The Civil Society Brexit Project: *Information*

BREXIT AND THE ENVIRONMENT

About the Civil Society Brexit Project

The Civil Society Brexit Project is a collaboration between the **Scottish Universities Legal Network on Europe** (SULNE) and the **Human Rights Consortium Scotland**, funded by the **Legal Education Foundation**. We give information, insight and independent advice to make sure that organisations in Scotland are able to influence Brexit as much as possible. The Project will also help organisations to prepare for Brexit consequences for themselves or their beneficiaries.

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Who is this Civil Society Brexit Project: *Information* for?

This briefing is written for civil society organisations working in Scotland. For more information, contact hrcscotland@gmail.com

BREXIT AND RIGHTS IN AREA OF ENVIRONMENT, ENERGY AND SUSTAINABILITY

What areas of rights does this briefing cover?

This briefing covers rights in the area of environment, energy and sustainability. To best understand the impact of Brexit on these rights, it is helpful to consider them in two categories: procedural environmental rights and substantive environmental rights.

Procedural environmental rights are:
- access to environmental information;
- public participation in environmental decision-making; and
- access to justice in environmental matters.

Substantive environmental rights are:
- rights to life, family life, property, health, food and water that depend on a healthy environment for their realisation. Some countries also recognise a standalone right to an environment of a particular quality.

Which environmental rights currently come from EU law, policy or regulations?

EU law on environmental rights is heavily interlinked with two international treaties which the UK has signed up to: the Aarhus Convention on Access to Information, Public Participation and Access to Justice in Environmental Matters (the Aarhus Convention) and the European Convention on Human Rights (ECHR). The UK is bound by these two treaties even if it leaves the EU.

Procedural environmental rights
EU legislation and case law in the area of procedural environmental rights has largely sought to implement the Aarhus Convention with regard to:
- access to environmental information, with the relevant laws including provisions on access to justice (Directive 2003/4/EC; Regulation (EC) No 1049/2001; EU Charter of Fundamental Rights);

- public participation in assessing the environmental effects of certain public and private projects (e.g., the construction of airports, motorways, certain types of waste disposal installations) and in permitting processes relating to industrial installations, including provisions on access to justice (Directive 2011/92/EU; Directive 2010/75/EU); and
- public participation in strategic environmental assessments of area- or sector-wide plans and programmes, such as a national renewables energy strategy (e.g. Directive 2001/42/EC).

There are also rules around public participation and access to information within EU laws on specific areas of environmental policy.

EU courts have also clarified what is expected of domestic courts on access to justice in environmental matters. Notably, EU courts have stated that access to justice in environmental matters should not be made impossible or excessively difficult in practice, for instance because of high costs or insufficient legal aid. You can read a summary of this EU case law here:
http://ec.europa.eu/environment/aarhus/pdf/notice_accesstojustice.pdf
This guidance is also complemented by a series of Member State-specific fact sheets on access to justice in environmental matters -you can read the UK factsheet here:
https://e-justice.europa.eu/content_access_to_justice_in_environmental_matters-300-uk-en.do?member=1).

Furthermore, it has been recognised that procedural environmental rights may stem from rights within the ECHR. This includes for example:
- a right to effective and accessible procedures to enable individuals to seek environmental information and to participate in environmental decision-making when their right to life or/and right to respect for private and family life is threatened (ECHR Art. 10, 2 and 8); and
- a right to access to justice and to an effective remedy in environmental matters (ECHR Arts. 6(1) and 13).

Substantive environmental rights
To some degree, EU law also protects substantive environmental rights. Specifically, the EU Charter of Fundamental Rights includes some of the environmental rights that have been recognised under the ECHR, such as:
- the right to have your life protected from dangerous activities (e.g., nuclear tests, the operation of waste-collection sites or chemical factories emitting toxic substances), whether these are carried out by public authorities or by private companies (ECHR Art. 2);
- the right to have your private and family life (including your home) protected from direct and serious detrimental environmental factors (e.g., excessive noise levels from an airport; air and water pollution from industrial activities; environmental harm caused by the collection, management, treatment and disposal of waste) (ECHR Art. 8); and
- the right to peaceful enjoyment of your property protected through the adoption of environmental standards (e.g., measures adopted to prevent damage to homes located near a waste disposal facility in the event of an accidental methane gas explosion) (Protocol No. 1 to the ECHR, Art. 1).

