Law & Society REVIEW

Legal Opportunity Structures and the Paradox of Legal Mobilization by the Environmental Movement in the UK

Lisa Vanhala

This article examines the strategic legal activity of the environmental movement in the United Kingdom over the past twenty years. Environmental non-governmental organizations (NGOs) have increasingly turned to the courts in pursuit of their policy goals, despite significant losses on substantive legal issues, difficulties gaining standing and high costs awarded against them under the "loser pays" system. This presents a puzzle: why does the movement continue to pursue legal action in the face of what activists claim is a hostile legal opportunity structure (LOS)? This study explores this seeming paradox using a single-country, cross-temporal comparative approach, an original dataset of legal cases taken by NGOs as well as qualitative case studies of strategic litigation. It highlights the agency the movement exhibits within opportunity structures and suggests that NGOs that use litigation are able to highlight the failings of the existing system and improve future access to justice for themselves and other groups.

Originally published in 1972, Christopher Stone's *Should Trees Have Standing*? served as a rallying cry for the then budding environmental movement in the United States. It launched a debate about the legal rights of trees, oceans, animals and the environment among social activists and their adversaries. Since then, in following

I am indebted to the Journal's four anonymous reviewers and the editors for their comments which greatly improved this manuscript. I wish to thank the British Academy for generous financial assistance, which made its preparation possible. I would like to acknowledge Rachel Cichowski, Carol Day, David Erdos, Liz Fisher, Tim Hicks, Chris Hilson, Kathleen Hull, and Dan Kelemen for sharing their insights and providing helpful comments on earlier drafts. I am particularly grateful to Rob Abercrombie who read and commented on the manuscript numerous times and to Corin Throsby for her able editorial assistance. Thanks also to participants and audience members at the Law and Society Association Annual Meeting in Chicago, Il (May 27th to 30th, 2010), the International Political Science Association's Comparative Judicial Studies Group Meeting in Bologna, Italy (June 21st to 23rd, 2010), the Role of Courts in a Democracy Workshop at Oxford University (Feb 10th and 11th 2010), the Oxford Environmental Law Discussion Group (Feb 22nd 2011), the Workshop on Law, Rights and Mobilization in a Multi-level Europe in Onati, Spain (June 16th–17th, 2011) and the UCL Department of Political Science Departmental Seminar for helpful comments. Thank you to Sarah Wilkins Laflamme, Nehal Panchamia and Asma Vranaki for their excellent research assistance. Please direct all correspondence to Lisa Vanhala, Department of Political Science and School of Public Policy, University College London, 29–30 Tavistock Square, London WC1H 9QU, United Kingdom; e-mail: L.vanhala@ucl.ac.uk.

Law & Society Review, Volume 46, Number 3 (2012)

https://doi.org/10.1111/j.1540-5893.2012.00505.x Published online by Cambridge University Press

the logic of Stone's treatise that the environment cannot defend its own interests, non-governmental organizations (NGOs) have regularly stepped into the courts in the U.S. in order to enforce or expand environmental law. 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 "[l]itigation is the most important thing the environmental movement has done over the past fifteen years" (quoted in Cole and Foster 2001: 30). The activity of the Sierra Club Legal Defense Fund, Earth Justice, the Natural Resources Defense Council and the Environmental Defense Fund and the policy impact has also been widely documented in existing socio-legal research (e.g., Coglianese 1996; Fritsvold 2009; Morag-Levine 2003).

NGOs elsewhere in the world have begun to follow suit, heralding what could arguably be coined a "global judicialization" of environmental disputes (Börzel 2006; Burns and Osofsky 2009; Cichowski 2007; Keck and Sikkink 1998; Morag-Levine 2003; Tate and Vallinder 1995). This article examines how the environmental movement in the United Kingdom has mobilized the law over the last twenty years. Drawing on the definition put forth by Epp (1998), legal mobilization is considered to be "the process by which individuals make claims about their legal rights and pursue lawsuits to defend or develop those rights" (18). The article considers the dynamics between the structure of legal opportunities and social movement organizations in a number of judicial review (JR) actions. All four UK organizations examined—Friends of the Earth, Greenpeace, Royal Society for the Protection of Birds and WWF—have taken JRs which are the most common form of legal action taken by environmental NGOs in the UK. This type of legal action allows groups and citizens to challenge the decisions of public bodies that they see as either contravening domestic environmental or administrative law, or European Community (EC) law.

A puzzle emerges from the empirical research presented in this article on the use of JRs 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 pursue legal cases despite facing what they claim is a relatively hostile legal opportunity structure (LOS)? In addressing this puzzle, this article adopts a legal mobilization perspective, as developed by scholars such as Scheingold (1974) and McCann (1994), to broaden the focus beyond the "direct" causes and effects of formal legal action. It shows that the continued use of litigation strategies by the social movement can

https://doi.org/10.1111/j.1540-5893.2012.00505.x Published online by Cambridge University Press

in part be explained by the legal mobilization theoretical tradition. Despite substantive losses, many of the cases involve procedural victories and legal and political benefits. By continually campaigning for environmental justice, activists can contribute to broader campaigns to enhance access to justice for others. 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 (Environmental Justice Project 2003: 23). It is only by regularly attempting to access justice that these groups credibly highlight the failings of the existing systems.

This research suggests that the static, snapshot image of "structure" as presented in some (but importantly not all) formulations of the LOS approach misses an important part of the story in explaining the emergence and progress of legal mobilization. Drawing on the legal mobilization research tradition (Andersen 2005; Cichowski 2007; McCann 1994) this article demonstrates that, by shifting focus on to social movement agents, we can gain a more accurate picture of the mechanisms that explain continuity and change in the socio-legal environment. My research shows that movement activists are not passive actors simply responding to externally-imposed legal opportunities but instead play a role in creating their own legal opportunities.

The next part of this article briefly lays out the growing body of research on the concept of the LOS with which this research engages. This is followed by a discussion of the methodological scope of this research and focuses in particular on why, theoretically, the UK is a particularly fruitful case within which to study the interaction of the LOS and social movement agency. Section three provides an overview of legal mobilization by the green movement over a twenty-year period. It addresses the question of why groups use litigation despite significant obstacles using two qualitative case studies of strategic litigation campaigns. The case studies, on the liberalization of standing and changes in the cost structure of litigation, serve to illustrate how legal campaigns have influenced the structure of legal opportunities despite substantive losses in legal cases. The discussion section highlights how these organizations approach legal mobilization and presents some of the recent changes in the movement to account for both the growing presence of UK environmental NGOs in the courts and the agency they have shown in campaigning to change the structure of legal opportunities. It concludes by signposting the trajectory of future research.

https://doi.org/10.1111/j.1540-5893.2012.00505.x Published online by Cambridge University Press

Legal Opportunities: Structures and Agents

As numerous studies have now asserted, the existence of a court does not automatically translate into effective and equitable access to justice. A key question asked by scholars concerns the types of conditions that will prompt social movements to mobilize the law. One vein of research has focused on organizational resources. Marc Galanter (1974), in his landmark study of the resource capacities of parties to litigation, found that the "haves" tend to come out ahead. According to Epp (1998), it is not merely the acknowledgment of rights by an able judiciary that lays the foundation for effective rights enforcement. Rather "material support for sustained pursuit of rights is still crucial" (Epp 1998: 17). In most cases, pursuing a legal campaign is a lengthy, costly and risky process. Actors with strong organizational and resource capacities stand a better chance of successfully exploiting legal opportunities (Börzel 2006). Michael McCann and others have developed a rich body of work—often grouped together under the title of *legal mobilization theory*—that combines an awareness of the material basis required for litigation with an understanding of rights consciousness and the role of broader political processes and opportunities.

Galanter's and McCann's approaches are united by a theoretical and methodological "standpoint shift" away from law and courts as the centre of analysis towards the multiple locations of social movements between law and social change (Paris 2010: 19). Epp's recent work found that "law [emerges] out of social relationships rather than imposed from above and, at the same time . . . law [emerges] from elites' interests and power" (Epp 2009: 216). "Bottom-up" studies examining the grassroots or everyday dynamics of law—for example, research on legal consciousness (Ewick and Silbey 1998), legal translation (Paris 2010; Schoenfeld 2010) and framing processes (Marshall 2003; Pedriana 2006; Vanhala 2011a)—are now featured in contemporary scholarship as commonly as traditional "top-down" impact studies. Legal mobilization scholars have shown that there are multiple ways of thinking about the consequences of judicial decisions and assessing the "success" or "failure" of litigation and law reform activity within the U.S. (Andersen 2005; Paris 2010) and beyond (Epp 1998; Holzmeyer 2009; Manfredi 2005).

In recent literature, LOS approaches have become one of the dominant frameworks for explaining legal mobilization. LOS perspectives focus on variables conditioning access to judicial governance and also seek to account for the role of judges in the policy output process. LOS scholars have noted, with near unanimity, that the extent of access significantly shapes the emergence and

https://doi.org/10.1111/j.1540-5893.2012.00505.x Published online by Cambridge University Press

progress of legal action. They focus on the mechanics of the judicial process that shape access to the court, including what may be litigated, who can litigate and where and when such litigation can occur. The general emphasis of LOS theory is on the practical and strategic situation within which groups decide whether or not to become active in the legal arena: the LOS represents the degree of openness or accessibility of a legal system to the social and political goals and tactics of individuals and/or collective actors.

Chris Hilson (2002) was among the first to deploy the terms "legal opportunity" and "legal opportunity structure" to describe both the stable and contingent factors that influence whether social movements are able and willing to pursue their goals through the courts. Andersen's (2005) *Out of the Closets and Into the Courts* developed the concept further in terms of its theoretical and empirical application. Similar approaches are used by Evans Case and Givens (2010) in their study of race equality in the European Community and Wilson and Rodriguez Cordero (2006) in their research on legal activity by gay rights groups and the movement for people living with AIDS in Costa Rica.

