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Journal of Environmental Law

DOI:

[10.1093/jel/eqt014](https://doi.org/10.1093/jel/eqt014)

Published: 24/07/2013

Peer reviewed version

[Cyswllt i'r cyhoeddiad / Link to publication](#)

Dyfyniad o'r fersiwn a gyhoeddwyd / Citation for published version (APA):

Finchett-Maddock, L. (2013). Responding to the private regulation of dissent: Climate changeaction, popular justice and the right to protest. *Journal of Environmental Law*, 25(2), 293-304. <https://doi.org/10.1093/jel/eqt014>

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Analysis

Responding to the Private Regulation of Dissent: Climate Change Action, Popular Justice and the Right to Protest

Lucy Finchett-Maddock*

Abstract

This analysis is a discussion on the ‘No Dash for Gas’ protests in the context of compromised rights of protest as a result of the use of civil law to protect the commercial interests of the energy sector. The use of law within protest movements is highlighted in terms of how climate change protest may respond to these changes in legal tactics both inside and outside of court in light of a recent ‘climate change defence’ in criminal proceedings.

In February 2013, 21 ‘No Dash for Gas’ climate change protestors involved in the occupation and week-long shut down of West Burton gas-fired power station in Nottinghamshire, were threatened with the onset of a civil action for £5 million worth of damages brought by Électricité de France (EDF), the owners of the site. Not only did the protestors face a criminal case brought by the Crown Prosecution Service, but so too were EDF intimating a civil action for damages in terms of financial losses incurred and disruption caused to the plant as a result of their occupation of the site. As a result of popular support via petition and the utilisation of social media to mount a campaign to bring a halt to the action, EDF backed down as of March 2013 and the protestors

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now only have charges of aggravated trespass and a restrictive injunction on all EDF sites to reckon with, and not the prospect of a David and Goliath civil lawsuit on the scale of *McDonald's Corp v Steel* (hereinafter *McLibel*).¹ Although the energy giant reneging on its pronouncement to sue the protestors is not quite a conquest in terms of the right to protest, in this instance any compromise on the freedom of expression and assembly has been avoided in the short-term.

Despite EDF's 'dramatic climb-down',² it can be said that the use of private law to assuage protest rights is not something confined to *West Burton*; a surreptitious encroachment of alternative private law mechanisms protecting private interests, has been observed by jurists and human rights commentators for some time. According to Mead, protest has changed in the past decade or two where direct action does not solely mean some form of occupation, but where demonstrators '...are as likely to try to disrupt a company's business to make their point directly...persuading suppliers to an arms manufacturer to seek alternative revenue streams or garnering support for fiscal change by publicity stunts directed at bankers.'³ This means that environmental protest, or any other type of civil disobedience, is now in closer proximity to private commercial concerns,⁴ ultimately moving legal responses away from traditional public law forms.

This analysis seeks to place the No Dash for Gas example in light of the *Kingsnorth* protests in Kent, past cases such as *McLibel* and situate EDF's response to the occupation of one of their new gas-fired sites within the context of the curtailing of protest rights through a combination of private interests and private law. The use of law within protest movements will be discussed to interrogate the way climate change protest may respond to these changes in legal tactics both inside and outside of court, and in particular how protestors might themselves deploy law in the form of a 'climate change defence'.

1. Public and Private Interests in Energy Generation

Public and private interests in energy have focused most recently on the Government's plan to build 20 new gas fired power stations in the United Kingdom by 2030;⁵ a move on the part of Energy and Climate Change

1 *McDonald's Corp v Steel* (No 1) [1995] 3 All ER 615; *Steel v United Kingdom* (68416/01) *Morris v United Kingdom* (68416/01) [2005] EMLR 15.

2 No Dash for Gas, 'Energy giant EDF in dramatic climb-down as £5m damages claim is dropped' (13 March 2012) <<http://www.nodashforgas.org.uk/press>>, accessed 18 April 2013.

3 David Mead, 'A Chill Through the Back Door? The Privatised Regulation of Peaceful Protest' [2013] PL 100.

4 *ibid* 100.

5 No Dash for Gas, 'Public and private interests in energy have focused most recently on the Government's plan to build 20 new gas fired power stations in the United Kingdom by 2030' <<http://www.nodashforgas.org.uk/west-burton-and-the-dash-for-gas>> accessed 18 April 2013.

