

Jemma Keown – Problems in the Scottish Legal Landscape

There have been calls for an environmental court in Scotland for a number of years, with the SNP making a commitment to investigate such a court in their 2011 manifesto:

“We have received representations calling for the creation of an Environmental Court in Scotland, potentially building on Scotland’s current Land Court. We are open-minded about this, but wish to seek wider views. We will, therefore, publish an options paper as the basis for a wider engagement on this proposal.”

However, over a decade later, Scotland does not have an environmental court nor an extension of the Land Court with jurisdiction in environmental matters. The current legal system is not fit to provide rigorous environmental justice and a standalone environmental court would ensure such justice in Scotland.

In Scotland, cases which concern issues of environmental law are not heard in a specific environmental court or environmental tribunal. Instead, cases go to different courts and within the judicial system depending on the specific environmental concern. Currently the Sheriff Court hears appeals on access to land under the Land Reform (Scotland) Act 2003, appeals concerning contaminated land and those regarding private water supplies among other things. The Scottish Land Court hears cases concerning nature conservation and notices concerning nitrate vulnerable zones and agricultural subsidies. Alongside these courts, the Department of Planning and Environmental Appeals deals with a number of planning appeals and environmental appeals (McCartney, 2015). This fragmentation of the legal system, with issues being decided in a myriad of courts and governmental departments and no ‘one-stop shop’ court which provides environmental justice does not allow for the development of environmental principles. Nor does it allow judges to become specialised in environmental decision making. This also does not allow for environmental jurisprudence to be built up which shows a clear line of precedent for recurring issues as is the case in other areas of law such as criminal law where lawyers in a criminal court can use previous cases to persuade the judge. This issue could be solved by having one environmental court, allowing judges to specialise and precedent for future cases to be developed.

There is also the option of judicial review. Judicial review is a mechanism which can be used by parties to provide a check and balance on public bodies, ensuring that they remain within the bounds of their power and make reasonable decisions based on the information with which they are presented (Mullen, 2015).

This form of review is often used by third parties, who may have no direct interest in e.g. a housing development, other than to raise an environmental concern about the project. A third party could be anyone from individuals, communities, pressure groups to Environmental Non-Governmental Organisations or NGOs (examples of NGOs include Friends of the Earth and the Royal Society for the protection of Birds).

However, this process is not suitable for environmental cases for a number of reasons, two of which are discussed below.

No merits considered

Judicial review cases are decided upon a point of law and not the merits of a case. This means that judges hearing a judicial review cannot take the facts of the case into consideration and come to an entirely new decision based upon their own views of the evidence and facts of the case. They can simply decide that the decision made by the original body (this may be a decision made by a local authority or a regulatory body such as the Scottish Environmental Protection Agency (SEPA)) was correct or that the decision was unlawful or out with the powers of the body for and the case should be reconsidered by the original body. Although the decision is referred back to the original body, this does not mean that they will come to a decision which the person seeking judicial review is happy with (Bell, 2017).

Narrow grounds of appeal

There are very specific grounds of appeal which must be met in order for a case to qualify for judicial review and if a case does not meet these stringent requirements, it cannot be reviewed. This is exemplified by the fact that of the 343 judicial review cases in 2016-17 only 3 were for an environmental issue (Scottish Government, 2018). This may reflect the difficulties in framing a claim for judicial review based on an environmental issue.

Overall, there are a number of issues with the Scottish legal landscape which prohibits access to justice. Scotland fails to provide a single point of contact for environmental justice to be provided resulting in ad hoc decisions and a difficulty when it comes to building up a judicial precedent for environmental law as is the case in other areas of law. Furthermore, the issues with judicial review prohibit access to justice, however, having an environmental court or tribunal with the ability to take into account all the facts of the case and make a new decision in respect of the issue would allow for the court to take environmental considerations into account in order to protect the environment. An environmental court, with less stringent grounds of appeal would provide an opportunity for more environmental cases to be heard in courts, resulting in more robust environmental justice as well as protection for the environment.

Bibliography

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