Environment, Climate Change and Land Reform Committee

EU Environmental and Animal Welfare Principles

Written submission from Dr James Harrison

Executive Summary:

- The principles of prevention, precaution, remedying environmental harm at source, and polluter pays should be incorporated into Scots law through a statutory duty on decision-makers to take into account these principles when exercising relevant functions;

- Careful thought needs to be given to the formulation of the principles to be incorporated and whether a basic definition should be given in legislation, whether a cross-reference should be made to relevant international instruments, or whether it should be left to decision-makers and courts to interpret the principles over time;

- Other principles should also be considered for incorporation, including sustainable use and the ecosystems approach.

Submission:

The focus of this submission is on the environmental principles and it will not address animal sentience. The submission draws upon the author’s own academic research, as well as other relevant work of leading scholars in this area, as referenced.

Environmental principles were included in the EU treaties for the first time in the late 1980s and the scope of the applicable principles has expanded over time to include the four main principles that are reflected today in Article 191(2) of the Treaty on the Functioning of the European Union (TFEU). The purpose of this provision is to ensure that environmental considerations play a key role in shaping the development of EU law and policy. However, these developments in EU law are not isolated and they mirror to some extent the emergence of a set of accepted environmental principles at the international level through instruments such as the 1992 Rio Declaration on Environment and Development, which reflects international consensus on principles relating to preventative action, precaution, and polluter pays. These principles have been repeatedly reaffirmed and they have been further crystallised through inclusion in a large number of other sectoral instruments and treaties. In particular, the principles have received wide application in the context of

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1 See e.g. Article 25 of the 1986 Single European Act, inserting Article 130r into the EEC Treaty. This provision was subsequently modified by the 1992 Treaty of Maastricht and the 1999 Treaty of Amsterdam.

2 Rio Declaration, Principle 4: ‘In order to achieve sustainable development, environmental protection shall constitute an integral part of the development process and cannot be considered in isolation from it.’

3 Rio Declaration, Principle 15: ‘In order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.’

4 Rio Declaration, Principle 16: ‘National authorities shall endeavour to promote the internalisation of environmental costs and the use of economic instruments, taking into account the approach that the polluter should, in principle, bear the cost of pollution, with due regard to the public interest and without distorting international trade and investment.’

5 See e.g. the Future We Want Outcome Document, 2012, para. 15.
marine environmental protection\textsuperscript{6}, reflected in treaties (applicable to the United Kingdom) adopted at the global\textsuperscript{7} and regional level.\textsuperscript{8} Some commentators have asserted that these principles collectively form a means of understanding and achieving the goal of sustainable development\textsuperscript{9}, a concept which is itself found in many Acts of the Scottish Parliament.\textsuperscript{10}

Environmental principles are important because of the systematic effect that they have on the development of law and policy. The nature of the principles means that their impact varies depending on the context in which they are employed.\textsuperscript{11} Principles are different to binding legal rules, in the sense that they do not dictate a particular outcome, but rather indicate a general objective, which may be achieved in a number of different ways. Indeed, environmental principles often need to balanced against other principles and their precise impact can therefore only be assessed on a case-by-case basis. Nevertheless, environmental principles play a vital role in environmental regulation because they ensure that certain considerations are taken into account in the process of developing policy, authorising particular activities, or interpreting relevant rules or standards. For this reason, it is important to consider how environmental principles will be reflected in Scots law following Brexit.

Strictly speaking, it would not be necessary to enshrine these principles in legislation in order for them to continue to have an influence; after all, the influence of principles largely stems from their general acceptance, rather than formal recognition in legislation. Indeed, it has been argued that international legal principles may already be considered part of domestic law and they may be thus relied upon to the extent that they do not conflict with primary legislation.\textsuperscript{12} Furthermore, they are already reflected in a wide range of policy documents.\textsuperscript{13} Nevertheless, there are advantages of clarity and certainty, which mitigate in favour of enshrining principles in legislation. Such a step would increase the prominence of the environmental principles, as well as ensuring that there was a single legal source of applicable principles.

