European Union (Withdrawal) Bill - call for evidence
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Evidence for the Finance and Constitution Committee on the European Union (Withdrawal) Bill

Evidence submitted by Professor Colin T. Reid, (Dundee Law School – c.t.reid@dundee.ac.uk) on behalf of the Brexit & Environment Network.[1] This network of academics is working on the implications of Brexit for the future of United Kingdom (UK) and European Union (EU) environmental policy (www.brexitenvironment.co.uk), and is funded by the ESRC's UK in a Changing Europe programme. Our evidence is given and phrased in the context of our specific concerns over environmental governance.

1. The European Union (Withdrawal) Bill (the Bill) envisages Ministers (initially largely at UK level) having broad powers to legislate in order to deal with the consequences of the UK leaving the EU, both securing continuity of the existing legal rules and making the adjustments necessary for legal frameworks to operate in the absence of the EU layer. We wish to comment on three issues:
a) Division of powers
b) Collaborative mechanisms
c) Scrutiny

A. Division of Powers

2. The well-publicised controversy over the division of competences between the UK and devolved administrations reveals a fundamental difference of view over the extent of power transferred by the devolution settlement. The Bill embodies the UK government's view that the power devolved is circumscribed by EU competences and activities, so that what has been transferred thus far was not power over environmental law (or any other devolved area), but only over those areas of environmental law not regulated by EU law. On this view, it follows that in providing that any powers held in Brussels revert (initially at least) to London, the Bill does not make any change to the extent of power enjoyed in Edinburgh; the Scottish authorities will enjoy exactly as much freedom of action as at present. Indeed by envisioning competences subsequently being passed on to the devolved authorities, the Bill is actually opening the way to an extension of their powers.

3. The alternative view is that in areas not reserved to London under the devolution legislation, the default position is that all power rests with the devolved authorities. On this view the fact that elements of that power are to some extent subservient to the EU at present does not alter the starting point that all matters not explicitly reserved are properly regarded as belonging in Edinburgh. Accepting the supremacy of EU rules, that represent wider consensus and are made by very distinct procedures, is something quite different from direct control by UK Ministers. The removal post-Brexit of the EU layer should therefore mean that all non-reserved powers are devolved and the proposal in the Bill that they should be exercisable in London alone (unless and until London agrees to pass them on) represents a major incursion into devolved competences.

4. The reason for spelling this out is to emphasise three points:
- The first is that the dispute is an inherently political one, which must be resolved by political discussion (recognising the ultimate legal supremacy of the UK Parliament embodied in the Scotland Act) and is not amenable to any legal or administrative "technical fix".

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- The second is that resolution of this matter is essential for many of the further issues raised in responding to Brexit to be finally settled, such as the nature of future collaborative mechanisms, since the way forward is inherently dependent on a clear understanding of where formal legislative power resides.
- The third is to note that in areas such as the environment which cross borders and policy sectors, it is impossible to isolate all matters into distinct categories, so that issues will unavoidably straddle reserved, devolved and (in due course, "retained") EU issues, wherever these boundaries are drawn.

The second and third points together mean that there is an urgent need to start devising a portfolio of collaborative mechanisms to fit whatever constitutional solution is ultimately reached. Such mechanisms are going to be required regardless of the ultimate pattern of legal powers, and identifying at this stage possible ways of working together will not only enable rapid progress once the deeper constitutional dispute is resolved but may also point towards ways of mitigating some concerns about the future operation of any constitutional settlement.

B. Collaborative Mechanisms

5. The devolution agreements post-date the UK's membership of the EU and were crafted in the light of the multi-level governance structure that has evolved at EU level. The EU rules provided a framework and in some areas a minimum benchmark that all EU (and by extension UK) states have to abide by. There is divergence in environmental policy within the UK but within the context of the EU frameworks and standards. Brexit raises the prospect of further divergence and fragmentation emerging across the UK, as devolved administrations exercise powers freed from the requirement to comply with EU law.[2]

6. However, it is essential both for the successful operation of the UK economy and market, and for the meaningful protection of the environment, to have co-ordinated and ambitious environmental standards across the UK. Brexit should not be seen as an opportunity for a race to the bottom within the UK. For many areas (such as chemicals) there is likely to be a continuing need to conform with EU standards for trade related reasons.

7. Given the need for future policies to be coordinated and negotiated by the devolved administrations together with the UK government, the lack of explicit and detailed consideration of how those administrations and, crucially, their legislatures can be involved in both the transfer and future development of policy is a significant weakness in the present Bill and associated proposals. This gap also undermines the principle of participation that underpins good environmental governance.

8. Turning to formal models for co-operative working, the Scotland Acts already allow for some mechanisms for working together, but these concentrate on bilateral arrangements between the UK and Scottish authorities, not on frameworks for working between all four administrations in the UK:
- concurrent powers: This is the position in relation to the implementation of EU law, where legislative powers can be exercised by Ministers in either London or Edinburgh (Scotland Act 1998, s.57; see also the Scotland Act 1998 (Concurrent Functions) Order 1999, SI 1999/1592).
- jointly exercised powers: In a limited range of circumstances, e.g. in relation to some statutory bodies, it is provided that powers are to be exercised jointly by UK and Scottish Ministers (Scotland Act 1998, s.56(3)).

