meet the requirements of the test and that an interest may be derived from membership of a group with a relevant set of beliefs.

The difficulties in defining the interest required by an applicant for judicial review were discussed in the Scottish Old People’s Welfare Council case:

There must be a real issue. But the existence of a sufficient interest is essentially a matter depending upon the circumstances of the particular case. The variety of adjectives which are employed to describe the quality of interest required by law reflects the difficulty of defining any single criterion.

(iv) Current law on standing: perpetuating environmental injustice?

The Scottish approach to standing for judicial review may be described as a restrictive one, preserving administrative efficiency by making executive decisions difficult to challenge. It is submitted that the current Scottish law on standing has two flaws which make it overly restrictive; thereby perpetuating environmental injustice by restricting access to judicial review.

Firstly, the test for title to sue adopts a ‘narrow approach’ which limits access to judicial review to those who can show some infringement of a legal right. This requirement is founded on an antiquated private law.

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79 Air 2000 v Secretary of State for Transport (No. 2), 1990 SLT 335, as per Lord Clyde at 339.
80 It is of note that environmental NGOs are afforded automatic interest to sue under the Environmental Impact Assessment (Scotland) Regulations 1999 (SSI 1999/1). Regulation 46A provides that, ‘[A]ny non-governmental organisation promoting environmental protection and meeting any requirements under the law shall be deemed to have an interest for the purposes of Article 10a(a) of the Directive and rights capable of being impaired for the purposes of Article 10a(b) of the Directive’, however this only applies to applications relating to environmental impact assessments. It refers to EU Directive 2003/35/EC providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment and amending with regard to public participation and access to justice.
81 See Wilson v Independent Broadcasting Authority, 1979 SC 351. at 357.
83 See J St Clair, and N Davidson (n 69) at p. 66, para. 5.06. C Reid also makes this observation in several of his works: C Reid, ‘Legal Standing in Scotland’ in D Robinson and J Dunkley, Public Interest Perspectives in Environmental Law (Wiley Chancery, 1995); C Reid ‘Environmental Citizenship and the Courts’ (2000) 2 Environmental Law Review 177 at p. 178; C Reid, Environmental Law in Scotland (2nd edn W Green & Son Ltd, 1997).
approach to standing; requiring that an applicant must have a personal legal interest which is being infringed to access a public legal remedy. Lord Hope has argued that this creates the, ‘risk of being out of touch with the public interest in having matters of that kind, about which a section of the public has a genuine grievance, litigated in the courts’. 84

In the absence of environmental rights, such as the acclaimed ‘right to a clean environment’, 85 often instances of illegality in environmental decision-making will not infringe a private legal right. This may be demonstrated by a recent, unsuccessful petition to suspend work on an area of sand dunes in Aberdeenshire so that an environmental impact assessment could be performed. 86 The public interest in ensuring that hard-fought environmental laws are applied stringently is dispensed with by the current test for title to sue. Consequently, environmental decision-makers may disregard the law with impunity; to the detriment of environmental justice.

A further corollary of the requirement for the infringement of a legal right is that environmental interest groups will often lack title to sue, as it may be difficult to have representative judicial review brought by a body which is itself not affected. 87 Often environmental interest groups will instead attempt judicial review in England where the test for standing is clearer and less restrictive. 88 Blair and Martin cite the example of Greenpeace’s decision to bring proceedings in England to challenge ministerial approval of the disposal of the Brent Spar oil platform in Scottish waters, on the basis of an opinion from a Scottish QC on problems that they would have in showing that they had standing in Scotland. 89 The status quo risks overburdening English courts and creates an anomalous situation

84 D Hope (n 53) at p. 306.
86 Forbes v Aberdeenshire Council and Trump International Golf Links [2010] CSOH 01. The petition of Aberdeenshire resident Mary Forbes for interim orders suspending work on stabilising the sand dunes on the site of the proposed golf course was rejected due to, inter alia, the lack of title to sue as she was not directly affected by the works. Lady Smith states at para. 26 that ‘so far as title and interest is concerned, the facts...do not show that she is affected in some identifiable way’. The illegality of the decision that the work did not require an EIA is not assumed; this example is merely used to show how legitimate questions of procedural legality concerning the environment are avoided due to the restrictive test of standing used in Scotland.
87 Noted by Lord Clyde, “Public Law in Scotland”, (Address to the Murray Stable Public Law Group, November 10th 2008).
whereby a petitioner elsewhere in the UK may have less constrained access to judicial review than the petitioner in Scotland, despite their case having an identical legal and factual background. Furthermore, where there is an issue of Scottish public interest at stake, it has been suggested that such cases would be better dealt with in Scotland.

Secondly, the test for interest to sue is insufficiently clear to allow an applicant to determine whether or not (s)he will be determined to have standing to petition the court for judicial review. The question of standing is logically prior to any other when raising a petition for judicial review, and should be dealt with at the outset of litigation. The lack of clarity in this area of the law can act as a barrier to procedural environmental justice. Potential applicants cannot initiate an application for judicial review fully confident that they will meet the test, and are thus discouraged from accessing a legal remedy essential to challenging environmental injustices.

O’Neill observes that ‘questions as to the extent of title and interest needed to give an individual sufficient standing to be able to challenge national measures on environmental law grounds have not yet been satisfactorily addressed or answered’. He further argues that there has been unwillingness shown by the Scottish courts towards addressing the issue, and when combined with a tactical policy by the Scottish Government not to challenge title and interest in environmental cases to avoid the possibility of an ‘unwelcome precedent’, the result is further uncertainty in this area of law.

(v) Recommendations of the Gill Review on standing for judicial review

The Gill Review recommends a comprehensive change in the test of standing for judicial review in Scotland. It makes several criticisms of the existing Scottish law, recognising the current law on standing as being ‘too restrictive’.

