A New Beginning for Environmental Governance

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A New Beginning for Environmental Governance: The UK Withdrawal from the European Union (Continuity) (Scotland) Act 2021

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Prof Reid examines the UK Withdrawal from the European Union (Continuity) (Scotland) Act 2021, which marks a new beginning in environmental governance in Scotland. It embeds environmental principles in Scots law and establishes a new environmental "watchdog", Environmental Standards Scotland. The Act does more than just fill the gaps created by leaving the European Union, requiring both an environmental policy strategy and a broad review of the effectiveness of environmental governance arrangements.

Introduction

One of many things that happened in the week before Christmas 2020 was the passage of the UK Withdrawal from the European Union (Continuity) (Scotland) Act 2021, which received Royal Assent on 29 January 2021. Like its predecessor, the ill-fated UK Withdrawal from the European Union (Legal Continuity) (Scotland) Bill that was passed in 2018 but failed to survive legal challenge in the Supreme Court ([2018] UKSC 64), the Bill is a response to Brexit. Initially the 2020 Bill was designed just to fill specific gaps created by the new relationship with the European Union (EU), but during its passage through Parliament some additional measures were added so that the environmental Part of the Act now does more. Part 1 of the Act, dealing with alignment with EU law will be considered briefly before the environmental measures are examined more closely.

Dynamic Alignment

The Scottish Government's policy after Brexit is one of "dynamic alignment" with the EU, keeping in step with EU laws with a view to a future independent Scotland being in a position to reapply for membership. In order to implement this, the Act grants Scottish Ministers a broad legislative power (s.1). This enables them to make regulations corresponding with or implementing EU laws, broadly similar to the power previously enjoyed under the European Communities Act 1972.

Concerns over the breadth of the power being conferred on Ministers were raised during the parliamentary process and a number of rules were added to impose some constraints and greater accountability. In addition to the initially proposed limits on the power (e.g. in relation to the creation of new offences (s.3)), there is now a statutory statement of the purposes for which the power may be used, including "to contribute to maintaining and advancing standards" in relation to various matters, including environmental protection, animal health and welfare, equality, non-discrimination and human rights, and social protection (s.2). Ministers are also required to produce a formal policy statement on how this power will be used (s.6), annual reports on its use (s.11) and explanatory statements on proposed regulations (ss.8-9). The power is to last for six years, extendable up to a maximum of 10 years (s.4).

This power provides the Scottish Government with a straightforward power to keep pace with EU where it wishes to do so, without having to scrabble around to see how far existing legislative powers enable the desired changes to be made or having to introduce primary legislation where required. The use of this power may clearly lead to divergence from the position in other parts of the UK where alignment is not being pursued. It remains to be seen how the United Kingdom Internal Market Act

2020 will operate to override any differences that arise and how any resulting tensions will be resolved.

Environmental Principles

Environmental principles are embedded in the EU Treaties and the Continuity Act maintains their legal status by granting them recognition in Scottish law. The principles involved are (s.13):
(a) the principle that protecting the environment should be integrated into the making of policies,
(b) the precautionary principle as it relates to the environment,
(c) the principle that preventative action should be taken to avert environmental damage,
(d) the principle that environmental damage should as a priority be rectified at source,
(e) the principle that the polluter should pay.
This list can be amended to keep step with EU developments.

Ministers must have "due regard" to these principles in making policies (including proposals for legislation) (s.14); they have a similar duty in relation to the environmental policy strategy required under later provisions in the Act (s.47). Other public authorities must also have due regard to the principles when developing plans and policies to the extent that these are covered by the Environmental Assessment (Scotland) Act 2005 (s.15). During the passage of the Bill the wording here was changed from a duty to "have regard" to a duty to "have due regard", but stronger formulations such as to "act in accordance with" the principles were rejected. Ministers and authorities may therefore be subject to judicial review if it can be shown that they wholly failed to take the principles into account, but will not be legally vulnerable to arguments that their policies are not in line with the recognised principles.

To assist in the implementation of this duty, there is a requirement on Ministers and authorities to comply with it with a view to protecting and improving the environment and contributing to sustainable development (s.16); this latter obligation overlaps with the existing duty to act in the way considered most sustainable under section 44 of the Climate Change (Scotland) Act 2009. The Ministers must produce guidance on the principles and their application, having regard to their interpretation by the Court of Justice of the EU (ss.13, 17). The legal duty, however, is to have due regard to the principles themselves, not just the ministerial statement. This is in contrast to the position proposed in the Environment Bill at Westminster where it is only the ministerial statement to which due regard must be had, and only by Ministers of the Crown, not other authorities.

Attempts to apply the duty to all actions, not just the making of policies, were rejected on the basis that the principles' reflection in the polices will naturally flow through into individual decisions. Moreover, there is a good argument that there are already so many overlapping broad duties on authorities in relation to sustainability, climate change, biodiversity, equalities, etc. that a further duty would merely add further complexity for little, if any, gain.