[2] Reid: "BREXIT and the Future of UK Environmental Law", (2016) 34 Journal of Energy and Natural Resources Law 407.

- executive devolution: It is possible for UK Ministers to give Scottish Ministers the power to act in certain areas within reserved powers, without altering the fundamental reserved/devolved boundary. The powers may be exercisable by Scottish Ministers alone, by them with the consent of or after consultation with UK Ministers, or concurrently (Scotland Act 1998, s.63).
- agency agreements: Either set of Ministers can provide that powers within their competence (other than powers to make subordinate legislation) can be exercised by the other, but responsibility remains with the original authority (Scotland Act 1998, s.93).
- legislative consent: The devolution settlement did not diminish Westminster's ultimate power to legislate on any matter its chooses (Scotland Act 1998 s.28(7)) but this is tempered by the process of legislative consent or "Sewel motions", whereby approval from the Scottish Parliament is normally obtained before such legislation is made (Scotland Act 1998, s.27(8)). As was made clear in the Miller case (*R (Miller) v Sec. of State for Exiting the European Union* [2017] UKSC 5), this does not provide a legal obstacle to legislation by the UK Parliament, but does provide a vehicle for encouraging co-operation.

9. Other models also exist and go beyond the bilateral approach above. The Joint Ministerial Council is supposed to provide a forum for discussion and agreement between the various administrations in the UK. As a recent House of Lords inquiry concluded, this is not working effectively at present,[3] but a re-vitalised structure (as supported by the Welsh Government)[4] might be appropriate. There is also potential in the British-Irish Council.[5]

10. An alternative is the establishment of separate, technical bodies that can bring together representatives of the various statutory bodies across the UK to discuss particular topics and make recommendations, which are then left to be implemented by the competent legislative authorities. An existing example is the Joint Nature Conservation Committee (Natural Environment and Rural Communities Act 2006, s.34 and Sched 4), which as well as providing advice and recommendations, e.g. on the lists of plants and animals to be given legal protection, is charged with establishing common standards across the UK for the monitoring of and research into nature conservation and the analysis of resulting information. The cross-border bodies created under the Good Friday Agreement (e.g. the Loughs Agency) provide a further example. In the establishment of any such bodies, questions over funding and accountability arise.

11. The potential of these and further mechanisms and their suitability for particular subject matters should be actively considered at this stage, but there are two significant obstacles. The first is that just as strong co-operation can work regardless of the structural arrangements when there is goodwill on all sides, no formal structure can work effectively in its absence, and the current constitutional dispute appears to be standing in the way of mutual goodwill. More must be done at all levels to establish a culture of working together. The second is that the discussions over the Bill have highlighted the question of parliamentary scrutiny. If new forms of joint working are to be created, there is a question over how such activities are going to be overseen.

[3] House of Lords European Union Committee, *Brexit: Devolution* (4th report of 2017-19, HL 9).
[4] Welsh Government and Plaid Cymru: *Securing Wales' Future: Transition from the European Union to a new relationship with Europe*, p.28.
[5] Ibid., p.23.

C. Scrutiny

12. Concern has been expressed over the limited extent to which there will be parliamentary scrutiny over the exercise of ministerial legislative powers under the Bill. One general observation is that in view of the bulk of legislation that will be necessary in a short timescale, considerable use of the existing streamlined mechanisms for scrutiny (such as the negative procedures for Statutory Instruments) is unavoidable, and has been accepted in wide areas of legislative activity for decades. In particular, at present there is very little parliamentary scrutiny of measures made under the European Communities Act 1972 to give effect to EU law, although it can be argued that there is a qualitative difference between the rapid introduction of a large volume of legislation as expected under the Bill and measures implementing elements of EU law which have emerged through a prolonged consultative and participatory process.

13. A more specific issue is scrutiny over any existing and new forms of joint working. At present the legislative consent process at Holyrood gives the Scottish Parliament a say over when primary legislation is to be made at Westminster within a devolved area, but there is no process for the Parliament to be informed, far less to intervene, when it is decided that delegated legislation on devolved matters is to be made in Whitehall rather than Victoria Quay. At present this occurs most commonly under the European Communities Act 1972 in order to implement EU law, and in such circumstances the participative process through which EU law is produced and the timescales for implementation may at least provide opportunities for Scottish institutions and stakeholders to be aware of and potentially contribute to the outcomes. That may not be the case in the exercise of powers under the present Bill.

14. Moreover, if there is to be effective joint working between the administrations, should there also be joint working between the Parliaments? Is there potential for joint commissions established by all four elected bodies to scrutinise the operation of whatever collaborative arrangements are put in place? Or are there lesser ways of securing co-ordination and collaboration to achieve the desired level of parliamentary oversight in an efficient manner? The oversight of the mechanisms for co-operation and collaboration must be a major factor in establishing the new ways of working.

15. The specific issue of parliamentary oversight is, of course, just one aspect of the wider issue of governance. The design of collaborative mechanisms must ensure not only that they can do their job effectively and efficiently, but do so in accordance with the principles of good environmental governance, including accountability, transparency and public participation. The relationship with the parliaments is just one element of this.