The Gill Review makes the recommendation that the Scottish requirement for standing be replaced by a single test of ‘whether the petitioner has demonstrated a sufficient interest in the subject matter of the

90 J St Clair and N Davidson note that ‘to the extent that Scots law takes a restrictive view of title and interest, there is the anomaly that the petitioner elsewhere in the UK may have freer access to judicial review that the petitioner in Scotland’; St. Clair and N Davidson (n 69) at pp. 72-73, para. 5.15.
91 D Hope argues that ‘it would surely be better that serious issues of public interest should be determined in their own courts’; D Hope (n 53) at p. 304.
92 A O’Neill (n 54) at p. 263, para. 9.60.
93 ibid at p. 266, para. 9.67.
95 Gill Review, Vol II, at ch. 12, p. 29, para. 25. The Gill Review makes an explicit acknowledgement that the current Scottish test may breach Scotland’s requirements on ensuring access to environmental justice under the Aarhus Convention, at p. 28, para. 19. See pp. 27-28 for further criticisms of the Scottish test for standing.
proceedings’.96 The implications of this new test for environmental justice in Scotland will now be assessed.

(vi) Analysis - implications of the new test for environmental justice in Scotland

An identical test of ‘sufficient interest’97 is used in England; thus a comparative analysis is useful to understand the implications for environmental justice in Scotland if the Gill Review’s proposal is adopted.

‘Sufficient Interest’ in England

In England, the test of sufficient interest is recognised as providing a relaxed, liberal approach to standing, regarding it as a threshold question for an applicant.98 It has allowed applicants, despite having no legal rights being infringed by an administrative act, to draw a court’s attention to an apparent misuse of public power.99 It is thus said to be a relatively low hurdle for applicants to overcome,100 one whose height is being continuously lowered by a liberal English judicial approach.101

The use of the sufficient interest test has allowed environmental interest groups such as Greenpeace,102 the World Development

96 ibid p. 29, para. 25.
97 s. 31(3) Supreme Court Act 1981 provides that ‘the court shall not grant leave [for judicial review] . . . unless it considers that the applicant has a sufficient interest in the matter to which the application relates.’
98 The English approach is based on Lord Diplock’s rationale, in I.R.C. v National Federation of Self Employed and Small Businesses Ltd. [1982] AC 617. N De Sadeleer et al, note the existence of three different approaches to standing in a comparative study of EU member states in N De Sadeleer et al, Access to Justice in Environmental Matters (CEDRE, 2002) at pp. 21-22. J St Clair, and N Davidson comment that ‘[I]n England the courts have adopted a liberal approach to title and interest or locus standi, and it is now rare for anyone with a bona fide interest to be turned away’; J St Clair and N Davidson (n 69) at p. 66, para. 5.07. A O’Neill, remarks that ‘[I]n general the English courts have . . . interpreted the test on standing liberally’; A O’Neill (n 54) at p. 175, para. 6.05. N Sheridan, remarking on the English law of standing in environmental matters, states that ‘[A] number of themes can be seen in the development of the case law on standing: The general approach of the court to standing is a liberal one; Financial interest may be sufficient but will seldom if ever be necessary’; N Sheridan, Measures on access to justice in environmental matters (Article 9(3)): Country report for United Kingdom (Milieu Environmental Law and Policy, 2006) at p. 11, s. 2.2.2.
99 I.R.C. v National Federation of Self Employed and Small Businesses Ltd. [1982] AC 617, as per Lord Diplock. See also W Wade and C Forsyth (n 61) at p. 682; Regina (Feakins) v Secretary of State for the Environment, Food and Rural Affairs [2004] 1 WLR 1761 and; R v Somerset County Council ex p Dickson [1998] Env.LR 111 per Sedley J at 7.
100 E Legere (n 64).
101 M Beloff (n 88) at p. 96, para. 17.
102 R v HM Inspectorate of Pollution, ex parte Greenpeace Ltd (No. 2) [1994] 4 All ER 329.
Moveinent,\textsuperscript{103} Friends of the Earth\textsuperscript{104} and the less familiar Buglife\textsuperscript{105} standing for judicial review in England, allowing them to contribute to environmental justice by challenging a variety of administrative decisions which impact on the environment.

\textit{Implications of the new test for Scotland}

Whilst the new test perhaps does not represent as radical a move as Joseph Sax’s famous Michigan Environmental Protection Act 1970,\textsuperscript{106} it is submitted that it could be of considerable benefit for enhancing procedural environmental justice in Scotland for two reasons.

Firstly, it would liberalise the test of standing. The requirement for ‘sufficient interest’ would allow a wider range of interests than at present to access judicial review. It is submitted that it would address the uncertainty surrounding whether individuals can challenge national measures on environmental law grounds by removing the need for an infringement of a legal right. It would also allow Scottish environmental interest groups access to judicial review.\textsuperscript{107} Wider access to judicial review would allow individuals and interest groups\textsuperscript{108} a potent weapon to ensure that the rule of law is adhered to in administrative decisions, combating environmental injustice in Scotland.

Secondly, it would bring clarity to the law. Potential litigants would be far better positioned to assess their eligibility, having no longer to face the uncertainty as to whether a court may reject their petition on grounds of a lack of standing.

\textsuperscript{103}R v Secretary of State for Foreign Affairs, ex parte World Development Movement Limited [1995] 1 All ER 611.
\textsuperscript{104}R v Secretary of State for the Environment, ex parte Friends of the Earth [1994] 2 CMLR 760 and R v Secretary of State for the Environment, ex parte Friends of the Earth [1996] 1 CMLR 117 CA.
\textsuperscript{106}See s. 2(1) Michigan Environmental Protection Act. It was described at its inception as being ‘the most revolutionary measure to have been enacted in . . . environmental law’; J Thibodeau, ‘Michigan’s Environmental Protection Act of 1970: Panacea or Pandora’s Box’ (1970-1971) 48 Journal of Urban Law 579 at p. 579.
\textsuperscript{107}See (n 102-105).
\textsuperscript{108}Academic concerns have been expressed over the ability of environmental interest groups to contribute to environmental justice. C Nadal argues that ‘the assumption that NGOs can represent those suffering environmental injustice is somewhat questionable. The very structure and nature of NGOs pose real challenges as the predominantly white and middle-class composition of staff fails to reflect, inter alia, the socio-economic, ethnic and cultural diversity of those suffering injustice’; C Nadal, ‘Pursuing substantive environmental justice: the Aarhus Convention as a “pillar” of empowerment’ (2008) Environmental Law Review 28 at p. 35.
B. Expenses of Public Interest Litigation

(i) Introduction

It is suggested that there is little point in liberalising the requirements relating to standing in Scotland if costs still prevent access to judicial review. Justice Toohey has argued that:  

Relaxing the traditional requirements for standing may be of little significance unless other procedural reforms are made. Particularly is this so in the area of funding of environmental litigation and the awarding of costs. There is little point in opening the doors to the courts if litigants cannot afford to come in. The general rule in litigation that ‘costs follow the event’ is in point. The fear, if unsuccessful, of having to pay the costs of the other side (often a governmental instrumentality or wealthy private corporation), with devastating consequences to the individual or environmental group bringing the action, must inhibit the taking of cases to court. In any event, it will be a factor that looms large in any consideration to initiate litigation.