There are as many versions of what the LOS constitutes as there are scholars deploying the concept. Among the various formulations of LOS surveyed here, its dimensions could include: procedural variables (Alter and Vargas 2000; Andersen 2005; Cichowski 2007; Evans Case and Givens 2010; Hilson 2002; Wilson and Rodriguez Cordero 2006); material resources (Epp 1998; Evans Case and Givens 2010; Galanter 1974; Hilson 2002); legal resources or the existing legal stock (Andersen 2005; Evans Case and Givens 2010); judicial receptivity to policy arguments in particular cases (Andersen 2005; Hilson 2002); cultural frames (Andersen 2005); and the presence of allies or counter-mobilizing forces (Andersen 2005; Keck 2009; Vanhala 2011b).

Different studies place a differing emphasis on these factors in accounting for the influence of LOS on a group's behaviour. There is, however, a general consensus among LOS scholars that procedural rules constraining or enhancing access to justice are a determining factor of legal opportunity. Research has focused in particular on standing doctrines; those jurisdictional rules that dictate who can take a legal claim and particularly whether collective actors can access the courts either directly as a participant or as a third party or *amicus curiae*. Evans Case and Givens (2010) write that "Relaxing or eliminating these rules is a key step for interests that seek to use courts as a means of influencing politics and policy-making" (p. 224). Among existing research, Wilson and Rodriguez Cordero (2006), who look at the way marginalized groups have accessed the new Constitutional Court in Costa Rica,

https://doi.org/10.1111/j.1540-5893.2012.00505.x Published online by Cambridge University Press

define "legal opportunity" most loosely. In contrast to previous research emphasizing material resources, they suggest that it is the rules that make access to the Court affordable that are a new LOS, as they make the Court "effectively open to all citizens regardless of their resources" (343).

Many conceptualizations of the LOS implicitly assume that procedural rules and structures have a mechanical, unilateral impact on behaviour: they intimate that an open structure will encourage participation in the system and a closed one will exclude it. However, some existing research challenges this assumption by focusing on the contextual interface between activists and legal processes (Cichowski 2007; McCann 1994). According to Andersen (2005) "The political configuration of the state shapes the opportunities afforded to movements; shifts in that configuration can open or close 'windows' for action. Conversely, social movements can influence the political configuration of the state; through their actions they can forge opportunities" (2005: 7). Anderson convincingly shows the ways in which "socio-legal structures shape movement strategies and are shaped by those strategies in turn" (2005: 8). Here, focusing on the "access dimension" of the LOS this research contributes to this challenge to static, snapshot applications of the LOS by bringing attention to the dynamic nature of the relationship between "the structure" of legal opportunities and the agency of activists.

Agents can mobilize both within and outside of a LOS to render it more open or closed: groups can lobby parliament, government or the courts themselves to enhance or diminish access for collective actors wishing to litigate. These procedural victories can have a long-term, systemic impact on levels of access to justice. In liberalizing standing for one group, courts have often signalled a willingness to hear the claims of others. By altering the laws on costs in order to make access to justice less risky or burdensome, other potential litigants may also be more likely to bring a claim. And by extending the time limits for challenging an action by a public authority, a greater number of claims may be brought. Winning legal battles on standing, costs and time limits also offers groups potential indirect benefits in terms of publicizing these victories to their constituencies. However, procedural victories do not necessarily have these wide-ranging effects. In some cases, victories in the courtroom in the face of substantive losses may be purely symbolic in the longer term; sops to soften the blow of losing on the issue that really matters (Mandel 1994). In summary, this recursive relationship between activists and legal opportunities is not completely novel to proponents of the legal mobilization approach. McCann (1994) points out that "the pluralistic character of law provides reform activists with some measure of choice regarding both the

https://doi.org/10.1111/j.1540-5893.2012.00505.x Published online by Cambridge University Press

general institutional sites and the particular substantive legal resources that might be mobilized to fight policy battles and advance movement goals" (McCann 1994: 9).

There is a clear empirical understanding among students of legal mobilization that use of the law by social movements is just one of a number of different openings available to groups to influence policy, and social movements tend to use tactics in parallel (but see Barnes 2009; Rubin and Feeley 2003; Silverstein 2009). The tactic of litigation may be a last resort or, if there are lawyers on staff who tend to see policy conflict in legal terms and perhaps overvalue the use of law as a policy strategy, legal action may be the first port of call. The literature on legal mobilization and opportunity structures suggests that determining why an organization uses one tactic over another requires an assessment of an organization's legal and political environment as well as all their alternative (potential) activities, resources, dynamics and complex motivations. Rather than considering why NGOs choose (not) to turn to law over other possible courses of action, this research has a more targeted ambition. By exploring why groups mobilize the law in the face of constraints, it attempts to elucidate a key part of the larger story of how movements shape the opportunity structures within which they are situated.

Methodological Approach

Justification of Case Selection: An Inhospitable Legal Opportunity Structure?

To highlight the theoretical weaknesses of relying on a LOS-approach alone (i.e., without taking into account the agency of social movement groups), selecting a jurisdiction with a relatively unfavourable environment for legal mobilization would provide an "unlikely case" (Eckstein 1975) for study. Even low levels of legal mobilization activity in an "unlikely case" would counter theoretical expectations that a hostile LOS is necessarily a deterrent to litigation.

For this reason the UK green movement is a usefully illustrative case. On a general level, a number of historic and contemporary factors contribute to what at first appears to be an inhospitable environment for legal mobilization (Epp 1998): 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 (Rootes 1992). Furthermore, the "conservative" nature of the English judiciary was noted by almost all research participants (although all of them were also careful to point out that

https://doi.org/10.1111/j.1540-5893.2012.00505.x Published online by Cambridge University Press

there are important exceptions to this conservatism) suggesting a general perception of the hostility to be faced when accessing justice. One interviewee said: "The judiciary is cautious, conservative and most of them, most of the time, are very keen to avoid making new law, especially new law which could have a wider impact" (Interview, 13 April 2010).

Many elements of the political and legal culture concerning environmental protection have been evolving over the last twenty years. There have been significant changes in government positions on issues including climate change and the influence of European legislation and practices over domestic ones. In the UK, environmental law-making and enforcement is carried out by a patchwork of local and central government bodies and agencies, including local councils, the Environment Agency, the Department for Environment, Food and Rural Affairs and the Department of Energy and Climate Change. In addition to domestically developed environmental regulation, the supremacy of an ever-growing body of EU environmental law represents an important source of environmental law. The most progressive and extensive environmental legal frameworks emanate from the European Union (EU). For example, in the realm of nature conservation, the Birds Directive, the Habitats Directive, and the Protection in Trade of Species of Wild Flora and Fauna Regulation constitute important sources of protections. Further to the conservation measures, extensive EU legislation on chemicals, waste, air quality, water quality and acidification, genetically-modified organisms, and energy has been incorporated into UK law (see for example McCormick 2001).

There have also been important international developments concerning access to environmental justice in recent years. 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 on 25 June 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, of particular focus here, 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 UK government, operating under the understanding that its existing judicial review procedures would fulfil the access to justice requirements of the Convention, ratified the Aarhus Convention on 24 February 2005 and became a full party to the Convention 90 days after this date. The EU has also been a party to the Convention since 18 May 2005.

These significant changes at the supranational and international level suggest the UK environmental movement may be operating in a less inhospitable environment for legal mobilization than it used to. However, important barriers to the ability of citizens and NGOs to access the courts have existed over the last twenty years, some of which remain: issues of interest group standing, the judiciary's knowledge of environmental issues, increasingly restricted access to public legal funding and, particularly, the continuing problems associated with the fee-structure and associated high levels of risk in terms of costs have limited the ability of citizens and groups to bring meritorious claims.

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" (Milieu Environmental Law and Policy 2007: 22). A 2002 cross-national comparative report 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 (de Sadeleer et al. 2005).[1]

Painting an Empirical Picture of Legal Mobilization

In practice, legal mobilization 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. In the UK, the term judicial review refers to a type of legal action in which a judge assesses the lawfulness of a decision or action made by a public body. Judicial reviews challenge the way in which a decision

[1] A number of other studies and policy reports, including some partly or wholly commissioned or funded by the government have reaffirmed these findings (Brooke 2006; Capacity Global 2003; Environmental Justice Project 2003; Environmental Law Foundation 2009; Friends of the Earth Scotland 2011).

https://doi.org/10.1111/j.1540-5893.2012.00505.x Published online by Cambridge University Press

has been made, rather than the conclusions reached. Generally, the courts' jurisdiction covers: applications to prevent a public authority acting unlawfully; applications to require a public authority to act lawfully; applications to quash an invalid act; applications for declarations as to what is the proper legal regime and rules applying to a particular case; applications for injunctive relief; and applications for costs associated with a substantive claim. As Paul Stookes (2008) has highlighted, the reliance that citizens and groups place upon judicial review can have significant limitations. First, JRs are widely considered by the judiciary as a last resort and can only be relied on after all other channels have been exhausted. Second, a JR does not address the merits of the decision, only the process undertaken by public decision makers. This has particular implications in the case of environmental law, in which the scientific complexity of the issues at hand are often ignored (Interview, solicitor, 13 April 2009). Despite this, NGOs have favored the use of JRs over other avenues of possible legal action.

