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Regulatory appeals in Scotland: patterns behind the patchwork[1]

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In recent decades many jurisdictions have established an environmental court or tribunal and in others the desirability of such a specialist judicial body is a topic of debate. Alongside discussion of the distinctive features of environmental law, one of the strands of argument in favour of such a development is provided by the way in which environmental regulation has developed. Often this has occurred in a rather fragmented manner, with different bodies entrusted with regulating different matters under various statutory regimes, and consequently it is not unusual for there to be a lack of coherence and consistency in the routes of appeal (if any) provided against the regulatory decisions taken. A specialist adjudicatory body could end this fragmentation in how appeals are being handled and ensure that appeals are decided by those with appropriate expertise.

The calls for such an apparently obvious rationalisation can, however, overlook the patterns that lie behind the existing patchwork of appeal routes and that serve to illuminate different aspects of the appellate function that need to be taken into account in considering how any new body might work and where it might sit in the wider institutional context. This article examines one jurisdiction, Scotland, where the fragmented and inconsistent pattern of environmental regulatory appeals has been criticised and where the desirability of an environmental court or tribunal is coming under active scrutiny. The aim is to identify what lies behind some of the structural choices that have already been made, with a view to identifying features that need to be considered as the potential for an environmental court is considered, including structure, functions and procedure.

Background

There is ample literature on the issue of environmental courts and tribunals, including general overviews,[2] analytical studies of the nature of environmental adjudication[3] and studies of specific national developments[4] and potential for these to be copied.[5] Across the world UNEP has reported that there are 2,115 operational environmental courts or tribunals in 67 countries,[6] but these can take different forms and perform different roles, linked to the wider landscape of environmental regulation and judicial structures in each jurisdiction. Within the United Kingdom, the creation in England and Wales of an environmental tribunal[7] and a Planning Court[8] has significantly redrawn the map of how environmental decisions are taken; the story of those developments is well told in the writings of Richard Macrory whose work had a major part to play in bringing about such changes.[9]

Scotland has lagged behind such developments. Despite calls for reform beginning 30 years ago,[10] suggestions being made by leading players in the justice system[11] and official consultations that have included the potential of an environmental court [12] (albeit criticised as too narrow in scope),[13] no significant rationalisation of the varied routes to redress has taken place. The issue is coming under scrutiny again since issues of environmental governance demanded attention as a result of the UK's withdrawal from the European Union and the loss of the mechanisms within the EU that called governments to account if they failed to live up to their environmental obligations. The statutory provisions that created Environmental Standards Scotland as a new environmental watchdog[14] also set out

1 This article is developed from a shorter paper published as T Matthews, 'The fragmented routes to redress across Scottish environmental law' (2023) 216 *Scottish Planning and Environmental Law* 33 and is based on work originally undertaken as part of a Carnegie Vacation Scholarship at the University of Dundee.

2 For example, *Environmental Courts and Tribunals – 2021: A Guide for Policy Makers* (UNEP, Nairobi 2022); B Preston 'Characteristics of successful environmental courts and tribunals' (2014) 26 *Journal of Environmental Law* 365; G Pring and C Pring *Greening justice: creating and improving environmental courts and tribunals* (IUCN, Washington, DC 2009).

3 For example, C Warnock *Environmental courts and tribunals: powers, integrity and the search for legitimacy* (Hart, Oxford 2020); E Lees and O Pedersen *Environmental adjudication* (Hart, Oxford 2020).

4 For example, E Fisher and B Preston (eds) *An environment court in action* (Hart, Oxford 2022); G Gill 'Environmental justice in India: the National Green Tribunal' (2017) 29 *Environmental Law and Management* 82; C Warnock 'Reconceptualising the role of the New Zealand Environmental Court' (2014) 26 *Journal of Environmental Law* 507.

5 M Salekin, 'A specialised environmental court for Ireland: the model of India' (2023) 27 *Environmental Liability* 158.

6 UNEP (n 2) 11.

7 Formally part of the First-tier Tribunal (General Regulatory Chamber).

8 Part of the Administrative Court within the King's Bench Division of the High Court.

9 R Macrory 'The long and winding road – towards an environmental court in England and Wales' (2013) 25 *Journal of Environmental Law* 371; R Macrory, *Irresolute Clay: Shaping the Foundations of Modern Environmental Law* (Hart, Oxford 2020) ch 10.

10 J Rowan-Robinson 'Environmental protection: the case for a new dispute-resolution procedure' (1993) 38(1) *Journal of the Law Society of Scotland* 5.

11 See C Reid, 'An environmental court for Scotland?' (2015) 27 *Environmental Law and Management* 55.

12 Scottish Executive, *Strengthening and streamlining: the way forward for the enforcement of environmental law in Scotland* (2006); Scottish Government, *Developments in environmental justice in Scotland: A consultation* (2016).