The prospect of having to pay the costs of public interest environmental litigation can dissuade all but the most confident, or perhaps reckless, litigant from accessing the courts. Tollefson opines that finding funding presents an ‘enormous challenge for any potential public interest litigant’. The normal rule in Scottish litigation is that an unsuccessful litigant must pay their opponent’s costs. The uncertainty that this brings to litigants when assessing their potential liability at the outset of litigation, has been noted to have a ‘chilling effect’; acting as a barrier to public interest litigation. In England, costs have been recognised as being one of the largest barriers to environmental litigants seeking to access justice. There is some evidence of the existence of a similar problem in Scotland, but

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109 In his address to a conference of the Australian National Environmental Law Association, 1989.
110 This includes the fees for the litigant’s legal team, court fees and potentially the fees of the other side if the litigant is unsuccessful.
112 Lord Penrose noted the ‘general principle that expenses follow success’, in Ramm v Lothian and Borders Fire Board 1994 SC 226 at 227. J Maclaren notes that this rule is based on the rationale that ‘if any party is put to expense in vindicating his rights, he is entitled to recover it from the person by whom it was created’; J Maclaren, Court of Session Practice (Edinburgh, 1916).
113 S Chakrabarti et al state that ‘the courts’ tendency to award costs against the unsuccessful party undoubtedly serves as a formidable barrier to litigants bringing an action which is in the wider public interest’; S Chakrabarti et al, ‘Whose cost the public interest?’ (2003) Public Law 697 at p. 698; Sonia Burkett v London Borough of Hammersmith and Fulham [2004] WL 2295482 per Brooke LJ at 13, para. 80.
115 Research by F McCartney has shown that cost is a barrier to justice in accessing legal remedies in Scotland, she concludes that cost presents the ‘most obvious barrier’ to access to
further research is needed to give an accurate assessment of the effect of the costs of litigation on environmental justice in Scotland.

But does public interest environmental litigation necessarily promote environmental justice? There is much debate over the merits of public interest litigation generally, and it will be asked first of all whether the two go hand in hand. In Scotland, where environmental injustice frequently manifests itself in the form of distributional inequity against impoverished communities, those suffering an environmental injustice will likely be impecunious. A litigant who is unable to meet the full expense of litigation is presented with two main options; apply for legal aid, or apply to the court for a PCO. The availability of these two remedies to meet the cost of litigation in environmental cases will be analysed and the potential effects of the Gill Review’s recommendations for environmental justice will then be discussed.

justice; F McCartney, The State Of Environmental Justice in Scotland LLM Dissertation (University of Strathclyde, 2005) (unpublished) at p. 70. However, McCartney acknowledges the limitations of her research at p. 57. The Gill Review recognises the barrier posed by costs to access to justice (although not in a purely environmental context), recognising that in the consultation for the review ‘[A]lmost all respondents agreed that cost is a significant factor in deciding whether or not to pursue or defend a case’ at p. 74, para. 4. Anecdotal evidence shows that costs of environmental litigation in Scotland can be prohibitive. WWF-UK Ltd and Another v Secretary of State for Scotland [1999] Env LR 632. See also Note of Oral Submissions made by WWF-UK in respect of Communication ACCC/C/2008/33’, (25/09/2009), available at <http://www.unece.org/env/pp/compliance/C2008-33/correspondence/FlrWWFReC33oralsubmissions.doc>. Furthermore, a complaint which has been made to the Aarhus Convention Compliance Committee by the Scottish community group ‘Road Sense’ in relation to the proposed Aberdeen Western Peripheral Route states that ‘the costs of seeking Judicial Review are high. Certainly the costs are beyond the means of a small environmental organisation. Moreover, in the event of failure the plaintiff is liable for the costs of the other party or parties – which will be significant in the case of a plaintiff taking on the might of both Transport Scotland and the Scottish Government, with their high internal costs. As no legal aid or support is available then these high costs effectively preclude any individual or small organisation seeking environmental justice against the Scottish Government through Judicial Review’; Communication to the Aarhus Convention’s Compliance Committee from Road Sense (May 7th 2009) at p. 17.

116 See (n 42).

117 Conditional fee arrangements whereby a litigant may not pay any of their own legal fees unless they are successful and legal expenses insurance present other means by which litigation may be funded. Conditional fee arrangements are excluded from consideration by this dissertation due to the recognition by the Gill Review that public law issues ‘are not generally undertaken on a speculative basis’; Gill Review Vol II, at ch. 14, p.74, para. 5. Legal expenses insurance is not considered as most ‘before the event’ or ‘after the event’ insurance policies either exclude judicial review cover completely, do not provide a sufficient level of cover, or are restrictively expensive. This is due to the expensive and unpredictable nature of judicial review proceedings. See How to fund a judicial review claim when public funding is not available (The Public Law Project, 2007), available at <http://www.publiclawproject.org.uk/documents/FundJRNOLegalAid.pdf>.
(ii) Public interest environmental litigation: a help or a hindrance to environmental justice?

