Representation

Routledge
Taylor & Francis Group

ISSN: 0034-4893 (Print) 1749-4001 (Online) Journal homepage: https://www.tandfonline.com/loi/rrep20

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To cite this article: Lisa Vanhala (2013) CIVIL SOCIETY ORGANISATIONS AND THE AARHUS CONVENTION IN COURT: JUDICIALISATION FROM BELOW IN SCOTLAND?, Representation, 49:3, 309-320, DOI: 10.1080/00344893.2013.830483

To link to this article: https://doi.org/10.1080/00344893.2013.830483

Published online: 17 Oct 2013.

CIVIL SOCIETY ORGANISATIONS AND THE AARHUS CONVENTION IN COURT: JUDICIALISATION FROM BELOW IN SCOTLAND?

Lisa Vanhala

The landscape for 'judicialisation from below' is changing in Scotland. The environmental movement has harnessed the provisions of the Aarhus Convention—an international agreement guaranteeing procedural rights in matters of environmental decision-making—in litigation efforts. In doing so litigants have begun to significantly challenge the structure of opportunities for contesting and overturning decisions of the state when it comes to environmental policy. Rather than undermining representative democracy this article argues this process constitutes a democratisation of access to justice.

Introduction

In the last 20 years non-governmental organisations (NGOs) and community groups have begun to play an increasingly significant and diversified role in environmental policy-making. They participate, to varying extents, in a range of regulatory processes: from agenda-setting to policy-drafting, from monitoring to implementation and enforcement (Bugdahn 2008; McCormick 1999; Princen and Finger 1994; Raustiala 1997; Wapner 1996). Scholars have also noted increasing levels of representation of NGOs and community groups in policy-relevant venues where they had been previously absent. Actors in the environmental movement have sought to enforce, challenge and influence policy in judicial arenas. This has long been the case in the United States: in 1988 the executive director of the Sierra Club Legal Defense Fund said that '[l]itigation is the most important thing the environmental movement has done over the past fifteen years' (quoted in Cole and Foster 2001: 30). While the turn to the courts by European environmental activists is more recent, the mobilisation of law in this policy realm is increasingly evident across jurisdictions and at different levels of governance (Börzel 2006; Cichowski 2007; Kelemen 2011; Vanhala 2012).

This article asks how civil society actors leverage legal norms and judicial institutions at different scales of governance. It explores how this leveraging activity may facilitate judicialisation—defined here as the expansion of the role of courts and judges in determining public policy outcomes (Hirschl 2008). This article illustrates how legal mobilisation—'the process by which individuals make claims about their legal rights and pursue lawsuits to defend or develop those rights' (Epp 1998: 18)—may be constrained by procedural rules limiting access to courts, such as restrictive standing doctrine on who can take a case and punitive cost rules on the spending required to take a case and the financial risk if a case is lost

Representation, 2013
Vol. 49, No. 3, 309–320, http://dx.doi.org/10.1080/00344893.2013.830483

(Cichowski and Stone Sweet 2003). However, it also serves to highlight the agency these groups exhibit in drawing on international law and approaching multiple venues to challenge the constraining conditions that limit their mobilisation activity (Cichowski 2007; Vanhala 2012).

The conceptual relationship between processes of legal mobilisation and judicialisation is a complex one. The term 'judicialisation' is focused more on the substantive public policy 'outputs' of legal disputes whereas 'legal mobilisation' is more focused on 'inputs' to the judicial process as well as the broad range of outcomes of these disputes (policy losses, procedural victories and impacts on social movements themselves). By using the term 'judicialisation from below' I do not mean to suggest that groups are always successful in determining policy outcomes through their litigation campaigns but rather that in mobilising the law they encourage public policy debates to move into judicial arenas.