This research draws on original data gathered from judicial review actions taken by four national environmental NGOs based in England (see Appendix 2): The Royal Society for the Protection of the Birds (RSPB), which was founded in 1889 and is devoted to working to securing a healthy environment for birds; The World Wide Fund for Nature (WWF) UK, which was established in 1961 and works to protect endangered wildlife and environments; Friends of the Earth England, Wales and Northern Ireland (FoE) which was established in 1971, and currently focuses on environmental justice; and Greenpeace UK, which was set up in 1977 with the mandate to defend the natural world and promote peace. Christopher Rootes (2009) has shown that these four organizations are among the largest, most professionalized and well-resourced in Britain.

As Michael Paris (2010) points out, legal mobilization approaches tend to focus on the practical consciousness and the strategic choices of social movement actors. The objective here is to decipher meaning and action from the vantage point of the actors engaged (or not) in legal mobilization. As such, I draw on court records, interviews, newspaper coverage and other documents such as press releases and annual reports that provide evidence of how different actors approached legal opportunities and their outcomes.

I use two different types of data: the first is a simple count of the number of cases these organizations have taken and won over a twenty-year period and the second is more complex, qualitative data that contextualizes the numbers. Cases included in the overall empirical case law database constructed for this project are limited to those which successfully passed through the permission stage

https://doi.org/10.1111/j.1540-5893.2012.00505.x Published online by Cambridge University Press

and which were not ultimately settled. Legal actions that are not granted permission or that are settled are often difficult or impossible to identify but are also a crucial piece of the puzzle in assessing litigation outcomes.[2] Cases were considered at all levels of the judicial system and cases on appeal were treated as separate cases, even when they dealt with the same substantive issues. They were identified using the British and Irish Legal Information Institute's Case Law database and the information was supplemented by research on the NGOs' press releases and additional information provided by the NGOs.[3] Measuring whether legal mobilization is "successful" is not a straightforward task. In the numerical analysis, I consider a very simple and narrow understanding of "success/failure" by identifying the main substantive issues and any procedural issues in a case and the NGO position on those issues to assess success.

Methodological Limitations and Challenges

Admittedly, relying on data like this offers only a very limited, and at times even misleading, picture of legal mobilization activity. There are a number of dimensions on which this type of analysis falls short. There is, for example, significant difficulty in interpreting what these figures suggest. Without a baseline for comparison it is difficult to interpret whether the number of legal cases and the number of victories (substantive or procedural) is "high" or "low" for a jurisdiction. The filing of a single case might be high in some contexts and the filing of thousands in another jurisdiction may be low. The data here is used to highlight that there is at least some level of legal mobilization activity by the green movement, even though the hostile legal environment may lead us to expect otherwise. Also, considering that all the organizations are situated within the same LOS, the very existence of differences between their levels of litigation activity goes against theoretical predictions. The data is broken down to focus on changes over a twenty-year period: temporal trends can provide some clue as to whether litigation activity is largely structurally determined or a result of organizational agency.

[2] Specific legal cases that do not proceed past the permission stage have little likelihood of directly shaping policy and may even legitimate the claims of policy opponents. In contrast, settled cases can usually be considered at least a partial victory for the plaintiff. Looking only at the outcomes of decided cases will provide a distorted picture of the outcomes of strategic litigation. As previous research has shown, if we are to understand the full range of possible outcomes in litigation and what the term "success" represents in these legal cases, consideration should be given to out-of-court settlements (Dotan and Hofnung 2001).

[3] Particular thanks are owed to Carol Day at WWF-UK who compiled a similar dataset on which this work draws heavily.

https://doi.org/10.1111/j.1540-5893.2012.00505.x Published online by Cambridge University Press

There is also a difficulty in considering the idea of "success", as not all cases are the same, and there may be some that address issues of greater importance for the litigating party. NGOs may lose the majority of their cases but win most of the cases (or win on the issues) that are most important to them. Judicial decisions are often not binary decisions but instead address a number of legal issues put forward by the parties to the case. It is frequent for both sides to claim victory after a high court decision (Mandel 1994; Morton and Allen 2001). For these reasons, in addition to many others put forward by socio-legal scholars, counting case results is clearly a limited tool.

Nevertheless this narrow focus is useful as an entry point for my more contextualized, holistic analysis. The numerical data was supplemented by qualitative analysis of the arguments put forward by the movement in particular legal cases, the judicial decisions and media and secondary analysis of the legal actions. I also conducted eighteen semi-structured interviews with two categories of interviewees in Britain between April 2010 and January 2012: elites within the relevant NGOs with knowledge of campaigning and/or legal activity within their organizations; and environmental lawyers with expertise in the area (many of whom have worked with the NGOs examined). The underlying purpose for outlining this litigation activity is that it provides a pathway for tracing the processes by which environmental activists exerted agency, developed strategic responses and constructed meaning as to the overall outcome of legal decisions within the broader British LOS.

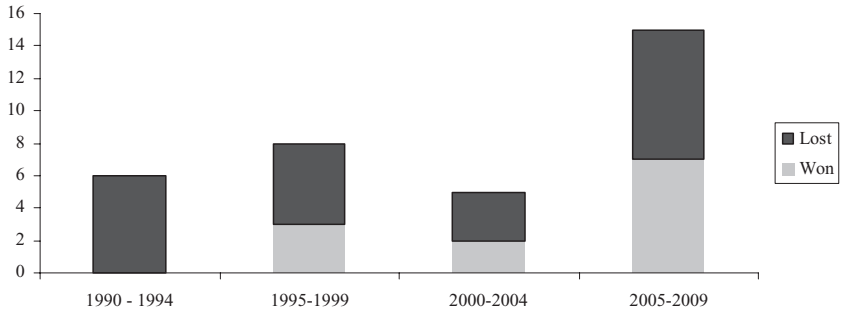
Legal Mobilization by Environmental NGOS

Overview

Bearing the many limitations of this type of analysis in mind, this section asks: what is the overall character and record of legal mobilization by the environmental movement? Between 1990 and 2010, courts decided 35 legal actions in which at least one of the four NGOs examined here participated.[4] 22 of these cases were lost and 13 were won (see Appendix 1). Across organizations, FoE was the most active in its judicial review activity, as it participated in, or indirectly supported groups (either financially or through provision of legal representation) in 18 different cases. Greenpeace took

[4] 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 brought a case related to development and environmental impact to the Scottish courts together in the late 1990s.

https://doi.org/10.1111/j.1540-5893.2012.00505.x Published online by Cambridge University Press



Graph 1. NGO Judicial Review Results by Period.

10 cases, RSPB took eight cases and WWF only took three cases in the period.[5] There has been an increase in the number of cases taken in recent years, with 15 taken in the period 2005 to 2009 (see Graph 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.

However, these somewhat dismal results are based on wins of substantive issues, and are to some extent mitigated if we consider judicial decisions on procedural issues (see Appendix 2). Courts assessed nine explicit procedural issues across seven different cases. These include: assessment of standing doctrine concerning NGOs; 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. This is a very partial picture: in many of these cases, the standing of the NGO may have been challenged by the opponent, or it may have requested an injunction to stop development on a proposal. These cases would not have been explicitly addressed in the Court's decision or in other data examined here and hence not documented.

Although the results are more balanced on procedural issues, they fail to change the fact that each individual organization has tended to lose more cases on substantive issues than it has won, and collectively the movement is only "succeeding" in about a third of legal actions. It is surprising that groups have continued to use

[5] 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.

https://doi.org/10.1111/j.1540-5893.2012.00505.x Published online by Cambridge University Press

legal action in pursuit of their goals, given a mixed record in court, potentially crippling costs and a general perception of the conservative nature of the judiciary. By broadening the analysis to consider the structure of legal opportunities leveraged by the environmental movement to enhance subsequent opportunities, I offer some reasons why these groups continue to turn to the courts despite these drawbacks.

The Reciprocal Influence of the LOS and NGO Agency

Two case studies highlight the recursive nature of the relationship between legal mobilization and the structure of legal opportunities: one looks at standing rules and the other looks at the costs of legal action. These cases demonstrate the agency that organizations can use to shape the nature of the LOS. I have chosen these particular cases because they are illustrative examples of social movements acting in creative and strategic ways within existing litigation campaigns.

Liberalizing Legal Standing: Losing on Substance, Winning on Procedure

Rules governing standing to sue are a crucial dimension of the LOS for environmental litigation. These rules dictate who can legally take court action and who cannot. Standing rules are regulated, generally on a sector-by-sector basis, through legislation and precedential judicial rulings. The question of whether these rules should be relaxed changes depending on whether one adopts a moral, a strategic litigation or a politically instrumental perspective. For many scholars of environmental law and justice the question of whose "voice" is heard in court is a moral one that goes right to the heart of questions about environmental justice (Hiskes 2009; Low and Gleeson 1998; Schlosberg 2007; Stone 1972). Relaxed rules of standing mean that a wide range of litigants can present their arguments to the court. For those who see courts as important players in democratic policy processes, access to them should be granted broadly. The court, in this view, is a pluralistic, participative venue for policy-debate and groups who may have been excluded or overruled in the original debate should be included (Hilson and Cram 1996; Morag-Levine 2003).

For those interested in legal strategy, a liberalization of standing doctrine "opens the floodgates" and increases opportunities for winning. Christopher Stone points out that "it is good to keep in mind that to achieve *standing* does not imply *winning*. Standing is only one of a number of justiciability issues that a party has to satisfy to get through the courthouse door. From there on, the plaintiff has

https://doi.org/10.1111/j.1540-5893.2012.00505.x Published online by Cambridge University Press

to make its way 'on the merits' " (2010: 35). However, while standing does not necessarily mean winning on issues of substantive law, it is certainly the case that one cannot win in court if one does not have access to it.