13 C Agnew 'An environmental court for Scotland?' (2016) 178 *Scottish Planning and Environmental Law* 133, at 133.

14 C Reid, 'A new beginning for environmental governance: the UK Withdrawal from the European Union (Continuity) (Scotland) Act 2021' 2021 *Scots Law Times (News)* 41.

a requirement for a review of the effectiveness of environmental governance arrangements, including specifically the potential for an environmental court.[15] This has prompted renewed calls for such a body to be established,[16] although the consultation report published in early June 2023 does not recommend any such reform.[17]

While the desirability and appropriateness of a specialist environmental court or tribunal flow from the complex interrelationship between legal regulation, polycentric arguments and scientific innovation,[18] one specific strand in the arguments has been criticism of the regulatory appeal structures for environmental matters in Scotland as incoherent and inconsistent. Looking at those structures more closely both identifies the problem to be solved and factors to bear in mind in moving to a solution.

Such a study also identifies one of the contentious issues here, which is what should be the scope of any distinctive environmental adjudication. There is no fixed boundary to what can be considered as raising 'environmental' matters, and in different jurisdictions the regulatory and judicial structures will encompass differing ranges of activities. Wildlife protection, hunting, exploitation of natural resources such as minerals, hydrocarbons, water and timber, renewable energy, pollution of air and water, noise pollution, waste issues, land contamination, genetically modified organisms and aspects of agriculture and forestry, as well as control of land use and development, can all be included. Such breadth and diversity pose challenges in designing and operating structures that can truly offer the benefits of expertise and specialism across such a potentially wide field.

Overall pattern

An early distinction must be drawn between the opportunities to appeal against a decision, enabling the correctness of the decision (or merits) to be considered, and those to challenge it by means of judicial review, when only the legality of the decision can be questioned. In practice this distinction between merits and legality is often blurred, either through specific provisions limiting the scope of an appeal or the approach to be taken by the appeal/review body,[19] but the formal distinction is important. Not only is it structurally significant, but it is likely to have an impact on the likelihood of decisions being overturned. Statistics and comparisons are misleading given the huge range of variables involved, but for Scotland it is worth noting that whereas planning appeals (on the merits) have a success rate of 45 per cent, fewer than 20 per cent of judicial reviews succeed when raised by individuals and groups (on legality, with deference being paid to the original decision-makers).[20]

In Scotland, rights of appeal must be expressly created as part of the particular regulatory regime and the statutory provisions will specify the details of who may appeal, to whom, on what grounds and according to what procedure. In contrast, judicial review is generally available (subject to rules on standing and timeousness) as a means of challenging the legality of any decision-making by a public body.[21] Therefore if no appeal is expressly provided for, the only means of recourse against a decision will be to seek judicial review in the Court of Session,[22] leaving the dissatisfied party with a challenge on the grounds of illegality alone and facing the costs of litigation at that level.[23] The distinctions here can again be blurred by the provision of a procedure for a statutory challenge which is essentially the equivalent of judicial review rather than an appeal, but subject to distinct procedural rules.[24] Judicial review is usually also available to challenge the legality of decisions of appeal bodies, but in all cases judicial review is excluded where another route to redress is provided.[25] Most environmental regimes do provide some means of questioning at least some of the decisions taken by the body entrusted with regulatory decisions,[26] but the pattern is not consistent.

Before examining more closely the structural inconsistencies across and between specific environmental regimes, some observations can be made about the broad picture that emerges. Across the majority of environmental regimes, there is typically a primary appeal body that is assigned responsibility in handling the majority of appeals within a given regime, although outliers emerge where appellate roles are allocated out of line with the overarching trend. As discussed more fully below, the appeal body can be part of the judicial or executive branches of the state and may not always respect the usual constitutional hierarchies. For example, whilst the general supervisory

15 UK Withdrawal from the European Union (Continuity) (Scotland) Act 2021, s 41.

16 B Christman, *Why Scotland needs an environmental court or tribunal* (Environmental Rights Centre for Scotland, Edinburgh 2021); C Gemmell, *The clear and urgent case for a Scottish Environment Court* (Environmental Rights Centre for Scotland, Edinburgh, 2023).

17 Scottish Government, *Report into the effectiveness of governance arrangements as required by section 41 of the UK Withdrawal from the European Union (Continuity) (Scotland) Act 2021* (2023); see https://consult.gov.scot/environment-forestry/effectiveness-of-environmental-governance/.

18 Warnock (n 3); Lees and Pedersen (n 3).

19 For a wider perspective on this issue in a particular comparative context, see M Eliantonio, E Lees and T Paloniitty (eds) *EU environmental principles and scientific uncertainty before national courts – the case of the Habitats Directive: some comparative conclusions* (Hart, Oxford 2023).

20 Planning and Environmental Appeals Division: annual review 2021 to 2022, appendix A; N Collar, *Judicial review of planning decisions in Scotland* (Brodies, Edinburgh 2018).

21 Although not relevant here, it is important to note that in Scotland the scope of judicial review extends to some decisions by private bodies as well, whereas in England the scope is firmly limited to 'public law' matters; Lord Clyde and D Edwards, *Judicial* review (W Green, Edinburgh 2000) 340–341.

22 The Court of Session is the senior civil court, sitting in Edinburgh and divided into the Outer House that hears cases at first instance and the Inner House which hears appeals and some original applications; further appeal to the United Kingdom Supreme Court is often possible.

