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Brexit and the Devolution Dynamics

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A lot has happened since the UK joined the Common Market at the start of 1973. “Taking back control” as the UK leaves the EU does not mean going back to how things were over 40 years ago, but adapting to a very different situation. One of the big differences is the impact of devolution. Of course, this was an established part of the background in 1973, with the Northern Ireland Parliament and Government having been in operation for 50 years but recently suspended in March 1972. Since then, for almost 20 years now, devolution has been very much an active part of the governance of the UK, with significant, but significantly different, powers devolved to Edinburgh, Cardiff and Belfast. What might this mean for environmental law post Brexit?

Many areas of EU competence are ones which are reserved (to use the Scottish terminology) to Westminster. After all, the issues that are regulated to create the Single Market within the EU are also regulated to provide a single market within the UK, e.g. free movement, aspects of employment law, product standards. But in some areas power is devolved and probably the most important of these are agriculture, fisheries and the environment.

At present this means that each of the devolved administrations is responsible for policy and law in these areas, but subject to the need to fit within the framework established by EU law. As a result there are differences between each nation - e.g. the details of agricultural payments, and the structure and scope of the environmental protection agencies - but the scope for divergence is limited. Each nation can go its own way, but only to a certain extent and anything that the devolved authorities try to do in breach of EU law is invalid.

On withdrawal from the EU this will no longer be the case. For various reasons they may not want to, but each devolved nation will be legally free to adopt its own radically different law on devolved issues, including environmental matters. Scotland, Northern Ireland or Wales could introduce water quality standards that are far higher or lower than those that currently apply or confer legal protection on a much longer or shorter list of wild animals.

¹ This paper is based on a talk given at the Brexit and Environmental Law seminar held as part of the Brexit Seminar series at the Centre of European Law at King's College London in January 2017.

A further feature of the devolution settlements is that the power to legislate on EU matters is shared between the UK and devolved authorities, even in areas of devolved responsibility. This means that when it comes to implementing EU law, the boundary between devolved and reserved matters can be ignored and it is easy for legislation to be made in London to apply on a UK or GB basis. On Brexit, this will not be the case and there will have to be rigid recognition of the boundary between what can be done by the UK authorities and what is the preserve of the devolved ones. This will require not only careful study of the precise terms of the different devolution settlements in each case, but also difficult decisions on how certain measures are to be categorised since the division between environmental regulation (devolved) and say technical standards (reserved) may not be clear and neat (as seen in the different context of the litigation² over controls on the sale of cigarettes). Legislation from London extending beyond just England will still be possible, but will require compliance with the formal arrangements for consultation and approval with the other nations affected (legislative consent motions, etc.).

Brexit will remove the constraint that EU law imposes on the development of environmental law and policy within the UK, but will serve to highlight the extent to which international law imposes limits on freedom to manoeuvre in this area. In recent decades the extent of our international law obligations has been masked by the fact that the visible source of many rules has been the EU law implementing a wider treaty to which the EU and its Member States are parties, rather than the treaty provisions themselves. Of course, compared to EU law international obligations tend to be expressed in less detailed and strict language, sometimes closer to aspirations than precise legal duties. International regimes usually lack the strong (if slow) measures provided by the EU structures to enforce compliance by states. And, whilst the courts in the UK are bound to ensure that individuals can enjoy the rights conferred by EU law, the same does not apply for international law. Nevertheless, this extra layer of legal obligation can be significant in determining environmental policy.

A key feature here is that international affairs remain the exclusive preserve of the UK government. The devolved administrations have no legal right to make international agreements, or even to be involved in their negotiation. This may be especially significant as new international trade agreements are made, with the EU and others, which may include terms that (intentionally or not) limit the extent to which domestic regulation is permitted to interfere with access to markets, e.g. in

² *Imperial Tobacco Ltd v Lord Advocate* [2012] UKSC 61.

relation to genetically modified products where views differ strongly between London on the one hand and Cardiff and Edinburgh.

In terms of what may happen in the future, the different nations are obviously starting at (broadly) the same point, but they do have distinct views on environmental matters. The strong de-regulatory tone in England is not shared elsewhere; Wales has placed the sustainable development principle at the heart of government; Scotland has particular focus on renewable energy; and in Northern Ireland the environmental initiative of the Renewable Heat Initiative has forced an election rather than a reduction in carbon emissions. The freedom to escape aspects of EU regulation may be seized in different ways by different nations, e.g. adapting the definition of “waste” to ensure that it does not provide obstacles to the Zero Waste policy in Scotland, and the responses to new problems will vary. Even without conscious policy differences, though, the law in each country will gradually drift apart as a consequence of different administrative structures etc. There is thus a risk that the environmental benefits of integration and co-ordination achieved thorough membership of the EU might unravel.

Nevertheless, there will be strong reasons for continuing some co-ordination and cooperation. The cross-border river basins are one obvious example (and already the subject of substantial legislative provision between Scotland and England), but commercial arguments, based on the efficiency of standardisation and on securing access to markets, are likely to be more powerful. But mechanisms for this must be established, at political, administrative and technical levels. Within the UK, does the Joint Nature Conservation Committee provide a model? How far will the UK and devolved agencies continue to co-operate with their EU counterparts? A major issue here is likely to be capacity. Each nation will formally have full responsibility for all environmental matters, but there is not the capacity in either scientific expertise or civil service resources actually to develop wholly independent policy and law across the whole spectrum of environmental matters. Responses to this vary from doing nothing in some areas, and allowing the law to stagnate and wither, to slavishly following EU developments simply because they provide one way of dealing with otherwise unmanageable issues.

There may also be consequences for the devolution settlements themselves. The Scottish Government’s paper *Scotland’s Place in Europe*³ sets out a clear objective of remaining within the Single Market and Customs Union and proposes a differentiated position for Scotland to enable it to maintain close ties with the EU

³ Scottish Government, *Scotland’s Place in Europe* (December 2016).

(including meeting the rules for the Single Market) even if the rest of the UK decides not to. In terms of Scotland's legal powers, it calls not only for all powers within devolved areas to come to the Scottish authorities, but also for enhanced devolution so that some reserved areas currently dominated by EU law, such as health and safety, can be handled in Scotland and for mechanisms to secure international agreements with other countries in areas of devolved competence, whether directly or through the UK Government. Moreover, London's handling of the devolved administrations' interests in negotiating Brexit and any subsequent trade and other treaties, and in untangling the law across the UK from its EU inheritance, will undoubtedly place pressure on the relationships between the different layers of government.

At the time of writing there seems to be an increasing divergence between the views of the Scottish and UK governments and the constitutional issues may become more significant, with talk of a second independence referendum. For the environment, though, it is likely to be the less dramatic issues that make the immediate difference in practice. How and through which authorities are procedures that currently involve EU bodies going to be operated post Brexit? How quickly will the law in each nation get out of step as the authorities respond separately to external developments and the continuing drive for "better regulation"? Will robust mechanisms to ensure continuing cooperation be established, and if so, will the focus be on environmental or commercial priorities? One wonders where the environment sits on the "to do" list of the Prime Minister and Department for Exiting the EU.