

Brexit and environmental protection in the UK: governance, accountability and law making

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Abstract

The European Union (EU) has been a central actor in the protection of the UK environment for over four decades. Much environmental law and policy is established at the EU rather than the UK level. As the UK prepares to leave the EU, we need to consider the ways in which we shall develop domestic environmental standards and policies. Equally importantly, we need to replace the dense and extensive governance and legal framework that ensures the accountability of government for its environmental commitments. This paper explores the gaps that will arise on Brexit, and outlines some possible responses.

Introduction

UK environmental law and policy has been profoundly shaped by European Union (EU) legislation and policy for four decades. Law and policy established at EU level play a central role in the protection of the UK's flora, fauna, air and water quality. As the UK prepares to leave the EU, we need to consider how ambitious environmental standards and policies shall be developed domestically. Equally importantly, we need to replace the dense and extensive governance and legal framework that enhances the legal and political accountability of government and government bodies for their environmental obligations.

Brexit is of course a moving target, and there is an enormous range of possible institutional arrangements for our future relationship with the EU. The Department for Environment, Food and Rural Affairs (Defra) is planning for a 'no deal' Brexit, in which the UK leaves the EU without having reached any agreement on terms of our future relationship,

and a negotiated outcome, as well as a transition period.¹ The future place for EU environmental standards, and EU governance frameworks, in the UK will depend on the details of exit – simplifying, the closer the trade relationship, the greater the role of EU environmental law and governance in the UK (although the UK will have not role in the negotiation of EU law). For current purposes, we do not need to reconcile different aspirations for the EU/UK relationship. Even the very ‘softest’ of Brexits would mean losing some environmental standards and environmental governance mechanisms, meaning that the issues raised here need to be addressed.

After a brief introduction to the European Union (Withdrawal) Bill, this paper shall discuss standard setting and law making after the UK leaves the EU. There will no doubt be noisy battles over detailed environmental rules, case by case. I shall focus here on the more easily overlooked principles of governance that should drive environmental standard setting across the board. I shall then turn to the ways in which EU governance frameworks enhance government accountability for its environmental commitments, outlining the ways in which leaving the European Union will expose gaps in domestic environmental governance and the accountability of government, before exploring possible characteristics of a future environmental governance regime. Although I shall not explore it here, we should also be conscious that Brexit is exposing the extreme sensitivity of the UK’s devolution settlement.² Any focus on environmental law must not be allowed to discount the constitutional significance of allocating environmental powers.

In both cases (ie, the setting of environmental norms and the scrutiny of government commitment to those norms), providing a space for accountability is crucial. Accountability is a pillar of any democratic system, but it is not straightforward. It is a rich and complicated idea, involving multiple, dynamic and always imperfect relationships.³ At its simplest, it involves a relationship in which one party can require another to provide an account of their conduct. That account is subject to scrutiny, against established standards. The possibility of sanctions, of political or legal ‘consequences’, is often, but not always, considered to be a

¹ See National Audit Office, *Implementing the UK’s Exit from the European Union: The Department for Environment, Food & Rural Affairs* (HC 647, Session 2017-19), 6.

² Devolution of powers from the UK level to Scotland, Wales and Northern Ireland is relatively recent and still dynamic, as well as distinctive for each administration. The environment is in principle a devolved matter, but action has always been subject to compliance with EU (environmental) law – the question now is whether authority exercised at EU level will now be exercised at UK or the devolved level. See Colin Reid, ‘Brexit: Who’s in Charge Here?’ *UKELA Newsletter* September 2017.

³ Eg Julia Black, ‘Constructing and Contesting Legitimacy and Accountability in Polycentric Regulatory Regimes’ (2008) 2 *Regulation & Governance* 137.

necessary element of accountability.⁴ The party being required to account, for current purposes, is the government, central and local, and the agencies and bodies that deliver and advise on government policy. A number of parties may seek to hold government to account, including parliaments, environmental NGOs, businesses, citizens, and any of a range of institutions that might be established specifically for the purposes of accountability. The heavy demands that accountability makes of the various parties doing the holding to account should not be overlooked. Providing support for those accountability relationships is an important role for law, and for the governance frameworks it creates.