Proponents of public interest environmental litigation espouse its methods as a panacea for a wide range of environmental and social ills. Sax opines that litigation can encourage institutional integrity in the executive decision making process, and that the courts represent a citizen’s direct access to the decision making process as the courts have a duty to respond to a complaint, with no opportunity for the ‘political screening’ of cases.\textsuperscript{118} Preston argues that litigation increases media attention placing a greater public focus on environmental issues and can be useful to ensure that hard-fought environmental laws are enforced.\textsuperscript{119} McCartney contends that ‘Scottish environmental law may be under-litigated, leading to a lack of judicial precedents and certainty’;\textsuperscript{120} she cites the vague duty imposed on Scottish public bodies to ‘further the conservation of biodiversity’\textsuperscript{121} as an example of this. The threat of legal action is also advanced as being sufficient to change environmentally damaging behaviour, or it can provide sufficient time to delay such action; allowing community groups time to mobilize and demonstrate their opposition.\textsuperscript{122}

Critics have pointed out that litigation can have a perverse effect of disempowering communities; as lawyers take decisions, set priorities and undertake responsibilities that should instead be determined by the community.\textsuperscript{123} Cole states that paradoxically, winning a legal battle can harm communities by removing an important organising tool from the community and failing to tackle the root political and economic conditions that led to the threat in the first place.\textsuperscript{124} The Cahns criticise public interest environmental litigation as often misanthropically eschewing social aims, and pandering to the narcissistic interests of its lawyers, rather than the clients.\textsuperscript{125}

\textsuperscript{119} B Preston, “Role of Public Interest Environmental Litigation” speech given to the Environmental Defender’s Office National Conference on Public Interest Environmental Law in Australia Customs House (Sydney, May 13\textsuperscript{th} 2005).
\textsuperscript{120} F McCartney, \textit{The State of Environmental Justice in Scotland} LLM Dissertation (University of Strathclyde, 2005) (unpublished) at p. 86.
\textsuperscript{121} s. 1(1) of the Nature Conservation (Scotland) Act 2004.
\textsuperscript{122} See J Denvir (n 59) at p. 1136 and p. 1142 respectively.
\textsuperscript{125} E and J Cahn argue that ‘in the public interest field, the power to serve the public can all too readily be viewed as a personal possession-a private prerogative to play god in defining the public interest for the public’ and ‘the concept of ecology preached by the new conservationists and incorporated into the new public law gospel does not appear to include those two-legged animals of varied hues who are the most hard hit by urban and industrial pollution’; E and J Cahn, ‘Power To the People or the Profession?- The Public
On balance, public interest environmental litigation can be of benefit to environmental justice, but must be treated with care. Litigation that is tactically used to empower those suffering environmental injustices, assisting the organisation of communities, serving as a rally point for public support and creating political leverage can be a force for environmental justice. However, legal practitioners must be careful in choosing which cases to litigate, and ensure that such litigation remains a client-focused tool, rather than a vehicle to exploit their own career ambitions.

(iii) Funding public interest litigation

**Legal Aid**

To be eligible for civil legal aid, an applicant must meet two tests,\(^{126}\) Firstly, the applicant must show that (s)he has a *probabilis causa litigandi*.\(^{127}\) Secondly, it must be reasonable in the circumstances that legal aid should be made available,\(^{128}\) including means-testing to ensure that they are unable to afford litigation using their personal income or capital.\(^{129}\)

The Scottish Legal Aid Board (SLAB, the administrative body for legal aid in Scotland) has issued guidance to clarify its position on supporting public interest litigation.\(^{130}\) It provides that where a public interest is demonstrated by the case of an applicant, SLAB may accept this as a ‘determining factor in deciding whether to grant civil legal aid’.\(^{131}\) The public interest is widely defined as where ‘the outcome of the case may have a direct tangible benefit to the applicant and to others’.\(^{132}\) However, the mere fact that other citizens may find the proceedings interesting or of some hypothetical interest will not suffice.\(^{133}\)

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\(^{126}\) The Scottish Legal Aid regime is based in the Legal Aid (Scotland) Act 1986, as amended by the 2002 regulations: The Civil Legal Aid (Scotland) Regulations 2002, Scottish Statutory Instrument 2002 No. 494.

\(^{127}\) Translated as an ‘arguable case backed up by sufficient evidence’; s. 14(1)(a) Legal Aid (Scotland) Act 1986.

\(^{128}\) *ibid.*

\(^{129}\) See s. 14(1)(a) Legal Aid (Scotland) Act 1986 (as amended by S.S.I. 2009 No. 143). If the applicant’s disposable income is above £25,000 then (s)he will not be entitled to legal aid, (s)he may also be refused legal aid if his/her disposable capital exceeds £12,439. The Scottish Legal Aid Board’s advice leaflet, *A Guide to Civil Legal Aid* (Stewarts Colour Printers, 2009) provides advice on the conditions for eligibility and the contributions which an applicant will have to make towards civil aid costs.

\(^{130}\) *Guidance on Cases of a Wider Public Interest* (Scottish Legal Aid Board, August 2003). SLAB administers legal aid in Scotland.

\(^{131}\) *ibid* at para. 2.

\(^{132}\) *ibid* at para. 1.

\(^{133}\) *ibid* at para. 3.
The guidance also states that, in deciding whether to grant legal aid SLAB will also have regard to any potential ‘cost benefit’\textsuperscript{134} of litigation. It states particularly that ‘[C]ivil legal aid will not be granted where there is little prospect of any worthwhile financial benefit to the applicant’.\textsuperscript{135} The requirement of a ‘worthwhile financial benefit’ can make it difficult for applicants to obtain legal aid in public interest environmental cases. One author has remarked that SLAB’s approach to environmental litigants ‘suggests that only cases where there is a financial interest for the individual will be funded’.\textsuperscript{136} Some public interest environmental issues will affect financial interests, in some cases to a significant degree such as in planning cases where an applicant wishes to avoid the siting of an undesirable land use next to their property; but in many cases the pecuniary benefits to a litigant will be dissolute or even negligible.\textsuperscript{137} SLAB uses a private interest test arguably unsuited to a public interest context, excluding litigants with genuine public interest environmental issues.