The term 'civil society' actor has a long history in the study of social movements. Paul Wapner (2000) described the associations and groups as 'the bonds and allegiances that arise through sustained, voluntary, non-commercial interaction' (p. 266). Within a democracy, civil society serves as a counterbalance to state power and can channel societal demands to the state more effectively than individuals can alone. NGOs and other groups are also playing an increasingly significant role in the implementation and monitoring of law, whether domestic or international, and can act as 'whistle blowers' when states fall behind on their commitments (McCormick 1999; O'Neill 2009). I argue drawing on evidence from a case study of Scotland that judicialisation from below the nation-state (Epp 1998) does not necessarily undermine representative democracy. On the contrary, it can play a democratising role by ensuring effective enforcement of policies decided by majoritarian institutions, by enhancing access to justice so that all members of society have equal recourse to the courts and by expanding the range of voices heard in court-led policy-influencing processes.

This article is based on a case study of the impact of 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 (known more commonly as the Aarhus Convention after the Danish city in which it was conceived), which entered into force in Scotland in 2001. The Convention was developed largely to promote democracy within post-communist Europe, but it has also had an impact on policy in Western European countries thanks to strategic litigation efforts by a number of environmental NGOs. This article explains how this treaty, largely seen as symbolic by its Western European signatories, is nonetheless proving transformative in *who* is participating in environmental politics. The research offers a nuanced picture of the way in which civil society actors shape the legal and regulatory structures as much as they may be moulded and influenced by them (Cichowski 2007; Cichowski and Stone Sweet 2003). It sees NGOs not as automatons operating within a structure that largely determines their behaviour but rather as active agents that strategically transform the structures within which they are situated.

The first section of this article introduces the Aarhus Convention, while the second section discusses the research methods and discusses why the Scottish jurisdiction merits focus. The third section presents the case study: it analyses key legal cases and other empirical data to trace continuity and change in judicial policy on who can access justice and at what cost. It shows how Scottish NGOs and activists have harnessed the provisions of the Aarhus Convention in litigation efforts. In doing so, it suggests that NGOs have begun to influence the structure of opportunities for contesting and overturning decisions of the state in environmental policy. Civil society activity in the courts may expand the power of courts in the realm of

environmental policy-making (though the evidence for this is relatively weak as courts are reluctant partners in this process), and it may also help to democratise access to justice. The concluding section offers an assessment and suggestions for future research.

The Aarhus Convention

The Aarhus Convention was adopted on 25 June 1998 as part of the 'Environment for Europe' process (Wates 2005). It represents a novel type of environmental agreement in its procedural rights-based approach and its imposition of obligations on member states and on the EC (also a member) vis-à-vis civil society. The Convention also refers to the goal of protecting the right of every person, both present and future generations, to live in an environment adequate for health and well-being.[1] The Convention grew from the embryo of Principle 10 of the Rio Declaration on Environment and Development (1992), which promoted the idea that individuals should have appropriate access to information, opportunities for participation in decision-making and effective access to judicial processes. Maria Lee and Carolyn Abbot (2003) note that 'the emphasis on public involvement is one of a range of responses to a certain disillusionment with the authority of the state (or the EC) to regulate for environmental protection'.

The Aarhus Convention is unique among international treaties in its reflection of the distinctive role of citizen groups and NGOs in enforcing environmental law. Articles 4 to 9 regulate in a detailed manner the three pillars of the Convention:

(1) access to environmental information as well as collection and dissemination of environmental information;
(2) public participation in decisions on specific activities, public participation concerning plans, programmes and policies relating to the environment, and public participation during the preparation of executive regulations and/or generally applicable legally binding normative instruments; and
(3) access to justice.

The third pillar of the Aarhus Convention, of particular focus here, is concerned with access to environmental justice. It grants rights to members of the public, including environmental organisations, to challenge the legality of decisions by public authorities that are contrary to the provisions of national laws relating to the environment. 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 UK ratified the Aarhus Convention on 24 February 2005 and became a full party to the Convention 90 days after this date. Richard Macrory and Ned Westaway (2011) write that in the UK 'compliance with Aarhus was not considered a significant challenge – the prevailing view was that the Convention was largely aimed at the emerging democracies in Eastern Europe' (p. 315). In announcing the ratification in 2005, a Department of Environment, Food and Rural Affairs spokesperson said that the UK was already living up to its Aarhus commitments:

> Over recent years, the EU and the UK have taken steps to improve people's ability to have a say in the quality of their environment. We are also encouraging other countries to make progress in this area, in particular in the Eastern European, Caucasus and Central Asian Region. UK

> ratification of the Aarhus Convention confirms our commitment to the best principles of environmental democracy, both at home and abroad.

