A Study of Administrative Environmental Decision-Making before the Courts

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Abstract

This article presents the findings from a quantitative study of 249 judicial environmental decisions. The study finds that the courts find against claimants challenging administrative environmental law decisions by a higher margin than in other areas of administrative law (though the margin varies from court to court). The paper identifies the main reason for this in the dynamics between the ‘political’ nature of environmental law and the legal focus of judicial review. The article also finds that this variation between courts is potentially narrowing and that the rate of success enjoyed by claimants varies depending on which public authority they seek to challenge. Having presented the quantitative findings of the study, the article briefly sketches out the relevance of the type of quantitative work presented here in relation to ongoing debates on role of the courts in environmental law whilst also identifying future avenues for additional follow-up research.

Keywords: Environmental law, adjudication, judicial review, statutory appeals, administrative law, deference.

1. INTRODUCTION

This article sets out to establish the extent to which courts uphold administrative environmental law decisions made by public authorities in England and Wales. This is done through a quantitative study of judicial decisions in the context of environmental law, utilising a dataset of 249 decisions reported in the Environmental Law Reports over a 20 year period. This is done for two reasons. First, when surveying the literature on the role played by the courts in

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environmental law, one encounters a significant gap. Often this literature is rich on normative assumptions, ranging from the claim that the courts are not sufficiently attuned to environmental concerns to the argument that judicial reticence in environmental adjudication is ‘not necessarily a matter of regret’. Equally often, there is little quantitative work underpinning these assumptions. Second, the need to more fully understand the role played by the courts in environmental law adjudication becomes particularly pressing in the context of Brexit. In response to the need for filling the significant enforcement and scrutiny vacuum created by the assumption that the EU Commission will no longer be overseeing the implementation of much of UK environmental law, judicial review is likely to remain an important mechanism for securing supervision. The article thus provides a quantitative underpinning against which normative arguments can be developed as well as a context for present debates on the future role of the courts in supervising environmental law. In doing so the article offers a diagnostic account of how environmental claims fare before the courts, filling a gap in the literature on environmental adjudication as well as a gap in the more general jurimetrical literature which has so far neglected environmental law. A related reason for undertaking this research is to act as a catalyst for further research. The main focus of the article is on judicial review claims though a subset of statutory appeal cases are also included.

The article finds that, on the whole, and in particular in judicial review decisions, the courts tend to find against claimants challenging administrative environmental law decisions by a significant margin (though the margin varies from court to court but not much between areas of environmental law). The article, however, also finds that this variation between courts is potentially, in more recent years, narrowing and that the rate of success enjoyed by claimants

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2 Often this argument is used as a springboard for arguing more generally in favour of specific environmental tribunals. See e.g. Patrick McAuslan, ‘The Role of the Courts and other Judicial Type Bodies in Environmental Management’ (1991) 2 JEL 195.


4 UKELA, Brexit and Environmental Law: Enforcement and Political Accountability Issues (2017). Section 16 of the European Union Withdrawal Act 2018 contains an obligation on the Secretary of State to introduce ‘provisions for the establishment of a public authority with functions for taking, […] action (including legal proceedings if necessary) where the authority considers that a Minister of the Crown is not complying with environmental law’ emphasis added.

5 As Eloise Scotford argues: ‘it is the careful methodological treatment of environmental law issues, rather than the taming of environmental law into coherent universal legal submission, that is a priority for environmental law scholarship’, Environmental Principles and the Evolution of Environmental Law (Hart 2017) 64.
varies depending on which public authority they seek to challenge (with claims against central government agencies encountering a lower rate of success). In the context of EU environmental law, the article finds that the rate of success in judicial review claims raising points of EU law is near identical to the average rate of success in environmental claims. In presenting these findings, the article takes a primarily outcome-based approach to administrative environmental adjudication, though a brief discussion of the nature of environmental claims and judicial review is included.

This study holds lessons beyond the discipline of environmental law in two ways. First, many of the points made below are of relevance to adjudication in other branches of the law which share characteristics with environmental law such as areas of law which engage questions of the proper exercise of discretion in the context of resource allocation and the supervision of expert decision-making. Second, in the context of ongoing debates, surrounding recent changes to the judicial review regime, setting a lower threshold for when the High Court must refuse an application for judicial review, an evidence-based understanding of the role performed by the courts would go some way towards providing a more nuanced and detailed understanding of the actual workings of the courts.

One general caveat about this type of work must be made, however. Though the sample size utilised in the study is robust, caution ought to be exercised when it comes to extrapolating the findings and any trends identified in the study. That is, ‘what holds for the part is not necessarily true for the whole.’ A highly contingent combination of concrete statutory frameworks and unique facts inevitably make for an element of contingency. The fact that in judicial decision-making context is highly determinable goes firstly to the substance of the article and the study of judicial decisions in general. This in turn poses methodological challenges for the type of work undertaken in this article, focusing on environmental law where there is reason to think that legal distinctions which are well-established in other disciplines of

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7 Section 84 of the Criminal Justice and Courts Act 2015 (inserting s. 2A in the Senior Courts Act 1981, setting out that the High Court must refuse an application for judicial review where it appears highly likely that the outcome for the claimant would not have been substantially different if the conduct complained about had not occurred). The change in the law emphasising the likelihood of a substantially different outcome is, it seems, something which the courts themselves are increasingly alert to cf. most recently R (Champion) v North Norfolk District Council and another [2015] UKSC 52.

8 These changes, alongside changes allowing the court to request disclosure of funding sources for those undertaking judicial review proceedings, have predictably been heavily criticised. See Isabella Kaminski ‘Fresh Threat to Environmental Judicial Review’ ENDS Report (25 November 2014).


10 E.g. R (Daly) v Home Secretary [2001] 2 AC 532, 548.
law are perhaps less firm on account of the nature of environmental law and the values it embodies. Consequently, a quantitative study like this necessarily overlooks some of the important details which are often highly relevant when it comes to, for example, establishing points of doctrine: ‘general propositions do not decide concrete cases’ as it were. This does not mean that quantitative work like this lacks scholarly relevance. On the contrary, the purpose of this kind of work is important when dealing with a subject like environmental law which is of a recent origin in temporal terms and often subject to different normative impulses, lacking, as a result, in firm foundations. Accordingly, the purpose of this article is in part to lay foundations for future work which can identify and engage in depth with the variables that a purely quantitative study of this kind cannot engage with. With this in mind, the article proceeds along the following lines: section 2 provides the analytical framework, setting out the methodology of the article, while section 3 sets out the overall findings and draws inferences therefrom by reference to the type of public authority and type of claimant (3.1) by reference to a longitudinal perspective (3.2), by first instance and appellate levels (3.3) and section 3.4 breaks down the main findings by subject area of environmental law. In light of these findings and inferences, section 4 briefly reflects on the potential impacts of the findings on the way in which environmental litigation might be perceived while identifying avenues for further research and section 5 concludes.