A more liberal standing doctrine can prove to be politically instrumental for campaigning groups. The ability to access a court and hence use the threat of legal action may strengthen an NGO's bargaining power vis-à-vis one of their opponents in a policy process or in settlement discussions. It may be the very uncertainty of litigation that becomes a critical legal resource to be leveraged, as McCann (1994) and Epp's (2009) work suggests. One of Epp's most intriguing findings is that the *threat* of liability, rather than a judicial holding, became a lever to push for change. The possibility of normative censure by a court and the resulting public embarrassment of a government agency can be more important than the potential financial loss: ". . . bureaucratic reformers on the inside of the system—ostensibly the targets of liability—enthusiastically joined with external activists in using the threat of liability as a lever of reform" (Epp 2009: 3). This potential threat may have been a factor in the use of litigation by the groups looked at here. In addition, organizations may have been influenced by the heightened press coverage surrounding a legal case, which could serve to focus their constituency's—or the broader public's—attention on an issue (McCann 1994).

Traditionally in the UK, status to sue required proving the merit of an existing "case or controversy" (Cichowski and Stone Sweet 2003). Until the 1980s, British citizens wishing to litigate against the government were required to show that they had "suffered a special injury apart from the general populace," thus making NGO public-interest litigation especially difficult. This changed with the *Fleet Street Casuals* case in 1982. In this case, the House of Lords interpreted *locus standi* more liberally, encouraging those bringing valid complaints. Subsequent legal mobilization by the environmental movement built on this precedent to further liberalize standing doctrine. Many of these early cases resulted in losses on the substantive issues, but resulted in an important shift in levels of access to justice.

In *Greenpeace Ltd. v HM Inspectorate of Pollution No.2* [1993] before the Court of Appeal in 1993, Greenpeace unsuccessfully challenged a nuclear licensing decision. The THORP case arose when Greenpeace challenged the decision of HM Inspectorate of Pollution and the Ministry of Agriculture, Fisheries and Food to grant variations to applications by British Nuclear Fuels (BNFL), which had authorised the discharge of radioactive waste in order to test a new thermal-oxide processing plant. While Greenpeace lost the case on the substantive issue regarding the lawfulness of the

https://doi.org/10.1111/j.1540-5893.2012.00505.x Published online by Cambridge University Press

authorisation, the judge considered the question of *locus standi* as a separate issue. Otton J said that Greenpeace is "a responsible and respected body with a genuine concern for the environment." However, he concluded that Greenpeace's *bona fide* interest in the activities carried out by BNFL at Sellafield lay in the fact that 2,500 out of 400,000 supporters of Greenpeace resided in Cumbria where the plant was situated. As Leonor Moral Soriano (2001) points out, Greenpeace was considered to have judicial standing because it represented *individual* interests. Despite his maintenance of the individual aspect required for standing, Otton J suggested the benefits of allowing access to environmental organizations included "sparing scarce court resources, ensuring an expedited substantive hearing and an early result." This built on the foundation for enhanced access to justice through the liberalization of standing for NGOs and also began to shape the discussion on costs (Interview, 9 January 2012).

R (Friends of the Earth) v Secretary of State for the Environment [1994] raised similar issues. Friends of the Earth and the organization's campaigns director, Andrew Lees, challenged the government's failure to enforce the pesticide standards laid down in the EC Drinking Water Directive. Thames Water Utilities and Anglian Water Services were supplying drinking water with pesticide levels above that admissible under the European legislation. Under the Water Industry Act (WIA) 1991 the Secretary of State is under a duty to issue an enforcement order if conditions are breached, unless he accepts an undertaking from the company that they will take the necessary steps to secure compliance. It was the Secretary of State's acceptance of such undertakings in this case—and hence the permission to continue to supply water in breach of EC standards—that was challenged as unlawful by FoE. The inclusion of Andrew Lees was a tactic used to ensure the legitimacy of FoE's participation in the case: he had a general local health interest related to the quality of drinking water supplied to his London home by Thames water. The organization was granted standing in the case. However, the Court determined that member states enjoy discretion in the way they transpose European directives into national law and relied on this to overturn FoE's challenge. The organization was ordered to pay £34,000 in costs. There was some hesitation within parts of the organization about using legal action for campaigning purposes after the substantive loss in this early case but the victory on the standing issue was significant (Interview, 22 April 2010).

The trend of liberalizing standing was continued in *R v Secretary of State for Trade and Industry, ex parte Greenpeace Ltd* [1999]. In this case Greenpeace applied for permission to seek judicial review against decisions taken by the Secretary of State for Trade and

https://doi.org/10.1111/j.1540-5893.2012.00505.x Published online by Cambridge University Press

Industry, who had granted permission to a number of oil companies to search for and extract petroleum in areas within the UK continental shelf, but outside the territorial waters. The areas contained a species of coral that Greenpeace claimed was protected under the European Habitats Directive. In this case, Greenpeace's, *locus standi* was not contested. In particular, Laws J considered "the important fact that the applicants' *locus standi* to sue is as a public interest plaintiff; they have no private axe, economic or otherwise, to grind."

This series of cases, which mainly resulted in losses for the NGOs on the substantive issues, nonetheless constituted a significant expansion of the legal opportunity for environmental litigation. One interviewee noted: "Judges are more receptive to the importance of having NGOs using the court process, whereas before they would think that NGOs had no place in the court" (Interview, 13 April 2010). The courts accepted the cases on the grounds that the concerns of these organizations represented the public interest. The doctrine of standing now focuses on deciding whether a lawsuit is frivolous or the expression of a judicially defensible public interest and does not preclude cases just because they are not of an individual nature. However, these elements of the LOS are neither static nor isolated. One research participant pointed out the relationship between different dimensions of the LOS:

> If the costs position were to change and more cases were to come forward, my gut feeling is that standing would become more difficult again . . . and of course this would be entirely in accordance with the Civil Procedure Rules and the requirement to demonstrate "sufficient interest." Equally, I think the permission filter would become more rigorous. (Personal communication, 12 April 2011)

The Cost of Accessing Justice: Using the Aarhus Convention to Expand Legal Opportunities

With the issue of standing resolved in the mid to late 1990s, the most worrying element for these organizations now in choosing whether to take a case are the costs and risks associated with participating in legal activity in the UK. In the "loser pays" fees-system the cost of legal action also includes the potential exposure to the risk of paying the other party's costs should the claimant's legal action fail. As one former in-house lawyer at FoE pointed out, the problem with the English costs structure is a double one, of risk and uncertainty: "Not only do claimants risk paying the costs of the other side, but they also have no idea at the outset of proceedings whether, if they lose their case, they will have to find £5,000, £50,000 or £150,000" (Michaels 2004).

https://doi.org/10.1111/j.1540-5893.2012.00505.x Published online by Cambridge University Press

In the cases examined in the empirical analysis, costs were often awarded against the participating NGOs. These can range from several thousand to several hundred thousand pounds. This may be having a significant dampening effect on litigation activity.[6] For example, in 1998 in *WWF-UK and RSPB v Scottish Natural Heritage* the NGOs involved in the case were ordered to pay £203,500 in costs (reduced marginally on assessment to £195,500). WWF did not take another legal action again for a full decade for fear of further costs to the organization. The organization's trustees must now sign off in cases where its liability is over a certain amount or where there are risks of reputational damage. One interviewee from the organization said "we need their consent . . . what they want is cost certainty" (Interview, 6 April 2010). This was true at another NGO where the board was also responsible for making the final decision, based on recommendations from legal staff, on whether to pursue a legal case. A lawyer there said:

> All my recommendations have been accepted. They think about it a lot so this is not a light decision. The decision to go ahead is nearly always conditional on some form of cost assurances. . . . I always tell them when we start, "assume that we will lose." I've never had a negative reaction. It might be different if we had lost [in the past] and we had had to pay a massive amount of costs—it happened to WWF and RSPB years ago and I think it scared them. I talk throughout the process to campaigners and key people in management. I would say the issue of costs is coming up and we may need to think about this . . . we will use the tools available to us to try to minimise our cost liability. (Interview, 13 April 2010)

The "chilling effect" of the costs rules has been cited as a reason why more NGOs do not use legal action. In their submission to the Aarhus Convention Compliance Committee on 1 July 2009, the Coalition on Access to Justice for the Environment (made up of some of the environmental NGOs studied here) wrote: "The effect is that even the largest environmental NGOs in the UK are very slow to take legal action against the UK Government. It is extremely rare for small environmental NGOs . . . to take such action for precisely the same reason." The deterrent impact has also been expressly recognised by the courts. In 2004, the Court of

[6] It is difficult to determine the volume, scope and nature of the grievances that were not ultimately brought to the courts specifically because of the impact of the cost rules. However, some evidence does shed light on the situation. The Environmental Law Foundation (ELF), which provides free initial legal advice to citizens with environmental concerns, undertook a study in 2009. They found that of the 97 cases in which the advice of ELF was that the case should proceed, 36% proceeded further while 56% did not do so "explicitly for reasons of cost." A further 5% did not proceed further for reasons other than the high cost (Environmental Law Foundation 2009).

https://doi.org/10.1111/j.1540-5893.2012.00505.x Published online by Cambridge University Press

Appeal in *R (Burkett) v LB Hammersmith and Fulham* [2004] noted that: "An unprotected claimant . . . if unsuccessful in a public interest challenge, may have to pay very heavy legal costs to the successful defendant, and that this may be a potent factor in deterring litigation directed towards protecting the environment from harm."

