



University
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The UK and Environmental Law after Brexit

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Overview

- Background
- Continuity
 - Laws
 - Regulatory systems
- Filling the gaps
 - Principles
 - Scrutiny and enforcement
- Devolution
- Future policy



Chronology

- UK joined the European Communities in 1973
- Referendum on continuing membership in 1975
 - 67% in favour
- Referendum on withdrawing from EU in June 2016
 - 52% leave, 48% remain – majority for remain in Scotland and Northern Ireland
- Withdrawal Agreement agreed in October 2019
 - UK left EU at end of January 2020, but transition period until end of 2020
 - Special rules in Northern Ireland Protocol – many aspects of Customs Union and Single Market still apply
- EU-UK Trade and Cooperation Agreement in December 2020
 - Still to be ratified by European Parliament

UK Constitutional background

- Devolved parliaments and governments
 - Scotland, Wales, Northern Ireland (details differ in each case)
 - No changes for England
- Devolved and reserved matters
 - UK Government responsible for reserved matters, including all foreign relations
 - Most environmental matters are the responsibility of devolved administrations
 - UK Government deals with some matters for whole of UK, with others just for England
- Not a system of exclusive powers with constitutional guarantee
 - Rather a delegation of power by UK Parliament
- UK Parliament can change the boundaries of devolved power
- UK Parliament can still legislate on any matter, even within devolved competence
 - Seeks consent, but can still proceed without it





Progress

- European Union (Withdrawal) Act 2018
- European Union (Withdrawal Agreement) Act 2020
- European Union (Future Relationship) Act 2020

- Responses on environmental matters at different formal stages
- England
 - Environment Bill still going through UK Parliament - plans clear but not all details
- Northern Ireland
 - To be covered by same structure as England
- Scotland
 - Legislation for new structure now in place but not yet in force
 - UK Withdrawal from the European Union (Continuity) (Scotland) Act 2021
- Wales
 - Detailed plans to come after May 2021 elections



Continuity: start again or carry-over?

- Impossible to have a fresh start, eradicating/replacing all EU law
- Existing EU law at end of transition period continues in force
 - EU Regulations and Directives and UK laws to implement them
 - Judicial decisions
- Becomes “retained EU law”
- Law continues in effect, but subject to amendment
 - Lots of technical amendments made to cut out role of EU institutions
 - CJEU decisions remain binding
 - Can be overruled by Supreme Court (to be extended to Appeal Courts)



Continuity: regulatory systems

- UK decided not to continue within EU regulatory systems
- No longer part of:
 - EU Emissions Trading System
 - UK Emissions Trading System
 - But parties “shall give serious consideration to linking” systems (TCA)
 - EU REACH (Registration, Evaluation, Authorisation and Restriction of Chemicals)
 - Separate UK system (NI complications)
- European Environment Agency
 - UK agencies continue in some collaborative networks



Filling the gaps – Environmental Principles

- Without the EU Treaties, no legal recognition for environmental principles in the UK
- Gap filled by Environment Bill and Continuity Act
- Principles
 - Integration, preventive, precautionary, rectify at source, polluter pays
- Duty to “have due regard” to principles in making policy
 - Not in taking individual regulatory decisions etc – should flow from policy (?)
- England and NI
 - Duty on Ministers only; look at ministerial statement, not principles themselves
- Scotland
 - Duty on all public authorities; look at the principles (as developed in EU law)



Filling the gaps: oversight and enforcement

- EU provides external oversight of government performance
- Commission checking implementation
- Reporting obligations on targets
- Complaints to Commission
- CJEU's power to compel compliance
- Powerful informal pressure

- All lost on withdrawal from EU



New structures

■ **England and NI**

- Office for Environmental Protection
- Appointed by Ministers and subject to direction
- Review progress on environmental plans
- Advise government
- Decision notice to authority if non-compliance
- Refer case to court for review of legality
 - No sanctions

■ **Scotland**

- Environmental Standards Scotland
- Parliamentary approval of members
- No ministerial direction powers
- Review effective implementation of and compliance with environmental law
- Improvement reports requiring Ministers to prepare remedial plan
- Compliance notices
 - Court can impose sanctions



