

How an environmental court could enhance Scotland's governance arrangements

Briefing for Roundtable on 2 February 2023

Overview

The publication of Environmental Standards Scotland's Strategic Plan¹ triggers the duty under section 41 of the UK Withdrawal from the European Community (Continuity) (Scotland) Act 2021 to consult on, 'whether the law in Scotland on access to justice on environmental matters is effective and sufficient, and whether and, if so, how the establishment of an environmental court could enhance the governance arrangements'.

ERCS invites you to a Roundtable to consider the persistent and systemic barriers to access to justice and the argument for a specialist environmental court.

The Roundtable discussion will contribute to a report which will be launched in March to inform the Scottish Government's review of environmental governance.

Introduction

The question of whether to establish an environmental court for Scotland has been under periodic consideration for over forty years with the last government consultation in 2016.² There is extensive literature on environmental courts and tribunals and they exist in hundreds of jurisdictions worldwide.³ Hence, we might want to reverse the question to ask, "Why does Scotland not have an environmental court?".

Scotland needs a dedicated environmental court to offer an appropriate judicial route to remedy for environmental matters. Such a one-stop shop would address the gaps existing in environmental governance in Scotland, particularly following the UK's exit from the European Union (EU) and the loss of oversight which was provided by the EU Commission and access to the European Court of Justice. It would also help to address Scotland's failure to comply with its obligations under the Aarhus Convention.⁴

Background

A series of studies identified the elements of environmental governance in Scotland prior to Brexit and those likely to be lost by leaving the EU.⁵ Following Brexit, the supranational Court of Justice of the EU, the European Commission and the reporting work of the European Environment Agency have been lost. Environmental Standards Scotland was established to provide elements of the role of the European Commission but it has limited powers - based on persuasion of authorities via Information and Compliance Notices, leading on to Improvement Reports to Government, or seeking Judicial Review as a last resort.



However, there is no parliamentary commissioner or connected court process with the power to fine or direct the Government or other parties to address or compensate for failures. And there is no dedicated environmental court.⁶ In addition, there has been no identifiable review of, or adjustment to, the governance arrangements in existing bodies to reflect exit from the EU.⁷ In summary, Scotland needs all three good governance tiers: independent oversight (including by Parliament); effective executive (including regulatory) controls; and robust juridical processes. Given the current status of all of these, the case for the creation of a dedicated environmental court remains strong.

Arguments against

Arguments against a dedicated court largely fall into three categories. First, the adequacy of the status quo and thus there being no need for change. Second, insufficient case work to merit such an arrangement, or the opposite argument that there would be a flood of potentially trivial cases. Third, the costs and added bureaucracy of establishing and servicing any new court. These last concerns would be amplified by current economic pressures.

Responses to these objections become especially clear when considering the three governance tiers of oversight, executive and judiciary outlined above. First, the loss of the Court of Justice of the EU and Commission have not been addressed and failures of environmental performance and governance are persistent, including access to justice being in breach of the Aarhus Convention.⁸

Second, the barriers to access to justice cause a chilling effect⁹ and without addressing these there is no accurate way of assessing demand. Despite this, as well as the long-standing argument articulated by the eNGO sector, the establishment of Environmental Rights Centre for Scotland has demonstrated the need for environmental justice as evidenced by receiving 150 referrals to its free legal advice service in its first eighteen months and submitting five representations to Environmental Standards Scotland.

Third, the costs in relation to potential court options need to be set against the future efficiency savings of reconfiguration and the societal, human rights and performance gains arising from affordable, fair, effective and timely judicial routes to remedy.

Arguments for

Arguments for a dedicated court with a comprehensive jurisdiction and specialist expertise are based on the loss of the two key EU institutional controls and full compliance with the Aarhus Convention. *Why Scotland needs an environmental court or tribunal* sets out the case in detail.¹⁰ This is underscored by the loss of comparative environmental data across the EU, exacerbated by the decline in available and reliable Scottish data and the continued lack of transparency of environmental performance at local and national level.



