Better Call Brockovich: The Use of Injunctions in English Law as a Remedy of Enforcement of the Preventative Principle in Environmental Law

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Abstract—This article discusses the issues in the use of injunctive relief to enforce the preventative principle in environmental protection claims. While injunctions could serve as effective preventative measures, the criteria for granting this remedy render their use in the prevention of environmental pollution limited. The article identifies two significant issues in their stringent requirements – (i) an unsound interpretation of the discretionary nature of equitable remedies and (ii) the property rights-linked locus standi. It then engages in a cross-jurisdictional analysis of the use of injunctions in environmental cases in US federal law which reveals some interesting distinctions between injunctions in English and US law. Based on this analysis, the

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article proposes potential solutions to the identified issues, which would increase the availability and effectiveness of the remedy as a preventative measure in the cases of environmental pollution.

Introduction

In 1988, a tanker driver at Lowermoor Water Treatment Works accidentally discharged an aluminium sulphate solution into the treated water tank. This led to the contamination of drinking water supply for over 20 000 local consumers as well as temporary visitors of North Cornwall,[1] who experienced health issues such as severe skin conditions, digestion problems and even dementia as a result.[2]

In a similar period, in Hinkley, California, a large number of inhabitants started suffering from different types of cancer, mothers were increasingly experiencing miscarriages, and the majority had regular nose bleeds.[3] A young American law clerk Erin Brockovich in 1991 discovered that these conditions were caused by a negligent discharge of water contaminated with hexavalent chromium Cr (VI) from a compressor station operated by Pacific Electric & Gas between 1952 and 1964.[4]

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[1] Douglas Cross, 'The Politics of Poisoning; The Camelford Aluminium Sulphate Scandal (An examination of the effects of aluminium poisoning after the Lowermoor Incident)' (1990) 20(6) The Ecologist 228, 228.

[2] Geoffrey Lean, 'Poisoned: The Camelford scandal' The Independent (London, 16 April 2006) <https://www.independent.co.uk/climate-change/news/poisoned-the-camelford-scandal-358010.html > accessed 25 March 2024.

[3] Amanda Fortini, 'Erin Brockovich Wants to Know What You're Drinking' The Atlantic (15 September 2020) <https://www.theatlantic.com/magazine/archive/2020/09/the-relentless-erin-brockovich/614185/> accessed 19 February 2023.

[4] John A. Izbicki and others, 'Occurrence of natural and anthropogenic hexavalent chromium (Cr VI) in groundwater near a mapped plume,

In both cases, the affected individuals initiated legal actions against the companies responsible for the respective contaminations of drinking water.[5] However, the damage in the form of cancer, respiratory diseases, skin conditions, digestive issues and dementia was done, and could never be fairly compensated. The two incidents serve as proof of the inadequacy of compensatory remedies in many violations of environmental law and emphasise the importance of preventative remedies which should be integrated into law to avoid the recurrence of such incidents.

The preventative principle was introduced in the EU First Environmental Action Programme 1977. It imposes on a state the duty to take early measures to prevent or minimise environmental harm as opposed to solely remedy the harm that has already been caused.[6] The UK clearly continues to enshrine the preventative principle in its legislation after leaving the EU as the Environment Act 2021 explicitly includes the principle of

Hinkley, CA' (United States Geological Survey, June 2023) <https://pubs.usgs.gov/of/2023/1043/ofr20231043.pdf > accessed 19 February 2023.

[5] Paloma Esquivel, '15 years after 'Erin Brockovich,' town still fearful of polluted water' Los Angeles Times (Los Angeles, 12 April 2015) <https://www.latimes.com/local/california/la-me-hinkley-20150413-story.html> accessed 19 February 2023; Camelford poisoning hearings begin BBC (London, 3 April 2002) <http://news.bbc.co.uk/1/hi/england/1908534.stm> accessed 25th March 2024.

[6] Declaration of the Council of the European Communities and of the Representatives of the Governments of the Member States meeting in the Council of 22 November 1973 on the Programme of Action of the European Communities on the Environment [1973] OJ C112/1.

preventative action to avert environmental damage as one of the five environmental principles.[7] This principle is essential in environmental protection as, based on the EU Environmental Action Programme, the preventative principle provides the protection and improvement of the environment 'at the lowest cost' by avoiding environmental harm in the first place.[8] This implies both monetary and non-monetary cost as the preventative principle avoids both expensive remediation of an area and, more importantly, permanent harm to the ecosystem and human health.