Secretary Ed Davey, that sees a 'dash for gas' as opposed to preference for renewables, coal or even the nuclear option. This shift back over to environmentally detrimental fossil fuels has been opposed by the Committee on Climate Change (CCC),⁶ which was established with the Climate Change Act 2008. As a result of this legislation, the United Kingdom has committed itself to a legally binding reduction of 80% from 1990 levels of carbon by the year 2050,⁷ as well as carbon budgets.⁸ Thus, extensive use of unabated gas-fired capacity is unlikely to be compatible with meeting legislated carbon limits.⁹ The CCC wrote to Ed Davey, expressing their great concern about the recent Government statement '...that it sees gas as continuing to play an important role in the energy mix well into and beyond 2030 [not] restricted to providing back up to renewables.'¹⁰ As a solution, the CCC recommended the setting of a clear carbon objective in secondary legislation, as suggested by the Energy and Climate Change Select Committee.¹¹ In addition, the UK is signatory to the United Nations Framework Convention on Climate Change (UNFCCC), the main international agreement on tackling climate change and the second commitment phase of the Kyoto Protocol from 2013 to 2020. EU leaders have also endorsed an 80–95% reduction in emissions by 2050, with which the UK agreed.¹²

EDF, or *Électricité de France*, is known as one of the 'Big 6' energy providers, alongside Centrica UK, E.ON UK, SSE UK, RWE npower UK and Scottish Power. According to a recent Bloomberg Energies report for Greenpeace, EDF Energy is the second worst performer in terms of their lack of investment in renewables and non-fossil fuels.¹³ The switch to gas has been linked politically to lobbying on the part of the Big 6 with the Chancellor of the Exchequer, George Osborne, announcing tax breaks for shale gas extraction¹⁴ at the expense of carbon capture goals, investment in renewables for the long-term, and ultimately, the reduction of the impact of climate change. EDF own the West Burton site upon which 16 protestors (21 in total including those who did not climb the towers) recently scaled the smoke stacks and shut down the power station for a week in October 2012.

6 See Committee on Climate Change, *The Need for a Carbon Intensity Target in the Power Sector* (Letter to Rt Hon Edward Davey MP 13 September 2012) <<http://www.theccc.org.uk/wp-content/uploads/2013/02/EMR-letter-September-12.pdf>> accessed 9 May 2013.

7 Climate Change Act 2008, s 1(1).

8 *ibid* ss 4–10.

9 Committee on Climate Change (n 6).

10 *ibid*.

11 *ibid*.

12 Committee on Climate Change, 'Legal Context', <<http://www.theccc.org.uk/tackling-climate-change/the-legal-landscape/>> accessed 18 April 2013.

13 Bloomberg Energy, 'UK Big 6 Utility Investment Trends' (23 April 2013) Bloomberg New Energy Finance, 4.

14 David Cullen, 'No Dash for Cash: EDF and the Game of Risk' (New Left Project, 5 March 2013) <<http://www.newleftproject.org/index.php/site/article.comments/no.dash.for.gas.edf.and.the.game.of.risk>> accessed 26 April 2013.

The CCC have tried to encourage early investment in low-carbon technologies in order to achieve longer-term objectives, stating that there is a clear set of low-carbon options available for power sector decarbonisation.¹⁵ This is an advice that has proven politically less attractive than the lure of more profitable gas, with the Big 6 influencing energy policy by supporting its promotion.¹⁶ According to the No Dash for Gas protestors, when the new Combined Cycle Gas Turbine (CCGT) plant at West Burton is completed, it will emit approximately 4.5 million tonnes of CO₂ per year when operating at full capacity, a backward turn in terms of reaching carbon reduction targets.¹⁷

Energy company E.ON has also caused similar concern by seeking to exert influence over Ed Miliband, leader of the Opposition, during the *Kingsnorth* protests whilst the now Leader of the Labour party was Secretary of State for Energy and Climate Change in Gordon Brown's cabinet (2008–10).¹⁸ According to a recent Freedom of Information request, the Chief Executive of E.ON, Dr Paul Golby, had met with Ed Miliband to make representations for harsh sentencing against the release of the six Greenpeace climate change campaigners involved in the occupation of the same energy company's *Kingsnorth* site in Kent in 2007, stating: 'EoN, and indeed other market participants in the generating sector, are hoping for a dissuasive sentencing to discourage similar such incidents in the future.'¹⁹ In light of the release of these recent papers, demonstrating the clear prioritising of business interests in the energy sector, both *Kingsnorth* and *West Burton* illustrate how the 'attractiveness of the UK's energy market for global investors'²⁰ takes precedence over the rights of the protestors and concern for climate change overall. According to activist Ben Steward: 'It reads like a threat – either clamp down on climate activism or we withdraw investment. The attitude of the energy giants to those who oppose them is over-bearing, arrogant and illiberal.'²¹