The introduction of Protective Cost Orders (PCOs) by the Court of Appeal in the leading case of *R (Corner House Research) v The Secretary of State for Trade & Industry* [2005] has somewhat changed this picture but in a limited way (Interviews, barrister and solicitor, 27 Nov 2009; 13 April 2010). Through PCOs, a court can limit the costs a claimant will be obliged to pay in order not to hold back a case where an issue of public interest is at stake. The decision of the Court of Appeal states that a PCO may be provided if a court is satisfied that: the issues raised are of general public importance; the public interest requires that those issues should be resolved; the applicant has no private interest in the outcome of the case; and, considering the financial resources of the applicant and the respondent(s) and the amount of costs likely to be involved, it is fair and just to make the Order. An important element in choosing to apply for a PCO is that if the Order is not made, the applicant will discontinue the proceedings.

While the advent of PCOs seems to be a promising avenue for expanding the opportunities to take legal action, interviews with environmental lawyers and those working on access to environmental justice suggest otherwise. An update to the Sullivan Report (August 2010), which looks at access to justice in environmental matters in the UK, argued that despite a developing jurisprudence on PCOs "it is obvious that tinkering with the Protective Costs Order regime will not be sufficient to address prohibitive costs and secure compliance with Aarhus. A radical change in the Civil Procedure Rules is required, one which recognises the public interest nature of environmental claims" (Working Group on Access to Environmental Justice 2010: 4). The report cites numerous reasons why the PCO regime does not go far enough in addressing uncertainty in terms of costs, including the fact that, in many instances, the PCO decision comes too late in the proceedings to be of value and, due to the likelihood of a more favourable outcome on an order if a lawyer is working pro bono, it begins to disadvantage lawyers working for environmental NGOs (interviews, in-house lawyer and former in-house lawyer, 13 April 2010; 22 April 2010). The assumption that a claimant will desist from pursuing a case if an Order is not awarded means that for very serious breaches of environmental law, an NGO might choose not pursue a PCO in order to ensure the issue will be addressed by the courts.

https://doi.org/10.1111/j.1540-5893.2012.00505.x Published online by Cambridge University Press

Since the identification of these problems with PCOs, the environmental NGOs studied here have focused much of their legal activity on using the Aarhus Convention to address the costs issue. Representatives from the ELF, FoE, Greenpeace, RSPB, WWF-UK and Capacity Global established a Coalition on Access to Justice for the Environment (CAJE). CAJE has undertaken a number of activities including: research on NGOs and their use of litigation as well as costs awarded against them; submissions to the Civil Procedure Rules Committee to urge them to address the issue; and the presentation of evidence to parliamentary committees and third-party interventions in legal cases to address the costs issues. In terms of drawing in allies from the supranational level, CAJE's most notable activity was the submission of a complaint to the EC alleging UK non-compliance with the Aarhus Convention.

In parallel to these actions by CAJE, and an NGO called ClientEarth made a complaint to the Aarhus Compliance Committee in 2008, alleging that the law and jurisprudence of the UK fail to comply with the requirements of the Convention. The Aarhus Compliance Committee, which sits in Geneva, is tasked with ensuring parties to the Convention fulfil their obligations. One of the ways in which the compliance mechanism can be triggered by members of the public who may make communications concerning a Party's compliance—this is unique in international environmental law. The ClientEarth complaint focused specifically on a challenge to the granting of licenses for the disposal of contaminated metals issued to the Port of Tyne. The communication cites in particular restrictions on the review of substantive issues through judicial review procedures, limitations on the possibility for individuals and NGOs to challenge acts or omissions of private persons which contradict environmental law, the "chilling effect" of costs rules and the uncertain and overly restrictive nature of rules related to time limits within which an action for judicial review can be brought in England and Wales. These claims were further supported by an amicus brief by CAJE. In September 2010 the Aarhus Compliance Committee in its draft findings held that the UK was failing to live up to its full obligations under the Convention in terms of the prohibitive expenses and the timing constraints (*Aarhus Compliance Committee* 2008).

In parallel to the Aarhus Compliance Committee's proceedings, the Commission of the European Union is also pursuing some of these concerns through infringement proceedings against the UK government. In response to a complaint made by CAJE in 2005, the Commission is claiming that the UK government has failed to give effect to the European directives implementing the Aarhus Convention. Again, the high cost of legal action to protect the environment was the crux of the complaint. The Commission sent the UK

https://doi.org/10.1111/j.1540-5893.2012.00505.x Published online by Cambridge University Press

a letter of formal notice—in which the Commission sets out how a Member State has failed to comply with the requirements of EC law—in December 2007 and issued the UK with a Reasoned Opinion—a more detailed outline of the issues—in March 2010. In April 2011, the EC referred the UK to the European Court of Justice for failing to provide equitable access to justice in environmental cases.

Interwoven with this NGO action in international judicial venues, recent domestic case law has developed thinking on protective cost orders. In a Court of Appeal case *Garner v Elmbridge Borough Council* [2010] Sullivan LJ disapproved of a lower court's decision not to grant a PCO on the basis that there was lack of information about the claimant's financial resources and therefore it was impossible to tell whether the costs would be prohibitively expensive. This moved the discussion about PCOs to one where an objective test became the standard. In another case, members of a local community group applied for a judicial review of the Environment Agency's decision to permit a cement works to use shredded tires for fuel. They lost their case in the Court of Appeal in 2008 and costs were awarded against them for £88,000. The decision against full costs was appealed in *Edwards v The Environment Agency* [2010]. Hope LJ ruled that the House of Lords had used the wrong test (a subjective rather than an objective test) when making a costs order in the case. The Supreme Court ruled that the costs order made by the House of Lords should be stayed pending the reference to the European Court of Justice for a preliminary ruling.

These cases highlight the international dimension of the legal opportunity structure. By drawing on legal bases established in an international environmental treaty (and related European supranational legislation) domestic environmental NGOs have been able to highlight the limitations of the UK LOS "from below" the state. By filing complaints with international institutions such as the Aarhus Compliance Committee and the EC, they have triggered compliance mechanisms "from above" the state. While the preliminary results of these complaints suggest that the government may have to take steps to address this dimension of the LOS, the final judgment of the European Court of Justice will have an important role to play in assessing whether changes are needed to ensure that access to environmental justice is guaranteed.

Discussion and Conclusion

At a theoretical level, the logic behind a LOS approach would suggest that activists who see themselves as situated within a relatively closed LOS will be less likely to use legal action. The empirical

https://doi.org/10.1111/j.1540-5893.2012.00505.x Published online by Cambridge University Press

evidence suggests otherwise: despite knowing that there was a high likelihood they would lose in court, organizations continued to pursue litigation strategies. The trend over time is even more puzzling, as the organizations have taken an increasing number of cases, even after losing on the substantive issues in all of the cases they took in the first period of litigation activity.

The literature on social movement organizations and cause lawyers suggests that what may account for social movement agency in a hostile LOS is an organizational willingness, ability and possibly even a preference for taking policy battles to the courts. This builds on McCann's (1994) work, which has highlighted how legal mobilization can provide important social movement and political payoffs, even in the absence of legal victories. McCann and Silverstein have also shown how the internal dynamics of organizations, and particularly the presence of lawyers within an organization, can have implications for levels of legal mobilization activity (McCann and Silverstein 1998).

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 mobilization (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. (Interview, NGO lawyer, 6 April 2010)

> 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

https://doi.org/10.1111/j.1540-5893.2012.00505.x Published online by Cambridge University Press

> that, necessarily, involves winning less. (Personal Communication, NGO lawyer, 12 April 2011)

Another participant thought that as soon as lawyers are involved, an organization can propel government action: she mentioned that as soon as her organization's lawyer writes a pre-action protocol letter they tended to get a response from government (Interview, NGO lawyer, 22 September 2011). Another, from the same organization agreed with this:

> We discovered during campaigns taking place 10 years ago . . . that having an in-house lawyer could add massively to the effect of a campaign . . . for instance our work on GM (genetically modified organisms) . . . having a lawyer added massive impact to the campaign in terms of pressuring governments to achieve what we want. And also using legal rights to create temporal space, create delays in the process to enable us to develop our campaign . . . It creates political space. It can add va va voom to a campaign. It can be the only option available to you. You will not win the politics as the politicians are against you so this may be your last alternative. It gets people to listen to you . . . They are keen to talk to you as you represent a serious threat to them, maybe their reputation. (Interview, NGO lawyer, 13 April 2010)

The growth in the number and influence of lawyers working with or within these organizations in the UK also helps explain their willingness to use litigation despite the perception of a hostile LOS. It may also go some way to explaining the variation in legal mobilization activity across the groups. One research participant noted:

> I wonder whether the "success rates" have been influenced by the arrival of in-house lawyers? A decade ago, very few NGOs had in-house lawyers—now most of the large NGOs do. This may have improved the quality of legal advice received—or at least have secured improved access to legal advice! (Personal Communication, 12 April 2011)

Research participants identified Greenpeace as the first organization to work closely with lawyers and establish in-house legal advice. The reason cited for this was Greenpeace's use of civil disobedience tactics and related encounters with criminal law (Interview, NGO lawyer, 6 April 2011). Greenpeace was also among the first to use legal actions in a strategic manner, taking a JR as early as 1993. FoE was also seen by research participants to be quite law-savvy from the late 1980s onwards, primarily because of the long-standing presence of lawyers on its board of trustees (Interview, NGO lawyer, 6 April 2011). Over the last few years, there have been between two and three in-house solicitors working at the

https://doi.org/10.1111/j.1540-5893.2012.00505.x Published online by Cambridge University Press

organization. FoE also established a Rights and Justice Centre in 2006, offering legal advice, specialized legal training, public legal education and representation to other groups (Interviews, NGO lawyers, 13 April 2010 and 5 August 2010). Both WWF and RSPB also have in-house legal staff.