Although the integration of the principle into legislative framework and environmental policy can be noticed in the Environment Act 2021,[9] the principle plays a less prominent role in the law of remedies. While the Act enshrines the principle of preventative action to avert environmental damage which requires the government to incorporate it as one of the considerations in the policy-making process,[10] the preventative principle is not as well incorporated into the law of remedies through which prevention is ultimately enforced in practice. The current gap between substantive environmental laws and

[7] Environment Act 2021, s 17 (emphasis added).
[8] ibid, Title II: Principles of a Community Environment Policy.
[9] s 17 of the 2021 Act imposes an obligation on the Secretary of State to prepare a policy statement on environmental principles – (a) the principle that environmental protection should be integrated into the making of policies, (b) the principle of preventative action to avert environmental damage, (c) the precautionary principle, (d) the principle that environmental damage should as a priority be rectified, (e) the polluter pays principle. This statement should explain how these environmental principles should be interpreted and applied by the government in policymaking.
[10] ibid (emphasis added).

environmental enforcement tools is one of the most pressing problems of environmental law.[11] Without remedies capable of enforcing the preventative principle, substantive policy rules become 'paper tigers with no teeth'.[12] The substantive provisions encapsulating the preventative principle should thus be accompanied by appropriate remedies to ensure a robust enforcement of the preventative provisions.

English law already devises a remedy capable of enforcing the preventative principle – injunctions. Injunctions are an important remedy for environmental law as environmental litigation often concerns a future or ongoing action that presents an imminent threat to the environment.[13] These court orders can thus enforce prevention by prohibiting the action before the harm of the action materialises. Nevertheless, while injunctions are a well-established relief in the English law of remedies, their stringent legal criteria significantly diminish their practical value in environmental protection. The cases of *Dennis v Ministry of Defence*[14] and *Coventry v Lawrence*[15] are representative cases of courts preferring to use damages to compensate for the noise pollution nuisance claims and refusing to grant an injunction prohibiting this activity due to their restrictive criteria. While such remedy would be extremely important for the enforcement of the preventative principle in environmental law, its stringent

[11] George Pring and Catherine Pring, 'Twenty-first century environmental dispute resolution – is there an 'ECT" in your future?' (2015) 33(1) Journal of Energy & Natural Resources Law 10, 30.
[12] ibid.
[13] ibid 31.
[14] *Dennis v Ministry of Defence* [2003] EWHC 793 (QB).
[15] *Coventry (t/a RDC Promotions) v Lawrence* [2014] UKSC 13, [2014] AC 822.

requirements ignore the cardinal feature encapsulated in the principle – taking measures to prevent environmental harm.[16]

Although injunctions are urgently needed as a preventative measure of environmental law, the nature of the remedy and the standing requirements are overly restrictive. The article will examine the discretionary nature of the remedy, its stringent standing criteria and the implications of these rigid rules in the context of enforcement of the preventative principle. In search for a more accessible injunction regime in environmental protection, the article will then engage in a cross-jurisdictional analysis, exploring the use of environmental injunctions in the United States. Ultimately, it will be demonstrated that greater availability of environmental injunctions could be achieved with a more flexible reading of the already established criteria.

Using injunctions to enforce the preventative principle

Injunctions are court orders which demand or prohibit a certain party to take a certain action.[17] They are equitable remedies granted by the High Court.[18] While many types of remedies are important in environmental law, including in the form of non-judicial, administrative orders like remediation notices,[19] this

[16] *London Borough of Islington v Elliot and Morris* [2012] EWCA Civ 56 (CA).
[17] Jill E Martin, Hanbury & Martin: Modern Equity (22nd edn, Sweet & Maxwell 2009) para 25-001.
[18] ibid para 25-002.
[19] Environmental Protection Act 1990, s 78E.

article will focus on the use of prohibitory injunctions which restrict or prohibit a certain party from engaging in an action[20] and are thus instrumental in preventative prohibition of potentially polluting actions. The analysis will investigate both interlocutory and perpetual injunctions.[21] Nevertheless, particular attention will be dedicated to perpetual injunctions, thereby exploring injunctions as a final and long-term preventative remedy, prohibiting polluting activities at any time, and not simply as an interim measure.

The remedial capacity of injunctions is effective due to their severe sanctions acting as a deterrent to any environmentally harmful practices. If the party in question fails to comply with an injunction, they will be held in contempt of court, which is punishable by a custodial sentence, removal of property or fine.[22]

Despite their remedial qualities, injunctive relief is unavailable in many instances of the environmental law proceedings due to their stringent requirements. This essay identifies two major challenges in using injunctions to enforce the preventative principle. Firstly, the contemporary interpretation of their discretionary nature does not provide the flexibility needed for the availability of injunctions as preventative remedies in environmental protection. Secondly, the standing requirement is based on property rights and therefore allows only a limited, and

[20] Halsbury's Laws of England (5th edn, 2020) vol. 12, para 1086.
[21] Martin (n 17) para 25-005. While perpetual injunctions are granted to settle an issue as a final remedy, interlocutory injunctions are used in the first stages of litigation to stop an action which will cause irreparable damage while the legal proceedings concerning this practice are pending *(Beese v Woodhouse* [1970] 1 All ER 769) (CA).
[22] Martin (n 17) para 25-011.

potentially disinterested, pool of applicants to file a claim for injunctive relief. Both challenges may greatly impede success of a private claimant engaged in proceedings for injunction against a polluting activity.