Protected Costs Orders

PCOs are instruments deployed by a court to protect a public interest litigant from the normal rule that the ‘loser’ pays their opponent’s costs. They are issued in recognition that a litigant is acting in the public interest.\textsuperscript{138} They are issued at the discretion of the court, and may exclude completely, or limit to a specified sum, a claimant’s liability for the expenses of the defendant or any third party, regardless of the outcome of the case. Issued normally at the outset of litigation, PCOs can thus reduce the uncertainty surrounding a litigant’s financial liability. To combat the potential for PCOs to be seen as a ‘blank cheque’ they are often accompanied by a costs capping order limiting the amount which a public interest litigant may recover from the defender if successful. Macintyre argues that PCOs can facilitate the equitable access to justice for claimants of limited means by removing financial barriers to litigation.\textsuperscript{139}

\textsuperscript{134} ibid.
\textsuperscript{135} ibid.
\textsuperscript{136} F McCartney, ‘Access to environmental justice’ in D McArdle (ed) (n 46) at p. 12.
\textsuperscript{137} See McGinty v Scottish Ministers [2010] CSOH 5 for an example. Note that the petitioner may not be said to have a private financial interest in the outcome of this case.
\textsuperscript{138} For a discussion on the justifications for PCOs, see C Tollefson (n 111) and C Tollefson \textit{et al}, ‘Towards a Costs Jurisprudence in Public Interest Litigation’ (2004) 83 La Revue du Barreau Canadien 473.
\textsuperscript{139} O Macintyre describes PCOs as ‘innovative solutions to ensure that impecunious litigants are not denied the opportunity of raising questions of public law which are of general public importance’; O Macintyre, \textit{The Role of Pre-emptive/Protective Costs Orders in Environmental Judicial Review Proceedings} (University College Cork, 2006) at p. 5. Available at <www.ucc.ie/en/lawsite/eventsandnews/previousevents/environapr2006/DocumentFile, 16192,en.doc>.
The power of Scottish courts to grant PCOs was considered firstly in McArthur140 where Lord Glennie held that it was competent for Scottish courts to make PCOs.141 He then stated that, when deciding whether or not to make a PCO, the principles developed by the court in the English Corner House case142 were equally applicable in Scotland.143

In Corner House the Court of Appeal laid down the following principles for the creation of PCOs: 144

1. A protective costs order may be made at any stage of the proceedings, on such conditions as the court thinks fit, provided that the court is satisfied that:
   i) The issues raised are of general public importance;
   ii) The public interest requires that those issues should be resolved;
   iii) The claimant has no private interest in the outcome of the case;
   iv) Having regard to the financial resources of the claimant and the respondent(s) and to the amount of costs that are likely to be involved it is fair and just to make the order;
   v) If the order is not made the claimant will probably discontinue the proceedings and will be acting reasonably in so doing.
2. If those acting for the claimant are doing so pro bono this will be likely to enhance the merits of the application for a PCO.
3. It is for the court, in its discretion, to decide whether it is fair and just to make the order in the light of the considerations set out above.

A subsequent attempt by Friends of the Earth Scotland to obtain a PCO for litigation concerning the extension of the M74 saw a turnaround by the Scottish judiciary.145 The Inner House made it apparent that they were not prepared to grant the order, and recommended that the issue be resolved by way of a more general review of the courts instead.

January 2010 witnessed a further jurisprudential rotation. Lady Dorrian, of the opinion that ‘a protective and restricted expenses order was competent in Scotland’,146 granted a PCO to a petitioner seeking to challenge

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140 McArthur v. Lord Advocate and Scottish Ministers 2006 SLT 170. Lord Glennie was invited to make a PCO on behalf of three women seeking judicial review of decisions made by the Lord Advocate and Scottish Ministers regarding the investigations into the deaths of their relatives.
141 ibid per Lord Glennie at 173.
143 “…[T]he importance of Corner House is . . . the recommendation of the principle that in a certain category of case it may be in the public interest that there be a departure from the ordinary approach to costs. It is, to my mind, a principle which applies as much in Scotland as it does in England and in the other jurisdictions to which the Court of Appeal made reference in that case”; McArthur v. Lord Advocate and Scottish Ministers (n 140) as per Lord Glennie at p. 173, para. 11.
144 Corner House Research at para. 74.
146 McGinty v Scottish Ministers [2010] CSOH 5 at para. 1. It is of note that no mention was made by Lady Dorrian to the M74 case cited referred to above in (n 133).
the Scottish Government's decision to include a new coal power station at
Hunterston in the National Planning Framework. She applied the Corner
House criteria and granted the petitioner a PCO which limits his potential
liability for the other party’s expenses to a maximum of £30,000, but also
caps the recovery of his own costs on success to that of a solicitor and one
senior counsel acting without a junior.

(iv) Does the current law on the expenses of public interest litigation in
Scotland promote environmental justice?

To assess whether the status quo regarding the costs of public interest
environmental litigation promotes environmental justice in Scotland, it must
be asked whether potential litigants unable to pay for the costs of civil
litigation are assisted by the current provisions regarding legal aid and
PCOs.

Legal Aid

Legal aid is only available where an applicant has a private financial interest
in the outcome of his/her case. Applicants without a financial interest in a
case, but with an otherwise valid public interest such as securing the
protection of the environment, ensuring that public authorities adhere to the
rule of law in environmental decision making or the protection of human
health from potentially harmful developments are excluded from accessing
legal aid. It would appear that environmental justice is not being well served
by SLAB’s use of a private interest test in a public interest context.

Protected Costs Orders - The Corner House Jurisprudence

The Scottish courts have had recourse to English jurisprudence on PCOs;
one which may be criticised on several grounds. Firstly, the restriction on a
petitioner having a private interest in a case has been argued to be based on
’a false dichotomy’; the assumption that public and private interests
operate distinctly and to the exclusion of the other. Whilst some
consideration of the degree of private interest held by a litigant is necessary
to prevent the abuse of PCOs by those seeking to shelter behind their
protection for a private benefit, the exclusion of all private interests is very

\[147\] J Mulcahy, ‘Protective Costs Orders in Scotland: the significance of McArthur’ in D
Public Law 697 at p. 702. M Potter also notes that ‘the requirement that the applicant should
have "no private interest in the outcome" a somewhat elusive concept to apply in any case
in which the applicant, either in private or public law proceedings is pursuing a personal
remedy, albeit his or her purpose is essentially representative of a number of persons with a
similar interest. In such a case, it is difficult to see why, if a PCO is otherwise appropriate,
the existence of the applicant’s private or personal interest should disqualify him or her
from the benefit of such an order’; in Wilkinson v Kitzinger [2006] EWHC 835 (Fam).
restrictive and implies that only an altruistic stranger or an environmental NGO may apply for a PCO.\textsuperscript{148} The demanding nature of litigation, combined with the low numbers of environmental NGOs in Scotland and the limited resources of such NGOs, precludes all but a handful of public interest cases from ever being litigated by NGOs alone. The private interest restriction may also operate to the exclusion of those applying for judicial review; as the test for standing requires that an applicant have a private interest in the issue.\textsuperscript{149}