Leaving the European Union

An enormous proportion of governmental, parliamentary and civil society time and energy is currently devoted to the task of taking the UK out of the European Union. The primary constitutional mechanism for this withdrawal is the European Union (Withdrawal) Bill. The Withdrawal Bill provides for the repeal of the European Communities Act 1972, the Act of Parliament that establishes the central place of EU law in the UK's domestic system. But EU law is so deeply embedded in UK law⁵ that the loss of EU law overnight by repeal of that Act would leave a gaping hole. So the Bill creates a new category of 'retained EU law', which allows for the body of existing EU law to survive in UK law on exit day – for amendment or repeal if desired thereafter. Retained law includes secondary legislation that was passed under the European Communities Act 1972, EU rules contained in EU Regulations, which are not transposed into domestic law, but have effect in domestic law, and Court of Justice decisions that have been handed down before exit day.

The Bill merits lengthier discussion, and continues to make its way through Parliament.⁶ For current purposes, it is worth observing that most of the UK's environmental law is contained in secondary legislation, based on EU law. These rules are not contained in delegated legislation because they contain mere 'technical' detail, but because the law and its amendment is subject to expert and democratic scrutiny during the law-making process at EU level.⁷ In the absence of amendment to the Withdrawal Bill, we might assume that this secondary legislation can, after Brexit, be amended by delegated legislation in the normal way. So there is worrying potential for all sorts of quiet changes to environmental standards,

⁴ Eg Mark Bovens, 'Analysing and Assessing Accountability: A Conceptual Framework' (2007) 13 *European Law Journal* 447.

⁵ The National Audit Office, above n 1, says that 'approximately 80% of Defra's areas of responsibility are currently framed by EU legislation', 5.

⁶ Its progress can be followed at <https://services.parliament.uk/bills/2017-19/europeanunionwithdrawal.html>. On the environmental elements in particular, see ClientEarth, *Report: The Withdrawal Bill: Destination and Journey* (2017).

⁷ See ClientEarth, *ibid*.

subject only to the weak parliamentary (and other) scrutiny allowed to statutory instruments,⁸ and judicial review of vires after the event.

Making Environmental Law after Brexit

Environmental standards and long term environmental policy are currently developed largely at EU level, using the shared expertise of the Member States and the EU institutions and bodies. Legislation through directives and regulations is subject to joint decision-making by the Member States in Council and the European Parliament, acting on a Commission proposal. The environmental principles are supposed to guide and shape the development of EU environmental law and policy, legitimising and incentivising high environmental standards.

Elaborate processes and spaces for the setting of detailed environmental standards at EU level have been developed.⁹ Numerous expert committees are in place, open consultation of some sort is generally expected, and sometimes a narrower but deeper consultation involves representatives of the public, private and NGO sectors negotiating detailed norms to fill out legislative standards. The Seville process (named for the location of the European Integrated Pollution Prevention and Control Bureau) for developing 'best available techniques' under the Industrial Emissions Directive,¹⁰ and the Common Implementation Strategy (CIS) under the Water Framework Directive,¹¹ are perhaps the best known of this sort of collaborative approach. In both Seville and the CIS, rather than (or in addition to) open consultation, a restricted number of participants, drawn from the public, private and NGO sector, engage in lengthy negotiation of detailed norms.

⁸ Unless enhanced scrutiny is introduced during the passage of the Withdrawal Bill through Parliament, see eg House of Lords Select Committee on the Constitution, *European Union (Withdrawal) Bill: Interim Report* 3rd report of Session 2017-19, HL Paper 19; Hansard Society, *Taking Back Control for Brexit and Beyond: Delegated Legislation, Parliamentary Scrutiny and the European Union (withdrawal) Bill* (2017).