Which policy areas that particularly affect environmental rights are currently reserved to the UK Parliament and which are devolved to the Scottish Parliament?

Environmental rights relate to policy areas that are both devolved or reserved. Matters devolved to the Scottish Parliament include agriculture and fisheries, forestry, certain aspects of energy and transport policy, and the environment. Other, more general devolved powers that can have a great impact on environmental rights are local government (including legislative/administrative frameworks, policy and elections) and law and order (including civil justice, civil law and procedure, courts, freedom of information and legal aid).

However, the UK Parliament controls of a number of policy areas which hold significant implications for environmental protection, including energy,

transport, trade and industry and foreign affairs. the Scottish Parliament has no power to enter into international agreements, but does have responsibility for implementation of international agreements on devolved matters.

The complex interplay between reserved and devolved matters related to the environment highlights the need for common UK frameworks to ensure that, post-Brexit, the policies adopted by the different countries within the UK are consistent and, where necessary, coordinated. These frameworks may take the form of common goals, minimum or maximum standards, harmonisation, limits on action, or mutual recognition.

What do we *know* will happen to environmental rights when the UK leaves the EU?

International obligations will remain post-Brexit
Post-Brexit, the UK will continue to be bound by its international obligations under the Aarhus Convention and the ECHR. The same is true of the UK's obligations under a number of UN human rights treaties which are relevant to the protection of environmental rights (see, e.g., the right to food in the International Covenant of Economic, Social and Cultural Rights), and international obligations relating to the conservation and sustainable use of biodiversity. You can read more about the relationship between human rights and environmental protection in the 2018 UN Framework Principles on Human Rights and the Environment.

Likely loss of EU Charter of Fundamental Rights
The European Union (Withdrawal) Act states that the Charter of Fundamental Rights will not be included in UK law after Brexit (Section 5(4)). However the Act also states that any fundamental rights or principles found in other parts of EU law will be carried across into UK law (Section 5(5)). There are two implications from an environmental perspective:

- The Charter includes a principle for policy-makers to integrate a high level of environmental protection and the improvement of the quality of the environment in all policies (Art. 37). To the extent that this principle is recognised in other parts of retained EU law, it will not be affected by the Charter's non-incorporation into domestic law post-Brexit.
- The Charter gives additional legal strength to the environmental rights protected under the Aarhus Convention and the ECHR. The Charter provided a remedy against acts of UK public authorities that violate environmental rights which is stronger than the remedy available under UK law, i.e. the Human Rights Act: the offending law can be disapplied rather than merely declared incompatible.

What do we *not know* yet?

- We do not yet know the exact content of the Withdrawal Agreement Bill or whether the UK Government will be able to get it through Parliament. This is the vehicle through which the UK Government is planning to implement into domestic law the Withdrawal Agreement. The Withdrawal Agreement, which sets out the negotiated terms of the UK's departure from the EU, contains several provisions of relevance for environmental rights:
  - **Non-regression in the level of environmental protection**: The Agreement recognises the need to ensure that, post-Brexit, the level of protection provided by law, regulations and practices is not reduced below the level provided by common EU and UK standards related to environmental rights, such as standards relating to industrial emissions; air emissions and air quality targets and ceilings; nature and biodiversity conservation; waste management; the protection and preservation of aquatic and marine environments; the production, use, release and disposal of chemical substances; and climate change.
  - **Environmental principles**: The commitment to non-regression extends to four environmental principles that must continue to guide UK and Scottish law post-Brexit, namely:
    - the precautionary principle (in summary, when an activity might harm the environment, precautionary measures should be taken even if definitive scientific evidence is lacking);
    - the principle that preventive action should be taken;
    - the principle that environmental damage

should as a priority be rectified at source;
- and the 'polluter pays' principle.