The Scottish Government's commitment to incorporate the right to a healthy environment with substantive and procedural elements is testimony to the wider acknowledgment and public demand to address the triple crisis of climate breakdown, ecological loss and pollution. The Human Rights Bill, we hope, will address the broad access to justice reforms required within a human rights statutory framework.¹¹ In addition, given that human rights law and environmental law are separate but mutually beneficial, the argument for a dedicated environmental court is strengthened because it will provide the specialism and expertise to enforce the procedural element of the right to a healthy environment whilst also enhancing environmental governance.

Summary

The case for a 'new' dedicated environmental court with an institutional purpose to promote access to justice, democracy, the rule of law and the human right to a healthy environment has already been made. As has its need for a comprehensive jurisdiction to act as a one-stop shop, supported by technical experts. The environmental governance landscape emerging since Brexit requires consideration, as does the opportunities of current reconfiguration within the courts and tribunals service and potential reforms inherent in fulfilling human rights obligations. The time has now come to move on, with some urgency, from 'why' to 'how' to define the form of the court and progress its establishment.

Roundtable

The Roundtable provides an opportunity for participants to reflect on:

- the enhanced regulatory framework with Environmental Standards Scotland and the commitment to merge the Scottish Land Court and Lands Tribunal for Scotland
- the persistent and systemic barriers to access to justice on environmental matters and Scotland's non-compliance with the access to justice requirements of the Aarhus Convention and its action plan to address this
- the opportunities with the incorporation of the right to a healthy environment and wider access to justice reforms anticipated from the Human Rights (Scotland) Bill – particularly in relation to non-judicial and judicial routes to remedy and the role an environmental court could provide
- the key features of a dedicated institution
- the current financial constraints on the public purse exacerbated by the cost of living crisis and how this might impact on any new initiatives.



Questions for Roundtable

1. What would a specialist environmental court need to look like and what are the challenges to its establishment?
2. What should the practical and legal fit be between a specialist environmental court, Environmental Standards Scotland and the other existing institutions and agencies in Scotland?
3. What should the consultation on environmental governance and establishing an environmental court contain? On what subjects should it seek inputs and further clarity?

¹ Environmental Standards Scotland (Nov 2022) [Strategic Plan 2022 - 25](#)

² Scottish Government (Sep 2017) [Developments in environmental justice in Scotland: analysis and response](#)

³ Pring & Pring (2009) [Greening justice: creating and improving environmental courts and tribunals](#) identified over 350 environmental court or tribunals, UNEP/ Pring & Pring (2016) [Environmental Courts & Tribunals – A guide for policy makers](#) states there were over 1200 and the latest review UNEP/Pring & Pring (2021) [Environmental Courts & Tribunals - A guide for policy makers](#) identifies 2116 in 67 countries.

⁴ United Nations Economic Commission for Europe (1998) [Convention on access to information, public participation in decision-making and access to justice in environmental matters.](#)

⁵ Scottish Environment Link/Gemmell (2019) [Environmental Governance: effective approaches for Scotland post-Brexit](#) and Agnew (2016) An Environmental Court for Scotland? *SPEL* 178 (2016): 133-135

⁶ ERCS/Christman (Oct 2021) [Why Scotland needs an environmental court or tribunal](#) sets out the case

⁷ Scottish Environment Link/Gemmell (2019) [Environmental Governance: effective approaches for Scotland post-Brexit](#) recommendations

⁸ ERCS (July 2022) [Evaluation of Scotland's action plan on access to environmental justice](#) and ERCS (Nov 2022) [Protective Expenses Orders: access to information remains a barrier to justice](#)

⁹ Clan Childlaw, Human Rights Consortium Scotland, Amnesty International, Friends of the Earth Scotland, Shelter Scotland, Just right Scotland & Rape Crisis Scotland (2018) [Discussion Paper: Overcoming Barriers to Public Interest Litigation in Scotland](#)

¹⁰ ERCS/Christman (Oct 2021) [Why Scotland needs an environmental court or tribunal](#)

¹¹ Scottish Government (Mar 2021) [National Taskforce for Human Rights Leadership Report](#), recommendations 21 - 26