2. EDF and No Dash for Cash

In October 2012, protestors staged the longest occupation of a power station in the UK history at the West Burton site in Nottinghamshire.²² Sixteen of the

15 Committee on Climate Change (n 6).

16 This advice has proven politically less attractive than the lure of more profitable gas, with the Big 6 influencing energy policy by supporting its promotion. Bloomberg Energy (n 13).

17 No Dash for Gas (n 2).

18 James Ball, 'E.ON Lobbied for Stiff sentences against Kingsnorth activist, paper shows' *The Guardian* (19 February 2013) <<http://www.guardian.co.uk/environment/2013/feb/19/eon-lobbied-miliband-sentences-kingsnorth>> accessed 18 April 2013.

19 *ibid.*

20 *ibid.*

21 *ibid.*

22 Martin Wainwright, 'No Dash for Gas ends UK's longest power station occupation' *The Guardian* (5 November 2012) <<http://www.guardian.co.uk/environment/2012/nov/05/no-dash-for-gas-end-occupation>> accessed 26 April 2013.

No Dash for Gas group scaled the smokestacks before abseiling into the flues and living inside them, preventing the scheduled opening the following day of a new chimney, and stopping 20,000 tonnes of CO₂ over the course of their seven day occupation.²³ Arguing a calculated £5 million claim for damages against the members of No Dash for Gas, EDF threatened a civil lawsuit, which would have left each of the protestors facing bankruptcy. EDF argued: 'the consequences of this illegal activity put lives at risk, caused considerable disruption to the site during its construction, and considerable financial losses'. They also claimed the delayed completion of the new power station, undoubtedly setting the individual financial liability so high. Nevertheless, with 64,421 supporters signing an E-Petition,²⁴ and with signatories at the rate of 1,000 an hour on 27 February 2013,²⁵ EDF were forced to reconsider their action. A website 'EDF Off'²⁶ was set up to divert customers away from EDF, with support from the likes of Naomi Klein and Noam Chomsky fuelling the backlash against the energy giant and customers using social media to share their disgruntlement with the company. EDF dropped the claim on 13 March 2013, although insisted on a restrictive injunction preventing activists entering EDF power stations in future. The protesters have been given conditional discharges and community service orders for power station occupation as of 6 June in Nottingham Magistrate's Court.²⁷ The energy company defended the intended civil action arguing: 'EDF Energy supports the right to lawful protest and respects differing points of view. However, the consequences of this illegal activity put lives at risk, caused considerable disruption to the site during its construction, and considerable financial losses.'²⁸

3. Right to Protest and the Move to Private Law

The £5 million claim against No Dash for Gas was described as 'a disgraceful attempt to close down peaceful protest';²⁹ Greenpeace, Plane Stupid and UK

23 No Dash for Gas (n 2).

24 See <<http://www.change.org/en-GB/petitions/tell-edfenergy-to-drop-legal-action-against-no-dash-for-gas-activists>> accessed 9 May 2013.

25 George Monbiot, 'EDF's Vengeful £5m No Dash for Gas Lawsuit is Corporate and PR Suicide' *The Guardian* (28 February 2013) <<http://www.guardian.co.uk/environment/georgemonbiot/2013/feb/28/edf-climate-change>> accessed 18 April 2013.

26 See <http://www.edfoff.org/>.

27 David Doyle, 'EDF Sues Activists for £5m - an Attack on Peaceful Protest?' *Channel 4 News* (20 February 2013) <<http://www.channel4.com/news/edf-sues-activists-for-5m-an-attack-on-peaceful-protest>> accessed 18 April 2013. See also No Dash for Gas, 'Climate Change Activists Escape Jail Sentences for Power Station Shut Down' (6 June 2013) <<http://www.nodashforgas.org.uk/blog/climate-activists-escape-jail-sentences-for-power-station-shut-down>> accessed 28 June 2013.