2. METHODOLOGY

This article reviews a set of 249 judicial decisions reported in the Environmental Law Reports (Env LR), a report which purports to report ‘the more significant [environmental] cases’. A timeframe of 1994-2014 was chosen in order to provide a sufficiently large and representative research sample. The reason for focusing on cases reported in the Env LR was moreover that the report provides the most authoritative source of environmental law reports and because it

12 Lochner v New York Times (1905) 198 US 45, 76 per Holmes J.
13 Ole Pedersen, Modest Pragmatic Lessons for a Diverse and Incoherent Environmental Law’ (2013) 33 OJLS 103.
14 See website of the Environmental Law Reports http://www.sweetandmaxwell.co.uk/Catalogue/ProductDetails.aspx?productid=6909&recordid=411 (accessed 6 December 2018). Throughout the article reference is therefore made to the cases as reported in the Env LR as opposed to making use of neutral citations. Neutral citations are used where a case not forming part of the data set is referred to and it is not reported in the Env LR.
offers a single repository for environmental cases. This latter point is important as it avoids the issue of delineation and definition in respect to what amounts to an ‘environmental’ case.\textsuperscript{15} Were the study to focus on cases reported in law reports with a general focus, the difficult question of definition would have been much more prescient. Having said that, it must be borne in mind that when focusing on a solitary source of case reporting as is done here, a possibility of selection bias creeps in on account of the case selection of the Env LR. As noted, the Env LR aims to include ‘significant cases’,\textsuperscript{16} possibly resulting in some cases going unreported; for example where a case upholds a well-established principle of law. Such cases may well hold important lessons for the courts’ approach to environmental issues but these would not feature in this analysis.

The main focus of the study is on judicial review decisions which form the bulk of the 249 cases identified. The study thus identified 207 judicial review decisions and 42 statutory appeals in the relevant period. The study excludes all non-judicial review and non-statutory appeal cases reported in the Env LR. These excluded cases include: criminal cases and appeals; claims in nuisance (private, public and statutory) and negligence. The study also excluded cases where a magistrates’ court decision was subsequently challenged by way of judicial review proceedings.\textsuperscript{17} The reason for disregarding the few reported judicial review challenges to, for example, criminal cases or the not insignificant number of decisions in statutory nuisance, is that it allows the study to focus on administrative decisions made by traditional administrative public authorities such as local authorities and government agencies. Following the application of these exclusion criteria, the data set yielded 249 decisions. The decisions are primarily from England and Wales though one Scottish case which made it to the Supreme Court is included. The study includes case law from the Senior Courts in England and Wales and the House of Lords/Supreme Court with 157 decisions by the High Court (134 judicial review cases and 23 statutory appeal decisions), 81 decisions by the Court of Appeal (64 judicial review claim and 17 statutory appeal cases) and 11 decisions by the House of Lords/Supreme Court (nine in judicial review and two statutory appeals).

The reasons for focusing on judicial review and statutory appeal cases as a subset of environmental litigation more widely are several (though it is accepted that focusing exclusively on cases reported in one sole set of law reports, inevitably skews the data set away

\textsuperscript{16} (n 14). A further potential restriction is that of space in each volume.
\textsuperscript{17} E.g. \textit{R (Howson-Ball) v Canterbury Crown Court} [2001] Env LR 36 and \textit{R (Khan) v Isleworth Crown Court} [2012] Env LR 12.
from other types of ‘adjudication’, taking place in other fora a such as, for example, the Planning Inspectorate, performing an important role when it comes to resolving environmental disputes). First, the primary aim of the study has been to gauge the extent to which the judiciary affirm or overrule administrative decision-making in the area of environmental law. Judicial review and statutory appeal decisions offer a ready-made focal point for doing so. Second, environmental law is today primarily regulatory and statutory (though not exclusively so) and it therefore offers a useful overview of judicial engagement with modern environmental law. Third, and related to this, the part of environmental law which has been developed by the common law doctrines of private and public nuisance are, though still developing, extensively examined elsewhere.\(^{18}\) The same cannot be said for the courts’ engagement with statutory environmental law. Fourth, with respect to the main focus on judicial review claims, on an instrumental basis, judicial review claims are, as noted, significantly over-represented in the Env LR and therefore offer a more coherent data set as well as appropriate sample size compared to statutory appeal cases (though these are referred to in section 3).\(^{19}\) A potential additional limitation of a study of statutory appeals is that one such study would have to take into account the exact parameters of each statutory framework and the grounds for appeal within it as well as deal with the fact that the level of scrutiny undertaken by the courts will vary significantly.\(^{20}\)

Where a case has been appealed, and the final decision has been reported in the Env LR, the final decision has been included in the study and the decision from the first instance ignored. Where the final decision from an appeal court has not been reported in Env LR, the case has been excluded altogether in order not to compromise the data set.\(^{21}\) This may well give rise to an artificially low number of cases as some cases on appeal are presumably not reported in the Env LR simply because the appeal court upholds the lower court’s decision on the same grounds as those provided by the lower court.\(^{22}\) Nevertheless, it is assumed that these cases are


\(^ {19}\) In discounting a relatively wide range of cases it is accepted that, on quantitative grounds, a high number of decisions are excluded.\(^ {20}\) Having said that, it is today widely accepted that the substantive differences between e.g. a statutory appeal under s 288 of the Town and Country Planning Act 1990 and judicial review are minor. E.g. *E v Secretary of State for the Home Department* [2004] EWCA Civ 49 per Carnwath LJ [42].

\(^ {21}\) E.g. *R (Reprotech (Pebsham) Ltd) v East Sussex CC* [2000] Env LR 381, ending up before the House of Lords though not reported in Env LR cf. [2002] UKHL 8.

\(^ {22}\) E.g. *R (Buglife: The Invertebrate Conservation Trust) v Thurrock Thames Gateway Development Corp* [2008] Env LR 31, affirmed by the Court of Appeal cf. [2009] EWCA Civ 29 (not reported in Env LR) and *R (Federation of Tour Operators) v HM Treasury* [2008] Env LR 22, affirmed by the Court of Appeal cf. [2008] EWCA Civ 752 (not reported in Env LR).
too few to significantly alter the overall trend found in the data. Also excluded are decisions resulting from follow-up litigation relating exclusively to the allocation of costs.\textsuperscript{23} A separate issue apart from this is the situation where several cases arise out of the same facts as a result of several and separate disputes running for a number of years. Where this is the case, each case has been included in the study.\textsuperscript{24}

Each of the 249 decisions was read and scrutinised in order to establish whether a court allowed a claim challenging an administrative environmental law decision or whether the court dismissed the claim. That is, whether the court upheld the decision reached by the public authority or whether it found against the public authority. Following this, the allow/dismiss rates were assessed against, firstly, the type of public authority and claimants and, secondly, the allow/dismiss rate was considered against each sub-discipline of environmental law. A potential limitation of this kind of approach follows from the discretion which a court enjoys when it comes to providing a specific remedy once it has found for a claimant or in favour of a public authority. The study found, however, that by far the most common remedy provided by the High Court and the Court of Appeal in the judicial review claims in which they find in favour of a claimant challenging an administrative decision is a quashing order.

3.1 THE OVERALL RATES OF ‘SUCCESS’

In the context of judicial review claims, the findings suggest that the success rate of claimants in environmental cases is, on the whole, lower than that of judicial review claims in general. In the 207 decisions reviewed, the courts found in favour of public authorities, and thereby upheld administrative environmental decisions, in 143 cases (69.1 per cent), whereas they found in favour of those challenging administrative environmental law decisions in 60 cases (28.9 percent). Four cases out of the 207 were recorded as being allowed in part (1.9 per cent). The findings are presented in Fig. 1.