⁹ Eg Maria Lee, *EU Environmental Law, Governance and Decision-Making* (Hart Publishing, 2014), including discussion of both the Industrial Emissions and Water Framework Directives; Joanne Scott and Jane Holder, 'Law and New Environmental Governance in the European Union' in Grainne de Búrca and Joanne Scott (eds), *Law and New Governance in the EU and the US* (Hart Publishing, 2006).

¹⁰ Directive 2010/75/EU of 24 December 2010 on industrial emissions (integrated pollution prevention and control) [2010] OJ L334/17, see http://eippcb.jrc.ec.europa.eu/about/more_information.html.

¹¹ Directive 2000/60/EC establishing a framework for Community action in the field of water policy [2000] OJ L 327/1, see http://ec.europa.eu/environment/water/water-framework/objectives/implementation_en.htm.

As outlined above, existing EU environmental law is to be 'retained' after Brexit by the Withdrawal Bill. Although there may be some gaps,¹² the basic framework will be in place. But environmental law cannot stand still, and detailed standards, as well as overarching policy, will need to be developed. The EU approach to environmental decision making is not perfect, but it does call on well-developed institutional arrangements. Careful thought must be given to domestic capacity, and to the governance mechanisms that will replace the responsiveness, and the democratic and expert contributions at EU level. A range of institutions is likely to be involved, most obviously Parliaments and assemblies, central and local government and non-departmental government bodies such as the Environment Agency and Natural Resources Wales. The precise role of each of these bodies will vary, depending on issues such as significance, urgency, subject area and level of detail. New institutional arrangements may be necessary. Without any claim to comprehensiveness, five governance principles might guide the future development of environmental law and policy.

First, a diverse range of interests and perspectives should be involved in developing environmental standards. Open consultation is an important part of that, and more detailed discussions including environmental and industrial groups, alongside public regulators, may also be appropriate. This should be coupled with a mandatory explanation, by the public body making the decision, of the balance of consultation between different interests, of who was consulted, what was said, and how observations were taken into account. Secondly, environmental standards should take account of the latest scientific evidence. Environmental protection depends heavily on scientific and technical knowledge, and regulation should reflect our constant learning. Thirdly, those developing new environmental standards and policies should have regard to international and EU standards. This is in addition to the UK's obligations to comply with international law, and beyond any (possibly extensive) obligations in a future trade deal to comply with evolving EU environmental rules.

Fourthly, ambition should be reinforced by setting standards in accordance with established environmental principles. The environmental principles set out in the Treaty on the Functioning of the European Union are the precautionary principle, the polluter pays principle, the preventive principle and the principle that pollution should be rectified at source, and they are supported by a number of objectives (eg that environmental policy should aim at a high level of protection), and considerations that must be taken into account. They perform many different roles, including guiding the development of policy and rules for

¹² ClientEarth, above n 6.

current purposes, but also guiding policy implementation, the interpretation of legislation, and the exercise of discretion, and providing in some cases a criterion for judicial review. The strength and meaning of the environmental principles are dynamic and dependent on jurisdiction and context, so not to be taken for granted. Experience in the EU has however taught us that the environmental principles are capable of underpinning judicial review, and in any event have the potential to shape and guide the development of the law. New UK environmental governance frameworks could simply take on the existing EU principles, or could pick and choose. New principles, such as a non-deterioration principle that requires no backtracking on existing environmental standards, is not found in the EU Treaties, might be added.

And finally, the public authority responsible for taking decisions should report against each of these governance principles of inclusion, expertise, internationalisation and principles, explaining how the governance principles have been incorporated into the law and policy making process. Setting criteria against which the making of environmental law and the setting of environmental standards can be assessed is a crucial accountability mechanism. Reporting against those criteria provides a measure both of transparency and reflection to the process, as discussed further below.