The arrival on the environmental policy scene of ClientEarth, an organization of activist environmental lawyers supported by policy officers and scientific staff, further supports this trend of the "legalization" of the environmental protection support structure. Established in 2007, ClientEarth has seen its income and capacity grow enormously in the last five years. In its mission, activities and composition it resembles the conventional American-style legal NGOs that have thus far been unknown in the UK (ClientEarth 2009, 2010). ClientEarth has also established offices in Brussels, Paris and Warsaw. Unlike most of the other NGOs examined here, its financial resources come largely from philanthropic organizations (although it does have some operational funding from the EC) rather than from membership support or government grants. This "American style" model is perhaps unsurprising considering ClientEarth's CEO has a long history as a litigator for the Natural Resources Defense Counsel (NRDC) in the U.S., although one interviewee was keen to point out:

> We are very European and it is a different culture from the US, but we use the same tools as in the US . . . We focus on law and using the legal system because law has not been used a lot by the other groups and hence it comes last in the thought process. I am exaggerating here but the other groups always start with politics and then bring in law later on. We look at problems in the world and think of the best way to deal with these problems using law . . . This is the idea: to be able to work on the whole cycle of the law, from its inception to working in Parliament, to implementation and enforcement. The latter stages are really not focused on by other groups. (Interview, 22 April 2010)

The evidence indicates an increasing number and growing influence of lawyers within the traditional NGOs. The emergence of a new public interest law-devoted organization also suggests that changes are occurring in the UK environmental movement. This evidence lends support to the idea that the perseverance of legal mobilization may, at least in part, be explained by a growth in the legally-minded support structure with the organizations themselves.

Drawing on a legacy of research by legal mobilization scholars, I have shown that movement activists are not passive actors and in the long-term they often play a role in creating their own opportunities (Andersen 2005; Cichowski 2007). However, this is not to

https://doi.org/10.1111/j.1540-5893.2012.00505.x Published online by Cambridge University Press

deny that in the short and even medium-term it can be difficult for movement activists to shape the LOS in radical and direct ways. The approach adopted here does not aim to supplant existing LOS perspectives but rather seeks to encourage scholars developing this approach to improve their power to explain the empirical puzzle that this research has revealed. The hope is that this case study of the environmental movement in the UK will give law and society scholars some purchase on the forces influencing opportunities at various points in the legal and political process.

This research contributes to the growing literature on legal mobilization beyond the U.S. domestic political context where the concept was first elaborated. It has shown many similarities between the experience of British and American NGOs: the benefits of expanding procedural opportunities in the face of substantive losses and an appreciation of the indirect political benefits of litigation. There are, however, some significant differences that highlight why the UK merits particular attention and can, in some ways, be seen as an "unlikely case" for legal mobilization by environmental organizations. First, this type of legal mobilization began much later in the UK than in the U.S. Strategic litigation was a core aspect of the work of American environmental NGOs throughout the 1970s and 1980s (Cole and Foster 2001; Morag-Levine 2003). The British groups looked at here only began to mobilize the law from the early 1990s onwards, largely because of 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 U.S., whereas UK and European protections only began to emerge in a significant way in the 1980s and 1990s (Kelemen and Vogel 2010; McCormick 2001). The impact of the introduction of new laws also likely had a symbolic dimension, as it raised NGO's awareness of the very possibility of strategic litigation as a political instrument.

A second point of distinction between the U.S. and the UK is that the existence of EU legislation and the ratification of the Aarhus Convention represent an additional source of legal opportunities to British 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 (Alter and Vargas 2000; Cichowski 2007; Kelemen 2011). The UK case study provides the opportunity of analysing how this multi-level legal opportunity structure can both limit and enhance the ability of social movement agents to pursue their goals. As the only country with a common law legal system in the European environment, the UK can serve as the closest comparator for developments in the U.S.

https://doi.org/10.1111/j.1540-5893.2012.00505.x Published online by Cambridge University Press

Several points for further research merit particular attention here, including the puzzle of organizational variation in levels of legal mobilization. One explanation for the differences is whether an environmental NGO is purely domestic, such as RSPB, or whether they are part of a larger international NGO network such as FoE or Greenpeace. This is linked to the role of perception, which has been neglected by many scholars advocating a LOS approach. Social movement theorists have observed that opportunity structures and their types ("open" or "closed," "liberal" or "conservative") are not objective facts that will definitely have an impact on behaviour. Rather, they can be perceived in different ways by different activists and could encourage or constrain mobilization to varying degrees (Andersen 2005; Goodwin and Jasper 1999; Morag-Levine 2003). One way in which the potential benefits of strategic litigation may have come to the attention of activists is through diffusion or learning processes. This could be international diffusion (Heyer 2002)—litigation has been a model favoured by North American environmental groups since the 1960s—or domestic diffusion (Vanhala 2011a)—strategy entrepreneurs may have been inspired to use litigation by early UK adopters such as Greenpeace. The internationally-linked NGOs may be better informed than their domestic counterparts of the possibility of strategic litigation. Groups that use litigation in the U.S., for example, may be more inclined to use it in other countries even when their legal structures are not as amenable.

There is also a further need to analyse the dynamic interplay between the various elements of the LOS (Princen and Kerremans 2008), and the relationship between the LOS and the political opportunity structure. As one research participant suggested, standing doctrine may be re-visited again if and when the costs issue in the UK changes. This highlights a fact that has faded to the background in research on opportunity structures: their dimensions are neither static nor isolated from one another. By examining the various dimensions of LOS—as well as the interactions, contradictions and the cumulative impacts, both direct and indirect, of these dimensions—the literature will be better able to account for the shape and progress of legal mobilization activity across countries, across groups, and over time.

https://doi.org/10.1111/j.1540-5893.2012.00505.x Published online by Cambridge University Press

Appendix 1

Environmental Movement Cases by Substantive Issues, 1990–2010

NGO Case	Year	Issue	Court	Result for NGO
R (RSPB) v Swale Borough Council	1991	Need for an environmental assessment in respect of the proposed development.	High Court	Lost
Greenpeace Ltd. v HM Inspectorate of Pollution No.2	1993	Greenpeace granted standing to challenge a nuclear licensing decision made in relation to the THORP reprocessing plant at Sellafield. Challenge to whether a variation of the terms for nuclear waste site testing was lawful.	Court of Appeal	Lost
R (RSPB) v Secretary of State for the Environment	1994	Whether or not the Secretary of State for the Environment was entitled to take into account economic factors when designating a European Special Protection Area for Birds.	High Court	Lost
R (Greenpeace) v Secretary of State for the Environment	1994	Challenge to whether Secretary of State's decision to consult on granting of licenses regarding nuclear processing, unless there is a mandatory statutory requirement to do so, is matter for the public body to decide.	High Court	Lost
R (RSPB) v Secretary of State for the Environment	1994	Appeal as to legality of Secretary of State's taking into account economic factors when designating a Special Protection Area for Birds.	Court of Appeal	Lost
R (Friends of the Earth) v Secretary of State for the Environment	1994	Challenge to government's failure to enforce the pesticide standards laid down in the EC Drinking Water Directive.	High Court	Lost
R (Friends of the Earth) v Secretary of State for the Environment	1995	Appeal regarding government's failure to enforce the pesticide standards laid down in the EC Drinking Water Directive.	Court of Appeal	Lost
R (RSPB) v Secretary of State for the Environment	1995	Appeal as to legality of Secretary of State's taking into account economic factors when designating a Special Protection Area for Birds.	House of Lords	Won
R (RSPB) v Secretary of State for the Environment	1996	Preliminary Reference. Whether or not the Secretary of State for the Environment was entitled to take into account economic factors when designating a European Special Protection Area for Birds.	European Court of Justice	Won
R (William Guy Watson) v Secretary of State for Environment, and Transport and Regions and Ministry of Agriculture, Fisheries and Food (supported by Friends of the Earth)	1998	The possibility of cross-pollination between GM maize being grown under trial near an organic farmer's own organic maize crop.	High Court	Lost
World Wild Life Fund & Ors, Re Application For Judicial Review (also supported by RSPB)	1998	Challenge to development decisions relating to the EC Special Protection Areas at Cairngorm Mountain and proposals for construction of a funicular railway.	Scottish Court of Sessions	Lost
RSPB & The Wildfowl & Wetlands Trust Ltd, Re Application for Judicial Review	1999	Challenge to a decision of the Secretary of State to grant licences to shoot barnacle geese within SPAs.	Scottish Outer Court of Session	Lost
R (Greenpeace) v Secretary of State for Trade and Industry	1999	Whether national regulations failed to give full effect to EC Habitats Directive directive in regards to waters beyond territorial waters	High Court	Won