28 James Ball, 'EDF Drops Lawsuit against Environmental Activists after Backlash' *The Guardian* (13 March 2013) <<http://www.guardian.co.uk/environment/2013/mar/13/edf-lawsuit-environmental-activists-backlash>> accessed 18 April 2013.

29 No Dash for Gas (n 2).

Uncut claimed it could change the face of protest in the UK,³⁰ with penalties into the millions of pounds for direct action protests bringing an end to such forms of civil disobedience.³¹

At the heart of this discussion is the impact upon the right to protest, a right that arguably has paved the way for true changes and challenges in society, for reforms, freedoms and alterations that without dissent and popular uprising, would not have had the capacity to happen. Following from an Arendtian conception of civil disobedience, to be civilly disobedient is to effect and affect law through extra-legal action: '...the law can indeed stabilise and legalise change once it has occurred, but the change itself is always the result of extra-legal action.'³² Civil disobedience has always been something intrinsically linked to a politically motivated stance targeted to alter or contribute towards the reform of a state and/or law. If there is a law or a demand led by the state that would cause a subject moral concern, then it is rightful and a duty to not accept such a law: 'If (an injustice) is of such a nature that it requires you to be the agent of injustice to another, then, I say, break the law. Let your body be a counter friction to stop the machine.'³³ This duty to question the constitution of law derives from a moral and legal call and is often manifested in the form of protest.

What a protest such as West Burton of course highlights is whether cases of civil disobedience on private property are different from those in public spaces. And yet in terms of climate change activism and the particular case of a West Burton protestor, there is an intrinsic right and expectation that is being defeated by state (in)action. In fact, the expectation is not one directed only at the state as it concerns the redefinition of rights in terms of our relationship with the market and private interests. Perhaps the predominance of what Mead has depicted as the 'coming up against private interests'³⁴ is something increasingly prevalent, so that there is less and less that is public and more and more which is private, and so the realm of public law is in retreat. It is not so much a question of whether the protests are legitimate or illegitimate on private property, more a question of what public space there is left after the private encroaches further and further onto traditional platforms for dissent. Mead has highlighted this in terms of

30 *ibid.*

31 Ball (n 28).

32 Hannah Arendt, *Crises of the Republic* (Harcourt 1970) 80.

33 Henri D Thoreau, *Or Life in the Woods: On the Duty of Civil Disobedience* (Norman Holmes Pearson 1948) 280.

34 Mead (n 3) 100.

the criminalisation,³⁵ conveyance and limitation of land, which speaks of registration, planning and squatting as much as it speaks of the St Paul's protest and occupation of City Corporation of London private property in the case of *City of London Corp v Samede*³⁶:

On the one hand society values (or purports to value) public engagement with the polity by guaranteeing rights such as the right to peaceful protest whilst on the other hand shoring up the rights (largely) of a few to buy, to own and to bequeath great tracts of land, so removing them as places in which public debate and the expression of views occurs.³⁷

The increased encroachment of privatisation logically leads to a synchronous advance of private law. Mead is not the first to comment on the increased remit of private law, indeed Illan Wall and Mairead Enright have headed a highly successful Economic and Social Research Council (ESRC) series on 'The Public Life of Private Law',³⁸ probing discussions on the use of private law to counter *inter alia* the student protests,³⁹ the 'Year of the Protestor', Parliament Square's 'Democracy Village'⁴⁰ and Occupy LSX.⁴¹

Within the European Court of Human Rights, the right of peaceful assembly⁴² has a close symbiotic link⁴³ with freedom of expression.⁴⁴ In domestic law, the control of peaceful protest has been confined to criminal or administrative interference.⁴⁵ In terms of the evident shift towards combating protest through civil sanctions as exemplified in the *West Burton* example, there is a due process and equality of arms contention, in that criminal sanctions have

35 The criminalisation of residential squatting and the Legal Aid, Sentencing and Punishment of Offenders Act 2012, s 144. Squatting in residential buildings has been made a criminal offence of trespass as of 1 September 2012 under s 144 Legal Aid Sentencing and Punishment of Offenders Act 2012: 'A person commits an offence if—

- (a) the person is in a residential building as a trespasser having entered it as a trespasser,
- (b) the person knows or ought to know that he or she is a trespasser, and
- (c) the person is living in the building or intends to live there for any period.'

36 *City of London Corp v Samede* [2012] EWHC 34 (QB); *City of London Corp v Samede* [2012] EWCA Civ 160 [2012] HRLR 14.