1) A discretionary nature of injunctions and its impact on the preventative capacity of the injunctive relief

Jurisdiction to grant injunctions is delegated to the High Court in the Senior Courts Act 1981, s 37. The statutory text reveals a discretionary approach to granting an injunction. The court can grant an injunction 'in all cases in which it appears to the court to be just and convenient to do so'.[23] While this, of course, does not entail that the exercise of discretion is exercised 'on the individual preferences of the judge' as emphasised by Martin,[24] the granting of the order nevertheless should depend entirely on the court's opinion whether injunction is really needed. However, although the discretion in deciding what 'appears to the court' seems to provide sufficient flexibility to the court, the later development of case law adopted a rather restricted view of discretion in awarding damages.

Equitable remedies are extraordinary remedies which can only be used when the common law remedies – damages – are unavailable or inadequate.[25] Only if common law damages were defective, would the court consider granting an injunction.[26] In more recent case law, the House of Lords in *American Cyanamid v*

[23] Senior Courts Act 1981, s 37(1).
[24] Martin (n 17) para 25-002.
[25] Denis Browne, Asburner's Principles of Equity (2nd edn, Butterworth & Co 1933) 343.
[26] Martin (n 17) para 25-008.

Ethicon established the *balance of convenience* test, which should be exercised by the court granting an injunction. This test clearly provides that the availability of injunction is contingent on the availability of damages – if damages are an available remedy in a case, an injunction should not be granted. [27]

All this means that a claimant would have to discharge the burden of demonstrating that damages for an environmental damage, which has potentially not even materialised, are unavailable or inadequate. This is particularly concerning in environmental protection where pollution often causes irreversible damage which cannot be compensated by damages. In light of the weaknesses of damages, the currently used discretionary approach, which prioritises damages, allowing injunctions only in extraordinary circumstances, restricts the access to injunctive relief where such remedy would be needed most.

The dilemma between injunctions and damages was introduced into law by the Chancery Amendment Act 1858 which provided the Chancery Court with the power to award damages, not merely injunctions.[28] However, this brought some confusion to the law in nuisance cases where both remedies were available. *Shelfer* explained that while an injunction could be awarded to correct a wrong, the court can also award damages if more

[27] *American Cyanamid Co v Ethicon Ltd* [1975] AC 396 (HL).
[28] Since equitable jurisdiction was transferred to the High Court by the Supreme Court of Judicature Act 1873, common law courts have the power to award both damages and injunctions.

appropriate.[29] This was clarified by the Court of Appeal in *Kennaway v Thompson*, which held that in the claims based on actions of nuisance or trespass, injunction should be a default remedy, despite its usual discretionary nature, unless the severity or duration of the complained activity do not warrant its prohibition.[30] The judges prevented defendants from 'buying off' claimant's rights through damages while carrying on the harmful action.[31] While this judgment introduced some prima facie optimism with respect to the use of injunctions in environmental law, its impact on the awarding of injunctions was limited.

Firstly, the *Kennaway* principle was limited to the actions of nuisance and trespass.[32] Though these are important in environmental protection, they are unavailable in certain cases which means that injunctions remain discretionary and rarely available in any other claim.

Secondly, notwithstanding the attempts in *Kennaway* by the Court of Appeal, it seems that later case law reversed the position and re-enshrined the equitable, discretionary nature of injunctions which in this case decreased their availability. This approach came to light in the case of *Dennis v Ministry of Defence*.[33]

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[29] *Shelfer v City of London Electric Lighting Co (No 1)* [1895] 1 Ch 287 (CA).
[30] *Kennaway v Thompson* [1981] QB 88 (CA). The case of *Colls v Home & Colonial Store Ltd* [1904] AC 179 (HL), contrary to *Kennaway*, emphasised the need for a more flexible approach in determining the remedy. However, the post-*Kennaway* cases adopted the *Kennaway* approach.
[31] Stuart Bell and others, *Environmental Law* (9th edn, OUP 2017) 376.
[32] *Kennaway* (n 30).
[33] *Dennis* (n 14).

Even though the court recognised the noise produced by RAF fighter jets flying over the claimant's property as nuisance, the public interest would be too severely harmed by an injunction prohibiting the use of the air base near the property for military drills. Damages, on the other hand, compensated the claimant for the nuisance suffered while allowing the polluting activity to continue operating. This new paradigm on injunctions was reaffirmed in *Coventry v Lawrence*. The case involved a nuisance claim against planning permission for a stadium to be used as a speedway. While the nuisance claim was successful, the Supreme Court in its discussion of remedies reaffirmed the approach in *Dennis*. Lord Sumption in his concurring judgment resolutely rejected the idea of using injunctions as a matter of principle, preferring damages which are less hostile to a wider public interest.[34] In this way, justice would be provided to the claimant, who would recover financial compensation, while the public could still enjoy a beneficial activity.