Consideration would have to be given to the manner in which principles were incorporated. One approach would be through a statutory duty (perhaps by way of amendment to the Nature Conservation (Scotland) Act 2004) for decision-makers to take into account the principles when making decisions that have the potential to affect the natural environment. This would be a broad duty, applicable to a wide range of decision-makers, from the Scottish Ministers to local authorities, which

\textsuperscript{7} E.g. 1995 United Nations Fish Stocks Agreement; 1996 London Dumping Protocol.
\textsuperscript{8} E.g. 1992 (OSPAR) Convention for the Protection of the Marine Environment of the North-East Atlantic; 1980 Convention on Future Multilateral Cooperation in North-East Atlantic Fisheries.
\textsuperscript{10} E.g. Climate Change (Scotland) Act 2009, ss. 57, 92; Marine (Scotland) Act 2010, s. 3; Land Reform (Scotland) Act 2016, ss. 1, 44, 49, 54, 56.
\textsuperscript{11} See e.g. discussion of the various ways that key principles have been operationalised in the context of marine environmental protection; Harrison, supra note 6, 303-304.
\textsuperscript{12} See UKELA, Brexit and Environmental Law: The UK and International Environmental Law after Brexit (September 2017) para 65(f).
\textsuperscript{13} See e.g. One Future - Different Path: The UK’s Shared Framework for Sustainable Development (2005); Our Seas: A Shared Resource, High-Legal Marine Objectives (2009).
would ensure that environmental principles were a factor in decision-making, without necessarily dictating the outcome of the process. However, it would require a decision-maker to be able to explain what role the principles played in the decision-making process. One sees this legislative technique used to incorporate a similar range of environmental principles in other jurisdictions. For example, sections 5 and 6 of the 1991 Protection of the Environment Administration Act of New South Wales establishes an Environmental Protection Authority to protect, restore and enhance the quality of the environment in New South Wales. In carrying out its functions, the Authority is mandated to have regard to the need to maintain ecologically sustainable development, including through the implementation of the precautionary principle, inter-generational equity, the conservation of biological diversity, cost-effectiveness and the polluter pays principle. This model of incorporation is also already used in existing Scottish legislation in order to require decision-makers to have regard to certain policies or objectives in their decision-making. For example, section 1(1) of the Nature Conservation (Scotland) Act 2004 provides that 'it is the duty of every public body and office-holder, in exercising any functions, to further the conservation of biodiversity so far as is consistent with the proper exercise of those functions' and section 1(2) further provides that in doing so, they must 'have regard to' the Convention on Biological Diversity. Were principles incorporated in a similar manner, failure to take them into account could potentially be challenged by way of judicial review. The implementation of principles could also be overseen in a more systematic manner by some other body, established in order to ensure compliance with environmental law.14

One question that arises in the context of translating principles into national legislation is the formulation of the principles that should be adopted. Whilst there is an overlap between the substance of the principles in international law and EU law, it cannot be assumed that the content of the EU environmental principles is identical to the principles at the international level.15 The principles listed in Article 191(2) of the TFEU have evolved in the particular context of the European institutions and they must therefore be understood by reference to relevant policy documents16 and case law17 of the EU. Yet, there may be other understandings of environmental principles, which reflect influences beyond the EU. As an alternative to referring to the principles as understood in EU law, direct reference could be made to the version of the principles found in the Rio Declaration, which is the most widely accepted basis for environmental principles. Alternatively, more specific definitions of the principles could be adopted as part of the transposition process, drawing upon other international treaties or instruments. For example, the OSPAR Convention offers definitions of the precautionary principle18 and the polluter pays principle19, which, although focused on the protection of the marine environment, could be adapted to be more broadly applicable. The more specificity that can be given to the principles that are being incorporated, the greater guidance (and less discretion) is offered to decision-makers who must follow them.

15 See e.g. E Scotford, Environmental Principles and the Evolution of Environmental Law (Hart 2017) 95.
18 OSPAR Convention, Article 2(2)(a).
19 OSPAR Convention, Article 2(2)(b).
There is also an argument that thought should be given to expressly incorporating other relevant environmental principles, going beyond what is found in Article 191(2) of the TFEU. One strong candidate for incorporation would be the principle of sustainable use, which requires the use of natural resources in a way and at a rate that does not lead to long-term decline, thereby maintaining their potential to meet the needs and aspirations of present and future generations. Another candidate would be formal recognition of an ecosystems approach, which demands that decisions with the ability to affect the environment take into account all cumulative impacts on ecosystems and their components, including the ability for ecosystems to continue to provide all relevant ecosystem services.

James Harrison, 23 March 2018

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20 See e.g. Convention on Biological Diversity, Article 2.
21 OSPAR again provides a useful definition of the ecosystem approach in a joint declaration adopted with the Baltic Sea Commission in 2003: ‘the comprehensive integrated management of human activities based on the best available scientific knowledge about the ecosystem and its dynamics, in order to identify and take action on influences which are critical to the health of marine ecosystems, thereby achieving sustainable use of ecosystem goods and services and maintenance of ecosystem integrity.’