Mobilising the law:
Environmental NGOs in court

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Originally published in 1972, Christopher Stone's environmental treatise *Should Trees Have Standing?* served as a rallying cry for the then budding environ-mental movement in the United States. It launched a debate about the legal rights of trees, oceans, animals and the environment among eco-activists and their adversaries. Since then, in following the logic of Stone's treatise that the environment cannot defend its own interests, non-governmental organisations (NGOs) have regularly stepped into the courts in the US in order to enforce or expand environmental legal protections. The extensive legal activity of a number of NGOs has been highlighted by those within the American movement: in 1988 the executive director of the Sierra Club Legal Defense Fund said that 'litigation is the most important thing the environmental movement has done over the past fifteen years'.[1] For some, this resort to law in the United States is not surprising considering the nation's reputation for litigiousness more generally. However, NGOs elsewhere in the world have begun to follow suit, heralding what could arguably be coined a 'global judicialisation' of environ-mental disputes.

This mobilisation of the law by social movement activists is not without its controversies in regards to the role of courts and NGOs in democracies. By its proponents, the use of strategic litigation is an important way for engaged civil society actors to influence public policy and participate in governance processes. They see the role of NGOs as two-fold: first, protecting the (legal) interests of the 'voiceless elements in nature', and second, advocating for changes to a system that they see as inherently biased towards the interests of business and developers to ensure that access to environmental justice is affordable, fair and effective. By its critics, legal mobilisation efforts empower 'non-democratic' NGOs and 'unaccountable' judges *vis-à-vis* majoritarian institutions, such as legislatures, thus undermining democracy. This article, while focusing on the empirics and theory of legal mobilisation by the environmental movement, sheds some light on this debate. One part of my British Academy Postdoctoral Fellowship examined how the environmental movement in the United Kingdom has mobilised the law over the last twenty years.[2] Two questions motivate the research presented here: to what extent have environmental NGOs mobilised the law in the UK, and have they been 'successful' in doing so?

The UK context is useful for thinking about these issues more broadly. On a general level, a number of historic and contemporary factors contribute to what at first appears to be an inhospitable environment for legal mobilisation: a traditional distaste for enshrined rights, a legal culture privileging parliamentary sovereignty, and the comparatively slow nature of new social movement development when considered in light of many other European nations. More specifically, policy research has suggested that access to environmental justice is particularly restricted in the UK compared to its European counterparts. For example, an independent study commissioned by the European Commission found that 'the potential costs of bringing an application for judicial review to challenge the acts or omissions of public authorities is a significant obstacle to access to justice in the United Kingdom'[3]. A 2002 cross-national study on access to environmental justice that looked at court structures, standing rules, scope of review, length of proceedings, costs and availability of interim relief found that the number of actual court cases brought by NGOs in the UK is among the lowest across Europe.[4]

[1] Quoted in L. Cole and S. Foster (2001) *From the Ground Up: Environmental Racism and the Rise of the Environmental Justice Movement*. New York: New York University Press at p. 30.

[2] The results presented here are part of a larger analysis published in September 2012 in *Law and Society Review* 46:3 at p. 523.

[3] Milieu Environmental Law and Policy (2007) *Measures on Access to Justice in Environmental Matters (Article 9(3)): Country Report for the United Kingdom*. Brussels: Milieu Environmental Law and Policy at p. 22.

[4] N. De Sadeleer, G. Roller and M. Dross (2005) *Access to Justice in Environmental Matters and the Role of NGOs: Empirical Findings and Legal Appraisal*. Groningen, NL: Europa Law Publishing.

In practice, legal mobilisation can include many different types of strategies and tactics. This article focuses on the use of strategic litigation through the use of judicial reviews by NGOs. This type of legal action allows groups and citizens to challenge the decisions of public bodies that they see as contravening either domestic environmental or administrative law, or European Community (EC) law. Judicial reviews are the most common form of legal action taken by environmental NGOs in the UK.

The record of legal mobilisation (1990-2010)

The research examines four prominent environmental NGOs in the United Kingdom: Friends of the Earth, Greenpeace, Royal Society for the Protection of Birds (RSPB) and WWF. Between 1990 and 2010, courts decided 35 legal actions in which at least one of the four NGOs examined here participated.[5] Twenty-two of these cases were lost and 13 were won. Across organisations, Friends of the Earth was the most active in its judicial review activity, as it participated – or indirectly supported groups (either financially or through provision of legal representation) – in 18 different cases. Greenpeace took 10 cases, RSPB took eight cases and WWF only took three cases in the period.[6] There has been an increase in the number of cases taken in recent years, with 15 taken in the period 2005 to 2009 (see Figure 1); this is triple the number of cases taken by these groups in the previous period. In terms of results, all cases taken in the first period examined here (1990 to 1994) were lost. In contrast, in the most recent period the split between victories and losses was relatively even: seven cases were won and eight were lost. Breaking the data down across courts also tells an important story. Figure 2 shows that any case that NGOs brought to the Court of Appeal they lost during the period under study.