Accountability of government in the context of Brexit

The day to day, banal routines of environmental governance determine what hard-fought environmental standards mean in practice. EU law consistently imposes a framework of planning and reporting obligations on Member States. Member States must plan for implementation of their environmental obligations; they must report on their performance, explaining failures to comply, as well as the lawful use of derogations and exceptions to the primary compliance obligation; and they must explain how compliance will be maintained or achieved in the future. The plans and reports are public documents, and sent to the European Commission. These responsibilities pervade EU environmental law.

To take one example, the requirement to produce River Basin Management plans under the Water Framework Directive requires government (at the sub-national, or transnational, river basin level) to provide information including:

- a summary of the measures put in place to achieve ‘good water status’ and ‘no-deterioration’;
- an explanation of any failure to meet those objectives, or any risk of failure;

- an explanation of the extra monitoring and remedial obligations that apply when basic aims are not met;
- an explanation of the use of alternatives or exceptions to the norms of good water status or no-deterioration.¹³

Environmental obligations are often cast into the future, and in any event are rarely met once and for all. Environmental obligations are ongoing, and require sustained attention over many years. Requirements to make plans for compliance bring those obligations into the here and now, and make them real both to government officials, and to outsiders. The open publication of plans provides an important opportunity for external input, for improved outcomes. They also prevent accountability being cast into the future; it is not necessary to wait for the outcome obligation to be breached. Planning takes place alongside reporting on past compliance. This renders the breach of legislation, and even risk of breach, transparent; lawful derogations and exceptions must also be explicitly acknowledged and explained.

The seriousness with which government bodies take planning and reporting obligations may sometimes fall short. But providing an account, articulating a story about an institution and its behaviour, can be powerful.¹⁴ These obligations underpin our understanding of whether government is doing what it said it would do, a crucial element of our democratic system. In turn, they enhance the opportunities for mechanisms of political and legal accountability to be called into action. Government's account of its conduct can be scrutinised by a range of political actors, including the Westminster Parliament and the devolved Parliament and Assemblies, NGOs, businesses, the media, and with varying levels of formality. Political sanctions might be formal or informal, via parliament or the media, via environmental groups, and are ultimately in the hands of an electorate.

There may also be scrutiny by the courts. EU law makes a very significant contribution to legal accountability in the UK. The EU has long relied on the capacity of private parties and domestic courts to ensure the implementation of law. Even unimplemented EU environmental law can, subject to conditions, be relied on in national courts (direct effect); domestic law must in any event be interpreted consistently with EU law whenever possible;¹⁵ and remedies sufficient to provide adequate and effective legal

¹³ Directive 2000/60/EC establishing a framework for Community action in the field of water policy [2000] OJ L 327/1.

¹⁴ Black, above n 3.

¹⁵ Case C-106/89 *Marleasing* [1990] ECR I-4135.

protection must be provided in domestic systems.¹⁶ EU law played a crucial role in the famous *ClientEarth* air quality litigation. The case was complicated, but ultimately, in addition to granting a declaration that government was in breach of the limit values for pollutants in the EU Air Quality Directive,¹⁷ the Supreme Court also issued ‘a mandatory order requiring the Secretary of State to prepare new air quality plans’.¹⁸ In subsequent litigation, the High Court made it clear that whilst Government enjoyed discretion around the development of the plan, that discretion was constrained by the obligation in the legislation to bring areas into compliance ‘as soon as possible’.¹⁹ This might sound fairly straightforward. But importantly, the EU law obligation on national courts to take ‘any necessary measure’ to ensure compliance with EU law²⁰ was decisive in the imposition of meaningful remedies.

As well as this significant effect of EU law on judicial review in the UK, the European Commission is able to bring Member States before the European Court of Justice for violations of EU law, and the Court can impose significant fines in certain cases. There is little doubt that the availability of fines has influenced the UK government.²¹

Government has until recently insisted that existing purely domestic mechanisms of judicial review and parliamentary scrutiny will suffice to hold government to account after the UK has left the EU.²² Although the official position on this has changed, as discussed below, pending the firm institutionalisation of new governance mechanisms, it is worth reviewing the limitations of existing domestic governance mechanisms.