23 Special rules on protective expenses orders go at least some way to limiting exposure to costs in environmental cases, in line with the requirements of the Aarhus Convention (and formerly EU law): Rules of the Court of Session, chapter 58A.

24 For example, Town and Country Planning (Scotland) Act 1997, s 239.

25 For example, *Cosmopolitan Hotels Ltd v Renfrewshire Council* [2021] CSOH 116.

26 Even where there is an environmental court, many decisions may be left without a statutory appeal route: T Daya-Winterbottom 'The scope of environmental judicial review in Aotearoa – New Zealand (2022) 27 *Environmental Liability* 91, 94–95.

jurisdiction that lies behind judicial review is a jealously guarded power of the higher courts,[27] with only the Court of Session able to reduce (quash) decisions of Ministers and public authorities,[28] in many environmental appeal processes the sheriff is given power to substitute their own view for that of Ministers.[29]

Whereas standing to bring a judicial review has been widened in the last 15 years, now resting on the test of 'sufficient interest in the subject matter of the application',[30] for statutory appeals the position remains more limited. Commonly it is only the party who is the direct recipient of the decision being questioned who is entitled to appeal, although sometimes widened to include other 'persons aggrieved'.[31] For example, if an application for planning permission is refused, the unsuccessful applicant has the opportunity for a full appeal on the merits of the case through a dedicated appeal route,[32] whereas if it is granted, dissatisfied objectors have recourse only to the more limited and expensive route of seeking judicial review challenging the legality of the decision.[33] In a case arising in Northern Ireland, this lop-sided pattern has been condemned by the Aarhus Convention Compliance Committee as failing to live up to the standards of access to justice required under the Convention.[34]

Appeal structures vary in whether they make express provision for the basis on which any appeal will be heard, often in some detail,[35] and for any further appeal. On the latter point, where no route for further appeal or challenge is specified, judicial review will normally be available to challenge the legality of decisions taken by the appeal body, even where it is said to be 'final'.[36] On the former, the statute may leave no room for doubt. For instance, in relation to species control orders, the sheriff is expressly instructed to decide an appeal 'on the merits rather than by way of review' but their decision can be further appealed on a point of law only,[37] whereas on waste matters the further appeal against the sheriff's decision is unrestricted.[38]

27 *Brown v Hamilton District Council* 1983 SC(HL) 1.
28 This power is now shared with the Upper Tribunal: Tribunals (Scotland) Act 2014, s 57.
29 For example, Pollution Prevention and Control (Scotland) Regulations 2012, SSI 2012/360, reg 58.
30 Court of Session Act 1988, s 27B(2).
31 In line with the loosening of the wider rules on standing, this term has been given a more generous interpretation in recent years, for example, *Bruce v Moray Council* [2023] CSIH 11 [28]–[29].
32 Town and Country Planning (Scotland) Act 1997, s 47.
33 Either under the general procedures or where relevant the statutory equivalent under the Town and Country Planning (Scotland) Act 1997, ss 237–239.
34 ACCC/C/2013/90 United Kingdom. Similar issues arising in Scotland are the subject of further consideration by the Committee: ACCC/C/2022/196 United Kingdom.
35 For example, the differing grounds in s 74(4) and s 74(6) of the Reservoirs (Scotland) Act 2011.
36 As is the case for Ministers' appeal decisions under the Environmental Authorisations (Scotland) Regulations 2018, SSI 2018/219, reg 56(3). The courts' responses to finality clauses and other attempts to oust their supervisory jurisdiction present a long and complex tale; see, for example, R Craig 'Ouster clauses, separation of powers and the intention of Parliament: from *Anisminic* to *Privacy International*' [2018] *Public Law* 570.
37 Wildlife and Countryside Act 1981, s 14H.
38 Environmental Protection Act 1990, s 73(2).

However, the nature of the appeal is not always wholly clear and in a recent case a key point at issue was whether the appeal before the sheriff should proceed by way of a full rehearing, including factual issues, or as a more limited review.[39] Guidance was taken from *Macphail on Sheriff Court Practice*,[40] where key factors identified are the nature of any remedy available (the power to substitute a new decision points to a re-hearing), the need for factual determinations (again pointing to a re-hearing) and whether the original decision is a matter of statutory discretion (pointing to a more limited review). Other factors noted included, in the case of a statute applying more widely than just in Scotland, comparison with the equivalent procedure in England and Wales[41] and how far the original decision-maker could be seen as an expert body whose expertise when compared to the court should be respected, suggesting that decisions should be overturned only on the basis of the tests applied in judicial review.[42]