As far as policy-makers were concerned, the country was adhering satisfactorily to the principles of environmental democracy underpinning the Convention. For this reason, a case study of the deployment of the norms contained within the Aarhus Convention by civil society groups provides a useful illustrative case study of judicialisation from below.

Case Study Justification

Scotland provides a particularly fertile context in which to explore the judicialisation and legal mobilisation dynamic. The UK government was a long-standing supporter of the Aarhus Convention and one of the early signatories (Macrory and Westaway 2011). The UK has a well-developed system of environmental law, opportunities for public participation and access to environmental information as well as more general provisions on the freedom of information. In England and Wales, rules of standing have been fairly liberal since the early 1990s, allowing individuals and NGOs to challenge the legality of decision-making processes by public authorities through judicial review procedures (Cichowski and Stone Sweet 2003; Macrory and Westaway 2011; Vanhala 2012).

However, Scotland operates under a different legal system: Scots law. Two defining features of Scots law justify its selection as a case study worthy of focus. These are restrictive standing doctrine, that limits who can take cases to court, and deterrent costs rules, meaning those who wish to take legal cases face the risk of paying the expenses incurred by the other side if they lose (McCartney 2011). Scotland has a distinct civil society sector and, among the larger NGOs, Friends of the Earth Scotland (FoES) is separate from Friends of the Earth England, Wales and Northern Ireland and both the World Wide Fund for Nature (WWF) and Royal Society for the Protection of Birds (RSPB) have separate administrations in Scotland. Interviews with representatives from several different NGOs highlighted their reluctance to use legal mobilisation. While the RSPB had previously taken legal cases in Scotland, in 1998 it suffered a major loss in a case that it had brought in collaboration with the WWF; a court ordered the NGOs to pay almost £200,000 in costs. The Head of Policy for RSPB Scotland said of the experience, 'we've learned we don't get access to justice' (19 May 2011). Similarly, FoES had decided after an early anti-roads campaign experience that pursuing legal action was too costly and risky (interview, 19 May 2011). The procedural rules and empirical evidence suggest that the Scottish jurisdiction is a particularly hostile one for groups seeking to turn to the courts. While the focus on this jurisdiction is admittedly a narrow one, the case is nonetheless analytically useful in serving as an 'unlikely case' for NGO and community group activism in the judicial realm (Eckstein 1975).

This research draws on original data gathered from judicial review actions taken by Scottish NGOs, community groups and individual activists. The cases were identified through secondary literature on environmental law in Scotland. I draw on court records, NGO newsletters, annual reports, press releases and a dozen interviews conducted in Scotland between April 2010 and April 2012 with NGO decision-makers, lawyers and legal experts that are knowledgeable of the Scottish context. The analysis traces how the norms contained with an international convention have been given life in civil society litigation campaigns in this jurisdiction. It seeks to shed light on the dynamics of judicialisation from below the state.

Access to Justice in Scotland

Because both the UK and the European Union have signed the Convention, the Scottish executive is obliged to implement its standards. The relationship between the UK government and Scotland in implementing and enforcing environmental law is laid out in the existing devolution settlement; the Scotland Act 1998; and the 2001 Memorandum of Understanding and Supplementary Agreements between the United Kingdom Government, Scottish Ministers, the Cabinet of the National Assembly for Wales and the Northern Ireland Executive Committee.[2] Under this legislation, the Scottish parliament has competence to address all policy areas in Scotland except for those reserved for the Westminster parliament, for example international relations, energy and some elements of transport. Environmental protection is thus largely a devolved competence although the boundary is not always clear (Reid 2009; Ross et al. 2009).