3.1.1 Judicial Review

Of the 134 judicial review claims before the High Court, the Court found in favour of claimants, challenging an administrative decision in 44 cases (32.8 per cent) whereas it found in favour


\textsuperscript{24} \textit{R v Rochdale MBC Ex p. Milne (No.1) [2000] Env LR 1 and R. v Rochdale MBC Ex p. Milne (No.2) [2001] Env LR 22 as well as R (Catt) v Brighton and Hove City Council [2007] Env LR 32 and R (Catt) v Brighton and Hove City Council [2010] Env LR 6.}
of the public authority at nearly twice the rate in 86 decisions (64.2 per cent) and in four decisions the Court found in favour of the claimant only in part (3 per cent). Before the Court of Appeal, appellants challenging the High Court’s refusal to impugn an administrative environmental law decision made by a public authority fare even worse as the Court of Appeal found in favour of a public authority in 47 out of the 55 judicial review decisions (85.5 per cent), challenging decisions made by public authorities. The Court of Appeal found in favour of appellants, challenging decisions made by public authorities only in eight of the 55 judicial review decisions (14.5 per cent). Though the sample size is small, the Court of Appeal pattern of finding in favour of public authorities with statutory environmental responsibilities is only partially substantiated by it ruling in favour of public authorities appealing a High Court decision which went against the public authority at first instance in five out of the nine appeals (55.5 per cent). In contrast, the Court of Appeal rejected appeals by public authorities against a High Court decision in four out of the nine judicial review cases (44.4 per cent). Before the House of Lords/Supreme Court, the willingness to find in favour of public authorities waned slightly (though the sample size is small) with the Court allowing three out of seven (42.8 per cent) appeals against decisions of public authorities whilst dismissing four (57.1). The number of appeals by public authorities before the House of Lords/Supreme Court in the data set was only two with one decision finding in favour of a public authority and the other against the public authority.

Fig 1. Overall success rate by court in judicial review
The findings suggest that the success rate of claimants in judicial review cases is lower than that of judicial review claims in general. In their 2015 study Bondy, Platt and Sunkin thus found that the overall success rate in judicial review claims in the Administrative Court was 44.1 per cent against a dismissal rate of 55.9 per cent. Tellingly, however, Bondy, Platt and Sunkin also found that the success rate of planning cases is lower at 31.1 per cent with a dismissal rate of 68.9 per cent which is broadly in line with the overall success rate identified in this study of 28.9 per cent (with a dismissal rate of 69.1 per cent) and the success rate before the High Court, standing at 32.8 per cent (against a dismissal rate of 64.2 per cent). This begs the question why environmental claims are less successful before the courts compared to other types of cases.

The primary reason is likely to be the combination found in the nature of judicial review and environmental law respectively. Though a full discussion of the nature of environmental judicial review deserves its own article, it merits brief mention here. An explanation for the

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26 Ibid., 65. The Bondy, Platt and Sunkin study contains only one decision labelled ‘environment’, making the success rate of planning cases the most obvious comparator.
27 The qualitative and doctrinal implications of the ways in which the courts engage with environmental claims is the subject of a separate study, presently being undertaken by the author, suggesting that the courts are indeed...
high rate of dismissals of challenges to environmental decision-making by public authorities, may be found in the fact that many of the statutory regimes engaged in the claims forming part of the study expressly afford decision-making power on the public authorities.28 There are good reasons for this being the case: most notably expertise and the associated legitimacy that comes with having specialised agencies and local authorities making decisions. Importantly, where courts defer to such environmental decision-makers, they can be seen as simply giving effect to the statutory mandates provided by Parliament.29 That is, the high rate of dismissal that follows is a feature of the statutory framework of environmental law itself, including the Town and Country Planning Act 1990 and the Environment Act 1995 which both afford local authorities and administrative agencies specific decision-making powers. The courts are simply giving effect to this framework.30

A related factor is likely to be that gathering factual evidence may often require the commissioning of technical expert evidence drawn up by environmental engineers, consultants or scientists, adding significant costs effectively creating an ‘inequality of arms’ in favour of more resourceful claimants and defendants, including the government. Moreover, the steps taken by the courts and the government to remedy this, making it more affordable to bring environmental claims (in the attempt to secure compliance with the Aarhus Convention which requires that environmental litigation is not ‘prohibitively expensive’)31, have come too late to have any discernible impact on the cases in the data set.32

Equally, in the context of environmental judicial review claims, it is hard to ignore the argument that many claims are polycentric and often come across as inherently ‘political’. Polycentric and ‘political’ in a sense that the law requires decision-makers to execute a value judgment by balancing ‘competing claims on the public purse and the allocation of economic resources which the court is ill equipped to deal with’ as well as balancing ‘the interests of those primarily affected with the wider public interest.’33 This, for example, includes the need

28 E.g. s. 58 of the Town and Country Planning Act 1990, providing for the local planning authority to grant planning consent for development and Chapter I of the Environment Act 1995, creating the Environment Agency and transferring statutory duties to it.
29 For a prescriptive argument to this effect see Paul Daly, A Theory of Deference in Administrative Law (CUP 2012) ch 2-3.
30 (n 28).
33 R v Secretary of State for the Home Department, ex. P. [1995] 1 All ER 870 [39]. See also Warnock and Pedersen (n 11).
34 Mott v Environment Agency [2016] EWCA Civ 564 [78].

Electronic copy available at: https://ssrn.com/abstract=3124930
to strike a balance between the need for new infrastructure projects and the economic and human well-being that goes with this against the environmental harm and impacts, flowing from a project. Ordinarily this requires the balancing of future and unknown risks which are difficult to quantify and the weighing of contestable advantages and disadvantages. Moreover, undertaking such an assessment necessarily requires appreciation of considerations typically found in the disciplines of science, economics and/or technology. Against this background of a statutory framework which embodies open-ended standards and value judgments, it is likely more difficult to persuade a court that a decision is wrong in law or irrational.\(^{35}\) This is not to suggest that courts are not appropriate places for the contestation of environmental claims, but merely to highlight the fact that this necessarily takes place against a background which is distinctively non-legal and which gives rise to specific challenges.\(^{36}\)

Against this potentially ‘political’ nature of environmental law stands the principal legal nature of judicial review in which, as Cane highlights, the focus of the courts is ‘distinctively legal … in order to provide a counterweight to the political might of government’.\(^{37}\) The origin of this, ‘subordinate judiciary’ is, to Cane, ironically found in the constitutional framework of the rule of law and the need for the courts to act as the ultimate restraint on government power.\(^{38}\) The upshot of this is, for present purposes, that in cases where perceived ‘political’ considerations are prominent, as in environmental claims, the courts are likely to be more deferential to government agencies which enjoy statutory legitimacy.\(^{39}\) The impact of this on environmental judicial review claims is likely to be profound though it must be appreciated that the distinction between, on the hand, law and, on the other, policy is far from clear-cut in environmental cases. In fact, there is reason to believe that in the context of environmental law, the boundaries between law and policy are fluid and indistinct, considering the rate at which so-called policy considerations gain legal force in environmental law.\(^{40}\)

In turn, this arguably gives rise to a situation where many claims inevitably give the impression of being driven by disagreement about the merit of a decision rather than specific legal grounds which may well serve to explain, in part, the lower rate of success in


\(^{36}\) E.g. Ceri Warnock, ‘Reconceptualising Specialist Environment Courts and Tribunals’ (2017) 37 LS 391. See also Jeff King, ‘The Pervasiveness of Polycentricity’ [2008] PL 101, arguing that polycentricity does not preclude judicial decision-making as is it ordinarily understood to do.