Appendix 1 Continued

NGO Case	Year	Issue	Court	Result for NGO
R (Watson) v Secretary of State for the Environment (2) Ministry for Agriculture, Fisheries and Food (Respondents) & (1) Sharpes International Seeds Ltd (2) British Society of Plant Breeders (Interveners) (supported by Friends of the Earth)	1999	Appeal over the possibility of cross-pollination between GM maize being grown under trial near an organic farmer's own organic maize crop.	Court of Appeal	Lost
RSPB & Anor v Secretary Of State For Scotland, Re Application For Judicial Review	2000	Appeal to a decision of the Secretary of State to grant licences to shoot barnacle geese within SPAs.	Scottish Inner Court of Session	Won
R (Friends of the Earth and Greenpeace) v Secretary of State for the Environment, Food and Rural Affairs	2001	The challenge to the decision of the Secretaries of State that the proposed manufacture of MOX fuels at Sellafield by British Nuclear Fuels Plc (BNFL) is justified in accordance with the relevant European Directive.	High Court	Lost
R (Friends of the Earth Ltd and Greenpeace) v (1) Secretary of State for the Environment, Food and Rural Affairs (2) Secretary of State for Health	2001	Appeal to the challenge to the manufacture of MOX fuels by British Nuclear Fuels Ltd.	Court of Appeal	Lost
R (Greenpeace) v Secretary of State for the Environment, Food and Rural Affairs & Anor	2002	The case concerns the regulation of international trade in endangered species of flora and fauna: specifically, mahogany from Brazil. Greenpeace argued the importation constituted a contravention of the regulatory regime prevailing in the European Union	Court of Appeal	Lost
R (on the application of Friends of the Earth) v Environment Agency	2003	Challenge to the planned dismantling of U.S. "ghost ships" at Hartlepool docks.	High Court	Won
R (Greenpeace) v Secretary of State for the Environment, Food and Rural Affairs	2005	Alleged failure of the Secretary of State to fulfil UK's obligations under the EC Habitats Directive to ensure that incidental capture and killing of the common dolphin does not have a significant impact on the species	High Court	Lost
R (Greenpeace) v Secretary of State for the Environment, Food & Rural Affairs	2005	Appeal of the dolphin-case and challenge to the South-west Territorial Waters (Prohibition of Pair Trawling) Order 2004	Court of Appeal	Lost
Friends Of The Earth, Re Application for Judicial Review	2005	Challenge to a Government policy that results in tonnes of raw and poorly treated sewage being dumped in Northern Ireland's seas, rivers and lakes.	High Court (Northern Ireland)	Won
Kay v The Commissioner of Police of the Metropolis (supported by Friends of the Earth)	2006	Challenge to the claim by the Metropolitan police that the monthly "critical mass" bike ride protest was unlawful.	High Court	Won
R (Greenpeace) v Secretary of State for Trade and Industry	2007	Application to quash order in respect of the defendant's decision, announced in "The Energy Challenge Energy Review Report 2006" to support nuclear new build as part of the United Kingdom's future electricity generating mix. The quashing order is sought on the ground that the consultation process leading to the decision was procedurally flawed and that therefore the decision was unlawful	High Court	Won

Commissioner of Police for the Metropolis v Kay (supported by Friends of the Earth)	2007	Metropolitan police appealed decision that the monthly "critical mass" bike ride protest was lawful.	Court of Appeal	Lost
R (Friends of the Earth) v Food Standards Agency	2007	Challenge that the FSA has failed properly to implement an emergency EU Commission Decision concerning the detection and removal from the market of U.S. long grain rice contaminated with genetically modified rice.	High Court	Lost
Friends of the Earth v Information Commissioner and Exports Credits Guarantee Department	2007	Challenge regarding withholding of information on Export Credits Guarantee Department (ECGD)'s consideration of financing oil and gas exploration off the north-east coast of Sakhalin	Information Tribunal	Won
R (Tree and Wildlife Action Committee Ltd) v Durham Estates Ltd (supported by Friends of the Earth)	2007	Challenge to the lawfulness of the Forestry Commission and a developer's plans to destroy up to five hectares of the forest without a comprehensive environmental impact assessment being carried out.	High Court	Won
Kay v Commissioner of The Police of The Metropolis (supported by Friends of the Earth)	2008	Appeal to decision that monthly "critical mass" bike ride protest was unlawful.	House of Lords	Won
R (WWF-UK and Corner House Research) v Secretary of Stae for Business, Enterprise and Regulatory Reform	2008	Challenge to the Export Credit Guarantee Department's decision to underwrite contracts for the Sakhalin gas and oil development project in Russia which threatened endangered grey whale population.	High Court	Lost
ECGD v Friends of the Earth	2008	Government's appeal to Information Tribunal's decision requiring it to release information to FoE to release information on environmental and human rights impacts of the Sakhalin II project.	High Court	Won
Friends of the Earth & Anor v Secretary of State for Business Enterprise and Regulatory Reform & Anor	2008	Challenge regarding Government's non-compliance with the Warm Homes and Energy Conservation Act 2000 in respect of fuel poverty.	High Court	Lost
R (Lewes District Friends of the Earth Ltd & Ors) v East Sussex County Council & Anor	2008	Challenge to East Sussex County Council's decision to build an incinerator because the planning committee which considered the proposal ignored long term regional recycling targets.	High Court	Lost
R (Friends of the Earth and another) v Secretary of State for Energy and Climate Change	2009	Appeal regarding Government's failure to take steps to implement targets specified in the Warm Homes and Energy Conservation Act 2000 and the UK Fuel Poverty Strategy	Court of Appeal	Lost
R (London Borough of Hillingdon & Ors) v Secretary of State for Transport & Anor (supported by Greenpeace and WWF-UK)	2010	Challenge to the planning proposal for a third runway at Heathrow under new Climate Change legislation.	High Court	Won

Appendix 2

Environmental movement cases by procedural issue, 1990–2010

NGO Case	Procedural Issues	Result	Court
R (RSPB) v Swale Borough Council [1991]	Issue of time limits in bringing a judicial review against a planning decision.	Lost	High Court
R (Friends of the Earth) v Secretary of State for the Environment [1994]	Whether Friends of the Earth have standing.	Won	High Court
Greenpeace Ltd. v HM Inspectorate of Pollution No.2 [1993]	(1) Whether Greenpeace has standing. (2) Greenpeace sought interlocutory relief in the form of a stay of decision without offering a cross-undertaking in damages.	Won Lost	Court of Appeal
R (RSPB) v Secretary of State for the Environment [1995]	RSPB sought interim relief without offering a cross-undertaking in damages.	Lost	House of Lords
R (William Guy Watson) v Secretary of State for Environment, and Transport and Regions and Ministry of Agriculture, Fisheries and Food [1998] EWHC (Supported by Friends of the Earth)	Issue of locus standi raised again: applicant only has public law rights. Judge was of the opinion that the present application is not the medium through which to pursue the applicant's substantial grounds for complaint.	Lost	High Court
R (Greenpeace) v Secretary of State for Trade and Industry [1999]	(1) Delay in bringing judicial review. (2) Whether Greenpeace has standing.	Won Won	High Court
R (Lewes District Friends of the Earth Ltd & Ors) v East Sussex County Council & Anor [2008]	Request to cap costs in light of report on access to environmental justice.	Won	High Court

References

Alter, Karen, & Jeannette Vargas (2000) "Explaining Variation in the Use of European Litigation Strategies: European Community Law and British Gender Equality Policy," 33 *Comparative Political Studies* 452–482.

Andersen, Ellen Ann (2005) *Out of the Closets and Into the Courts: Legal Opportunity Structure and Gay Rights Litigation*. Ann Arbor, MI: Univ. of Michigan Press.

Barnes, Jeb (2009) "In Defense of Asbestos Tort Litigation: Rethinking Legal Process Analysis in a World of Uncertainty, Second Bests, and Shared Policy-Making Responsibility," 34 *Law & Social Inquiry* 5–29.

Börzel, Tanja (2006) "Participation through Law Enforcement: The Case of the European Union," 39 *Comparative Political Studies* 128–152.

Brooke, Lord Justice (2006) "Environmental Justice: The Cost Barrier," 18 *J. of Environmental Law* 341–356.

Burns, William, & Hari Osofsky, eds. (2009) *Adjudicating Climate Change: State, National and International Approaches*. New York: Cambridge Univ. Press.

Capacity Global (2003) *Using the Law: Barriers and Opportunities for Environmental Justice*. London: Capacity Global.

Cichowski, Rachel (2007) *The European Court and Civil Society: Litigation, Mobilization and Governance*. Cambridge: Cambridge Univ. Press.

Cichowski, Rachel, & Alec Stone Sweet (2003) "Participation, Representative Democracy, and the Courts," in Bruce E. Cain, Russell J. Dalton, & Susan E. Scarrow, eds., *Democracy Transformed? Expanding Political Opportunities in Advanced Industrial Democracies*. Oxford: Oxford Univ. Press.

ClientEarth (2009) *Annual Trustees Report*. London: Client Earth.

——— (2010) *Annual Trustees Report*. London: Client Earth.

Coglianese, Cary (1996) "Litigating within Relationships: Disputes and Disturbance in the Regulatory Process," 30 *Law & Society Rev.* 735–66.

Cole, Luke, & Sheila Foster (2001) *From the Ground Up: Environmental Racism and the Rise of the Environmental Justice Movement*. New York: New York Univ. Press.

De Sadeleer, Nicolas, Gerhard Roller, & Miriam Dross (2005) *Access to Justice in Environmental Matters and the Role of NGOs: Empirical Findings and Legal Appraisal*. Groningen, NL: Europa Law Publishing.

Dotan, Yoav, & Menachem Hofnung (2001) "Interest Groups in the Israeli High Court of Justice: Measuring Success in Litigation and in Out-of-Court Settlements," 23 *Law and Policy* 1–27.

Eckstein, Harry (1975) "Case Study and Theory in Political Science," in Greenstein, Fred, & Nelson Polsby, eds., *Handbook of Political Science*. Reading, MA: Addison-Wesley.

Environmental Justice Project (2003) *Environmental Justice*. London: The Environmental Justice Project.

Environmental Law Foundation (2009) *Costs Barriers to Environmental Justice*. London: Environmental Law Foundation.

Epp, Charles (1998) *The Rights Revolution: Lawyers, Activists, and Supreme Courts in Comparative Perspective*. Chicago, IL: Univ. of Chicago Press.

——— (2009) *Making Rights Real: Activists, Bureaucrats and the Creation of the Legalistic State*. Chicago, IL: Chicago Univ. Press.

