

Written submission from Professor Gavin Little

The possible impact of Brexit on Scotland's environment and related challenges and opportunities: core legal issues

Introduction

Although there have been a number of developments since the UK vote to leave the EU in June 2016, there is still a lack of clarity on key issues. As a result, it is not possible to be definitive about the impact of Brexit on Scotland's environment and related challenges and opportunities. That said – and on the basis that Scotland does not leave the UK - three broad issues can be identified.

Implications of the Brexit process for environmental law in Scotland

The outcome of negotiations over the terms of the UK's departure from the EU and its future trade relationships may in time affect the substance of the legal rules governing Scotland's environment, a significant proportion of which are derived from EU law. But the extent to which this will happen depends on how Brexit and the subsequent trade negotiations with the EU and other trading partners unfold. The process is likely to extend over a period of years and cannot be predicted with certainty.

What, however, are the main issues? Post-Brexit, the UK could remain within the European single market as part of the European Economic Area (“EEA”), in which case large parts of EU environmental law would continue to apply in Scotland and throughout the UK. Another alternative is for the UK to participate in the European Free Trade Area (“EFTA”), either as a member of the EEA or not: the former scenario would mean that the UK as a whole would again be subject to significant parts of EU environmental law, while the latter would mean that some EU environmental laws would apply (although there could be a greater degree of scope for independent domestic legislation in some areas). The Scottish Government has argued that, if the rest of the UK leaves the European single market, Scotland could remain in it as part of the EEA while also remaining within the UK (Scottish Government (2016), chapter 3): this would mean that Scotland would for the most part still be subject to EU environmental law. If the UK, including Scotland, leaves the EU, does not participate in the EEA or EFTA and relies on World Trade Organisation rules – a so-called “hard” Brexit - EU environmental law would not apply in Scotland or the rest of the UK, unless it was part of a subsequent trade deal with the EU. It is also possible that this scenario may result in a second referendum on Scottish independence, the outcome of which cannot be predicted.

The UK Government's position is that it is seeking a bespoke deal with the EU, the terms of which are as yet unclear, but it does appear determined to ensure that a post-Brexit UK (including Scotland) will not be within the jurisdiction of the Court of Justice of the European Union (“the CJEU”) and that its laws “will be made in Westminster, Edinburgh, Cardiff and Belfast” (‘The government's negotiating objectives for exiting the EU: PM speech’). Currently, therefore, the UK's direction of travel appears to be towards a harder Brexit, although this is subject to political

developments and could change. It is also possible that there may be a transitional agreement with the EU which could come into operation at the end of the two year negotiating period set out in the EU Treaties for concluding the terms of a Member State's departure. A transitional agreement could then last for years, and it is possible that the UK could remain subject to some or all EU law and the jurisdiction of the CJEU during this period.

The UK Government has stated that the passage by the UK Parliament of its "Great Repeal Bill" will mean that The European Communities Act 1972 will be repealed and that EU law which is in force in the UK at the time of Brexit (including EU environmental law) will become domestic UK law wherever practicable, thereby providing a degree of legal certainty and continuity in the short term (House of Commons Briefing Paper 7793).

Assuming that the Bill proceeds, achieving this objective will be a vast, complex and challenging task. It requires large amounts of statute law to be assessed. Some EU law (e.g. relating to referrals to the CJEU) cannot be transposed for obvious reasons and in the event of a harder Brexit it may be intended that some should not be transposed to achieve domestic policy goals. The Bill may seek to make changes on its face and/or by delegating powers to Ministers to act before and after Brexit. In the environmental law context, much of which is devolved, this may have significant consequences for Scotland. If the transposition of EU law is done by UK primary legislation, then this would require the legislative consent of the Scottish Parliament, or for the UK Parliament to legislate for devolved matters without consent from Holyrood. The Secretary of State for Scotland has indicated that he anticipates that legislative consent will be sought. If transposition is delegated to UK Ministers, then this too would raise the issue of Holyrood's consent (notwithstanding that within the context of the Sewel convention consent is only necessary for primary legislation). Alternatively, within devolved environmental areas, the Scottish Parliament could be empowered to transpose EU law and Scottish Ministers enabled to exercise delegated powers. All of the options are likely to prove complex legally and controversial politically (House of Commons Briefing Paper 7793).

But if transposition is done successfully and Scotland and the UK then move to a hard Brexit, what are the likely outcomes for the content of environmental law in Scotland?

The Scottish Universities Legal Network on Europe ('SULNE') has produced a paper scoping the key issues (SULNE, 'The implications of Brexit for environmental law in Scotland', 2017). Although there may be some exceptions, it seems likely that most significant changes to matters of legal substance would take place over the medium to long term. Environmental law generally would not be perceived as a priority and in areas such as climate change it is unlikely that there would be many immediate, radical changes to the law as a result of Brexit. One theme in the SULNE paper is, however, that if Scotland and the UK are no longer subject to the long-stop of EU provision for the enforcement of environmental law, the functional effectiveness of the domestic regime may reduce over time: this suggests that review of alternative post-Brexit arrangements for enforcement may be required. In general terms, it can

also be argued that Brexit has the potential to result in both the substance of domestic environmental law falling behind developments in the EU and, alternatively, the facilitation of the development of a more stringent domestic legal system. Ultimately, whether or not a post-Brexit repatriation of political and legislative control over environmental law is perceived as presenting challenges or opportunities is a matter of political perspective and choice. For example, if a post-Brexit Scotland was to decide to adopt a less stringent legal regime for waste regulation than the EU some would no doubt view it as a retrograde step, while others would see it as an economic opportunity.