Devolution - background

- Devolution settlements designed when EU membership firmly in place
- No need to worry about different parts of the UK doing radically different things
 - Some scope to act separately, but had to keep within limits of EU law
- No need for proper mechanism to resolve differences
- Now potential for wide divergence
 - Clear policy differences
 - UK Government “taking back control”
 - Scottish Government keeping in step with EU
- Environmental law is heavily devolved
 - Likely area of difference and problems



Devolution - tensions

- Cooperation structures not working
 - Joint Ministerial Council
- Major tensions since UK Government is viewed as acting without proper respect for powers of devolved institutions
 - Initiatives emerging from London with no consultation
 - UK government not reflecting devolved concerns
 - No role for devolved administrations in international relations
 - Demonstrated in Brexit negotiations, where no information or consultation with devolved governments
 - Future trade deals likely to have environmental consequences, affecting devolved matters
- UK Government acts sometimes for whole UK, sometimes for just England
 - England has 80+% of UK economy



Devolution – solutions?

- Common Frameworks
 - All governments agree on common policy they will implement
 - Same result across whole UK but each administration still makes own laws
- United Kingdom Single Market Act 2020
 - Passed without consent from devolved Parliaments
 - Asserts market access and non-discrimination principles
 - Allows goods lawfully sold in any part of UK access to the market in all others
 - If deregulation in England, Scotland cannot insist on only goods meeting its own higher standards being available
 - Economic reality is that England dominates market so that in effect English decisions will dictate the position, even in devolved areas
- Unclear what will happen



Future Policy - strategies

- The new legislation commits governments to environmental plans/strategies
- Environment Bill (UK) requires long-term plan and includes duty to establish legal targets
 - Monitored by Office for Environmental Protection
- Continuity Act (Scotland) requires environmental policy strategy
 - No legal targets or formal review process
 - Also requires review of environmental governance, including whether there should be an environmental court



Future Policy – bigger picture

- Scottish Government committed to “dynamic alignment”
 - Keep in step with EU law
 - Allow future independent Scotland to rejoin EU
- NI bound to keep in step with many EU rules under the Protocol
- UK Government policy unclear
 - Rhetoric of strong environmental protection
 - But determined not simply to follow EU
 - Strong deregulatory pressure in many areas
 - May be willing to depart from EU position to secure other trade deals



Erosion?

- Even if no major changes, environmental protections may be eroded
- Legislation not kept up to date or not rigorously enforced
- Take full advantage of exceptions and discretion
 - EIA and Nature Directives: take decisions that are generous to developers in deciding whether any significant effect on the environment
- Limited scope for courts to intervene
 - Consider only the legality of decisions, on a formal basis
 - Not usually able to review on proportionality
 - Not as willing as CJEU to intervene to ensure broad purpose of legislation being satisfied



Impact of EU-UK Trade and Cooperation Agreement

- Parties entitled to set own levels of environmental protection
- Obligation not to reduce levels of protection “in a manner affecting trade or investment between the Parties”
 - Based on standards at end of transition period
- Unclear how much divergence is acceptable
 - Wholly political question whether willing to trigger any formal response
- Also “rebalancing” provisions
 - “If material impacts on trade or investment between the Parties are arising as a result of significant divergences between the Parties”
 - Take action to address the situation – rapid timescales by standards of trade agreements



Conclusion

- Environmental governance has had a surprisingly high profile in planning post-Brexit future
 - Very welcome after early talk was all about deregulation
- Legal steps being taken to fill gaps on environmental principles and new oversight mechanisms
 - Arguments over adequacy and still to see final position in England
- Brexit process has exposed weaknesses in the devolution settlements
 - Highlighted by major policy differences between UK and Scottish governments
- Future far from clear
 - Actual direction of UK environmental policy
 - Impact of Trade and Cooperation Agreement
 - Impact of desire for other trade deals

Same conclusion as in most talks on Brexit topics over the past five years



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