Lord Neuberger in the leading judgment similarly stressed the importance of the consideration of public benefit in determining the remedy, which diminished the *Kennaway* default status of injunctions. However, Lord Neuberger did not entirely endorse Lord Sumption's argument as he presented a more flexible approach to granting remedies. He emphasised that the question of whether to award damages or an injunction is a discretionary decision that should be based on the evidence and arguments in a particular case.[35] His proposal highlights the importance of discretion in equity and flexibility in the decision-making on remedies, but falls short of establishing an approach

[34] *Coventry* (n 15).
[35] ibid [120] (Lord Neuberger).

which would clearly provide such discretion to the courts. Firstly, Lord Neuberger refused to engage more thoroughly with Lord Sumption's arguments against the use of injunctions and simply recommended that the law is reviewed before it is further developed.[36] Secondly, despite acknowledging it, he did not endorse the argument made by Lord Mance,[37] in which he criticised Lord Sumption's approach as placing too much significance on the public interest. Lord Mance's argument was not adopted in Lord Neuberger's leading judgment, thereby creating uncertainty regarding the status of the public interest. [38] Thirdly, it should be noted that based on the position of the law before *Coventry*, the Court in this case restricted access to injunctions. The arguments submitted to the Court were based on the *Kennaway* principles where an injunction is a default remedy. *Coventry* rejected this approach and reaffirmed the availability of damages, which were explicitly preferred by Lord Sumption. Lord Neuberger's judgment was thus not an endorsement of injunctions, but rather a rejection of the *Kennaway* approach. The discussion on injunctions seems to serve as a reminder that injunctive relief is still possible and perhaps more suitable in some instances as a way to balance Lord Sumption's more hostile approach towards injunctive relief.

Lord Neuberger's discussion of injunctions is thus strictly obiter dictum. He explained that the Court could not set a precedent on this question as *Coventry* was not specifically concerned with the status of injunctions. Lord Neuberger himself acknowledged that this discussion presented the Court with a risk

[36] ibid [127].
[37] ibid.
[38] ibid [168] (Lord Mance).

of 'introducing a degree of uncertainty into the law'. While the leading judgment seems to have set the right course for the future development of law, it has failed to provide a ratio decidendi which explicitly reaffirms a true flexibility in the discretionary approach. Simultaneously, the paradigmatic understanding of the discretionary approach to granting equitable remedies diminishes the availability of injunctions as it only allows them to be awarded in exceptional circumstances. The failure of the discretionary approach to firmly establish the flexible approach as binding undermines the power of injunctions as a robust preventative remedy.

2) A proprietary nature of injunctions and its effect on a claimant's locus standi

Alongside their discretionary character, the criteria for establishing injunctions are inherently linked to specific proprietary rights, which detrimentally affects an individual's standing in their claim for injunctive relief. This is so because pollution[39] in such a claim and its impact are not confined to specific areas, designated by proprietary titles. This incompatibility between the criteria for establishing an injunction and actual pollution severely limits the availability of injunctions for the enforcement of the preventative principle.

Locus standi in claims for injunctions is conditioned by the existence of a proprietary right. This means, in the context of environmental protection, that a claim for injunction prohibiting

[39] This could be pollution of water, air or soil which would not be confined to a proprietary title but would likely be more widespread across an area.

a certain activity will only be available to an individual who has a legal or equitable title over the estate of land impacted by the polluting activity.[40] This requirement, however, does not provide standing for an injunction claim to an affected individual without a proprietary right in land or to an NGO wishing to prevent harm to environment which has no title over the polluted land. While a claimant without a proprietary right might not be impacted by a polluting activity to the same degree as an individual with a proprietary interest, an injunctive relief should not be available solely to prevent pollution of private property. For effective environmental protection on the basis of the preventative principle, locus standi should be extended so that pollution of the ecosystem as a whole can be stopped even in absence of a claim for injunction by a title-holder. As Lord Hope correctly stated in *Walton v The Scottish Ministers*, an erection of wind turbines will seriously affect the movements of an osprey even though it might not affect any individual's property rights.[41] This should of course not be a sufficient reason for restricting the availability of remedies as it would be 'contrary to the purpose of environmental law'.[42] The focus in standing should shift from an individual to the environment (in practice to someone acting on environment's behalf). However, even though pollution can have a detrimental impact on vast areas of the country, including flora and fauna, an injunction remains only available to the title-holders of the impacted land. In this way, the standing requirement denies access to injunctive relief to a large group of potential claimants, both affected individuals and interested NGOs.