In summary, each individual organisation has tended to lose more cases on substantive issues than it has won, and collectively the environmental movement is only victorious in about a third of legal actions. A puzzle emerges from the research presented here on the use of judicial review procedures by environmental NGOs. Despite significant losses in court, which have at times imposed high costs – financial and otherwise – the movement has, over time, increasingly used litigation strategies in pursuit of their goals. Why do environmental NGOs continue to pursue legal cases?

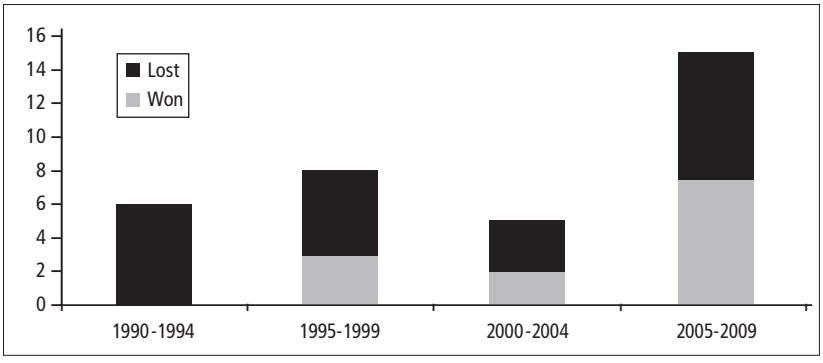

Figure 1. *NGO judicial review results by period, 1990-2010.*

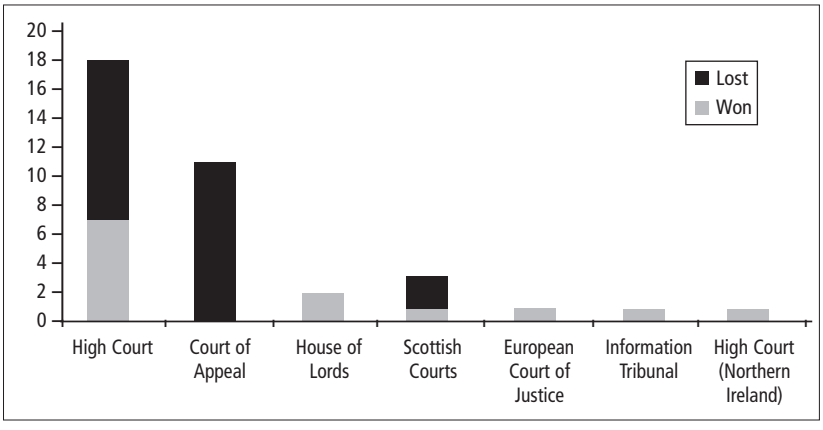

Figure 2. *NGO judicial review results by court, 1990-2010.*

Two explanations for perseverance despite legal losses

First, despite substantive losses, many of the cases involve procedural victories which make it easier for NGOs and other environmental groups to turn to the courts in later cases. By continually campaigning for environmental justice, activists can contribute to broader campaigns to enhance access to justice for the environment. In the realm of environmental policy, access to justice refers to the ability for concerned citizens and social movement groups to: access the courts and judicial advice at reasonable cost; be provided with a fair and equitable platform for the treatment of environmental issues; and obtain adequate and effective remedies (including injunctive relief) for environmental offences.[7] It is only by regularly attempting to access justice that these groups credibly highlight the failings of the existing systems. If we consider judicial decisions on procedural issues, the story of legal mobilisation begins to make more sense. Courts assessed nine explicit procedural issues across seven different cases. These include: assessment of standing doctrine concerning NGOs;

[5] In some cases, two or more NGOs joined together to bring a judicial review. For example, in 2001 Friends of the Earth and Greenpeace brought a series of cases to the High Court, and then the Court of Appeal, related to the lawfulness of the manufacture of fuels by British Nuclear Fuels. Similarly, WWF and RSPB together brought to the Scottish courts a case related to development and environmental impact in the late 1990s.

[6] The total number of cases examined along these lines is greater than the total number of cases in the other analyses because of the participation by more than one NGO in some cases.

[7] Environmental Justice Project (2003) *Environmental Justice*. London: The Environmental Justice Project at p. 23.

questions regarding time limits within which a judicial review should be brought; and considerations of whether interim relief should be available and various measures on how costs should be awarded, or capped. NGOs won on five of these issues and lost on four, suggesting a more even record. The majority of these issues were raised in the first decade of litigation activity which helps to explain the increase over time.