In regards to the first two pillars of the Aarhus Convention, Scotland—like the rest of the UK—is in compliance. Two key pieces of legislation—the Environmental Information (Scotland) Regulations 2004 and the Environmental Assessment (Scotland) Act 2005—implement the provisions of Aarhus in Scotland. However, the provisions on access to justice have been more controversial. The 2008 DEFRA Aarhus Convention Implementation Report lays out in detail the differences between Scotland and the rest of the UK in terms of how the Convention's provisions have been implemented under the first two pillars. However, in addressing the access to justice provisions, while containing an extensive discussion of what England and Wales had undertaken in order to meet the requirements, in regards to Scotland it simply states: 'Scotland advise us that their system complies with the requirements of article 9(4) [on access to justice not being prohibitively expensive]' (DEFRA 2008). The brevity and phrasing are telling.

In order to implement the access to justice provisions, regulations have been introduced which extend 'title and interest'—the Scottish test as to whether an individual or organisation can pursue a case—to environmental NGOs. However, the Pollution Prevention and Control (Public Participation etc.) (Scotland) Regulations 2005 and the Environmental Impact Assessment (Scotland) Amendment Regulations 2006 only relate to cases where there has been an allegation of breach of Environmental Impact Assessment provisions—not to broader environmental decision-making which is the remit of the Aarhus Convention. Further, it only allows environmental NGOs to take action, not individuals or local groups. In a 2011 report on access to justice, *Tipping the Scales: Complying with the Aarhus Convention on Access to Environmental Justice*, FoES argued that:

> Compliance with the third Pillar, on access to justice in environmental matters, is critical to ensure that the procedures established by the former two [pillars] are properly adhered to; however, in this respect, Scotland falls considerably short of meeting its international obligations. Aarhus demands broad and affordable access to justice, but the reality in Scotland is very different. It can be extremely expensive to undertake legal proceedings (environmental or not) in Scotland . . . In addition, rules on standing – and the interpretation of these rules by the courts – are extremely restrictive, making it very difficult for individuals, communities and NGOs to demonstrate that they have 'title and interest' to take an environmental case. (FoES 2011: 6)

In recent years, these perceived failures of compliance were implicated in a series of legal cases. Environmental NGOs in Scotland have been involved in these litigation efforts in a

number of different ways; from providing funding to individual litigants and submitting third-party interventions to using the narratives of lack of access to justice to mobilise their constituencies and pressure the Scottish government.

Two significant issues have proven particularly problematic in the Scottish context: rules on standing and the cost risk associated with litigation. Generally, rules on standing—known as 'title and interest' in Scots law—have been derived from a private law context. A person with 'title' is someone who is a party to a legal relationship, with the focus on ownership, contract, trust or other fiduciary relationship. In practice this has implications for which societal interests are represented in courts in Scotland. Particularly in the realm of environmental democracy—where issues are often problems of the commons or of nature and hence not of concern to a single individual—this understanding of who can access the courts means the environment's interests will not be spoken for (Stone 1972).

Like in England and Wales, the cost and risk of litigation is high in Scotland and the concept of public expenses orders (PEOs) has been developed in Scottish case law. A PEO caps the amount in a legal case of the other side's costs the petitioner would have to pay if she lost the case. However, this is a recent phenomenon and to date only two PEOs have been issued. In 2006, as part of an anti-roads campaign, FoES sought to overturn the Scottish executive's decision to permit an extension of the M74 motorway through southern Glasgow. The NGO applied for a PEO but the court refused to grant one, suggesting that the desirability of PEOs being introduced in Scotland should be pursued through the Court of Session Rules Council, the body responsible for addressing procedural rules in the court, and not through the judiciary. According to the NGO's access to justice report, FoES 'eventually and reluctantly withdrew the case to conserve scarce funds and in the face of a potential liability for expenses' (FoES 2011: 45).