Judicial review has a number of limitations in the environmental sphere. First, it is dependent on the priorities of civil society, and civil society’s willingness and capacity to take action. Second, judicial review is costly and risky, and although access to justice should be guaranteed by the UNECE Aarhus Convention,²³ that does need to be fought for.²⁴ Third, the

¹⁶ Eg Case C-404/13 *R (on the application of ClientEarth) v Secretary of State for the Environment, Food and Rural Affairs* [2015] 1 CMLR 55.

¹⁷ Directive 2008/50 on ambient air quality and cleaner air for Europe [2008] OJ L 152/1.

¹⁸ *R (on the application of ClientEarth) v Secretary of State for the Environment, Food and Rural Affairs* [2015] UKSC 28.

¹⁹ *ClientEarth v Department for Environment, Food and Rural Affairs* [2016] EWHC 2740 (Admin).

²⁰ Eg above n 9.

²¹ House of Lords European Union Select Committee, *Brexit: Environment and Climate Change*, 12th Report of Session 2016–17 HL Paper 109, p 24.

²² Government Response to *ibid*, 16 April 2017; Department for Exiting the EU, *The Repeal Bill: Fact Sheet 8: Environmental Protections*, <https://www.gov.uk/government/publications/information-about-the-repeal-bill>, in ‘Frequently Asked Questions’.

²³ United Nations Economic Commission for Europe (UNECE) *Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters* (1998) 38 ILM 517 (1999).

English courts do not generally involve themselves in ‘merits’ review, meaning that rather than examining the correctness of a decision, they look solely to its *legality*. This generally means assessing procedural legality, although occasionally, a public body may be found to have acted beyond the limits of its legal powers, or an egregiously unreasonable decision may be overturned. When hearing a challenge to implementation brought by the Commission, the Court of Justice looks to the application of the law. Importantly, as mentioned above, under EU law, *domestic* courts must ensure compliance with the law, often in substance as well as procedure. Fourth, the English courts are sometimes highly deferential to government, allowing wide discretion on questions of economic or political sensitivity. In the first *ClientEarth* air quality decision, for example, the High Court was concerned by the ‘serious political and economic questions’ that finding against the government would raise.²⁵ EU law, by contrast, has consistently rejected any attempt to rely on practical, political or economic difficulties to excuse a breach (unless provided for in the legislation).²⁶ Fifth, remedies are discretionary in domestic judicial review. As, again, we might see from *ClientEarth*, domestic courts must provide adequate and effective remedies ensure compliance with EU law.

Nor is political accountability adequate. A political forum for accountability, with formal or informal sanctions, is of course crucial. Parliaments make various arrangements, such as Select Committees at Westminster, for holding the executive to account. Political accountability is ultimately found in democratic accountability to an electorate, but although vital, this may be a blunt tool in environmental matters. And it must be borne in mind that political accountability is distinct from legal oversight. Moreover, parliament and civil society would need additional resources and expertise to provide consistent scrutiny and debate.

The relatively new Secretary of State for the Environment, Food and Rural Affairs (Michael Gove MP), has acknowledged on a number of occasions the need to think about governance after the UK exits the European Union.²⁷ The Government’s 25 year plan for the environment, launched by the Prime Minister in January 2018, promises a consultation ‘on how government should be held to account for environmental outcomes by a new

²⁴ *R (on the application of Royal Society for the Protection of Birds) v Secretary of State for Justice* [2017] EWHC 2309 (Admin).

²⁵ *R (on the application of ClientEarth) v Secretary of State for the Environment, Food and Rural Affairs* [2011] EWHC 3623 (Admin).

²⁶ Eg Case C-56/90 *Commission v UK (bathing waters)* [1993] ECR I-4109.

²⁷ See eg the evidence of the Secretary of State to the Environmental Audit Committee, 1 November 2017.

independent, statutory body.²⁸ This is very positive, but the detail and the surrounding context are important, and I turn to that now.