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[40] *Day v Brownrigg* (1878) 10 Ch. D. 294 (CA); Browne (n 25) 9.
[41] *Walton v The Scottish Ministers (Scotland)* [2012] UKSC 44, [2013] P.T.S.R. 51 [152] (Lord Hope).
[42] ibid.

A serious legal argument should, of course, consider the fact that such non-restrictive and non-property-based standing would open the floodgates to claims for injunctions which could detrimentally affect other people's rights and the wider public benefit. While such concern is valid, support for a standing requirement that is not linked to property rights does not entail support for an unregulated and unrestricted standing requirement. A flexible approach, which increases the availability of injunctions to non-title-holders, is important because property rights are often not the only relevant spatial factor in environmental pollution, which could have an impact on temporary visitors as well. Moreover, the property-based approach excludes the possibility of granting preventive measures for the protection of the non-human part of the ecosystem like flora and fauna. Even though it is true that such flexible and inclusive approach may invite 'floodgates' arguments, the law could use certain safeguards to ensure that only claims filed by the parties with genuine interest in environmental protection will pass the locus standi stage. Although not related specifically to the question of remedies, the point on standing in environmental law already gained some judicial recognition in *Walton*, where Lord Hope argued that to prove standing, the claimant would have to 'demonstrate a genuine interest in the aspects of the environment that they seek to protect, and that they have sufficient knowledge of the subject to qualify them to act in public interest in what is, in essence, a representative capacity.'[43] While normally this position would be taken by environmental NGOs, Lord Hope emphasised that due to the lack of funding, these grounds should not be limited to such organisations but should

[43] ibid [153] (Lord Hope).

be open to sufficiently concerned and well-informed individuals as well.[44] A similar line of argumentation was adopted by Lord Reed when he recognised that the claimant in the case demonstrated sufficient interest and concern on the basis of his engagement with the issue even though this interest was not demonstrated on the proprietary right grounds.[45] This representative capacity, enabling a person or an organisation would demonstrate a sufficient interest and knowledge on the issue, could be transferred to the law of injunctions in environmental law.

Such an approach would enhance the enforcement of the preventative principle by opening up access to injunctions to interested non-proprietary right holding parties. At the same time, the requirements of knowledge and interest would act as protection against the flood of litigation and therefore against the abuse of litigation for non-environmental law purposes. It is important to note that the issue in *Walton* relates only to a specific statutory standing criterion for judicial review, not to an injunction on the remedial stage. However, we could use Lord Hope's approach granting injunctive relief in environmental tort-based claims. Since not every instance of environmental harm is caused by an activity conducted by the state or its contractors, the *Walton* approach should be expanded to actions in tort, between two private entities, in order to provide a similar level of protection as provided in the judicial review criteria.

It is important to note that in light of the standing requirement based on proprietary rights, the courts created an

[44] ibid.
[45] ibid [88] (Lord Reed).

exception to the rule by granting injunctions on the *quia timet* principle.[46] This type of injunction is granted to prevent a threatened infringement from occurring,[47] and could, with its anticipatory function, serve as an effective enforcer of the preventative principle. However, although Browne claims that these injunctions do not have a property title-linked standing requirement,[48] in practice, the successful cases of *quia timet* injunctions were argued under the claims anticipating trespass or nuisance and therefore involved a claimant who had a proprietary right over the impacted territory.[49] This leads to a conclusion that even in these precautionary injunctions, a proprietary right was still needed and that the criteria in a *quia timet* injunction do not increase the availability of injunctions to non-title holders.

3) Conclusion on the discretionary nature and property-based locus standi

Both discretionary powers and property rights based standing criteria show the difficulties in using injunctions for enforcing the preventative principle. An attempt to find a solution to these two issues will be made in the following cross-jurisdictional analysis.

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[46] Browne (n 25) 337. *Quia timet* is a Latin expression meaning 'because he fears' and the very name of the principle implies precautionary and preventative characteristics. However, the preventative principle is only enforceable in rare instances as discussed above.
[47] Martin (n 17) para 25-042.
[48] Browne (n 25) 338.
[49] *Redland Bricks v Morris* [1970] AC 652 (HL); *Earl of Ripon v Hobart* (1834), 3 My. & K. 169, 40 ER 65; *Haines v Taylor* (1847), 2 Ph. 209, 41 ER 922.