\(^{37}\) Peter Cane, Controlling Administrative Power (CUP 2016) 230.

\(^{38}\) ibid.

\(^{39}\) ibid., 221 and 243.

environmental judicial review claims. In a 2003 study which mapped administrative appeal routes in environmental law, Macrory and Woods suggest that around 2/3 of the cases which they examined came across as merit driven.\textsuperscript{41} Though it has not been possible to firmly establish the rate at which claims are merit driven as part of the present study with its emphasis on quantitative methods, little concrete evidence emerged to suggest that Macrory and Woods’s argument is incorrect. In particular in cases relating to planning consent and EIA decisions, many claims can seem as attempts to second-guess administrative decisions. The reason for this is potentially two-fold. First, administrative environmental decisions are, in the majority of cases, likely only to be brought once there is a highly concrete and material interest at stake be it private, commercial, property or communal interest as (though there are of course notable exceptions).\textsuperscript{42} Second, there is no statutory right of appeal for third-parties in planning cases so where members of the public seek to challenge a planning decision judicial review in practice becomes the main appeal route. This poses a problem for claimants who will have to persuade a court, hearing a judicial review claim, that the matter before it is purely a legal one. One consequence of this is that, in environmental claims, the distinction between merit and legality is, as noted, arguably a fine one.\textsuperscript{43}

This fine distinction does, from time to time it seems, pose particular challenges for claimants. As pointed out by Ouseley J in a challenge relating to the granting of planning permission without an EIA:

It is inevitable that those who are opposed to the development will disagree with, and criticise, the appraisal, and find topics which matter to them or which can be said to matter, which have been omitted or to some minds inadequately dealt with. Some or all of the criticism may have force on the planning merits. But that does not come close to showing that there is an error of law.\textsuperscript{44}

\textsuperscript{41} Macrory and Woods (n 1), 21-22.
\textsuperscript{42} E.g. \textit{R (Friends of the Earth) v Secretary of State for Business, Enterprise and Regulatory Reform} [2010] Env LR 11; \textit{Greenpeace Ltd v Secretary of State for the Environment, Food and Rural Affairs} [2006] Env LR 27; \textit{R (Greenpeace Ltd) v Secretary of State for Trade and Industry} [2007] Env LR 29; and \textit{R (Friends of the Earth) v Environment Agency} [2004] Env LR 31.
\textsuperscript{44} \textit{R (Bedford) v London Borough of Islington} 2003 Env LR 22 [203]. See also \textit{R (Jones) v Mansfield DC} [2003] Env LR 26 in which Richards J (as he then was) rejected the challenge to the grant of planning permission based on the argument that an EIA had been required by reference a so-called ‘bounding-approach’ (effectively creating an assumption in favour of conducting an EIA in cases of uncertainty of the environmental impact), observing that ‘it is important not to over-complicate the analysis of this issue’ [51].
Related to this is the consideration whether certain grounds of review perhaps are more merit-driven than others or at least more likely to come across as being more merit-driven. This might well be the case for challenges based in *Wednesbury* unreasonableness grounds taken against a framework which requires decision-makers to take certain measures where, for example, impacts are identified as ‘significant’. In *Zeb v Birmingham City Council*, Beatson J (as he then was), for example, observed that central parts of the claimant’s *Wednesbury* challenge was really a disagreement on the merits. This in turn raises the prospect that certain types of claims, relying on particular types of grounds of review, are less likely to be successful.

In addition to the nature of environmental claims and judicial review explaining the low rate of success in judicial review claims, another probable reason is that certain environmental claims are less likely to be settled prior to reaching the full stage. This may in turn result in a higher rate of claims which are unlikely to succeed reach the courts in environmental law compared to other types of cases (e.g. housing claims). In addition, Bondy and Sunkin speculate that a further explanation is found in the *functus officio* status of the type of administrative decisions reached by e.g. planning authorities. Once a planning permission has been granted or a local authority has provided a negative screening opinion in the context of an environmental impact assessment (EIA), the decision is necessarily ill-suited to the settlement procedure and the only way to dispute such a decision is by way of a formal legal challenge. To the extent this is the case, this characteristic arguably highlights the point made above that claims are primarily brought where there is a confined and particular interest (not necessarily an individual interest) in challenging a decision. In these situations, interests and claims are perhaps more likely to be entrenched and set in direct opposition to one another, i.e. for or against a given development, and claimants are arguably less inclined towards seeking the compromise which an out of court settlement necessarily entails.

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45 *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1947] EWCA Civ 1.
47 See also Joanna Bell, ‘ClientEarth (No 2): A Case of Three Legal Dimensions’ (2017) 29 JEL 343.
48 Varda Bondy and Maurice Sunkin, *The Dynamics of Judicial Review Litigation: The Resolution of Public Law Challenges before Final Hearing* (Public Law Project 2009) 37-39. This is in part backed by research, finding that ‘out of court’ settlement and cases settled with consent order of a court are relatively rare in environmental claims, E.g. Radoslaw Stech, ‘Costs Barriers to Environmental Judicial Review: A Study in Environmental Justice’ (PhD Thesis Cardiff University 2013) Ch. 8 available on [https://orca.cf.ac.uk/47605/1/PhD_Radoslaw_Stech_0538599_final.pdf](https://orca.cf.ac.uk/47605/1/PhD_Radoslaw_Stech_0538599_final.pdf) (accessed 5 December 2018).
49 Bondy and Sunkin (n 48) 39.
50 Pedersen (n 13).
3.1.2 Statutory Appeals

In order to compare the main findings on the rate of approve/dismiss of judicial review claims, the rate at which the courts allow or dismiss challenges in statutory appeals was examined as well. The number of statutory appeals reported in the Env LR in the same period of 1994-2014 was thus identified and defined by reference to level of court and whether a court allows or rejects a challenge to an administrative decision. In making this assessment, a few points must be noted, however. First, as with the judicial review cases included in the study, statutory appeals relating to criminal convictions have been excluded as have statutory appeals in statutory nuisance challenging, for example, a decision by a magistrates’ court under Part II of the Environmental Protection Act 1990. Secondly, when identifying and surveying the statutory appeal cases reported in the Env LR, it becomes evident that appeals are heard from across a very wide range of statutory systems and routes. In the High Court alone, appeals were identified from 11 different appeal routes (including appeal routes under the Town and Country Planning Act 1990,51 the Planning and Compulsory Purchase Act 2004,52 the Finance Act 1996,53 the Environmental Information Regulations 2004,54 and the Transport and Works Act 1992).55

The third point to note is that, perhaps contrary to what one would expect, only a limited number of statutory appeals are reported in the Env LR. The study thus identified 23 statutory appeals heard by the High Court (of which a subset of two were brought by government agencies),56 17 appeals were heard by the Court of Appeal (of which a mere ten were claims brought against public authorities), and two statutory appeals heard by the House of Lords/Supreme Court. As a consequence, the utility of a comparison between the outcomes of judicial review claims and the outcomes of statutory appeal cases is significantly limited by reference to the small sample size of statutory appeal cases. This is particularly so for the Court of Appeal and the House of Lords/Supreme Court.