Factors influencing the structure

The way in which the appeal structure is shaped appears to be rooted in the nature of the legislative regime, the era when the legislation was drafted, varying views on the relationship between bodies, and the ultimate significance of the legislation itself. Several broad observations can be made. Firstly, environmental regimes that are regulated by a smaller number of core governing statutes function with an enhanced degree of coherence. The greater coherence in design is attributable to a rational vision at a key moment that sets a clear and unambiguous structure while simultaneously minimising scope for fragmentation across time. Thus the Reservoirs (Scotland) Act 2011 sets a clear pattern, allocating to the Scottish Ministers the appellate function against decisions taken by the Scottish Environment Protection Agency ('SEPA'). In direct contrast, legislation regulating natural heritage in Scotland is controlled by numerous statutes that have been adopted across preceding decades, and often subject to frequent amendment.[43] This has led to an environmental regime with a heightened degree of incoherence with similar appeals directed to a spectrum of bodies; for example appeals in relation to species control orders go to the sheriff[44] whereas for land management orders they go to the Scottish Land Court,[45] and for the muirburn licensing scheme proposed in the Wildlife Management and Muirburn (Scotland) Bill, no appeal is provided, leaving judicial review as the means of recourse.[46]

39 *Norbord Europe Ltd v Scottish Ministers* 2023 SLT (Sh Ct) 1, considering an appeal under the Pollution Prevention and Control (Scotland) Regulations 2012, SSI 2012/360, reg 58.
40 A Cubie (ed) *Macphail on Sheriff court practice* (4th ed) (W Green, Edinburgh 2022), para 27.42.
41 ibid.
42 *Norbord* (n 39) at [53].
43 The Wildlife and Countryside Act 1981 is an outstanding example of how unmanageable statutes can become, with almost every provision amended, major new insertions and despite originating as a Great Britain statute now existing in quite different versions for different jurisdictions.
44 Wildlife and Countryside Act 1981, s 14H.
45 Nature Conservation (Scotland) Act 2004, s 34.
46 Wildlife Management and Muirburn (Scotland) Bill (SP Bill 24 of session 6, as introduced), part 2.

A second observation is that there seemed to be a recent, but far from dominant, legislative trend towards allocating responsibility to the Scottish Land Court ('SLC') or the Lands Tribunal for Scotland ('LTS'), especially within agriculture, land and natural heritage regimes,[47] with a notable extension in relation to civil penalties across wider areas of activity.[48] The fact that the Wildlife Management and Muirburn (Scotland) Bill[49] proposes that appeals in relation to the licensing of the shooting of grouse go to the sheriff rather than the Land Court, despite it seeming well suited for this task, suggests that this is not to be an enduring feature. Similarly, the consolidation of, and reforms to, the tribunal system in the early 2010s might have sparked a new interest in making use of this structure as a preferred route for appeals, as is the case in a few instances,[50] but again this does not seem to have become a settled approach.

Thirdly, the drafting of legislation within the devolutionary context can contribute to inconsistencies in environmental regulation. When legislation is designed on the basis of Scotland alone, a more settled pattern can emerge, but departures from the dominant Scottish position can arise when other legislators are involved. For example, for certain notices relating to the transfrontier shipment of waste, the assignment of the relevant appeal body is translated from the magistrates' court in England to the sheriff court in Scotland.[51] While the sheriff is responsible for certain appeals within the waste regime, the primary appeal body is the Scottish Ministers and one suspects that if this provision appeared in Scottish as opposed to UK legislation, that route might have been the one specified.[52] Such jurisdictional quirks raise the potential of structures being adopted that do not match the standard model.

Routes to redress

The fragmentation of appeal routes across environmental law in Scotland is obvious when the number of bodies involved is noted and each looked at individually. In the following sections each of the appeal routes is considered, identifying the main areas of application and some general observations about their role and place in the wider context.[53]

The Scottish Ministers

The Scottish Ministers function as the primary appeal body across waste management, integrated pollution control, water and hazardous substances regimes. With the exception of one conscious departure in relation to civil penalties, based on ensuring a judicial element in view of the links to criminal enforcement, appeals against decisions taken by SEPA are predominately directed to the Scottish Ministers. In practice such appeals are handled by the Planning and Environmental Appeals Division of the Scottish Government ('DPEA') which is a division of the Scottish Government Legal Directorate, without direct ministerial involvement.

For waste management, the Waste Management Licensing (Scotland) Regulations 2011[54] operate as the legislative centrepiece, with appeals generally directed to the Scottish Ministers. While further recourse to the standard processes of judicial review remains possible, for appeals in waste management heard by the Scottish Ministers, there is no prescribed further appeal route. Legislative peculiarities arise, such as allocating to the sheriff court jurisdiction to handle appeals regarding waste receptacles and unlawfully deposited waste; where the sheriff court is invoked, there remains a further right of appeal to the Court of Session.[55]

Under pollution control legislation, appeals against the decisions of SEPA are mostly directed to the Scottish Ministers.[56] In a curious hierarchical quirk, though, after the Ministers have decided appeals on certain matters there is a further appeal, now confirmed as fully merits-based, to the sheriff who can substitute their own decision of the Ministers.[57] Where the sheriff has made a litter abatement notice, appeals are available on a point of law to the Court of Session.[58]

Within the land-use planning system, the formerly uniform pattern of appeals being directed to the Scottish Ministers has been split with the introduction of local planning authority review bodies to determine appeals from planning permission application decisions about proposed 'local developments' taken by planning authority officers under delegated powers.[59] There is also scope for the Court of Session to become involved, but on narrower grounds akin to the tests for judicial review.[60] The sheriff court has jurisdiction after ministerial determinations on the compulsory acquisition of listed buildings in need of repair;[61] the allocation of these appeals to a court may be because of the property rights at stake, and there is provision for further appeal to the Court of Session, albeit on a question of law only.

