Natural justice for the environment can be helped by specialist courts

We all have a right to a healthy environment, a human right. - Perhaps a contentious statement back in the day, but the fundamental idea of a link between human rights and the environment has become abundantly clear and generated huge international support.

By Isobel Mercer: Environment Courts Needed To Protect Nature

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Many countries have begun to establish this right in law; indeed the First Minister’s Advisory Group on Human Rights recently recommended the ‘right to a healthy environment’ be set out in Scots law, something that Nicola Sturgeon is working to take forward.

For people in Scotland, this means a right to live in a country free of air pollution, with clean rivers and lochs, land and seas rich with wildlife, and nature back in our towns and cities. This is clearly dear to many people’s hearts: a recent poll found that 70 per cent of Scots want to see greater action on climate change, with a high proportion concerned about threats to wildlife.

But what could you do if you thought your right to a healthy environment was being infringed?
Isobel Mercer, Senior Land Use Policy Officer, RSPB Scotland

At the moment, your options would be limited. The main way to raise a legal challenge is through judicial review, but this requires deep pockets – so much so that the process has been declared prohibitively expensive by international experts. Steep costs act as a barrier to ordinary citizens and civil society organisations being able to speak up when environmental rights and protections are violated. Only 16 environmental cases and 77 planning cases were brought to judicial review between 2008-2018.

Brexit, forever looming on the horizon, would make access to justice even more elusive. All EU citizens can lodge a complaint at the European Commission if they think laws are not being enforced. No equivalent complaints process exists in the UK so, if we leave the EU, we will also lose this way of challenging processes that affect our everyday lives.

Fortunately, the Scottish Government has published a consultation to tackle this, but a new complaints mechanism is not guaranteed. That is why environmental charities are calling for a Scottish Environment watchdog that would, among other things, replace this complaints process.

But a complaints mechanism without access to a court system is hollow – a mouthpiece surrounded by deaf ears. The case for a specialised Scottish Environment Court is strong. Despite this, and despite public support, the Scottish Government decided in 2016 that now was not the time.

Environmental courts might sound radical, but in fact there are 1,500 across 44 countries. In Australia, New South Wales Land and Environment Court recently put a stop to a controversial new coal mine, based on the impacts it would have on climate change. Sweden’s Environmental Court rejected an approach to storing nuclear waste just last year.

Environmental courts have specialist judges and experts that allow them to deal with the technical and scientific detail that general courts often struggle with. Whereas a judicial review can only explore procedural issues, environmental courts can look at the substance: what has been decided, why, and is it likely to cause environmental harm?

Evidence has shown that specialism makes environmental courts fairer, cheaper and quicker. This applies to all parties, not just environmental groups; these courts also benefit decision-makers, business and land managers by being faster, more consistent and more robust. Scotland’s natural world is home to rare and iconic species such as golden eagle, red squirrel, wildcat and capercaillie. Our rivers and lochs support globally important populations of Atlantic salmon and freshwater pearl mussels. The Flow Country has one of the largest blanket bogs in the world, storing three times more carbon than all of the UK’s woodlands.

Sadly, this is all at risk – 56 per cent of species have declined since 1970 and Scotland’s Caledonian pine forests now cover just over 6 per cent of their original area. The Scottish Government’s commitments on environmental protections are welcome and reassuring, but the scale of the challenge must not be underestimated.

Making sure that action is taken to protect and restore nature, and our ability to embrace and defend our right to a healthy environment, are deeply connected.

Now is the time for the Scottish Government to join the international movement and live up to its progressive credentials by creating a Scottish Environment Court. This will mean that Scotland’s citizens don’t lose their voice and can continue to speak up for nature. Fight for Scotland’s Nature, a coalition of 35 environmental charities, is encouraging as many people as possible to respond to the Scottish Government’s consultation. A simple e- action that you can take can be found at [www.fightforscotlandsnature.scot/action/](http://www.fightforscotlandsnature.scot/action/)

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Nature, a coalition of 35 environmental charities, is encouraging as many as possible to participate in the consultation to stop Scotland’s protected areas from being reduced or lost. The organisations are making a common call: that legislation should be strengthened to give us a right to a healthy environment, a human right.