With these limitations in mind, the study found that the rate at which the High Court found in favour of claimants in statutory appeal cases was lower than the rate of success enjoyed by claimants in judicial review proceedings. The rate of success in the High Court in

51 Including ss 107, 287, 288.
52 Including s 113.
53 Including s 55.
54 Including reg.18.
55 Including s 22.
56 Export Credits Guarantee Department v Friends of the Earth [2008] Env LR 40, relating to a challenge to the decisions of the Information Tribunal and Customs and Excise Commissioners v Darfish Ltd [2001] Env LR 3, also relating to a challenge by a government agency to the findings of a tribunal.
statutory appeal cases was found to be 19% with the rate of rejection of claims standing at 76.2% (in 4.8% of statutory appeals the High Court found in favour of the claimant only in part). This stands in contrast to the rate of success in judicial review claims of 32.8% with a dismissal rate of 64.2%. Conversely, before the Court of Appeal in the statutory challenges brought against public authorities, the rate of success stands at 20% with a rate of rejection at 80% which is a slightly higher than the rate of success enjoyed by claimants in judicial review proceedings against public authorities (standing at 14.5%). In light of the very small sample size for the Court of Appeal claims against public authorities, these findings must, however, be treated with caution. The even smaller sample size of statutory appeals heard by the House of Lords/Supreme Court makes any comparison between rates of success largely irrelevant. With this in mind, and to the extent the sample size allows any wider points to be extrapolated, there is little to suggest that the courts are finding in favour of claimants at any significantly degree (the opposite seems to be the case for the High Court) where Parliament has expressly provided for a right of appeal to the courts. One could, for example, reasonably expect that the high rate of dismissals would be less pronounced in statutory appeal cases though the findings here do not necessarily suggest this is the case.

3.1.3 EU Law Claims

In order to contextualise the findings of the study against the background of Brexit, the 134 judicial review cases decided by the High Court and 55 judicial review claims against public authorities before the Court of Appeal were examined separately in order to ascertain whether the fact that a case relates to EU law had any discernible impact on the success rate (though it is accepted that points of EU law might well arise in statutory appeal cases). The study thus identified the cases and success rates in which a point of EU law was relevant in the form of a) a claimant expressly basing a challenge to an administrative decision on an EU law argument (e.g. by questioning the legality of an underlying decision by reference to EU law) or b) where a court expressly relied on EU law or a Court of Justice decision in order to reach a decision without necessarily being expressly prompted to do so by the claimant. Examples of the former include *R (Noble Organisation Ltd) v Thanet DC*57 in which the claimant expressly relied on points of EU law as a base on which to challenge the decision by the local planning authority and examples of the latter include *Threadneedle Property Investments Ltd v Southwark LBC*,

where the High Court relied extensively on the EIA Directive\(^{58}\) in order to interpret the EIA Regulations\(^{59}\) without the claimant expressly inviting the Court to do so.\(^{60}\) Against this, it must be noted, however, that establishing whether a claim raises substantive issues of EU law is necessarily somewhat problematic in the area of environmental law. Often a claimant may base a claim on EU law only in part and the extent to which a court comes to rely on this point is not always readily discernible. Thus, the most common approach taken by claimants is (not surprisingly) to base a claim on several points of law at the same time. Consequently a court is, at times, likely to only engage briefly with a substantive issue of EU law where a claimant also relies on a point of e.g. domestic administrative law. In a majority of cases there is no doubt very good reasons for a claimant to pursue a claim on several grounds, whereas in other case this approach may well backfire if doing so is seen by the court as overly disparate.\(^{61}\) For the purposes of this study, cases in which a court has substantively engaged with a point of EU law irrespective of whether a claimant has expressly based the claim on an EU law source have been included.

A second type of EU law-relevant claims is those which relate entirely to domestically enacted legislation derived from EU law but do not as such rise questions of EU law. Though this may sound counterintuitive, a host of cases arise in which claimants challenge an administrative decision made in pursuance of domestic legislation (e.g. the Town and Country Planning (Environmental Impact Assessment) Regulations) which give force to EU law without necessarily basing the claim on a point of EU law or without the court necessarily engaging with matters of EU law. Often such claims may be based on points of domestic law (e.g. Wednesbury unreasonableness or irrationality) or they may relate primarily to domestic case law.\(^{62}\) Notwithstanding that the interpretive method by a court of such domestically-based claims might be similar to that of claims based on points of EU law (in that they inevitably include an assessment of the purpose of a given instrument), only the cases where EU law have been \textit{substantively} relied upon/engaged with have been included here.\(^{63}\) It must be appreciated,


\(^{60}\) [2013] Env LR 1.

\(^{61}\) E.g. \textit{R (Richardson) v North Yorkshire CC} [2004] Env LR 34 per Simon Brown LJ: ‘I am conscious that despite the unusual length of this judgment it nevertheless leaves unaddressed a number of Mr McCracken's disparate arguments. [...] where, as here, a challenge or appeal is pursued in a somewhat scattergun fashion, it is simply not practicable to examine every pellet in detail.’ at [80].


\(^{63}\) E.g. \textit{R. v Rochdale MBC Ex p. Milne (No 2)} [2001] Env LR 22 in which Sullivan LJ (as he then was) relied extensively on the EIA directive despite pointing out several times that the proper starting point was the
however, that inevitably undertaking this assessment involves an element of subjective judgment. Finally, the assessment here includes the cases in which a challenge to an administrative decision is based on EU law more widely and not just EU environmental law. That is, in a subset of case included here claimants have relied on, for example, provisions in the Treaties or secondary EU law which would not ordinarily be defined as environmental law. Consequently, the most frequent type of claim, engaging with a matter of EU law identified in this study is the paradigmatic claim that an administrative decision has been taken in violation of EU law (ordinarily a directive) and that the decision is unlawful as a result of this.

The study shows that of the 134 High Court judicial review cases, 75 cases (56%) are identified as raising points of EU law. In the 75 judicial review cases the High Court found in favour of the claimant in 24 cases (32%) and against the claimant in 49 cases (65.3%). In two cases (2.6%), the High Court found in favour of the claimant only in part. In the Court of Appeal, the study identified that a higher rate of claims taken against public authorities raised points of EU law. Out of the 55 cases, 41 were thus identified as raising matters of EU law (74.5%). In these, the Court found in favour of the claimant in 6 cases (14.6%) and against the claimant in 35 cases (85.4%) though the small sample size must be borne in mind (presented in Figure 1).

Compared to the respective rates of success in the High Court and the Court Appeal, the rates of success in claims relating to EU law are almost identical with a maximum deviation of no more than 1.1 percentage point in the case of the High Court with the Court of Appeal’s deviation being practically indistinguishable. Thus, while a claimant’s reliance on a point of EU law likely will make significant differences to the type of doctrinal argument pursued before a court and the scope and scrutiny of a court’s assessment, it seemingly makes little difference to the claimant’s overall likelihood of success. This suggests that in the post-Brexit environmental law landscape, comparatively speaking, claimants are not necessarily likely to

Regulations themselves, rather than the Directive at [82] and [96] contra R v Waveney DC Ex p. Bell [2001] Env LR 24, relating exclusively to domestically enacted law. Similarly, in some cases the courts seemingly apply EU-derived domestic rules side-by-side with the underlying EU rules without necessarily distinguishing materially between the two rules. E.g. Threadneedle Property Investments Ltd v Southwark LBC (n 58), Brown v Carlisle City Council [2011] Env LR 5 and R (Tree and Wildlife Action Committee Ltd) v Forestry Commissioners [2008] Env LR 5, all of which have been included.