A cross-jurisdictional perspective: an environment-friendly approach to granting injunctions in pollution cases in the US environmental law

Notwithstanding the strict standing criteria and discretionary nature of injunctions, the equity-based requirements established by Chancery might not demand as strict an interpretation as is currently used by English courts. The following cross-jurisdictional analysis thus presents a viable approach for the courts' use of equitable injunctions as a remedy of enforcement of the preventative principle. Such approach remains doctrinally consistent with the requirements for equitable remedies and simply uses a more pragmatic reading of the requirements to extend the use of injunctions to environmental protection cases and make them more accessible. Based on the doctrinal consistency and urgency of the immediate ceasing of polluting activities in legal actions, the approach to granting an injunction in an environmental case can be justifiably relaxed to make it a more easily accessible remedy in cases where it is most needed. The US Supreme Court at first established a similarly rigid approach to granting injunctions. However, despite the Supreme Court's restrictive view, the US circuit courts devised an interesting approach to enforcing the preventative principle which provides greater availability of environmental injunctions and could thus be embraced by English courts.

1) The established approach to granting injunctions in environmental law

In the case of *Winter v NRDC*, the majority of the US Supreme Court stated that a preliminary injunction is a 'an extraordinary remedy never awarded as of right' which should only be granted in exceptional cases and should not become a default remedy, or a favoured remedy in cases of environmental harm.[50] The Court emphasised that each of the four criteria for injunctions must be satisfied for injunction to be granted. These are that: i) the claimant is likely to succeed on the merits; ii) he is likely to suffer irreparable harm in the absence of preliminary relief; iii) the balance of equities tips in his favour; and iv) an injunction is in public interest.[51]

The binding ratio in the *Winter* decision sets a rather clear course of non-favourable treatment of environmental harm in injunctions in the US caselaw, resembling the approach in English law. However, in the *Winter* dissent and in some post-*Winter* cases, we can nevertheless observe a substantial divergence from this *Winter* approach in the issue of discretionary nature and in the requirement of proprietary rights in injunctions. The following two sections analyse the divergences in US caselaw and propose solutions to current constraints in using injunctions in English environmental law.

[50] *Winter v Natural Resources Defense Council, Inc*., 555 U.S. 7 (2008) [B].
[51] ibid.

2) A solution to the issue of the discretionary nature of injunctions: Ginsburg's dissent and Sierra Club

Despite the clear rejection of the more relaxed criteria for injunctions in environmental law in *Winter*, the doctrinal disagreement with such rigid approach can be seen in the *Winter* judgment itself, particularly in the interpretation of discretionary nature in Justice Ginsburg's dissent. Albeit dissents offer no binding legal authority, Justice Ginsburg in her dissent provided a helpful interpretation of discretionary jurisdiction in equitable remedies.[52] The Court in *Winter* reaffirmed that injunctions are an extraordinary remedy. As equitable remedies, they should only be used when damages do not suffice.[53] Justice Ginsburg, on the other hand, argued that the crucial component of equitable remedies is a discretionary jurisdiction and its flexibility.[54] Stemming from the original purpose of equity to correct an injustice produced by common law, equitable remedies are granted on a discretionary basis, where justice so requires.[55] The corpus of equity rules and remedies deriving from England was accepted in the US common law in the case of *Weinberger v Romero-Barcelo*, where the US Supreme Court emphasised the importance of the '*equity court's traditionally broad discretion*' and preserved this broad discretion in granting injunctive relief.[56]

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[52] ibid (Ginsburg J, dissenting).
[53] ibid (Roberts CJ) [III].
[54] ibid (Ginsburg J, dissenting).
[55] Frederic W. Maitland, *The Constitutional History of England* (Cambridge University Press 1920) 224.
[56] *Weinberger v Romero-Barcelo*, 456 U.S. 305 (1982), (White, J).

Following the line of precedents, Justice Ginsburg herself cited *Weinberger v Romero-Barcelo* when she argued that equity is distinguished from common law precisely by its '*[f]lexibility rather than rigidity*', as *'[t]he essence of equity jurisdiction has been the power of the Chancellor to do equity and to mould each decree to the necessities of the particular case*'. [57] According to Ginsburg, judges should thus not insist on meeting rigid *Winter* criteria like the extent of harm or the availability of damages. Each environmental case should be approached on a case-by-case basis, making a discretionary decision after evaluating the need for an injunction.[58] Justice Ginsburg proposes an approach similar to Lord Neuberger's idea in *Coventry,* but she seems to more robustly emphasise the importance of flexibility as an essential part of equitable discretionary power, linking it to the original purpose of equity. The more flexible case-specific assessment should increase the availability of injunction claims and therefore strengthen the enforcement of the preventative principle.