Making sure that action is taken to protect and restore nature, and our environment, is a test of the UK’s, and Scotland’s, ability to embrace and defend our right to a healthy environment, are deeply connected.

The challenge must not be underestimated. Environmental protections are welcome and reassuring, but the scale of the threat we face is huge.

Scotland’s Flow Country has one of the largest blanket bogs in the world, the only remaining natural habitat for the silver birch and the only breeding site for the critically endangered curlew. Its water-filled mires are home to rare birds such as the golden eagle and red kite, as well as iconic mammals such as red deer and the Scottish wildcat. The pine forests, the only ones of their kind in the UK, are home to the capercaillie, the largest flying bird in Europe.

The Sutherland and Caithness Coast is a nature-rich area of outstanding natural beauty. The Sutherland is home to sea eagles, red squirrels and arctic willow, while the Caithness coastline may soon be home to wind farms for renewable energy. The whole area is beautiful and full of life – but this is now at risk from an application for a road to be built, which may destroy the habitat of the iconic species.

The court process for this application has taken three years, with 13 legal challenges, 28 judicial reviews and 44 UK and international experts. The assessors thought the application was unsatisfactory and refused to grant it. The applicant then appealed to the courts, which decided to grant permission to appeal on a number of grounds.

But a complaints mechanism is not enough. If you live in Sutherland or Caithness, you would have no option other than to appeal and perhaps even to find a new lawyer. A court can only explore the legal consequences of an application and is not in a position to deal with the technical and scientific detail that general courts often struggle with. Whereas a judicial review can only explore whether the legal basis of an application is correct, an environmental court can look at the substance: what has been rejected, why, and is it likely to cause environmental harm?

Environmental courts might sound radical, but in fact there are 1,500 judges in Sweden’s Environmental Court, dealing with environmental matters. The court is strong. Despite this, and despite public support, the court is a mouthpiece surrounded by deaf ears. The case for a specialised Scottish Environment Court is strong. Despite this, and despite the Scottish Government’s commitments on protecting the environment, a court to deal with the technical and scientific detail that general courts often struggle with is still not on our agenda.

But a complaints mechanism without access to a court system is hollow – citizens and the courts do not share a role. The case for a specialised Scottish Environment Court is strong. The Scottish Government has published a consultation to put in place a complaints mechanism, and the consultation states that a National Policy and Planning Office (NPPO) would deal with the technical and scientific detail that general courts often struggle with. The consultation states that this could be a national mechanism to deal with appeals to Scottish Ministers.

Unfortunately, the NPPO’s proposed roles for decision-making do not include the right to a healthy environment.

Fortunately, the Scottish Government has published a consultation to establish an Environmental Court. The consultation states that an Environmental Court would be independent and have specialist judges and experts that allow them to understand and decide on the issues.

The consultation has a clear vision that the Court would look at the substance of the case, what has been rejected, why, and is it likely to cause environmental harm? The consultation states that the courts would have the power to issue a ‘no-go zone’ order: not a decision to allow or decide, why, and is it likely to cause environmental harm?

We all have a right to a healthy environment, a human right. Many countries have begun to establish this right in law; indeed the First Minister’s Advisory Group on Human Rights recently recommended the ‘right to a healthy environment’ be set out in Scots law.

A complaint against the Scottish Government or any public body, including the Scottish Ministers, is now possible, but the route is long and complex. If you want to appeal against a decision of the Scottish Ministers and you want your complaint to be decided by a court system with specialist technical and scientific knowledge, you would need a complaints mechanism with a court.

At the moment, your options would be limited. The main way to raise a complaint against the Scottish Ministers is by a judicial review. A judicial review is a process of challenging a decision of the Scottish Ministers to determine whether they acted within their powers or whether they legal basis of an application is correct. It can only explore whether the legal basis of an application is correct.

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