47 For example, n 45.
48 Environmental Regulation (Enforcement Measures) (Scotland) Order 2015 (SSI 2015 No 383).
49 Note 46 above, s 6.
50 Under the Marine Licensing (Notice Appeals) Regulations 2011, SSI 2011/936 appeals go the First-Tier Tribunal.
51 Transfrontier Shipment of Waste Regulations 2007, SI 2007/1711, Sched 5, para 4.
52 Or the Scottish Land Court to match other appeals against notices imposing sanctions (n 48).
53 See also Scottish Tribunals and Administrative Justice Advisory Committee: *Mapping administrative justice in Scotland* (2015), ch 10: Environment, heritage, water and waste management.
54 SSI 2011/228.
55 Environmental Protection Act 1990, ss 46, 47, 59 and 73.
56 For example, Pollution Prevention and Control (Scotland) Regulations 2012, SSI 2012/360, reg 58; Water Environment (Controlled Activities) (Scotland) Regulations 2011, SSI 2011/209, reg 50.
57 *Norbord* (n 39).
58 Environmental Protection Act 1990, s 91.
59 Town and Country Planning (Scotland) Act 1997, s 47; Town and Country Planning (Schemes of Delegation and Local Review Procedure) (Scotland) Regulations 2013, SSI 2013/157. See generally N Collar, *Planning* (4th ed) (W Green, Edinburgh, 2016), ch 8.
60 Town and Country Planning (Scotland) Act 1997, ss 237–239.
61 Planning (Listed Buildings and Conservation Areas) (Scotland) Act 1997, ss 42–45.

Further, for decisions concerning hazardous substances arising under land-use planning law[62] or the Environmental Authorisations (Scotland) Regulations 2018,[63] the Scottish Ministers remain the only appeal body to whom an appeal may be brought.

Sheriff court

The sheriff court[64] functions as the primary appeal body within the field of statutory nuisance,[65] marine licensing[66] and contaminated land,[67] while sporadically performing an appellate function to a greater or lesser extent across pollution,[68] waste[69] and natural heritage.[70] Judicial oversight of local authority decision-making manifests in various forms[71] and is familiar in non-environmental areas.[72] The sheriff court has also been given the power to hear appeals against compliance notices issued to public authorities by Environmental Standards Scotland in the exercise of its powers to ensure compliance with environmental law.[73]

Whilst the Ministers offer the appeal route for key regulatory decisions in relation to the regulation of water,[74] the sheriff court also has a significant role in handling appeals that flow from the Water Services etc. (Scotland) Act 2005[75] and the Water Resources (Scotland) Act 2013.[76] Within the water regimes, there are sporadic explicit possibilities of further appeal to the Sheriff Appeal Court, for example in relation to notices served on private sewage treatment works.[77]

Court of Session

The Court of Session is not usually the primary forum for appeals and when cases reach it the focus, as might be expected, is on legal issues. The routes to the court vary, but with its general deference to original fact-finders and expert decision-makers,[78] the differences between cases are not obvious in substance, even though the procedural pathways vary. Cases can arrive as an 'open' appeal,[79] as an appeal on point of law (as first port of call[80] or following an earlier level of appeal)[81] or under a statutory reference akin to judicial review.[82] Those able to access the court will depend on the limitations on access to any first level appeal[83] and any further provisions, such as granting access to a 'person [who] is aggrieved'[84] or has 'sufficient interest or whose rights have been impaired'.[85] The fact that the court is also available as the forum for judicial review when no alternative route of appeal or challenge is provided[86] further cements its role as the final place where decisions may be challenged.

Scottish Land Court and Lands Tribunal for Scotland

The Scottish Land Court has been claimed by observers to be the Scottish Government's 'most recent preferred choice for hearing appeals against SEPA decisions',[87] but looking at the statute book as it has developed over time this status is far from clear. The composition of the Land Court in combining members of the judiciary with experts in land-use and valuation lends itself to its traditional and primary function of determining disputes regarding crofting and agricultural holdings.[88] There are areas in which the court performs a specifically appellate function, namely: agricultural holdings,[89] deer control schemes,[90] nature conservation,[91] land,[92] nitrate vulnerable zones,[93] and fixed monetary penalties issued by SEPA.[94]

The Lands Tribunal for Scotland performs a characteristically similar function in handling disputes regarding land and agricultural holdings. The overlapping function performed by these bodies has led to plans for the court and the tribunal to be merged.[95] Such integration of the expertise afforded by its members and its procedural flexibility would seem to suit an expansion of its remit