The dissent correctly identifies the mistake in the leading judgment in *Winter*. Justice Roberts in the leading judgment described injunctions as an 'extraordinary remedy never awarded as of right'.[59] However, in this otherwise accurate description of equitable remedies, he only recognised one element of equity – namely that it only operates in exceptional cases to correct an injustice suffered under common law. He notably overlooked the second element – that in order for equity to fulfil its purpose to provide relief in case of injustice, the court has to use its discretionary powers to correct an injustice by granting an

[57] *Winter* (n 50) (Ginsburg J, dissenting) [III].
[58] ibid.
[59] ibid (Roberts CJ) [III].

equitable remedy, for which flexibility, as stated in *Weinberger*,[60] is essential. It seems that common law courts not only derived the idea of an 'extraordinary remedy' from the discretionary nature of equitable remedies, but also deprioritised this original discretionary nature, placing emphasis on the 'extraordinary character' of the remedies instead. In this way, the current paradigmatic understanding of discretion in equitable remedies is not correct as it lacks the flexibility required in the decision-making on awarding injunctions and only allows them to be awarded in exceptional cases. Allowing injunctions only exceptionally is only the implication of equity's purpose of correcting injustices caused by common law. The expectation that common law will correct the majority of legal wrongs inevitably leads to the conclusion that equity will only have to be resorted to in the minority of cases, in extraordinary situations. The implication should thus not be mistaken for a rule. As mentioned above, the discretionary nature, deriving from the Chancellor's discretionary power to correct an injustice of common law, is a quintessential part of equitable remedies, and as held in *Weinberger*, flexibility in court's decision-making is its essential feature.

Justice Ginsburg's understanding of the discretionary nature should be preferred as it is based on the original rationale and purpose of equitable remedies under which the court should not be restrained in granting equitable remedies by set rules as is the case in common law, but should, on the contrary, be allowed the flexibility to correct an injustice perpetrated by the common law. Despite jurisdictional differences between US and English law, English courts could easily adopt Ginsburg's interpretation

[60] *Weinberger* (n 56).

of the discretionary character of equitable remedies. This would enhance injunctions' ability to enforce the preventative principle as the courts could award the right remedy to correct a potential injustice using their discretionary powers in a flexible way as prescribed by the fundamental equitable principles.

As part of this proposal, it is important to address the question on the idea of injunctions as a default remedy in environmental law. This article argued in favour of adopting a discretionary approach, as proposed by both Justice Ginsburg and Lord Neuberger, where injunctions would not be resorted to only very exceptional circumstances while damages would be used as a primary remedy. However, it did not argue in favour of adopting injunctions as the default remedy. This is because of a practical and doctrinal reason. From a practical perspective, it is more viable to rely on the original idea of flexibility in the discretionary approach used when awarding a remedy. It would be much more difficult to introduce injunctions as a default remedy which would present a radical deviation from the centuries old case law in equity. This leads into the second, doctrinal, reason. The change of the status of injunctions is unnecessary since the correct reading of the old equitable principle of discretionary remedies, as explained by Justice Ginsburg, already provides the flexibility to the court in deciding whether damages or injunction should be more appropriate. This flexible approach can thus enhance the availability of injunctions to enforce the preventative principle in environmental law cases while, at the same time keeping in line with the elementary principles of equity and preventing any potential over-use of injunctions as a default remedy.

Moreover, while it could be proposed that the approach to granting injunctions in environmental law could differ from the approach in general equity, such a proposal should be rejected as it would create unnecessary and undesirable fragmentation of the law of remedies. This would bring another unnecessary frustration into the law of remedies while the issue could be solved more elegantly by adopting the correct original discretionary approach applicable to remedies in all claims.

3) A solution to the issue of the proprietary nature of injunctions

The disagreement with the majority in *Winter* has not ended with a dissent in the same case. Since the handing down of the strict and restrictive ruling in *Winter*, the federal courts invented a solution to the restrictive approach. The Eighth Circuit Court found a way to follow the binding *Winter* judgment in form but derogated from its substance through a unique interpretation of the *Winter* rules.[61] By doing that, the Court embraced substantively laxer approach to formally rigid criteria for granting injunctions in environmental cases. This laxer approach could be of great help to English courts specifically in respect of the treatment of the proprietary nature of injunctions.

After *Winter*, the Eighth Circuit Court of Appeals in the *Sierra Club* case adopted an interesting approach to the criterion

[61] Eric J. Murdock and Andrew J. Turner, 'How Extraordinary Is Injunctive Relief in Environmental Litigation? A Practitioner's Perspective' (2012) 42(5) ELR 10469.

of irreparable harm. [62] Similarly to *Winter*, in English cases, this criterion can only be satisfied by an infringement of a proprietary right through nuisance or trespass. As discussed above, only a recognised title over the land impacted by polluting actions provides an individual with a locus standi for an injunction claim. Unlike in England, the court in *Sierra Club* linked this standing requirement of irreparable harm to an individual's interests, instead of their rights, and made an injunction more accessible as a preventative remedy.[63] While the Court followed *Winter* in form and upheld the requirement of harm to the plaintiff, it broadened it so that it was satisfied by a proof of harm to environment, which in this case inevitably meant harm to the plaintiff.[64] The Court in *Sierra Club* held that such requirement of irreparable harm to the environment can be seen in 'the harm to the plaintiff's specific aesthetic, educational and ecological interests,' even where the claimant may not have any proprietary rights.[65]