37 David Mead, *The New Law of Peaceful Protest: Rights and Regulation in the Human Rights Act Era* (Hart Publishing 2010) 121.

38 Mairead Enright and Illan Wall, 'The Public Life of Private Law: An ESRC Seminar Series' (PubLifePrivLaw 2012) <<http://publicprivatelaw.wordpress.com/about/>> accessed 26 April 2013.

39 *Appleby v UK* (2003) 37 EHRR 783.

40 *Hall v Mayor of London* [2010] EWCA Civ 817; *Westminster City Council v Haw* [2002] EWHC 2073 (QB).

41 *City of London Corp v Samede* [2012] EWHC 34 (QB); *City of London Corp v Samede* [2012] EWCA Civ 160; [2012] HRLR 14.

42 art 11 ECHR.

43 David Mead, 'The Right to Peaceful Protest under the European Convention on Human Rights - a Content Study of Strasbourg Case Law' [2007] EHRLR 345.

44 art 10 ECHR.

45 Mead (n 3).

in the past allowed for a sense of justice. This sense of justice emanates from the democratic mechanism of the jury holding individuals to account for their actions, whilst protestors feel justice is 'seen to be done' with their 'day in court'. Ewa Jasiewicz, one of the No Dash for Cash protestors stated:

We think the civil case could act as a greater deterrent than criminal convictions. If they are successful in suing us for £5m it will send out a message that if you take direct action you will lose your home. They are playing a bigger game of trying to deter direct action and protest.⁴⁶

The protestors were prevented from having their 'day in court' whereby

... our arguments about why we take direct action, about climate change and ending fuel poverty, aren't heard by a jury [...] It is much harder to convince a magistrate about the social and political reasons for your protest.⁴⁷

Commentators have likened the *West Burton* civil action to the *McLibel* case: 'EDF's civil claim is an attempt by a state-owned French company to undermine the British tradition of organised dissent. The company would do well to re-think what they're doing before they have a *McLibel* on their hands.'⁴⁸ In *McLibel*, the longest libel trial in English history, the applicants were two well-known peace activists, had been involved in the distribution the leaflet 'What's wrong with McDonalds?' The leaflet made allegations about the company and McDonalds issued a writ against the applicants claiming damages in libel. At trial both applicants were denied legal aid and represented themselves, although they did have assistance in the form of volunteer lawyers (this, bearing in mind, contrasting the well-equipped and paid member of the McDonalds' legal team). The applicants' defences were rejected at first instance, the Court of Appeal then reduced the damages to £36,000 against Steel and £40,000 against Morris.⁴⁹ At the European Court of Human Rights the applicants claimed the denial of legal aid at the trial deprived them of the right to a fair trial⁵⁰ and that the trial and the damages awarded were an unnecessary and disproportionate interference with their right to freedom of expression as guaranteed by Article 10 of the Convention.⁵¹ The Court held that there had been a violation of Article 6 through the inequality of arms, which as a result constituted a violation of the applicants' Article 10 right on account of lack of procedural fairness and equality before the law.

46 Doyle (n 27).

47 *ibid.*

48 *ibid.*

49 Steve Foster, 'Freedom of Expression, Libel Laws and the European Convention on Human Rights' (2005) 10 *Cov LJ* 1, 71–72.

50 art 6 ECHR.

51 Foster (n 49).

Mead speaks of other similar instances where there have been attempts by companies to sue for damages representing losses. Injunctions and writs for damages were reported in the case of a £12 million Greenpeace occupation of a Range Rover plant in Solihull in 2005, as well as the occupation of the runway at Stansted by Plane Stupid where Ryanair was prepared to sue each of those found guilty.⁵² In light of this, it is clear that there is considerable argument that a SLAPPS (Strategic Lawsuits against Public Participation) culture may have arrived across the Atlantic to the UK.⁵³