Secondly, the influence of whether the litigant’s lawyers are working \textit{pro bono} in increasing the chances of having a PCO awarded may have dangerous implications for Scottish environmental justice.\textsuperscript{150} It is aimed sensibly at keeping the costs of litigation within reasonable parameters to mitigate the apparent inequity inflicted upon a defendant which is created by protecting one party to litigation from the costs of the other without reciprocation; but it begs the question why lawyers should be expected to work for free in cases of important public interest. The consequence is one of harm to the economic viability of the few environmental legal specialists working in the interest of those unable to afford litigation. Potential litigants may also struggle to find an adequately qualified lawyer who will represent them \textit{pro bono}. Stein and Beageant comment that ‘reliance upon goodwill and charity can only go so far towards achieving access to justice’.\textsuperscript{151}

Thirdly, the contestable nature of the procedure for application for a PCO means that the application itself may expose an applicant to considerable financial risk. If a litigant applies for a PCO in England and is unsuccessful, a financial liability of £5,000–£10,000 could arise from the application itself.\textsuperscript{152} Whilst this may prevent a ‘floodgates’ situation and encourage only the most genuine applications, it is submitted that it may also disincentivise applicants with legitimate public interest issues from litigating.

\textit{The approach of the Scottish courts to PCOs}

\textsuperscript{148} R Stein and J Beagent note that ‘in the environmental field potential claimants are almost invariably individuals (or groups of individuals such as residents' associations and action groups) who have an interest in preventing the environmental harm that is threatened. They would therefore appear, as a class, to have a private interest in the outcome of the case whether that interest is only one of amenity or is also a financial one (i.e. the value of their property may be affected)’; R Stein and J Beagent, ‘Case Comment R(Corner House Research) v The Secretary of State for Trade and Industry’ (2005) JEL 413 at p. 22.

\textsuperscript{149} See s. 3.1.3 above.

\textsuperscript{150} See commentary on this by R Stein and J Beagent, ‘Case Comment R(Corner House Research) v The Secretary of State for Trade and Industry’ (n 148), O Macintyre, \textit{The Role of Pre-emption/Protective Costs Orders in Environmental Judicial Review Proceedings} (n 139) and B Jaffey, ‘Protective Costs Orders in Judicial Review’ (2006) Judicial Review 171.

\textsuperscript{151} R Stein and J Beagent, ‘Case Comment R(Corner House Research) v The Secretary of State for Trade and Industry’, \textit{ibid.}, at p. 443.

\textsuperscript{152} R Stein, and J Beagent, ‘Case Comment R(Corner House Research) v The Secretary of State for Trade and Industry’ (2005) JEL 413 at p. 441. Research on the costs of an application in Scotland was unavailable.
The approach of the Scottish courts to PCOs has been puzzling; firstly accepting in *McArthur* that they have the power to vary expenses, showing considerable doubt in the M74 case, and then finally issuing a PCO in *McGinty*. This is perhaps indicative of the apprehensiveness of the Scottish judiciary to issue PCOs, due to the perceived inequity created by PCOs; protecting one party to litigation from costs without reciprocation. *McGinty* should now clarify the issue and firmly establish PCOs in Scots law.

It may be questioned whether orders of the type issued in *McGinty* will be sufficient to remove the barrier to environmental justice posed by litigation costs. The petitioner in *McGinty* was unemployed, receiving Job Seekers Allowance at £128.60 per fortnight and had savings in the region of £1,000. Even with a PCO granted in his favour, the petitioner still faces a liability for costs exceeding £100,000, if unsuccessful.\(^{153}\) The applicant is clearly unable to meet these costs himself and the litigation has been reliant on donated funds thus far.\(^{154}\) Whilst a reduction in the uncertainty offered by the PCO as to the potential liability of a litigant for the opponent’s costs is welcome, a reliance on public philanthropy is unlikely to offer a meaningful inroad to delivering procedural environmental justice in Scotland.

It is seen that the *status quo* as regards the funding of public interest environmental litigation in Scotland is failing environmental justice. Legal aid is unobtainable where no private financial interest exists, the *Corner House* jurisprudence has several deep flaws and PCOs of the type issued in *McGinty* will not provide enough assistance to impecunious persons seeking to fund litigation.

(v) Recommendations of the Gill Review for funding public interest litigation in Scotland

It is of note that the issue of the discretion of courts to award expenses in public interest cases was not mentioned in the consultation to the Gill Review, instead being raised independently by a number of respondents.\(^{155}\) This perhaps demonstrates the importance of improving the law surrounding the use of PCOs.

Two suggestions are made by the Gill Review in this area. Firstly, it proposes that an express power for Scottish courts to grant a PCO be made.\(^{156}\) It secondly suggests two potential forms which an express power may take.

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153 Lady Dorian commented that ‘[A]s to the costs which are likely to be incurred, an assessment by a legal accountant was placed before me, indicating that the petitioner’s potential liability should the Scottish ministers be successful, might be in the region of £90,000 and the petitioner’s own expenses might be in the region of £80,000’; *McGinty v Scottish Ministers* [2010] CSOH 5 at. para 4.

154 Noted by Lady Dorian, *ibid*.


156 *ibid*, p. 42, para. 73.
The Gill Review proposes two separate tests which may be adopted for use in Scotland (shown below);\(^{157}\) a 'Reformulated Corner House Test' and a model based on that proposed by the Australian Law Reform Commission (ALRC).\(^{158}\) The inclusion of two different recommendations is somewhat confusing, although they are not fundamentally dissimilar; perhaps indicating that they are purely hypothetical suggestions and that the criteria for PCOs would need to be formulated after extensive consultation with all interested parties.\(^{159}\)

**The Reformulated Corner House Test**\(^{160}\)

The court may make a protective costs order at any stage of the proceedings and on such conditions as it thinks fit if it is satisfied that:

- the issues raised are of general public importance;
- the public interest requires that those issues be resolved; and
- having regard to the financial resources of the applicant and the respondent and to the amount of expenses that are likely to be involved, it is fair and just to make the order.

In exercising its discretion the court may have regard to:

- whether the applicant is likely to abandon the proceedings and will be acting reasonably in so doing if an order is not made; and
- whether the applicant’s legal representatives are acting on a pro bono basis.