62 Planning (Hazardous Substances) (Scotland) Act 1997.
63 SSI 2018/219.
64 The sheriff court is the mid-level court in Scotland, with both criminal and civil jurisdiction and a role in various non-environmental licensing regimes, with further appeal routes to the Sheriff Appeal Court or Court of Session.
65 Environmental Protection Act 1990, s 80.
66 Marine (Scotland) Act 2010, ss 38, 47, 49 and 61.
67 Environmental Protection Act 1990, s 78L.
68 Note 38 above.
69 Environmental Protection Act 1990, ss 46–47.
70 Note 37 above.
71 For example, in relation to houses in multiple occupation (Housing (Scotland) Act 2006, s 159) and short-term lets (Civic Government (Scotland) Act 1982, Sch 1 para 18) and Civic Government (Scotland) Act 1982 (Licensing of Short-term Lets) Order 2022, SSI 2022/32.
72 Ranging from alcohol licensing (Licensing (Scotland) Act 2005, s 131) to pet shops (Animal Welfare (Licensing of Activities Involving Animals) (Scotland) Regulations 2021, SSI 2021/84 reg 27) and sex shops (Civic Government (Scotland) Act 1982, Sch 2 para 24).
73 UK Withdrawal from the European Union (Continuity) (Scotland) Act 2021, s 36.
74 For example, Water Environment (Controlled Activities) (Scotland) Regulations 2011, SSI 2011/209, reg 50.
75 Water Services etc. (Scotland) Act 2005, ss 26, Sch 2 para 1, Sch 2 paras 4, 9–11.
76 Water Resources (Scotland) Act 2013, ss 16, 38E, 43, Sch 1 para 10.
77 Sewerage (Scotland) Act 1968, s 38E.
78 *Royal Society for the Protection of Birds v Scottish Ministers* [2017] CSIH 31.
79 For example, Water (Scotland) Act 1980, s 93(6).
80 For example, Water Services (Scotland) Act 2005, Sch 2 para 1(9).
81 For example, Planning (Listed Buildings and Conservation Areas) (Scotland) Act 1997, s 42.
82 Town and Country Planning (Scotland) Act 1997 s 239.
83 For example, Environmental Protection Act 1990, ss 59(2) and 73(2).
84 Marine (Scotland) Act 2010, s 63A.
85 Forestry (Environmental Impact Assessment) (Scotland) Regulations 2017, SSI 2017/113, reg 31.
86 The availability of an alternative remedy is a barrier to being allowed to seek judicial review, for example *Cosmopolitan Hotels Limited v Renfrewshire Council* [2021] CSOH 116.
87 Environmental Rights Centre for Scotland, 'Scottish Government consultation on the future of the Scottish Land Court and the Lands Tribunal for Scotland' (ERCS Consultation Response, October 2020) 6.
88 Lord Gill, *Agricultural tenancies* (4th ed) (W Green 2015) part VI.
89 Agricultural Holdings (Scotland) Act 1991; Agricultural Holdings (Scotland) Act 2003.
90 Deer (Scotland) Act 1996 s 9 and Sched 2.
91 Nature Conservation (Scotland) Act 2004 s18 and s 34.
92 Land Reform (Scotland) Act 2003 s 91; Land Reform (Scotland) Act 2016 s 32.
93 Action Programme for Nitrate Vulnerable Zones (Scotland) Regulations 2008, SSI 2008/298 reg 29.
94 Environmental Regulation (Enforcement Measures) (Scotland) Order 2015, SSI 2015/383, Sched 1, para 8.
95 Scottish Government announcement on 8 September, 2021 (Scottish Land Court and Lands Tribunal for Scotland to be unified – gov.scot (www.gov.scot)) following *The future of the Land Court and the Lands Tribunal: consultation* (Scottish Government 2021).

to include matters such as contaminated land remediation notices[96] or species control orders[97] that are currently directed to the Scottish Ministers and the Sheriff respectively.

Local review bodies

Whereas most appeals are directed to existing judicial or executive bodies, within the town and country planning system a special set of appeal bodies has been created. These are local review bodies, comprised of elected members of planning authorities whose role is to decide appeals from decisions taken by the authority's planning officers under the delegated powers which enable many smaller-scale applications to be determined on that basis rather than requiring consideration through the committees, and ultimately full council, of the authority.[98] The appeal is by way of full rehearing on the merits and there is a further right of appeal on points of law to the Court of Session.[99] Given that the local review body is considering an appeal made by an official of the same authority, doubts have been raised over whether this process meets the standards of 'an independent and impartial tribunal' as required by the European Convention on Human Rights (see below).[100]

Scottish Information Commissioner and Environmental Standards Scotland

It is worth mentioning that other bodies are also involved in looking at matters within the environmental field. Appeals against decisions of a Scottish public authority that concern environmental information requests are directed to the Scottish Information Commissioner.[101] The Commissioner is appointed by the King on the recommendation of the Scottish Parliament and thus fulfils an independent role outside the standard judicial and executive structures.[102] Decisions by the Commissioner to issue either an information or enforcement notice may be appealed to the Court of Session on a point of law.[103]