Another case, *Mary Buchan Forbes v. Aberdeenshire Council and Trump International Golf Links* [2010] CSOH 1, that was scuppered by procedural barriers to justice, concerned Donald Trump's controversial golf and hotel development in Aberdeenshire. The petitioner struggled with issues both of standing and of costs. In 2009, Mary Forbes, a local resident, sought to halt development at the site. She alleged that the works were environmentally damaging and that the respondents did not follow correct Environmental Impact Assessment (EIA) and consultation procedures. The petitioner sought an interim interdict (an injunction) to stop the works on nearby sand dunes while her judicial review was in the court, but this was denied. In the 2010 decision, the judge cited the Aarhus Convention and noted that requirements to interpret the test of standing must be in line 'with the objective of giving the public concerned wide access to justice'. Forbes lived only a kilometre from the works being carried out, but she failed to show that she was 'affected in some identifiable way' and did not demonstrate sufficient interest. Paradoxically, Forbes had failed to get a PEO because they are confined only to public interest cases, and she had been refused assistance with the costs of her case because her 'application did not meet the "reasonableness" test for legal aid'. According to the Scottish Legal Aid Board, legal aid was refused 'on the basis of information available to the Board there were other people with an interest in the case who it would appear could fund or make a contribution to funding an action' (Scottish Legal Aid Board 2011). When Forbes lost her initial hearing, and faced the prospect of paying thousands of pounds of the other side's costs, she dropped the proceedings.

Another case that has evoked the Aarhus Convention in Scotland is *McGinty v. Scottish Ministers* [2010] CSOH 5. Marco McGinty sought to judicially review the Scottish government's proposed development of a new coal plant near his home in Hunterston, North Ayrshire. The

proposed site is classified as a Site of Special Scientific Interest (SSSI) for its wildlife. Both FoES and RSPB Scotland helped to financially support McGinty in the judicial review and participated in media efforts to raise awareness of the problematic nature of accessing justice (interviews, 19 May 2011, 3 May 2012). In some ways the progress of the *McGinty* case to date represents a waltz of one step forward and two steps back for Scottish compliance with the Aarhus Convention. An early hearing of the case resulted in the first ever PEO being awarded. The judge, citing the developing case law on protective cost orders (PCOs) in England, granted the petitioner a PEO and capped McGinty's liability for the defendant's costs at £30,000. The amount is high, particularly when considering the estimated cost of up to £80,000 he would face in bringing the case himself after being denied legal aid. Nonetheless, the PEO constituted an important symbolic liberalisation of the cost rules.

However, in another hearing, the *McGinty* petition was also challenged by the respondents on grounds of standing ('title and interest') and timeliness ('*mora*'). The judge in this case found in October 2011 that McGinty's occasional use of the site, five miles from his home, for bird-watching might entitle him to 'title' but did not meet the criteria of possessing sufficient 'interest'. Lord Brailsford held that:

> He does not in my opinion have a 'real and legitimate' or 'real and practical' interest to bring proceedings. He does not reside adjacent to the site and is not therefore a neighbour. His use of the site is limited, intermittent and non-essential. The type of usage he exercises over the site could in fact be exercised over any area of land to which the public has access at any location in Scotland. He does not sue as a member or representative of a group or organisation with title or interest. (Para. 26)

The petition was ultimately dismissed on standing and timeliness. In a press release in response to the judgment, McGinty said:

> I am deeply disappointed in this ruling, which has failed to overturn the manifestly unfair planning and legal processes that led to Hunterston being declared a national development. This is a sad reflection on Scotland and the Scottish planning and legal systems. It would appear that the value of the natural environment, as well as the principles of fairness, openness and democracy are set to one side when wealthy developers like Peel are involved. (WWF Scotland 2011)

Since then, to my knowledge, only one other PEO has been granted in Scotland. A campaign group, Road Sense, and an individual petitioner who was the chairman of the group, lodged a review of the Scottish government's decision to construct the Aberdeen Western Peripheral Route (AWPR). The proposed Aberdeen Bypass would consist of a new four-lane highway that would loop around the west and the north of the city of Aberdeen. On 7 May 2009, Road Sense made a communication to the Aarhus Convention Compliance Committee alleging non-compliance by the UK with its Convention obligations in the proposed construction of the AWPR. The Compliance Committee rejected these complaints after having considered written submissions, and a hearing attended by UK and Scottish government representatives. In short, the Committee was satisfied that the whole process of consultation, including the public participation through the statutory authorisation process, meant that it could not be said that the Scottish government was in breach.