Despite *West Burton* and *McLibel* as palpable instances of commercial interests battling against the vulnerable pleas of protestors within the court room, there is a slightly different story emanating from elsewhere of environmental activism and the law. Given that gas is the preferred fossil fuel of the day in terms of government policy, the occupation of gas-fired power stations constitutes an obvious response from climate change campaigners. Previous high-profile occupations were linked to coal-fired power stations, such as the *Kingsnorth* protests, and indeed in this instance the activists' occupation of the site back in 2007 had an unfounded level of legal success. The jury at Maidstone Crown Court acquitted the defendants on a majority verdict, accepting their argument that the climate camp was legally justified as part of a campaign to prevent further damage and harm around the world as a result of man-made changes to the environment.⁵⁴ Given that these were acquittals for criminal damage, the jury has been seen as reacting with a progressive demeanour, quite a different approach was shown by the criminal justice system to that envisaged by the energy companies in their threat of civil lawsuits. That E.ON in this instance had sought tougher sentencing, and expressed this directly to the then cabinet member, suggests that business concerns accelerated to a shift to private law mechanisms. These presumably look to outflank any 'climate change defence' while delaying any sanctions by a jury on the legitimacy of the protest.

4. Law, Social Movements, and Environmentalism

According to Tromans and Thomann, protestors now are frequently sophisticated, and will be well aware of the law, often avoiding activities that would involve criminal liability.⁵⁵ In a jurisprudence of indignation,⁵⁶ social movements have been recognised for their potential to both use and re-order law.

52 Mead (n 3).

53 Monbiot (n 25).

54 John Vidal, 'Not Guilty: The Greenpeace Activists used Climate Change as a Legal Defence' *The Guardian* (11 September 2008) <<http://www.guardian.co.uk/environment/2008/sep/11/activists.kingsnorthclimatecamp>> accessed 18 April 2018.

55 Stephen Tromans and Colin Thomann, 'Environmental Protest and the Law' [2003] JPL 1367.

56 See Oscar Guardiola-Rivera, 'A Jurisprudence of Indignation' (2012) 23 *Law and Critique* 253.

It is interesting at this juncture to consider the use of law in social movements, protest movements (whether those of an environmental nature or otherwise) and how protestors may now respond in the face of changing tactics of legitimacy from those from whom they dissent. It is appropriate also to ask how the public may respond to the private.

Chris Hilson talks of legal opportunity, framing and the importance of space and place to resist localised actions with the assertion of globalised values through direct action such as that at the West Burton site of late.⁵⁷ Hilson delineates work done in court and outside of court with protest movements, specifically in terms of 'climate change litigation' (CCL), with proactive interactions involving the law through civil cases bringing forward judicial review actions or tort cases as well as those of a reactive nature with criminal proceedings brought by the Crown concerning protesters' direct action.⁵⁸ In recent times, there has been a significant reactive use of the courts by social movement activists who have been arrested while undertaking environmental protesting, on issues such as nuclear weapons, GMOs, and climate change.⁵⁹

It is useful at this moment to place law within a history, and to conceptualise the role of the generation of private law norms at the cost of protest rights. When dealing with the state one can always argue that the content of the law is centred around the constitution and the people. But if we are cooperating increasingly with the publicly unaccountable interests of private bodies, then what is the content of this use of law and where does its justification lie? In Mulqueen and Tartaryn's recent piece on law and the Occupy Movement, they indicate a phenomenology of law and resistance whereby there is the demarcation of the 'inside' and 'outside' of an institutional law, the climate change protestor obviously acting outside of law, and the law always being the legitimate inclusion.⁶⁰ Not only is it interesting, then, to see the manner in which social movements interact with and deploy law, but also the extent to which it now seems multinationals and energy giants are using private law innovation as a strategy to protect their business interests.

As a result of EDF threatening No Dash for Gas with a lawsuit, social media and petitioning responded and the numbers kept the protestors from having

57 Chris Hilson, 'Framing the Local and the Global in the Anti-Nuclear Movement: Law and the Politics of Place' (2009) 36 JLS 1, 94.

58 Chris Hilson, 'UK Climate Change Litigation: Between Hard and Soft Framing' in Stephen Farrall, Tawhida Ahmed and Duncan French (eds) *Criminological and Legal Consequences of Climate Change* (Hart Publishing 2012) 4.

59 Chris Hilson, 'The Courts and Social Movements: Two Literatures and Two Methodologies' (Mobilisations 18 February 2013) <<http://mobilizingideas.wordpress.com/2013/02/18/the-courts-and-social-movements-two-literatures-and-two-methodologies/>> accessed 18 April 2013.