Environmental Standards Scotland

The loss of the powers of EU institutions to ensure that the government lives up to its environmental commitments was identified at an early stage as a major consequence of Brexit (Reid, 'Brexit: challenges for environmental law' 2016 SLT (News) 143). During membership of the EU, compliance was scrutinised through the reporting obligations on the UK Government and the European Commission's powers to investigate areas where the law might not be being properly implemented, acting on the basis of complaints received or on its own initiative and backed up by the European

Court's powers to decide disputes and ultimately impose financial sanctions. A new environmental watchdog is now being established in the form of Environmental Standards Scotland (ESS).

Independence from government is obviously a key requirement for any body charged with scrutinising government performance, but no body created within the domestic system can achieve this to the same extent as external EU institutions. Nevertheless, attempts are made to secure independence from the Scottish Government. Although the members of ESS are appointed by Scottish Ministers, who also determine their terms of appointment, the members must be approved by the Scottish Parliament and Ministers must "seek to ensure" that ESS is allocated resources "reasonably sufficient to enable it to perform its functions" (Sched.1 paras 2-6, 13). It is also expressly provided that ESS is not to be subject to the direction or control of any member of the Scottish Government; the qualification that this is subject to any contrary provision has been justified by Ministers as purely to allow for measures such as those in relation to auditing etc. to apply, not to permit any substantive interference (Sched.1 para.1).

ESS's functions are to monitor, investigate and take steps to ensure the compliance by public authorities (which includes Ministers) with environmental law and the effectiveness of environmental law and how is is implemented and applied (s.20). This includes keeping under review implementation of any of the UK's international obligations relating to environmental protection. In exercising its functions ESS must act "objectively, impartially, proportionately and transparently" (s.20(3)). A strategy must be prepared, setting out how ESS is to carry out its functions (s.22 and Sched.2). This must cover how ESS is to allow for complaints and representations to be made about environmental concerns, by individuals, public bodies or NGOs, how it is to decide when to investigate and how it will prioritise matters. The strategy must also cover how overlaps are to be avoided with other watchdogs such as the Scottish Public Services Ombudsman, the Scottish Information Commissioner, Audit Scotland and the Committee on Climate Change.

The ESS's remit covers "environmental law", defined as any legislative provision that is "mainly concerned with environmental protection", with the exclusion of access to information (supervised by the Scottish Information Commissioner), national defence or civil emergency or finance and budgets (s.44). During the Bill's passage, Ministers stated that the exclusion of financial and budgetary matters was restricted to the formal budgetary processes and did not mean that the impact of resources on environmental performance was off-limits. In line with the desire for ESS to deal with systemic issues rather than providing yet another route of appeal for disgruntled parties, it is also excluded from considering the exercise of a regulatory function in relation to a particular case (e.g. an individual licensing or enforcement decision) (ss.27,32). However, Ministers attempted to allay criticism that this might handicap ESS by saying that ESS would not be prevented from considering wider issues revealed by how a specific case was handled or decided.

There are two main ways in which ESS can intervene. The first is through an improvement report where it considers that an authority is failing to comply with environmental law, to make environmental law effective or to implement or apply it effectively (ss.26-29). The report will recommend how compliance can be achieved or effectiveness improved and is submitted to Ministers who must publish it and lay it before Parliament (s.29). Ministers must then produce, normally within six months, an improvement plan which sets out the measures to be taken to implement the recommendations (in full or part), the proposed timescale and arrangements for reviewing and reporting on progress (s.30). This plan must be laid before Parliament for approval. If Parliament is not content, a revised plan must be prepared and again submitted for parliamentary approval. An improvement report cannot be made where a compliance notice is in effect.

The second mechanism available to ESS is a compliance notice, which can be issued where it is considered that an authority in the exercise of its regulatory functions is failing to comply with environmental law (or has failed to do so in circumstances rendering a repeated or continuing failure likely) and it is likely that this failure is causing or has caused either environmental harm or the risk of such harm (ss.31-35). The notice must set out the grounds for the notice, the steps required be taken and the timescale for taking this action. Authorities have a right of appeal against a notice, to the sheriff court (s.36) and failure to comply with a notice can be reported to the Court of Session which can make such enforcement order as it considers appropriate and deal with the matter as if it were a contempt of court.

ESS also has powers to issue an information notice requiring a public authority to provide any information ESS reasonably requires, again enforceable through reference to the Court of Session (ss.24-25). Further powers are to apply to intervene in any litigation and to seek judicial review, where necessary to prevent or mitigate serious environmental harm (s.38). Public authorities are under a duty to co-operate with ESS and to take reasonable efforts to resolve matters swiftly and reach agreement on remedial action (s.23).