At that point, the campaigners continued to pursue the case in the Scottish courts. In February 2011, Road Sense were granted a PEO that capped the campaigners' potential liability for the other side's costs at £40,000. In the ruling, which references the Aarhus Convention

multiple times, the judge nonetheless took a subjective approach in assessing the amount at which the cap should be set. The cap was established at exactly the amount Road Sense estimated that they could raise from existing funds. In England, in the *Garner* case, this subjective approach to the granting of PEOs was explicitly rejected by Sullivan LJ as being inconsistent with the objectives of Aarhus. The Scottish government confirmed that they would challenge Road Sense's title to take the case, and the campaign group chose to drop the action and leave William Walton, one local resident, as the sole petitioner. In *William Walton v. Scottish Ministers* [2012] CSIH 19 XA53/10 the appeal to the Inner House of the Court of Session in February 2012 the judge, who looked at European Law, the Aarhus Convention Compliance Committee's decision as well as domestic law, dismissed the case.

In the last year there have been significant developments in relation to the law on title and interest. Most notably, environmental campaigners have heralded the UK Supreme Court decision in *AXA General Insurance Limited and others (Appellants) v. The Lord Advocate and others (Respondents) (Scotland)* 2011 UKSC 46 decided by the UK Supreme Court on 12 October 2011 immediately after the McGinty ruling. FoES participated in the case as a third-party intervener despite it not being a case that explicitly addressed issues of environmental law.[3] In the case, a group of insurance companies which had undertaken to indemnify employers against liability for negligence sought to challenge the lawfulness of a piece of Scottish legislation, the Damages (Asbestos-related Conditions) (Scotland) Act 2009. The Act provided that asbestos-related pleural plaques and other asbestos-related conditions constitute personal injury. The First Division court had found that some of the respondents—individuals who have been diagnosed with pleural plaques caused by negligent exposure to asbestos—lacked title and interest and should not have been permitted to be parties to the proceedings. In their written brief, FoES argued that they were intervening on the issue of standing for NGOs to bring judicial review proceedings in Scotland in relation to matters of public interest. They wrote:

> FoES is a body with a genuine concern for the environment, who with its particular experience in environmental matters, its access to experts in the relevant realms of science and technology and environmental policy is in a position to mount carefully selected, focused, relevant and well argued legal challenges . . . FoES do not wish to take legal action on a frequent or regular basis. However, it considers that there are a number of environmental issues in Scotland that are unlikely to be litigated by any other organisation or person. (Friends of the Earth Scotland 2011)

The Supreme Court dismissed the insurance companies' appeal. Importantly, it also allowed the cross-appeal by the third to tenth respondents—individuals diagnosed with pleural plaques who were challenging the lower court's finding that they did not have title and interest to be parties to the case. The decision represents a decisive shift on the issue of standing in Scottish public law. In their judgment, the two Scottish judges on the UK Supreme Court clearly elucidated a rejection of the approach derived from private law in terms of title and interest. Lord Hope, citing the arguments put forth by FoES, held that:

> As for the substantive law, I think that the time has come to recognise that the private law rule that title and interest has to be shown has no place in applications to the court's supervisory jurisdiction that lie in the field of public law. The word 'standing' provides a more appropriate indication of the approach that should be adopted. (Para. 62)

Lord Reed reiterated the point:

> In my opinion, the time has come when it should be recognised by the courts that Lord Dunedin's dictum [on title and interest] pre-dates the modern development of public law, that it is rooted in private law concepts which are not relevant in the context of applications to the supervisory jurisdiction, and that its continuing influence in that context has a damaging effect on the development of public law in Scotland. This unsatisfactory situation should not be allowed to persist. (Para. 171)

Many of the points made in the judgment echo FoES's intervention and in the end the Court concurred with the NGO's idea that the separation of title and interest serves no useful function and that the time was ripe 'to free Scots public law from its private law shackles, and to recognise "sufficient interest" as the proper test for standing in judicial review' (Friends of the Earth Scotland 2011).

The landscape for environmental justice is thus changing rapidly in Scotland. While continuing to face high barriers in Scotland, environmental groups as litigants and interveners have sought other venues—at both the international and the UK level—within which to pursue their goals. By taking cases both on different policy issues (asbestos) and in different jurisdictions (before the Aarhus Compliance Committee, the EU and the UK Supreme Court) civil society groups mobilised other forms of law which created the possibility of spillover effects. As a result of this multi-level, cross-cutting approach, it seems that the Aarhus Convention may have a significant impact on whether groups and individuals will be able to access justice in Scotland.