Evans Case, Rhona, & Terri Givens (2010) "Re-engineering Legal Opportunity Structures in the European Union? The Starting Line Group and the Politics of the Racial Equality Directive," 48 *J. of Common Market Studies* 221–241.

Ewick, Patricia, & Susan Silbey (1998) *The Common Place of Law: Stories from Everyday Life*. Chicago, IL: Chicago Univ. Press.

Friends of the Earth Scotland (2011) *Tipping the Scales: Complying with the Aarhus Convention on Access to Justice*. Edinburgh: FoE Scotland.

Fritsvold, Erik (2009) "Under the Law: Legal Consciousness and Radical Environmental Activism," 34 *Law & Social Inquiry* 799–824.

Galanter, Marc (1974) "Why the 'Haves' Come out Ahead: Speculations on the Limits of Legal Change," 9 *Law & Society Rev.* 95–160.

Goodwin, Jeff, & James Jasper (1999) "Caught in a Winding, Snarling Vine: The Structural Bias of Political Process Theory," 14 *Sociological Forum* 27–54.

Heyer, Katharina (2002) "The ADA on the Road: Disability Rights in Germany," 27 *Law & Social Inquiry* 723–762.

Hilson, Chris (2002) "New Social Movements: The Role of Legal Opportunity," 9 *J. of European Public Policy* 238–255.

Hilson, Christopher J., & Ian Cram (1996) "Judicial Review and Environmental Law—Is There a Coherent View of Standing?," 16 *Legal Studies* 1–26.

Hiskes, Richard (2009) *The Human Right to a Green Future: Environmental Rights and Intergenerational Justice*. New York: Cambridge Univ. Press.

Holzmeyer, Cheryl (2009) "Human Rights in an Era of Neoliberal Globalization: The Alien Tort Claims Act and Grassroots Mobilization in Doe v. Unocal," 43 *Law & Society Rev.* 271–304.

Keck, Margaret, & Kathryn Sikkink (1998) *Activists beyond Borders: Advocacy Networks in International Politics*. Ithaca, NY: Cornell Univ. Press.

Keck, Thomas (2009) "Beyond Backlash: Assessing the Impact of Judicial Decisions on LGBT Rights," 43 *Law & Society Rev.* 151–186.

Kelemen, R. Daniel (2011) *Eurolegalism: The Transformation of Law and Regulation in the European Union*. Cambridge, MA: Harvard Univ. Press.

Kelemen, R. Daniel, & David Vogel (2010) "Trading Places: The Role of the United States and the European Union in International Environmental Politics," 43 *Comparative Political Studies* 427–456.

Low, Nicholas, & Brendan Gleeson (1998) *Justice, Society and Nature: An Exploration of Political Ecology*. London: Routledge.

Mandel, Michael (1994) *The Charter of Rights and the Legalization of Politics in Canada*. Toronto: Thompson.

Manfredi, Christopher (2005) *Feminist Activism in the Supreme Court: Legal Mobilization and the Women's Legal Education and Action Fund*. Vancouver, BC: Univ. of British Columbia Press.

Marshall, Anna-Maria (2003) "Injustice frames, legality, and the everyday construction of sexual harassment," 28 *Law & Social Inquiry* 659–689.

McCann, Michael (1994) *Rights at Work: Pay Equity Reform and the Politics of Legal Mobilization*. Chicago, IL: Univ. of Chicago Press.

McCann, Michael, & Helena Silverstein (1998) "Rethinking law's 'allurements': A relational analysis of social movement lawyers in the United States," in Sarat, Austin, & Stuart Scheingold, eds., *Cause Lawyering: Political Commitments and Professional Responsibilities*. New York: Oxford Univ. Press.

McCormick, John (2001) *Environmental Policy in the European Union*. Basingstoke: Palgrave.

Michaels, Phil (2004) "The price of protest," *The Guardian*, Wednesday 23 June 2004.

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.

Morag-Levine, Noga (2003) "Partners No More: Relational Transformation and the Turn to Litigation in Two Conservationist Organizations," 37 *Law & Society Rev.* 457–510.

Morton, F. L. & Avril Allen (2001) "Feminists and the Courts: Measuring Success in Interest Group Litigation in Canada," 34 *Canadian J. of Political Science* 55–84.

Paris, Michael (2010) *Framing Equal Opportunity: Law and the Politics of School Finance Reform*. Stanford: Stanford Univ. Press.

Pedriana, Nicholas (2006) "From Protective to Equal Treatment: Legal Framing Processes and Transformation of the Women's Movement in the 1960s," 111 *American J. of Sociology* 1718–1761.
Princen, Sebastiaan, & Bart Kerremans (2008) "Opportunity Structures in the EU Multi-Level System," 31 *West European Politics* 1129–1146.
Rootes, Christopher (1992) "The New Politics and the New Social Movements: Accounting for British Exceptionalism," 22 *European J. of Political Research* 171–292.
——— (2009) "Environmental NGOs and the Environmental Movement in England," in Crowson, Nick, Matthew Hilton, & James McKay, eds., *NGOs in Contemporary Britain: Non-state Actors in Society and Politics Since 1945*. London: Palgrave Macmillan.
Rubin, Edward, & Malcolm Feeley (2003) "Judicial Policy Making and Litigation Against the Government," 5 *Univ. of Pennsylvania Constitutional Law Rev.* 617–664.
Scheingold, Stuart (1974) *The Politics of Rights: Lawyers, Public Policy, and Social Change*. New Haven, CT: Yale Univ. Press.
Schlosberg, David (2007) *Defining Environmental Justice: Theories, Movements, and Nature*. Oxford: Oxford Univ. Press.
Schoenfeld, Heather (2010) "Mass Incarceration and the Paradox of Prison Conditions Litigation," 44 *Law & Society Rev.* 731–768.
Silverstein, Gordon (2009) *Law's Allure: How Law Shapes, Constrains, Saves, and Kills Politics*. New York: Cambridge Univ. Press.
Soriano, Leonor Moral (2001) "Environmental 'Wrongs' and Environmental Rights: Challenging the Legal Reasoning of English Judges," 13 *Journal of Environmental Law* 297–313.
Stone, Christopher (1972) *Should Trees Have Standing? Law, Morality and the Environment*. New York: Oxford Univ. Press.
Stookes, Paul (2008) Public Involvement in Environmental Matters and the Funding Constraints in Securing Access to Justice. University of Hertfordshire: Unpublished PhD Thesis.
Tate, C. Neal, & Torbjorn Vallinder (1995) *The Global Expansion of Judicial Power*. New York: New York Univ. Press.
Vanhala, Lisa (2011a) *Making Rights a Reality? Disability Rights Activists and Legal Mobilization*. New York: Cambridge Univ. Press.
——— (2011b) "Social Movements Lashing Back: Law, Social Change and Socio-legal Backlash in Canada," 54 *Studies in Law, Politics and Society* 113–140.
Wilson, Bruce, & Juan Carlos Rodriguez Cordero (2006) "Legal Opportunity Structures and Social Movements: The Effects of Institutional Change on Costa Rican Politics," 39 *Comparative Political Studies* 325–351.
Working Group on Access to Environmental Justice (2010) *Ensuring Access to Environmental Justice in England and Wales: Update Report*. London: Working Group on Access to Environmental Justice.

Cases Cited

Aarhus Compliance Committee Draft Findings, ACCC/C/2008/33.
R (RSPB) v. *Swale Borough Council* [1991] 1 PLR 6.
Greenpeace Ltd. v. *HM Inspectorate of Pollution No.2* [1993] EWCA Civ 9; [1994] 1 WLR 570, [1994] 4 All ER 329.
R (Friends of the Earth) v. *Secretary of State for the Environment* [1994] 2 CMLR 760.
R (RSPB) v. *Secretary of State for the Environment* [1995].
R (William Guy Watson) v. *Secretary of State for Environment, and Transport and Regions and Ministry of Agriculture, Fisheries and Food* [1998] EWHC Admin 737.
WWF-UK and RSPB v. *Scottish Natural Heritage* [1998] ScotCS 38 (27 October 1998).

R (Greenpeace) v. *Secretary of State for Trade and Industry* [1999] All ER (D) 1232.
R v. *Secretary of State for Trade and Industry, ex parte Greenpeace Ltd*. [1999] All ER (D) 1232.
R (Burkett) v. *LB Hammersmith and Fulham* [2004] EWCA (Civ) 1342.
R (Corner House Research) v. *The Secretary of State for Trade & Industry* [2005] EWCA Civ 192.
R (Lewes District Friends of the Earth Ltd & Ors) v. *East Sussex County Council & Anor* [2008] EWHC 1981 (Admin).
Garner v. *Elmbridge Borough Council* [2010] EWCA Civ 1006.
Edwards v. *The Environment Agency* [2010] UKSC 57.

Legislation Cited

The Birds Directive (Council Directive 79/409/EEC).
The Habitats Directive (Council Directive 92/43/EEC).
The Protection in Trade of Species of Wild Flora and Fauna Regulation (Council Regulation 338/97/EEC).
European Community (EC) Drinking Water Directive (Council Directive 98/83/EC).
UK Water Industry Act (WIA) 1991.

Lisa Vanhala *is a Lecturer in Politics at the Department of Political Science and School of Public Policy, University College London (United Kingdom). She received her doctorate from Oxford University. Her research interests are in the field of comparative law, politics and society and in particular she is interested in social movement encounters with human rights, the law and courts. She is currently undertaking a research project on environmental NGOs in Europe which is funded by the British Academy.*

https://doi.org/10.1111/j.1540-5893.2012.00505.x Published online by Cambridge University Press