Implications of Brexit for environmental governance in Scotland

Since significant areas of Scottish environmental law are derived from EU law, the UK's departure from the EU may, depending again on the nature of the legal relationship with the EU post-Brexit, have significant implications for the constitutional context within which the Scottish Parliament and Government exercise their devolved law-making and executive powers over the environment. This suggests that the issue should be charted thoroughly beforehand in order to ensure that post-Brexit environmental governance is as effective as possible.

The SULNE paper touches on the key issues. If there is a hard Brexit and Scotland and the UK cease to be subject to EU environmental law, arrangements will have to be made to repatriate the policy-making, legislative and executive powers previously held by EU institutions. How this might be done may be controversial, given the ongoing Scottish constitutional debate. In this context, taking a view on whether the structure which emerges represents a challenge or an opportunity would again be a matter of political perspective and choice.

There are a number of potential scenarios which could emerge. For example, it could be agreed in the context of a fundamental review of the devolution settlement that the Scottish Government and Parliament should exercise the environmental powers of EU institutions in devolved and some reserved areas. The Scottish Government has argued that repatriated powers which sit within the Scottish Parliament's competence should remain with it and that the "powers of the Scottish Parliament should also be increased so that it takes responsibility for "repatriated" competencies in reserved areas" to protect key rights (Scottish Government, 2016). As the SULNE paper notes, a system could also be developed whereby Scotland and possibly the other parts of the UK could receive further powers, similar to those possessed by the sub-state Governments of the Faroe Islands and Greenland, to negotiate and conclude international agreements with foreign states and international organisations in areas that they have sole responsibility for.

Alternatively, the UK Government and Parliament could assume and retain the powers of the EU institutions: presumably, this would affect a range of repatriated areas, rather than environmental policy and law alone. It might mean that instead of EU-wide regulations having direct applicability in Scotland, there would be equivalent UK-wide legislation passed by the UK Parliament, and instead of transposing EU directives into law for Scotland, the Scottish Parliament would transpose equivalent

legislation of the UK Parliament which delegates responsibility for implementation to the devolved administrations.

In this context, the UK Government and Parliament could seek to take full control of strategic policy and law-making for the repatriated areas throughout the UK: the Scottish Parliament and Government would then exercise their devolved powers under the Scotland Act 1998.

A more holistic structure and process could also develop, which would enable the UK and devolved authorities to work together to facilitate the creation of UK-wide rules and standards for the repatriated areas when appropriate (e.g. to maintain the UK single market for goods, services and people), but at the same time provide the freedom for the devolved administrations (and England) to develop policies and legislation best suited to their needs and the preferences of their electorates. In this context, a reformed Joint Ministerial Committee acting under a statutory remit could perhaps perform a function for the UK as a whole that is similar in some respects to that of the Council of the European Union at EU level.

Implications of Brexit for environmental policy and law-making

There can be no doubt that the creation of the vast corpus of EU environmental policy and law over the past thirty years would have been beyond any individual Member State. In the event of a hard Brexit, Scotland and the UK will no longer be part of the policy and law making engine of the EU institutions and have access to its resources and expertise. This has obvious potential to affect the development and quality of both Scottish and UK environmental policy and law in the medium to long term. There is the possibility that being decoupled from EU institutions will mean a significant reduction in policy development and law-making capacity. It is also likely that the Scottish and UK Parliaments and Governments will be subject to much more intensive lobbying by environmental stakeholders than is the case at present.

Taken together, this may result over time in Scottish and UK environmental policy and law becoming more piecemeal, incremental, minimalist and reactive. In this context, it is worth reflecting on the slow development of early domestic environmental/public health law. For example, the Public Health (Scotland) Act 1897 (itself largely a consolidation of mid-nineteenth century statutes) and the basic Victorian regulatory structure based on local authorities and national inspectorates remained in place until the mid 1990s. While much modern Scottish environmental law, based as it is on EU provision, deals with domestic aspects of complex “new age” transnational issues such as climate change and low-carbon transition, it may be that Brexit could result in a reversion to this earlier, more conservative (and arguably less effective) policy/legal dynamic.

In the event of a hard Brexit, the issue of how Scottish and UK environmental policy and law-making capacity can be resourced and developed will therefore need to be reviewed.

Key References:

House of Commons Briefing Paper 7793, 21 November 2016, 'Legislating for Brexit: the Great Repeal Bill', chapter 6

<http://researchbriefings.parliament.uk/ResearchBriefing/Summary/CBP-7793>

Scottish Government, 'Scotland's Place in Europe' (2016)

<http://www.gov.scot/Resource/0051/00512073.pdf>

Scottish Universities Legal Network on Europe, 'The implications of Brexit for environmental law in Scotland' (eds A Cardesa-Salzmann and A Savaresi) (2017)

<https://sulne.ac.uk/position-papers/>

'The government's negotiating objectives for exiting the EU: PM speech', 17 January 2017

<https://www.gov.uk/government/speeches/the-governments-negotiating-objectives-for-exiting-the-eu-pm-speech>

Professor Gavin Little, University of Stirling

27 February 2017