65 E.g. R (Lewis) v Environment Agency [2006] Env LR 10 in which the claimant challenged the grant of a permit to a landfill operation on the grounds that the permit did not comply with the landfill directive Council Directive 1999/31/EC, OJ L 182, 16/07/1999 1.
fare worse (or indeed better) than is presently the case when claimants have recourse to EU law and doctrines in support of a claim. Importantly, however, this does not mean that the reliance on EU law in a given claim does not necessarily influence the likelihood of success before a court in individual cases. It cannot, for example, be ruled out that a claim relying on a point of EU law would have been, relatively speaking, weaker had it not been for its reliance on EU law. That is, an otherwise hopeless claim may become arguable as a result the claimant being able to rely on a point of EU law. Consequently, it may well be the case that relying on a point of EU law can make a weak claim - which would otherwise stand very little chance of being successful - at least as likely to be successful as other non-EU law claims. Moreover, this does not mean that the reliance on judicial review as a means of securing oversight is not problematic.66 Many of the challenges arising as a result of Brexit in the context of legal accountability relate not so much to the actual rate at which challenges before the courts are successful, but relate to the need to secure effective scrutiny and enforcement of standards and reporting obligations without necessarily having to turn to the courts.67

3.2 DECISION-MAKING BY AUTHORITIES AND CLAIMANTS

When breaking the total number of judicial review decisions down by type of public authority, the figures reveal, firstly, that the majority of cases are taken against local authorities (this is likely explained by reference to the high volume of planning decisions in the data set, discussed below). Out of the 134 judicial review cases heard by the High Court, 83 (61.9 per cent) were challenges to decisions made by local authorities, 34 (25.4 per cent) were challenges to decisions made by central government departments, 15 (11.2 per cent) were challenges to decisions made by the Environment Agency and two (1.5 per cent) were categorised as ‘other’. The rate of success against each of these authorities shows that those seeking to challenge decisions made by the Environment Agency stand a higher chance of finding support in the High Court than those challenging decisions by local authorities and, in particular, decisions made by central government agencies (Figure 2). Out of the 15 challenges to decisions made by the Environment Agency, the High Court found in favour of the claimant in six cases (40

66 UKELA (n 4).
per cent) whereas it confirmed the decision by the Agency in nine cases (60 per cent). Of the 83 challenges to local authority decision-making, the High Court allowed 31 challenges (37.3 per cent) and dismissed 49 (59 per cent) (three claims were allowed in part (3.6 per cent)). Strikingly, challenges to central government decisions were only allowed in seven out of 34 cases (20.6 per cent) and 26 (76.5 per cent) were dismissed (one case was allowed in part (2.9 per cent)).

The relative lower rate of success claimants have against the different types of public authorities in the Court of Appeal not surprisingly mirrors the overall lower rate of success before the Court. As in the High Court, the highest rate of success is found in challenges to decisions made by the Environment Agency with the Court of Appeal allowing 33.3 per cent of appeals against the Agency’s decisions (dismissing 66.6 per cent). The rate of success of appeals challenging decisions of local authorities is almost identical to the overall rate of success in the Court of Appeal with the Court allowing 15.6 per cent of appeals and dismissing 84.4 per cent of appeals. The rate at which the Court of Appeal dismissed appeals against decisions of central government agencies is, however, significantly higher than both the overall average and the average of the High Court: the Court of Appeal allowed only 5.5 per cent of appeals against central government agencies and dismissed 94.5 per cent. Again, the contexts and specific rules of each statutory framework likely play a central role. For example, the significantly lower rate of success enjoyed by claimants challenging environmental decisions made by central government agencies is possibly explained by the fact that many of these decisions have already undergone a significant level of scrutiny by virtue of them being, for example, decisions on appeal made by the Secretary of State (ie the Planning Inspectorate) in response to ‘first instance’ challenges to decisions by local planning authorities. By time such decisions reach the courts, contentious points may well have been ‘ironed out’. This extra layer of scrutiny is not necessarily enjoyed by decisions made by the Environment Agency or local authorities.

**Fig. 2 Success rate in High Court and Court of Appeal against public authorities by public authority in judicial review**
If the rate of success in judicial review is instead assessed by reference to the type of claimant, the data shows that in the High Court out of the four cases brought by so-called competitors (i.e., a third party who seemingly brings the claim in order to challenge an authorisation potentially benefitting a commercial competitor) the Court found in favour of the claimant in only one case (25 per cent). In the 12 claims brought by local authorities (against other local authorities or the government), the High Court found in favour of the claimant in half of them (50 per cent) whereas in claims brought by members of the public the Court found in favour of the claimants in 25 out of the 53 claims (31.2 per cent allowed against 66.3 per cent dismissed) and in claims brought by the regulatee/regulated entity the Court found in favour of the claimant in 9 (25 per cent) and dismissed 27 (75 per cent) of claims (presented in Figure 3).\(^{68}\) In the Court of Appeal, the findings for the claims brought by competitors is nearly identical to that of the High Court with the Court of Appeal finding in favour of the claimant in one out of the four claims (25 per cent). The success rate for claims brought by members of the public is significantly lower with the Court finding in favour of claimants in six out of the 43 claims (14 per cent) and against a member of the public in 37 cases (86 per cent) whereas in the claims brought by regulatees the court finds in favour of the regulatee in one out of the seven cases (14.3 per cent). Only the claims brought by members of the public and regulatees respectively are numerous enough to yield a meaningful data set. The rate of success enjoyed

\(^{68}\) Two cases not presented in Figure 3 were brought by a local health authority and an appointed liquidator respectively.
by members of the public and regulatees suggest, however, that members of the public enjoy only a marginally larger chance of success though this rate is near identical to the overall average rate of success enjoyed by claimants in both the High Court and the Court of Appeal.

Against these findings, a few observations must be made. First, the 55 judicial review claims heard by the Court of Appeal represent a rather small sample and any conclusions based on this basis must be treated with some caution. Second, the categorisation into types of claimant necessarily is somewhat crude. For example, the members of the public category includes a wide range of different types of claimants, ranging from large environmental groups with a national focus to small local groups formed with a particular issue in mind to individuals. Similarly, the category regulatee includes a wide array of claimants, including small family owned businesses, property owners impacted by e.g. the designation of property as a site of special scientific interest under s 28 of the Wildlife and Countryside Act 1981 as well as large utility companies.69 Consequently, any assessment of whether a claim can be said to be taken with the aim of pursuing environmental protection interests as opposed to being grounded in commercial interests cannot be established in a study of this type. This would instead require a much more fine-grained examination of the individual motives of each claim. Such motives might not, at the best of times, be detectable from reading the Env LR or indeed other types of law reports.