It is for the court, in its discretion, to decide whether it is fair and just to make the order in the light of the considerations set out above.

**The ALRC Test**\(^{161}\)

A court or tribunal may, upon the application of a party, make a public interest costs order if the court or tribunal is satisfied that

- the proceedings will determine, enforce or clarify an important right or obligation affecting the community or a significant sector of the community.
- the proceedings will affect the development of the law generally and may reduce the need for further litigation.
- the proceedings otherwise have the character of public interest or test case proceedings.

\(^{157}\) ibid, pp. 43-44, paras. 75-77.

\(^{158}\) ibid, pp. 43-44, paras. 75-78. The ALRC test derives from a report by the Australian Law Reform Commission; Report 75, Costs Shifting – who pays for litigation (Australian Law Reform Commission, 1995).

\(^{159}\) The Gill Review advocates formulating a PCO test after consultation, stating that '[O]ne advantage of having an express power is that draft rules in an area which is controversial and which involves a careful balancing of the interests of claimants and public bodies could be put out for consultation so that a range of views from interested parties, not just the arguments advanced in any particular litigation, could inform the formulation of the principles to be applied'; Gill Review Vol. II, at ch. 12, p. 41, para. 71.

\(^{160}\) ibid, at para. 74.

\(^{161}\) Ibid, at paras. 76-77.
A court or tribunal may make a public interest costs order notwithstanding that one or more of the parties to the proceedings has a personal interest in the matter. If the court or tribunal is satisfied that there are grounds for it to make a public interest costs order, it may make such orders as to costs as it considers appropriate having regard to the resources of the parties, the likely cost of the proceedings to each party, the ability of each party to present his or her case properly or to negotiate a fair settlement, the extent of any private or commercial interest each party may have in the litigation. The orders the court or tribunal may make include an order that costs follow the event [i.e. expenses follow success] each party shall bear his or her own costs the party applying for the public interest costs order, regardless of the outcome of the proceedings, shall not be liable for the other party’s costs only be liable to pay a specified proportion of the other party’s costs be able to recover all or part of his or her own costs from the other party another person, group, body or fund, in relation to which the court or tribunal has power to make a costs order, is to pay all or part of the costs of one or more of the parties. An order under this provision will be subject to the power of the court or tribunal to make disciplinary and case management costs orders.

(vi) Analysis: implications of the Gill Review’s recommendations on funding public interest litigation for environmental justice in Scotland

 Recommendation 1 - Creating an Express Power for granting PCOs in Scotland

An express power to grant a PCO would bring two benefits to environmental justice. Firstly, it would further clarify this area of law in Scotland; removing any remaining judicial hesitations surrounding the use of PCOs in Scotland. Although McGinty now appears to have established PCOs within Scots law, judicial doubts may persist and an express power (either legislated for, or provided by the Court of Session’s rules council as an act of sederunt) would further legitimise the use of PCOs. It is submitted that an express power could also lead to an increased public awareness of the availability of PCOs and public interest environmental litigation. This could stimulate interest in environmental justice issues and in Scotland, creating greater political demand to address environmental justice. The level of benefit offered to environmental justice by this proposal depends largely on the form of the express power, discussed below.

 Recommendation 2(a) - A Reformulated Corner House Test
This test makes several key departures from the original *Corner House* jurisprudence with implications for environmental justice.

Firstly, the absence of a private interest test widens the range of potential applicants who may apply for a PCO, from purely altruistic strangers and NGOs, to also include individuals with some form of private interest in the outcome of the litigation. However, the complete absence of the consideration of private interest exposes the system of PCOs to abuse by applicants whose main motivation for litigating is to protect a private interest, which could damage the credibility of such orders. It is submitted that this constitutes an oversight by the Gill Review, and that some mechanism for consideration of private interests to avoid the misuse of PCOs should be included.

Secondly, the continuing presence of the consideration of whether the applicant’s lawyers are working on a *pro bono* basis is troubling for Scottish procedural environmental justice, although the reduction in its weighting from the original *Corner House* jurisprudence is a welcome inclusion. The altruism of the environmental lawyer remains of some importance to a court when deciding whether to grant a PCO.

Finally, the weighting given by the court to ‘whether the applicant is likely to abandon the proceedings if a PCO is not granted and will be acting reasonably in doing so’ is lowered. It is reduced from a mandatory requirement to a discretionary factor for the court’s consideration.¹⁶² This reduces the onerous nature of the *Corner House* test, enhancing procedural environmental justice.

*Recommendation 2(b) - The ALRC test*

The ALRC test is broadly similar to the reformulated *Corner House* test; however there are two distinctions which can be made.

Firstly, the ALRC test allows the court to make a PCO for a party, ‘notwithstanding that one or more of the parties to the proceedings has a personal interest in the matter’, however the court may consider ‘the extent of any private or commercial interest each party may have in the proceedings’. This is not as restrictive as the original *Corner House* principles which exclude any element of private interest completely, but it allows a court to consider the private interest of an applicant. This prevents abuse of the PCO system by litigants whose main interest in litigating is a private one, and therefore deals adequately with the above criticism made of the reformulated *Corner House* test.¹⁶³ It is submitted that the ALRC criteria

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¹⁶² A distinction may be made between mandatory and discretionary criteria in the *Corner House* rules. Mandatory criteria are those which must exist for a court to issue a PCO; discretionary criteria require the court to apply discretion to determine whether applying the criteria is ‘fair and just’ in the other circumstances.

¹⁶³ See above at s. 3.2.4, para. 2.
represents the fairest way to deal with the issue of an applicant’s private interest when a court decides whether or not to grant a PCO.

Secondly, the test used by the ALRC is more prescribed in its definition of the ‘public interest’ and what types of orders relating to costs a court may make. This more prescriptive approach may increase certainty for the parties, but reduces the flexibility of the court in deciding which cases merit a PCO. The definition of the ‘public interest’ given by the ALRC test includes the test that ‘proceedings otherwise have the character of public interest or test case proceedings’. This somewhat vague caveat could afford considerable discretion to Scottish courts when making PCOs, lessening the constricting effect of the ALRC’s generally prescribed approach.

Other Considerations on the Implications of PCOs for Environmental Justice

There are two further issues which may hinder the ability of a Scottish PCO system to offer a significant contribution to Scottish environmental justice.