A distinct role is performed by Environmental Standards Scotland ('ESS'), created as part of the adjustment to environmental governance following the UK's withdrawal from the European Union and hence the loss of the mechanisms that provided a means to hold governments to account for failures to live up to environmental commitments.[104] This body adds a further dimension to the exercise of regulatory powers in relation to the environment across Scotland, but is explicitly prevented from considering any individual regulatory decisions. ESS is empowered to issue a compliance notice to a public authority if they consider that the body has failed to 'comply with environmental law' and that such a failure 'will continue or be repeated', and accordingly, any harm already caused or prospectively anticipated will trigger 'environmental harm or a risk of environmental harm'.[105] A public authority may appeal against a compliance notice to the sheriff who is empowered to cancel the compliance notice or confirm the notice, with or without any modifications.[106]

Analysis

This listing of the bodies involved in determining environmental appeals has demonstrated the variety of appeal routes provided and the fragmentation of the structure, with examples of inconsistencies and gaps. The case for tidying up the picture is overwhelming. Yet that does not mean that one size will fit all. The different bodies chosen have been selected for a reason. That reason may not be wholly convincing when the wider picture is considered, but the features of the different bodies are worth considering before any comprehensive reform is planned, whether that involves just rationalising the current picture or establishing a new structure.

One initial point to make is the need to look at the various stages of the decision-making process as a whole, not any one in isolation. The form and nature of any appeal process is inevitably affected by the initial decision-making procedure that comes before it and any further review process that comes after. This is particularly important in assessing whether the overall structure meets the requirement of the European Convention of Human Rights that when civil rights are being determined there is a fair hearing before an 'independent and impartial tribunal'.[107] It has been recognised that individual elements of the system may not meet this standard; for example, in planning matters Ministers may end up determining appeals against decisions which are based on the policies that they themselves have produced, but it has been held that when the procedural safeguards at the early stages are combined with the availability of judicial review, the procedure overall does provide sufficient independence.[108] However this is not always the case[109] and in particular doubts have been raised over whether the closeness of the connection between local review bodies and the officials whose decisions are being considered and the procedures they adopt do provide sufficient impartiality.[110]

There is a choice to be made between appeals being heard within the judicial or executive branch of the state. Allocating cases to the judicial branch provides the guarantee of independence which is built into the structure of

96 Environmental Protection Act 1990, s 78L.
97 Wildlife and Countryside Act 1981, s 14H.
98 Town and Country Planning (Scotland) Act 1997, ss 43A, 47(1A); The Town and Country Planning (Schemes of Delegation and Local Review Procedure) (Scotland) Regulations 2013, SSI 2013/157.
99 Town and Country Planning (Scotland) Act 1997, ss 237, 239.
100 European Convention on Human Rights, art 6(1).
101 Freedom of Information (Scotland) Act 2002, s 56 as applied by the Environmental Information (Scotland) Regulations 2004, SSI 2004/520, reg 17.
102 Freedom of Information (Scotland) Act 2000, s 42.
103 ibid, s 56.
104 UK Withdrawal from the European Union (Continuity) (Scotland) Act 2021, ss 19–40; Reid (n 14).
105 UK Withdrawal from the European Union (Continuity) (Scotland) Act 2021, s 31.
106 ibid, s 36.
107 Note 100 above.
108 *County Properties Ltd v Scottish Ministers* 2002 SC 79.
109 *Tfayso v United Kingdom* (2009) 48 EHRR 18.
110 A Ferguson and J Watchman *Local planning reviews in Scotland* (Avizandum, Edinburgh, 2015) 31–43; but see *Carroll v Scottish Borders Council* [2015] CSIH 73.

courts and tribunals, but an executive body will have a place within frameworks for political accountability which may be appropriate when the decisions being taken involve a complex balancing of many conflicting environmental, economic, social, public and private interests, potentially affecting whole communities for decades to come. Ministers as decision-makers may also have access to greater expert advice and support than the courts and can more readily place regulatory decisions coherently within a wider context, geographically or in terms of national policies. Their involvement may also raise the profile of environmental issues in the political and public spheres. This is not the place for a detailed discussion of the differences between what properly belongs in the legal/judicial and what in the policy/executive spheres of decision-making; across the range of appeals against regulatory decisions in environmental matters, neither is always obviously the only correct solution.

One clear requirement is that appeals should be heard by someone independent of the original decision-maker, although this is not to discount the value of an internal review procedure (such as required in relation to environmental information)[111] as a preliminary to a formal external appeal. The fundamental structural independence of the courts offers the strongest guarantee of this, but within the executive arm of the state the separation between bodies has been recognised as providing independent overview. The clear separation between local authorities and central government provides sufficient distinction in some cases, and the tradition of 'arm's length' statutory bodies operating independently of government is also accepted, as noted above, even though formally Ministers may have some powers of control, for example through the ability to issue directions[112] or to assume responsibility for some tasks.[113] The fact that most ministerial decisions are made by the arm's length DPEA without direct ministerial involvement strengthens the case for recognising this route as having sufficient (although not complete) independence, despite the potential within the formal legal structures for this to be undermined.