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**Fig. 3 Success rate in High Court and Court of Appeal (against public authority) by claimant in judicial review**

3.3 DECISION-MAKING OVER TIME AND DIFFERENCES IN FIRST INSTANCE AND APPELLATE DECISIONS

Viewed longitudinally, and focusing exclusively on the High Court and the Court of Appeal, which delivered 96 per cent of the judicial review decisions in the study, two potential conflicting temporal trends emerge. In the High Court, apart from a trend in the mid- to late-nineties of the Court moving towards allowing claims against public authorities at an increasing rate, the High Court has more recently moved to dismiss claims at a higher rate. Though this may in part be explained by the emergence of a limited number of cases in which the Court has found in favour of the claimant only in part, this possible trend stands in contrast to the potential pattern emerging from the Court of Appeal (focusing only on the number of appeals against decisions made by public authorities and excluding the relatively few cases appealed by public authorities themselves). In the Court of Appeal, a possible recent trend emerges from the mid-2000s and onwards of the Court moving to allow appeals against environmental law decisions of public authorities at a higher rate than was the case in the mid- to late-nineties. That is, the Court of Appeal found in favour of claimants challenging public authorities at an increasing rate. Though this possible trend is relatively recent, it serves to counter somewhat the overall high rate at which the Court of Appeal finds against claimants challenging the decisions made.
by public authorities. It moreover suggests that on closer scrutiny, the Court of Appeal’s high rate of dismissals of claims against public authorities is possibly more tempered than initially assumed. Having said that, the relatively small sample size of Court of Appeal cases must be acknowledged and whether a temporal trend is indeed emerging can only be definitively verified over a longer study period than the one applied in this study.

**Fig. 4 Success Rate in High Court and Court of Appeal over time in judicial review**

What explains the significant difference in success rate before the High Court against that of the Court of Appeal? One reason is likely to be that appeal is only allowed where permission is granted and not as a matter of course. Moreover, in most of the cases before the Court of Appeal, the Court will engage in only a limited review of the decision at first stage. In a sense, the claimant faces the extra hurdle of proving that not only was the public authority making an error of law but in finding this not to be the case, the High Court erred in law.

Apart from the overall trend of the Court of Appeal dismissing claims at a significantly higher rate than the High Court, the Court of Appeal has potentially in the most recent period covered in the study moved to find in favour of claimants at an increasing rate. Bearing in mind the relatively small sample size, is there a chance that the Court of Appeal’s approach to
environmental law and environmental claims is changing? Changing in a sense that the Court is becoming more accustomed to environmental claims and the issues to which they give rise and as a result is less hesitant to overrule public authorities? Having said that, even if this is the case, it does not necessarily follow that becoming more accustomed to environmental claims entails a propensity to find in favour of claimants and against public authorities.

One relatively straightforward explanation may be found not so much in the Court of Appeal’s attitudes to the law but in the gradual restriction in recent years in the ability of claimants to bring appeals to the Court of Appeal. As bringing appeals have become harder it may have had the effect of ‘weeding out’ unmeritorious claims. As a consequence, the cases actually making it to the Court of Appeal stand a higher chance of success.

Against this, the claim that in more recent decisions the Court of Appeal is leading a moderately ‘interventionist’ approach to environmental claims by reference to the Court being more accustomed to the discipline of environmental law, may seem puzzling in light of the fact that it is the High Court which hears the highest number of cases. If any of the courts in the study ought to become more accustomed to environmental law, one would arguably expect it to be the High Court (though individual exposure of each individual judge may be lower by virtue of there being more judges sitting compared to the Court of Appeal). Although the rate at which the High Court allows claims against public authorities in environmental claims is higher than the overall average, it is potentially declining in recent years, converging with the lower (but increasing) rate of allowing claims in the Court of Appeal. However, if indeed the argument that the Court of Appeal is getting less deferential towards public authorities is correct, the reason why the trend has not manifested itself in the High Court first may simply be explained by reference to the nature of precedent. To the extent that doctrinal points of precedent emerge from the Court of Appeal’s recent willingness to rule against public authorities with a higher frequency, it would arguably take some time for these to emerge and manifest themselves in a manner which is statistically significant and measurable in a study of this kind.

A further potential reason for the possible divergent trends between the High Court and the Court of Appeal partly explaining why the Court of Appeal is in recent years overruling at an increasing rate, could be the make-up of the bench in the respective courts. This point rests on the assumption that most of the judges sitting in the Court of Appeal in the period from 2003-2014, when the possible trend manifests itself, will have sat in the High Court in the

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70 E.g. Access to Justice Act 1999 and CPR 52.6.
earlier period of the study prior to being promoted to the Court of Appeal. That is, the judges being promoted to the Court of Appeal in the period covered by the study will have taken their ‘environmental law experience’ and the higher rate of allowing claims from the High Court with them. These judges include, for example, Sullivan LJ (promoted to the Court of Appeal in 2009) and Carnwath LJ (promoted in 2002). In light of the relative small sample size, it cannot be ruled out that the individual decision-making patterns of a few judges significantly shape the overall rates of a particular court.

3.4 VARIATION ACROSS SUBSETS OF ENVIRONMENTAL LAW

To test for any variability in the success rate of claimants in different types of environmental cases, the 207 judicial review (excluding the statutory appeal cases) decisions were divided into the following categories based on the primary statutory regime under which a claim was made: planning/EIA; nature conservation; pollution control; energy/water; environmental information; human rights; and others. This categorisation is somewhat simplistic insofar as many of the claims made in the cases inevitably overlap in terms of subject area. For example, a claimant seeking to gain protection of an endangered species or habitat might choose to do so by reference to the Town and Country Planning (Environmental Impact Assessment) Regulations\(^\text{71}\) just as a claimant seeking to challenge the various permits afforded a waste treatment facility may be more inclined to do so by challenging the planning permission granted by the local planning authority than through challenge to the environmental permit granted by the Environment Agency.\(^\text{72}\) Notwithstanding this, the breakdown of the 207 cases by reference to subject area clearly shows a preponderance of planning/EIA cases (presented in Table 1), making up more than half of the decisions in the data set. This pattern is even more pronounced in the small subset of statutory appeals identified where the vast majority of claims are planning appeals brought under the Town and Country Planning Act 1990.

### Table 1 Judicial review cases by subject area

<table>
<thead>
<tr>
<th>Judicial Review</th>
<th>Cases</th>
<th>Per Cent</th>
</tr>
</thead>
<tbody>
<tr>
<td>Planning/EIA</td>
<td>110</td>
<td>53.1</td>
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</table>

\(^\text{71}\) Most recent version of which is found in Town and Country Planning (Environmental Impact Assessment) Regulations 2017, SI no 571/2017.

\(^\text{72}\) E.g. R. (Hardy) v Pembrokeshire CC [2006] Env. L.R. 16.
In assessing the rate at which the courts found in favour of the claimants by subject area, the assumption alluded to above might well be that to the extent a subject area is likely to be perceived as more ‘political’ than others (as defined above by reference to the need to balance competing interests related to resource claims), the courts would be likely to find in favour of claimants at a lower rate and, conversely, in favour of public authorities at a higher rate. There is, however, little to suggest that this is the case. In the High Court, the rate at which the Court found in favour of claimants remained relatively constant across the three main subject areas with 29.8 per cent of decisions being decided in favour of claimants against 68.7 per cent being dismissed in planning/EIA cases, 25 per cent of cases being found in favour of the claimants against 68.7 per cent being dismissed in Nature Conservation cases and 35 per cent of pollution control cases being decided in favour of claimants against 65 per cent being dismissed (Figure 5). Only in some of the areas in which the total number of decisions remain relatively low (energy/water, human rights and others), does the allow/dismiss rate vary significantly whereas in the three environmental information cases, the rate is broadly in line with the overall average. This suggests that to the extent that environmental claims are perceived as more ‘political’ in