Conclusion

NGOs and community groups in Scotland have used litigation efforts to highlight and influence the restrictive nature of accessing justice. The costs and risks associated with litigation and rules of standing in Scotland have regularly hampered the efforts of green NGOs—as well as local groups and individual activists—to challenge government decisions. This has meant that it has largely been corporate interests that have been represented in courtrooms. In response, environmental NGOs have tried to soften these barriers to justice. The norms contained within the Aarhus Convention have been deployed in Scottish courts, before the UK Supreme Court and before the Aarhus Compliance Committee. In a number of instances these norms have been acknowledged, granting them legitimacy, even in cases where they did not make the difference that grassroots actors would have hoped for in the final judgments.

While some may argue that the use of litigation diminishes democracy because it allows groups to circumvent the legislative process, the findings of this study suggest otherwise. First, the groups explored here are relying on international legal instruments that have been adopted and ratified through democratic processes. This concerns both substantive law, such as national and European environmental protection legislation, as well as procedural rules. Civil society cannot encourage judicialisation on its own: groups require both a legal basis as well as opportunities to participate in the judicial system. Legislatures and executives have created these legal norms and procedural opportunities (Cichowski and Stone Sweet 2003).

Second, the courts are filled with a broad range of societal interests. The critics are correct when they note that the environmental movement is keen to pursue legal strategies. However, their analysis ignores the corporate interests that have long benefited from access to the court, particularly at the stage of policy implementation where contestation may be more diffuse. Hirschl (2004) and Bellamy (2008) argue that, compared to legislatures, unaccountable courts

tend to do more to serve the interests of powerful corporate actors and vested interests. Critics of judicialisation argue that a solution is to discourage policy debates in the courts. However, another way to redress this imbalance is to empower their opponents and ensure that access to justice is equal for all citizens. As Kelemen (2012) argues, for rights and norms to have any real effect, litigants must be able to pursue legal claims. Democracy is not served if civil society is unable to challenge the legality of the actions of businesses or the decisions of the state.

ACKNOWLEDGMENTS

I would like to thank Rob Abercrombie, Carolin Huebner, Dan Kelemen, Daniel Sabbagh, Kirsteen Shields, Corin Throsby and Andy Whitford for comments on earlier versions of this article. I would also like to thank participants and audience members at the 'Designing Environmental Protection: Law, Regulation and the Environment in the European Union' Workshop at the UCL Environment Institute, 12 May 2012 and at the conference 'L'etat des droits: Pratique des droits dans l'action publique', Université Paris 13-Villetaneuse et Sciences Po Paris, 25 and 26 June 2012. I am very grateful to the British Academy for the generous postdoctoral funding that made this research possible.

NOTES

1. The United Kingdom explicitly included the following reservation when it signed and ratified the treaty: 'The United Kingdom understands the references in article 1 and the seventh preambular paragraph of this Convention to the "right" of every person "to live in an environment adequate to his or her health and well-being" to express an aspiration which motivated the negotiation of this Convention and which is shared fully by the United Kingdom. The legal rights which each Party undertakes to guarantee under article 1 are limited to the rights of access to information, public participation in decision-making and access to justice in environmental matters in accordance with the provisions of this Convention' (Aarhus Convention 1998 Declarations and Reservations, available at http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXVII-13&chapter=27&lang=en, accessed 9 May 2012).
2. Devolution: Memorandum of Understanding and Supplementary Agreements between the United Kingdom Government, Scottish Ministers, the Cabinet of the National Assembly for Wales and the Northern Ireland Executive Committee (available at http://www.dca.gov.uk/constitution/devolution/pubs/odpm_dev_600629.pdf, accessed 10 May 2012).
3. This was the first time FoES had participated in the courts in this way. The organisation also considered intervening in the *Road Sense* case before an out-of-court settlement on costs was reached between the participants (interview, 3 May 2012).

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