Second, measuring whether legal mobilisation is 'successful' is not a straightforward task. NGOs in the UK, like their American counterparts, tend to see the taking of a legal claim as simply one element of a multi-pronged approach to campaigning. If campaigners bring a 'losing the battle but winning the war' mentality to any specific substantive campaigning goal, legal mobilisation (even in what they perceive to be an inhospitable legal environment) begins to make sense. The groups studied here engage (to various extents) in law reform activity, consciousness-raising, protest and fund-raising on their campaign issues in parallel with any legal efforts. Several NGO lawyers and policy officers asserted that simply participating in judicial reviews, regardless of the result, can bring multiple benefits:

> We will probably lose … it is a losing battle… We work on a number of levels and the legal action is just one level of the fight... So we say to people even if you lose the legal action, you will still raise awareness and support… So you might lose the battle but you will win the war… Even with Heathrow [a legal case decided in 2010 in the High Court on the proposal to build a third runway] … we know that a judgment can be quite complex … so although you may lose … you can still extract useful points from the judgment.[8]

> Environmental law is relatively new and many of the concepts inherent within it (precautionary principle, sustainable development, polluter pays) are new to the judiciary. As such, we are always pushing at the boundaries and perhaps, because of that, we expect to win less often, i.e. our expectations are moderated from the beginning. A QC [Queen's Counsel] once said to me 'if you start winning all your cases, you're taking the wrong cases'. His view was that we should always be moving the law forward and that, necessarily, involves winning less.[9]

Comparative findings

This research has shown many similarities with the experience of US NGOs – the benefits of expanding procedural opportunities in the face of substantive losses and an appreciation of the indirect political benefits of

Figure 3. *Protesters outside the high court in December 2011, highlighting the thousands of jobs that could be lost through the government's decision to halve solar tariff payments. Friends of the Earth and two renewable power companies were given leave by the high court for a judicial review of the ministerial decision. Photograph: Friends of the Earth.*

[8] Interview, NGO Lawyer, 6 April 2010.
[9] Personal Communication, NGO lawyer, 12 April 2011.

litigation. There are however some significant differences as well. First, this type of legal activity began much later in the UK than in the United States. Strategic litigation was a core aspect of the work of American environmental NGOs throughout the 1970s and 1980s. The British groups looked at here only began to mobilise the law from the early 1990s onwards. Part of this is undoubtedly due to the timing of relevant legislation on which claims could be based. The early 1970s saw a wave of environmental protection statutes come into effect in the United States, whereas UK and European protections only began to emerge in a significant way in the 1980s and 1990s. The impact of the introduction of new laws also likely has a symbolic dimension: the introduction of protections may have played an important role in raising awareness of the very possibility of strategic litigation as a political instrument.

A second point of distinction is the role of international law that may shape the future of legal mobilisation by environmental NGOs across Europe. The United Nations Economic Commission for Europe (UNECE) Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters was adopted in 1998 in the Danish city of Aarhus as part of the 'Environment for Europe' process. Known as the Aarhus Convention, it represents a novel type of environmental agreement in its rights-based approach and its focus on procedural as well as substantive rights. It is also unique in its reflection of the distinctive role of citizen groups and NGOs in enforcing environmental law: it links government accountability and environmental protection, and focuses on interactions between people and public authorities in a democratic context. The Aarhus Convention grants rights to citizens and NGOs, and imposes obligations on governments in regards to access to information, public participation and access to justice. The third pillar of the Aarhus Convention is concerned with access to justice in the environmental realm. Article 9(4) of the Convention requires that procedures for rights to access must 'provide adequate and effective remedies, including injunctive relief as appropriate and be fair, equitable, timely and not prohibitively expensive.' The importance of EU environmental legislation and the 2005 ratification of the Aarhus Convention by the UK government represent an additional source of legal opportunities to UK NGOs that is not currently available to those outside of Europe. The increasing reliance on supranational protections and the ability to turn to international judicial venues means that the scope of legal opportunity has expanded vertically for the British green movement in the last two decades.

Access to environmental justice

Access to justice matters for democracy. Unless citizens and groups are able to go to court on an equal footing to well-resourced governments and corporations to challenge the legality of decisions made by public authorities, then unlawful decisions will not be identified and overturned. Environmental law, like all law, has little purpose if it is not upheld. This is particularly important in the realm of the environment and climate change: the environment cannot defend its own (legal) interests, yet its protection is in the interest of all citizens. NGOs, as organisations with expertise and resources, therefore have an important role to play in both ensuring the effective enforcement of environmental law and in expanding legal opportunities for other groups and individual citizens. The four NGOs examined here are among the largest and best-resourced in the country; yet they regularly lose their legal battles and often have to pay the significant legal costs of their opponents. While the evidence of changes over time seems to suggest that there is hope for enhanced levels of access to justice for the environment – possibly the trickle down effects of the Aarhus Convention (that is for future research to determine) – this is a slow and frustrating process.