60 Tara Mulqueen and Anastazyta Tartaryn, 'Don't Occupy this Movement: Thinking Law in Social Movements' (2012) 23 Law and Critique 123–24.

to engage in court processes. This speaks to a Foucauldian understanding of Popular Justice,⁶¹ whereby at all costs a court, or the replication of a court proceeding, should be avoided. Using a Foucauldian framework in light of the private regulation of climate change activism and the use of law in social movements, the use of an auditing body, one similar to the jury within court, was mobilised through social media. Social media in this sense saved the West Burton protestors through 60,000 plus individuals petitioning for EDF to drop the case. The use of popular justice in the form of social media is infective, and operative outside of the court, whilst representing a centuries old tradition of dissent through petitioning. Here the will of the community acts as jury.

However, using an extant cause recently promulgated by lawyers and activists from 'Voices of the Earth,'⁶² there is an intrinsic faith in the usefulness and legitimacy of law in protest through test cases of 'Community Bills of Rights' (CBoR). CBoR are collective expressions of social, cultural and environmental values of a given community, and are a form of grass-roots constitutionalism. In the small South Devon town of Buckfastleigh,⁶³ there is an ongoing fight against a planning appeal to dump toxic waste in their local quarry, and Polly Higgins⁶⁴ and Isabel Carlisle⁶⁵ from the aforementioned organisation are assisting in terms of strengthening the local community's voice through the initiation of a CBoR. A CBoR indicates the pre-eminence and belief in law as an emancipatory tool, whilst at the same time highlighting the process of constitutionalism that gives way to a public form of law. Despite *West Burton* exemplifying the shift towards private law as a tactic, the use of law by social movements and those concerned with the environment still remains ambiguous, in that in order to uphold a right to protest, there must be an intrinsic belief in those rights. Remembering Arendt, all changes in society and the law, happen as a result of that which is extra-legal,⁶⁶ a way of testing the statute from the outside. And yet in this instance it is not the statute that is being tested, but the corporate strategies of huge energy conglomerates.

No Dash for Gas has plans to return to West Burton in August 2013 with a climate camp-style occupation and the hope of generating dialogue and debate through an onsite conference similar to those utilised within Occupy camps.⁶⁷ The level to which private law will be wielded by EDF will become

61 See Michel Foucault, 'On Popular Justice: A Discussion with Maoists' in Colin Gordon (ed), *Knowledge/Power* (Pantheon 1980).

62 See <<http://www.schumachercollege.org.uk/courses/voicing-the-earth-ecocide-and-the-emergence-of-a-peoples-process>> accessed 9 May 2013.

63 See <<http://www.community.buckfastleigh.org/>> accessed 9 May 2013.

64 See <<http://pollyhiggins.com/>> accessed 9 May 2013 and <<http://eradicatingecocide.com/>> accessed 9 May 2013.

65 (n 62).

66 Hannah Arendt, *Crises of the Republic* (Harcourt 1970) 80.

67 Fiona Harvey, 'No Dash for gas Plans to return to West Burton Power Station for Protest' *The Guardian* (22 April 2013) <<http://www.guardian.co.uk/environment/2013/apr/22/no-dash-for-gas-west-burton-protest>> accessed 26 April 2013.

evident once again. Echoing Mead, once more,⁶⁸ in an era where the lines between public and private are evermore varicose, all the resort to private law really does is to exemplify the threat that the justice system can actually pose to the commercial interests of large energy companies. *West Burton*, *McLibel* and *Kingsnorth*, the three outstanding indications of private interests expressed through a recourse to private law, show the law as a double-edged sword. The courts are there as mediators, the ‘Third Space’,⁶⁹ offering transparency to activists in the hope of revealing the unaccountability of the commercial energy sector; whilst simultaneously private law being proffered as a means to legitimately quell and bypass the right to protest. Whilst at once courts can defend the rights of those who seek to take political action, in a clever manoeuvre of legal reasoning, energy companies can scupper all hope of protestors winning a case by wielding private law rights likely to be upheld by the judiciary. At the same time in a criminal law context, the courts’ role may be to acquit those who trespassed on their land in the name of environmental activism. With that considered, the ambiguity of law can still be utilised by activists asserting Articles 10 and 11 ECHR in anticipation of a repetition of the *Kingsnorth* climate change defence. This potential of the poorly resourced David to utilise the law in climate change activism against Goliath-like environmental irresponsibility suggests that supporters of the right to protest need not lose all hope just yet.

68 Mead (n 3).

69 Michel Foucault, ‘On Popular Justice: A Discussion with Maoists’ in Colin Gordon (ed), *Knowledge/Power* (Pantheon 1980) 4.