That final provision is significant because although ESS is given substantial powers, it is hoped that most matters will be resolved informally. This was the case for most issues raised with the EU Commission, but the threat of meaningful enforcement powers in the background adds important weight to any informal intervention. The enforcement powers available to ESS in cases of non-compliance with environmental law are indeed significant, with potential for substantial penalties for contempt of court being applied as a final sanction. Given these serious consequences, the provision of a right of appeal against a compliance notice seems appropriate but it is perhaps a little surprising that the appeal is simply to the sheriff court rather than possibly to the Scottish Land Court (as for civil sanctions under the Environmental Regulation (Enforcement Measures) (Scotland) Order 2015, SSI 2015/383). This is another example of the fragmented and inconsistent pattern of appeals in environmental regulation in Scotland, an issue that may well be one focus of the review of environmental governance required under the Continuity Act.

ESS will not be acting alone as an environmental watchdog. The Environment Bill at Westminster proposes the establishment of the Office for Environmental Protection (OEP), which will consider compliance in England and Northern Ireland but also have a wider role in advising government and monitoring progress with the statutory environmental improvement plan also proposed in that Bill. Under current proposals, the OEP will be markedly more subject to ministerial guidance and less powerful, limited to seeking judicial review (without the potential for financial penalties) where authorities fail to comply with environmental law. In Wales concrete proposals for a new governance framework are on hold until after the Senedd election later in 2021, but an Interim Environmental Protection Assessor has been established. The Continuity Act expressly provides for ESS to consult and share information with the bodies fulfilling the same functions elsewhere in the UK (ss.23, 40).

Pending the relevant provisions coming into force, ESS is already operating on an interim basis, and the Act provides for appointments to be carried over into the statutory body (Sched.1 para.14); see Environmental Standards Scotland - gov.scot (www.gov.scot).

Review of Environmental Governance

During the Bill's passage a new provision was added requiring the Scottish Ministers to produce a report on the effectiveness and appropriateness of post-Brexit environmental governance arrangements (s.41). This must include whether there is effective and sufficient access to justice on

environmental matters and whether the establishment of an environmental court would enhance the position. Consultation on the review must begin with six months of ESS publishing its first formal strategy and the report to Parliament must include a summary of views expressed and the Ministers' recommendations in response to them.

Given the initially narrow focus of the Bill, filling post-Brexit gaps rather than looking at environmental governance more widely, the inclusion of this provision promises a more considered reflection on environmental frameworks in the near future, away from the immediate bustle of Brexit. The desirability of an environmental court has been debated for decades and the previous official reviews coming out against such a development have been rightly criticised for failing to provide a proper consideration of its potential. Big questions remain, though, over the appropriate role for such a court and its place within the landscape of regulatory appeals and civil and criminal jurisdictions.

Environmental Policy Strategy

A further provision added to the original Bill is a requirement on Ministers to produce an environmental policy strategy setting out objectives for protecting and improving the environment, policies and proposals for achieving this and arrangements for monitoring progress (s.47). In producing this, regard must be had to the desirability of securing a number of objectives including: aiming at a high level of environmental protection, contributing to sustainable development, improving the health and wellbeing of Scotland's people, and responding to the global crises in relation to climate change and biodiversity. Annual reports on progress are required and Ministers must have due regard to the strategy in making policies, including proposals for legislation.

Wide consultation is required on the production of the strategy, and consultation taking place before the relevant provision comes into force (or even before the Bill was passed) can count. This suggests no plans for a brand new start but rather a desire to see continuity with the existing processes that led to the publication in February 2020 of the *Environment Strategy for Scotland: vision and outcomes*. Responses to this called for the strategy to be given statutory status, but further calls for the strategy to include legally binding targets (a feature of the environmental improvement plan proposed for England under the Environment Bill) have not been acted on.

Conclusion

As a response to Brexit, the Continuity Bill was introduced to serve the core purposes of enabling dynamic alignment with the EU and filling the accountability gap created by the loss of the environmental oversight provided by the EU Commission and Court. The Act that emerged is now a more far-ranging environmental measure, imposing requirements for a review of environmental governance and an environmental policy strategy. The facts that the gaps have been filled, a potentially powerful watchdog created and environmental principles given legal status are all to be welcomed, as is the clearer framework for the future strategy and governance review.

How the new arrangements will come to operate in practice is perhaps as important as the formal legal structure. A lot will depend on both the strategy to be produced by ESS that will set out how it is to carry out its role and on the relationships it develops with Ministers, public authorities and other regulatory and supervisory bodies, especially the Scottish Environment Protection Agency and NatureScot. There will also be challenges for Parliament in determining how to exercise its role in approving improvement plans that may involved detailed legal and technical issues.

In terms of the broader picture, with an election due in May, it will be only after then that we are likely to see how far the new administration will carry forward the current Scottish Government's rhetoric

on responding to the climate and biodiversity crises and whether such concerns will really drive future policies. The shape of environmental policy and governance are likely to remain active areas of debate in the coming years. Similarly, the significance of the power to maintain alignment with the EU will become clearer only if policies at Scottish level for alignment with, and at UK level for divergence from, EU rules produce actual differences. At that stage further questions will arise over the application and impact of the UK internal market provisions. The consequences of Brexit will take a long time to settle.