Other factors also come into consideration for both judicial and executive bodies. Expertise is required to deal well with many environmental issues. This entails scientific understanding of environmental conditions, how human interventions have affected them, and risk, as well as familiarity with the specialist and complex legislative regimes created to regulate specific issues. For judicial bodies this supports the argument against using a generalist court such as the sheriff, where each individual sheriff will almost certainly lack technical expertise and come across environmental cases of any sort only very occasionally, if at all. A specialist environmental court or tribunal can both build up expertise within its limited jurisdiction and be established with a bench, or set of advisers, that can deal with difficult scientific as well as legal issues. As noted above, though, the arguments over specialisation and expertise are affected by the potential breadth of what can be included as 'environmental' matters. Where appeals are heard by Ministers, expert advice should be available and the delegation of decisions to specific bodies such as the DPEA provides further expertise.

The need for such expertise may point towards a centralisation of appellate decision-making, which can also assist in consistency of decision-making and coherence with national policies and plans. Yet that comes at the cost of local knowledge and sensitivity and with an additional consideration of cost. Having to engage with a centrally situated specialist court or other appellate body can add to the cost, financial and other, of making an appeal and make it harder to rely on local sources of advice and support. This can be ameliorated by the appellate body, however constituted, being willing to hold hearings close to the sites affected (as the Scottish Land Court can), which is just one aspect of the wider point that the procedure adopted, both the formal rules and how they operate, will make a big difference. Recourse to the higher courts will almost inevitably involve formality and the need for legal representatives, whereas other forms of proceedings can vary; some tribunals operate in a stricter manner than some courts whereas others make real efforts to be informal and welcoming to litigants in person. How far hearings are based on paper submissions alone as opposed to oral argument and examination of witnesses is another variable, regardless of the nature of the decision-making body concerned.

Further important considerations in designing an appropriate appeal system are those discussed earlier in terms of standing and the basis of any reconsideration of the original decision. Both of these in turn have influence on the procedural choices to be made, since an appeal on point of law open only to licence seekers who will be major commercial actors calls for something very different from proceedings requiring the hearing of evidence, the participation of 'ordinary' citizens and consideration of the risks to water or air quality or biodiversity. The financial and administrative costs of having a specialist body, judicial or executive, must also be borne in mind. Factors here include the caseload likely to be produced, which is in turn affected by the breadth of the jurisdiction, the rules on standing and how far costs and other obstacles deter parties from coming forward, and how far truly separate structures need to be created as opposed to providing a degree of specialisation within existing arrangements. In that respect, the rationalisation of the tribunal system in Scotland in recent years[114] makes a specialist environmental tribunal much more feasible, as a chamber of one of the existing tiers, than was the case when any such body would have required a wholly separate administrative structure.

111 Environmental Information (Scotland) Regulations 2004, SSI 2004/520, reg 16.

112 For example, the power of Ministers to issue directions to SEPA (Environment Act 1995, s 40).

113 For example, 'calling in' certain planning applications to be determined by the Ministers, not the planning authority (Town and Country Planning (Scotland) Act 1997, s 46).

114 Tribunals (Scotland) Act 2014; see https://www.scotcourts.gov.uk/the-courts/the-tribunals/about-scottish-tribunals.

The status quo is not perfect and improvements can clearly be made. Some tidying up of the appeal structures, within and between regimes, for example determining how wide a role the Scottish Land Court is to play, would clearly be useful, but the potential is there for a more radical reform, establishing a specialist environmental court and tribunal. If that route is chosen, though, important design choices need to be made in terms of composition, jurisdiction, functions and procedures.

Conclusion

There are two major conclusions to be drawn from this study. The first is that in Scotland the system of appeals against regulatory decisions on environmental matters is fragmented and at times lacking in coherence. In each sector, there typically emerges a favoured appeal body to whom appeals are generally directed, with other appeal bodies, to greater and lesser extents across differing regimes, sporadically operating in contradiction to the general trend. This creates a model where fragmentation is the norm, not the exception, and establishes a clear case for reform that rationalises the current messy system.

The second conclusion, though, is that if the focus is only on the forum in which an appeal is heard, that will be taking an unduly blinkered approach. There are many other factors to be taken into account and there are strengths and weaknesses in all of the options currently being used and in any that might be proposed. The nature of the appellate body, the basis on which it can make decisions, the breadth of its jurisdiction, its expertise, location, procedure and costs are all important considerations in assessing whether effective access to environmental justice is being delivered.

It had been hoped that the review of environmental governance underway in Scotland in the summer of 2023[115] would have provided the opportunity to reflect on such matters and explore thoroughly the potential for producing something better. Sadly, the published review does not engage deeply with the arguments on this issue. The analysis offered is focused at a high level and does not examine the details of any specific regulatory regimes. Its conclusion is that there is no strong argument for change in the current general pattern of parliamentary, administrative and judicial roles in environmental decision-making.[116] There is no consideration of the inconsistencies highlighted here nor of the arguments that even within the existing role of the judiciary a specialist court or tribunal might be advantageous, just a simple statement that the Scottish Government 'does not see any strong argument for the creation of a specialist court'.[117] The arguments for reform will continue to be made, but change still seems a long way off.

115 Note 17 above.
116 ibid, section 4.10.
117 ibid, section 2.5.