However, the Court went further and found the requirement fulfilled without conducting a detailed assessment of the impact of pollution on the claimant's interests.[66] This might seem problematic according to the strict reading of the assessment, but the assessment was in fact based on the sliding scale where 'no single factor is determinative'.[67] The sliding scale is a convenient feature providing the courts with sufficient

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[62] *Sierra Club v U.S. Army Corps of Engineers (Corps)*, 645 F.3d 978 (8th Cir. 2011).
[63] ibid.
[64] Murdock and Turner (n 61) 10471; *Sierra Club* (n 62) 996.
[65] *Sierra Club* (n 62) 996.
[66] Murdock and Turner (n 61) 10471.
[67] *Dataphase Sys., Inc. v. C L Sys., Inc.*, 640 F.2d 109, 113 (8th Cir. 1981) 113.

flexibility which is essential for the discretionary approach. In absence of explicit abrogation of this feature in *Winter*, the Court correctly derived the sliding scale from the equitable principle of discretion and by that enabled the flexibility in the remedial decision-making. This relaxation put the emphasis on the hypothetical harm to the claimant's interests – assessing how the pollution could affect the individual's interests even though there was no actual impact. The substantive deviation from the *Winter* approach enables a more effective enforcement of the preventative principle as it allows an injunction even if pollution does not harm the plaintiff directly. The *Winter* standard is plaintiff-focused – it only allows an injunction if there is an actual harm to the plaintiff. However, it overlooks the possibility that a hypothetical harm could entail an actual harm to the environment even if the harm was only hypothetical for the plaintiff. Moreover, the *Winter* standard is also short term oriented as it fails to recognise that an actual harm to the environment (like polluted air, soil and water) will arguably in most cases inevitably harm individuals in the long term, even if no individual is actually harmed by a polluting activity at a given time. The Eighth Circuit's assessment is thus preferrable as it focuses on the pure harm to environment which could ultimately harm the individuals and thus in its essence enforces the preventative principle.

While one could argue that this relaxed standard could potentially lead to an arbitrary exercise of discretion, the rules of equity clearly establish that discretionary powers can only be exercised 'according to sufficient legal reasons',[68] not on the judge's personal opinion, which requires the court to make the

[68] *Beddow v Beddow* (1878) 9 Ch.D. 89, 93.

determination within the limits of the set criteria. The *Sierra Club* standard provides the appropriate discretionary powers to use injunctions as an effective preventative remedy in addition to the safeguards of the law of equity which prevent an abuse of those powers.

The floodgate criticism also arises against such a proposal. By removing the requirement of property rights, a possibility of filing a claim for an injunction would be open to everyone and would thus be open to abuse. However, such removal of the property rights requirement should be paired with additional requirements like the ones proposed by Lord Hope in *Walton*, where a claimant could act on behalf of the environment if they demonstrated sufficient interest, concern and knowledge of the issue. This would strike the right balance between enhancing the availability of injunctions for the enforcement of the preventative principle while limiting the claim to the genuinely interested claimants.

Inspired by *Sierra Club*, the English courts could embrace a more relaxed interpretation of the criteria while continuing to apply the criteria for granting an injunction. The issue of proprietary rights could be resolved by adopting a more liberal understanding of interest instead of a right as established by the Eighth Circuit Court. This would make injunctions available to the wider public, not only title-holders, which could be affected by pollution. Moreover, the courts should adopt a more flexible approach to assessing the criteria, potentially by using a sliding scale, through which the focus could be shifted from the claimant to the environment as a whole. The relaxed standard would

enhance the power of injunctions in environmental protection and would make injunctions an effective preventative remedy.

Conclusion

Injunctions with their prospectively prohibitory effect are an essential tool for enforcing the preventative principle as they can in most cases prevent or stop pollution in early stage. But while their remedial function is effective and indispensable, the criteria for establishing a claim for injunction are overly restrictive. The current interpretation of discretionary powers limits the use of injunctions, as they are granted restrictively as an extraordinary remedy and not in a flexible manner as proposed by Lord Neuberger. Furthermore, property-based and individual-centred standing requirements greatly reduce the pool of individuals who can file a claim for the injunctive relief.

The article proposed that general injunctions could retain the existing formal criteria but should adopt a more flexible interpretation of those criteria. Cross-jurisdictional analysis presents the *Sierra Club* judgment and Justice Ginsburg's dissent in *Winter* as examples that could be used by English courts to introduce the laxer approach to rigidly defined criteria of injunctions. Whether this proposal is judicially endorsed remains to be seen. The current climate crisis calls for an environment-friendly approach to be adopted.