Post-Brexit environmental governance must ensure that the relevant government bodies articulate publicly, in a defined time frame, how they intend to meet their legal obligations in relation to environmental protection. A follow up obligation to report on progress should include reporting on failure to comply, and on any *lawful* use of legal derogations, exceptions or 'alternative' standards, coupled with explanations of how compliance will be maintained or achieved. These plans and reports must be publicly available, so that anyone can scrutinise and respond. Publicity alone would cast a very heavy burden on civil society. NGOs and a few individuals would need to find the additional resources to scrutinise in detail every area of environmental law, as well as raising the necessary hue and cry (politically) and considering the costs and risks of legal action.

If no one properly scrutinises these reports, they become red tape, in a self-fulfilling prophesy. Post-Brexit environmental governance requires a clearly identified public body, with adequate independence, expertise and resources, to scrutinise government (central government, local government and government bodies and agencies). As mentioned above, Defra is to consult on the new public body, which could do this job and others. The detailed characteristics of this body are crucial. It must be adequately independent, expert and resourced. These three criteria are tightly connected. The tension between accountability (to government) and independence (from government) is a perennial challenge. The imperfect, but more or less adequate, independence and resourcing of the European Commission with respect to scrutiny and enforcement, is a result at least in part of the mutual interest of the 28 Member States in supervising each other, and so accordingly in empowering the Commission. A UK wide body, scrutinising environmental performance across the UK, and funded by the four executives, would begin (imperfectly) to replicate that diffusion of authority and resourcing. A common (again imperfect) way of enhancing the independence of ombuds-type bodies is to make them responsible to parliament rather than government. That is also a possibility here. It is clear that whatever creative approach is designed, the continued independence, expertise and resourcing of the new environmental body will itself demand constant external scrutiny.

The powers of the new environmental body are another tricky but important issue. Its primary responsibility is to scrutinise the executive. Our new environmental body should

²⁸ HM Government, *A Green Future: Our 25 Year Plan to Improve the Environment* (2018), 24.

certainly be able to report, publicly, and to parliaments and assemblies, in response to the plans and reports on compliance with environmental law that are received from the executive. Relevant ministers should be required to respond publicly to the reports of the new environmental body. The new body should also be able to undertake investigations on its own initiative, so that it can take a strategic approach to governance. This implies that the new body would be able to address issues raised in complaints from individuals and NGOs (who are currently able to alert the Commission to problems). Beyond reporting, we might expect this body to have the power to demand remedial action (eg the drawing up of fresh plans and reports, or the provision of remedial or compensatory measures). It should probably be empowered to bring ordinary judicial review actions against government when appropriate.

That brings us to the courts. There are no simple institutional responses to the challenges outlined above. Merits review, and deference to economic and political judgments, for example, are challenging issues, and views reasonably differ. Importantly, if properly empowered, the new environmental body provides a non-judicial route for airing substantive merits issues, and for examining government decisions. The importance of courts enforcing specific legal obligations remains. The Aarhus Convention requires access to justice in environmental matters to be 'fair, equitable, timely and not prohibitively expensive'.²⁹ The various steps that have been taken over the years to comply with this obligation should be maintained or reinstated, and further developed, notwithstanding the loss of judicially enforceable EU rights to access to justice in respect of EU environmental law.

Conclusions

Accountability is messy, and the outlines proposed here may be deceptively tidy. The suggestions in this paper are imperfect, some are contentious, and more far reaching approaches (including fines, and an environmental court with merits review powers and extensive remedial options) are available. Importantly, *any* response will require constant attention to ensure that the institutional arrangements put in place after Brexit continue to contribute to accountability. And whilst Michael Gove has said very promising things about environmental protection, and environmental law, after the UK exits the EU,³⁰ these words need to be converted into institutions and firm frameworks, which will survive changes of personnel and political interest. There is much to be fought for: very high substantive

²⁹ Above n 23, article 9.

³⁰ Above n 27-28.

environmental standards; but also a powerful environmental governance framework, ensuring the constant and continued accountability of government for the environmental obligations it has undertaken.