<table>
<thead>
<tr>
<th>Subject Area</th>
<th>Allow (%)</th>
<th>Rate (%)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Nature Conservation</td>
<td>25</td>
<td>12.1</td>
</tr>
<tr>
<td>Pollution Control</td>
<td>57</td>
<td>27.5</td>
</tr>
<tr>
<td>Energy/Water</td>
<td>8</td>
<td>3.9</td>
</tr>
<tr>
<td>Environmental Information</td>
<td>4</td>
<td>1.9</td>
</tr>
<tr>
<td>Human Rights</td>
<td>1</td>
<td>0.5</td>
</tr>
<tr>
<td>Other</td>
<td>2</td>
<td>1</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Statutory Appeals</th>
<th>Allow (%)</th>
<th>Rate (%)</th>
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<tbody>
<tr>
<td>Planning/EIA</td>
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<td>64.3</td>
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<tr>
<td>Pollution Control</td>
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<td>16.6</td>
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<tr>
<td>Environmental Information</td>
<td>2</td>
<td>4.8</td>
</tr>
<tr>
<td>Energy/Water</td>
<td>2</td>
<td>4.8</td>
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<tr>
<td>Other</td>
<td>4</td>
<td>9.5</td>
</tr>
</tbody>
</table>

Electronic copy available at: https://ssrn.com/abstract=3124930
nature compared to other types of claims (and to the extent this is verifiable in a purely quantitative study of this kind), this is a tendency which is found across the board of environmental claims.

**Fig. 5 Success by subject area in judicial review**

A similar picture emerges from the breakdown into subject area of decisions by the Court of Appeal in judicial review appeals challenging decisions by public authorities (Figure 5). As with the High Court decisions, the deviation from the average (high) rate of rejection of such challenges by the Court of Appeal is minimal, suggesting that to the extent that environmental claims are ‘political’, this is the case in all subject areas and no area is necessarily judged to be more ‘political’ than others.

4. WIDER CONSIDERATIONS

In light of the findings presented in the preceding sections and the inferences drawn therefrom, this sections briefly contextualises the implications and relevance of the study for debates on the nature of environmental litigation. The first point to make is that the overall trend of a low rate of success in environmental judicial review claims, when compared to other areas of law, is perhaps likely to surprise few. What is important in this context is instead to keep in mind
that the findings of the study also suggest that the overall findings mask degrees of variation across other benchmarks. As highlighted above, the rate of success varies significantly between the High Court and the Court of Appeal and, generally speaking, the Supreme Court hears relatively few cases. This suggests that those taking part in debates on the nature of judicial review claims in environmental law and the proper role of the courts in supervising this important area of law at least ought to be alert to these variations and details. Often commentary on environmental adjudication and the role of the courts in environmental governance is somewhat generic, failing to engage with the variations identified in this study.\textsuperscript{73} The appreciation of such finer details is important. As Warnock argues in the context of environmental adjudication by specialist tribunals, the lack of appreciation of context ultimately runs the risk of impoverishing scholarly discourses.\textsuperscript{74} Bearing in mind the findings on the impact of EU law on the prospect of success, this is particularly important where there are practical implications flowing from such debates, eg in the context of supervision of post-Brexit UK environmental law and whether this, for example, ought to take the form of specialist adjudicatory bodies.\textsuperscript{75}

Beyond a desire to maintain scholarly integrity of any claims made in the context of environmental adjudication, the findings of the study go to the much wider consideration of what the proper role of courts in environmental decision-making might be. Obviously this is not a matter which can be settled in this article. The aim of the article has specifically been to provide a quantitative basis for such future discussions. The relationship between the findings reported here and the issue of what role the courts are considered to be playing in environmental adjudication has two elements to it. First, as with the point made above, in order to consider what role the courts \textit{ought} to have in environmental adjudication (and whether this might be different from other areas of administrative law), a firm understanding is needed of what the courts actually \textit{are} doing. That is, normative and prescriptive claims ought to be grounded in factual bases (though interpretations of those bases might well vary). Second, and conversely, the perceived role performed by the courts in environmental adjudication is of course likely to have an impact on \textit{what} the courts are actually doing when deciding claims. Whether the courts are seen as addressing regulatory inertia, identifying symbolic issues of social concern, and/or settling important points of facts impact on the response adopted by a specific court to a given

\begin{itemize}
\item \textsuperscript{73} McAuslan (n 2).
\item \textsuperscript{74} Warnock (n 36).
\item \textsuperscript{75} Gareth Simkins, ‘No Green Court for Scotland’ \textit{ENDS Report} (6 October 2017).
\end{itemize}
The point is that the purely descriptive claims about what the courts do (presented here by reference to rate of success) shapes understandings of any prescriptive argument about what the courts ought to do in environmental law and whether commentators ultimately will find whether courts are successful in performing their roles.

Against this, it becomes evident that the nature of work presented in this article only represents a snapshot of a particular subset of environmental adjudication from a specific period. That being the case, there are limitations associated with the kind of study executed here and, in a sense, it arguably asks as many questions as it answers. Consequently, future avenues for research might helpfully include follow-up quantitative work, seeking to establish the reality of eg the potential trend alluded to above in Fig. 4, relating to temporal changes in the rate of success in the High Court and the Court of Appeal. Additional quantitative work adding further context to the debate might also include comparative work with other decision-making and dispute settlement bodies, deciding environmental law claims, including eg the Planning Inspectorate and the separate planning chamber within the Administrative Court. Similarly, a more context-specific and qualitative approach to judicial decision-making than the one applied here would potentially add real value to the understanding of environmental litigation by revealing underlying values and attitudes beyond the primary outcome-focused study like the present one.77

5. CONCLUSION

In order to ascertain the rate at which courts allow or dismiss challenges to administrative environmental decision, this article has presented the findings of a quantitative study of 249 judicial decisions (made up of 207 judicial review decisions and 42 statutory appeal decisions). Focusing primarily on judicial review claims, the article finds that the rate of success for claimants challenging environmental decisions by public authorities is lower than in other areas of administrative law. The courts, in other words, uphold administrative environmental decisions by public authorities at a significant rate. In nearly 70 per cent of the judicial review decisions in the data set, the courts dismiss a challenge brought against a public authority. The article suggests that the primary reason behind this is found in the combination of the ‘political’ characteristics of environmental law and the ‘legal’ nature of judicial review. Importantly,

77 Eg Rachel Cahill-O’Callaghan, ‘The Influence of Personal Values on Legal Judgments’ (2013) 40 JLS 596.
however, the study also finds that the rate of success varies significantly between the High Court and the Court of Appeal though it varies less by reference to the subject area of environmental law, suggesting that the courts consider all areas of environmental law equally ‘political’. Similarly, the study finds that the likelihood of success enjoyed by a claimant varies significantly, depending on whether a challenge is brought against a central government agency or other public authorities with statutory environmental responsibilities. The study also finds that claims in which points of EU law are raised are at least as successful as claims in which EU law is not considered, suggesting that relying on points of EU law does not negatively affect the prospects of success. Though it cannot be ruled out that relying on a point of EU might make a particular claim more likely to succeed. In reaching these findings, the study provides a quantitative evidence base for ongoing debates on the future of administrative accountability in UK post-Brexit environmental law. Importantly, the inherent limitations of a study of this kind, relating to the finer intricacies unavoidably present in judicial decision-making must be borne in mind. This does not mean, however, that the type of quantitative study presented here is not relevant, for it provides a foundation for future work, seeking to engage with the important question of judicial oversight and scrutiny in environmental law. In addition to the explicit findings of the article, a central argument thus takes the form of an invitation: an invitation to fellow environmental law scholars to engage with this important area of law in order to further the scholarly understandings of the role played by courts in environmental law.

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