Firstly, the discretion afforded to judges granting PCOs. In England, considerable research has been undertaken on the judiciary’s understanding of environmental issues, with concerning results. The UK Environmental Justice Project raised significant concerns about the lack of expertise of English judges in handling environmental cases, and the deficiency in judicial comprehension of key tenets of environmental law. Lord Woolf has also voiced his disquiet about judicial ‘myopia’ in England. De Prez has echoed these misgivings with research revealing the susceptibility of English judges in environmental criminal cases to ‘ritual trivialisation’ of breaches of environmental law and various commentators have expressed their disquiet at the British judiciary’s apparent adjudicatory bias towards protecting private property rights at the expense of the public interest, particularly in planning litigation. This lack of environmental understanding displayed by the English judiciary seems to stem from the lack of specialist environmental legal training and expertise amongst these judges. It is submitted that the position in Scotland may not be much

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164 See above at s. 3.2.3, para. 1 on the discretionary nature of PCOs.
165 The Environmental Justice Project (n 25) at p. 33, para. 53.
168 M Grant, Urban Planning Law (Sweet & Maxwell, 1982) at p. 334; M Adebowale (n 48) at p. 44. H Fenwick and G Phillipson also note the predilection of the English judiciary towards protecting property rights in a human rights context; H Fenwick and G Phillipson, ‘Public protest, the Human Rights Act and judicial responses to political expression’ (2000) Public Law 627.
169 ‘Participants in the JR working group recommend the Bar Council and the Law Society incorporate environmental law into the training for all practitioners. The group also recommends the judiciary be subject to environmental and sustainability training and that, generally, awareness about the impacts and effects of economic and other decisions taken on the environment should be raised. There was also a general view that the judiciary
different, with a concurrent lack of specialist environmental expertise and training. However this assertion must be a qualified one; further research on the level of environmental awareness amongst the Scottish judiciary would be needed to expound this proposition.

If it were to exist, a lack of judicial environmental comprehension could considerably constrict the number of environmental cases which could be granted PCOs. The wide discretion afforded to judges to decide whether an applicant raises a public interest issue means that a low level of judicial environmental understanding could make it less likely that a case of environmental concern would be deemed a public interest issue; (arguably) some appreciation of environmental science or ecology is needed to fully appreciate the public importance of environmental issues. A low level of judicial environmental awareness could restrict the impact of any reforms made on PCOs for environmental justice in Scotland.

Secondly, there is the issue of defining the public interest. Defining the public interest is a difficult task, and the solution lies perhaps in putting the issue out for consultation to allow a pluralistic approach to definition. Concerns have been voiced over whether the public interest should be defined at all; it is questionable that the inherently varied nature of potential public interest cases would suit a prescriptive approach.

The interpretation given to public interest is critical if PCOs are to play more than a minor role in funding public interest environmental litigation. If the public interest is to be interpreted as only including cases which decide a new point of law, or be of wide scale importance, then this could preclude all litigation but that surrounding major infrastructure developments or major legal issues from qualifying for a PCO.

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170 See S Chakrabarti et al (n 113) and The Working Group on Facilitating Public Interest Litigation, Litigating the Public Interest (Liberty, 2006).
171 The Working Group on Facilitating Public Interest Litigation, Litigating the Public Interest (Liberty, 2006) at p. 27, para. 69.
4. Conclusion

A. Standing for Judicial Review

The current test of standing in Scotland is antiquated, restrictive and unclear. There is currently uncertainty as to whether an individual will meet the tests of standing for environmental judicial review and environmental NGOs are almost certainly excluded.

The Gill Review recommends that the test for standing is changed to require that an applicant need only have demonstrated a ‘sufficient interest’. It is submitted that this new approach to standing for judicial review would allow a wider range of potential applicants to access the remedy of judicial review, and bring a crucial element of clarity to Scots law. This could be revolutionary in offering Scottish individuals and environmental interest groups the opportunity to challenge illegal executive action through the courts; confronting environmental injustices and ensuring that environmental laws are enforced.

B. Costs of Public Interest Litigation

Where a potential litigant in Scotland does not have the requisite funds to support a legal challenge in an environmental case, they are presented with a potentially insurmountable obstacle to access justice.

Civil legal aid is denied to those public interest litigants without a private financial interest in the case. This use of a private interest test excludes genuine public interest litigants from accessing justice.

The Scottish courts’ approach to the use of PCOs has been uncertain, but now appears to be clarified with the advent of the McGinty case. However, the current jurisprudence on PCOs in Scotland follows the English principles from Corner House, which has been shown to be flawed in its ability to provide environmental justice. Furthermore, the PCO issued in McGinty, whilst reducing uncertainty as to financial liability over the costs of the respondent, still presents a financial liability sufficient enough to dissuade those without recourse to personal funds. It remains to be seen if Marco McGinty will proceed with his case.

The Gill Review proposes the creation of an express power to grant PCOs in Scotland, offering the examples of the reformulated Corner House approach, or the test adopted by the ALRC. It is submitted that the formulation of the test will need to go to consultation due to the difficult nature of the task of defining the ‘public interest’. If an express set of rules for Scottish courts to grant PCOs is adopted, and the flaws of the Corner House jurisprudence are addressed, this could help to ameliorate the barrier of exorbitant costs from environmental litigants, advancing procedural environmental justice in Scotland. However, even where a PCO is granted as
seen in *McGinty*, the litigant remains faced with a considerable financial liability for legal expenses.

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In conclusion, the potential implications of the Gill Review’s recommendations for environmental justice in Scotland are mixed.

The suggested change on standing in judicial review could be radical in its effect; ensuring wider access to legal remedy which is essential for providing environmental justice.

The recommendation on funding public interest litigation can reduce the barrier to environmental justice posed by the costs of litigation, addressing some of the current weaknesses and ensuring the firm establishment of PCOs in Scots law; but it is not a final solution to the predicament faced by impecunious public interest environmental litigants who remain dependant on charity for funding. The expenses incurred by public interest environmental litigation will remain a barrier to environmental justice in Scotland even if the Gill Review’s recommendations are implemented. This casts a shadow over the ability of the Gill Review’s recommendation on standing to provide greater environmental justice in Scotland, as ‘there is little point in opening the doors to the courts if litigants cannot afford to come in’.173

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173 See Toohey (n 109).