- **Access to justice**: The UK is required to ensure the availability of administrative and judicial proceedings so that public authorities and members of the public can take action against regression on environmental protection (see above and Art. 2 (1), Part 2, Annex 4 of the Withdrawal Agreement). The UK is also required to provide for effective remedies, and to ensure that any sanctions are effective, proportionate and dissuasive, and have a real and deterrent effect.
- **Scrutiny of environmental matters**: The Agreement requires the UK to put in place a transparent and effective system for monitoring and enforcing of environmental standards, so as to counter the loss of the EU's oversight. This involves setting up an independent and adequately resourced body (or bodies), which will be able to conduct inquiries either on its own initiative or on the receipt of a complaint. This body should also be empowered to bring a legal action. (It is, however, worth noting that disputes relating to the interpretation and application of the environmental protection non-regression clause will not be part of arbitration arrangements to resolve more general disputes between the Uk and the EU after Brexit – see Arts. 170-181).
- **Transition period**: The Agreement extends the applicability of the EU Charter and the jurisdiction of the European Court of Justice until the end of the transition period, i.e. until 31 December 2020.

- We do not yet know what developments in rights terms will happen at the Scottish level. The Scottish Government is in the process of setting up a task force to take forward recommendations from the First Minister's Advisory Group on Human Rights Leadership. These include the development of a new statutory human rights framework, which expressly recognises the right to a healthy environment (discussed below). The Scottish Government could also consider the recommendations of the Roundtable on Environment and Climate Change with regard to environmental governance in Scotland post-Brexit. These include the creation of an environmental watchdog that will provide transparent and easily accessible opportunities for citizens to raise environmental concerns and complaints (discussed below). The Scottish Government is currently gathering evidence in this connection.
- We do not know how the rights protected under the EU Charter will be developed by the European Court of Justice in the future, i.e. the rights protections there might have been if the UK had remained in the EU.

What are the main concerns around environmental rights after Brexit?

Loss of EU oversight and enforcement

The main concern around the UK's continuing compliance with the Aarhus Convention post-Brexit is the loss of the EU's oversight and 'hard enforcement' infrastructure (explained in more detail here). The European Commission and the EU courts provide an additional, legally binding avenue for ensuring compliance with EU environmental law, which may involve imposing fines. This is particularly evident in the crucial role that these two institutions have played in connection with the implementation of the Aarhus Convention and the protection of procedural environmental rights:

- first, EU courts have provided guidance to clarify the obligations of States in protecting procedural environmental rights, for instance on the prohibitive effect of litigation costs; and
- second, the European Commission brought infringement proceedings against the UK, which, together with the recommendations issued by the Aarhus Convention Compliance Committee and two seminal reports by members of the UK's senior judiciary, led to a broad-ranging reform of the regime around the costs of environmental court cases in England and Wales. While the ruling of the European Court of Justice did not concern Scotland, some of its criticism was also relevant for the Scottish system because it shared certain features with that of England and Wales. These issues have therefore been partially addressed by

the Courts Reform Scotland Act 2014 and a series of revisions to the rules on Protective Expense Orders in environmental matters (the most recent of which was enacted in 2018). However, these reforms continue to be criticised for failing to fully address the issue of costs in of legal cases relating to the Aarhus Convention.

Loss of EU Charter of Fundamental Rights
In addition, as noted above, the loss of the EU Charter means that, after exit, domestic laws infringing environmental rights will merely be declared incompatible with the ECHR (rather than disapplied).

Difficulty in establishing UK-wide frameworks
It has also proven challenging to develop a collaborative and co-designed framework for post-Brexit environmental governance that will apply to the UK as a whole. Devolution has led to increasingly different ambitions and regulatory approaches among the different countries within the UK but EU law provided a consistency across the UK. Without EU law, UK-wide frameworks will be required to ensure this consistency.The UK Government and the devolved administrations are already cooperating towards the establishment of UK-wide approaches, including with a view to enabling the functioning of the UK internal market; ensuring compliance with international obligations; enabling the management of common resources; and administering and providing access to justice in cases with a crossborder element.

What about in Scotland – are there particular concerns or opportunities affecting environmental rights because of devolution?

Concern about potential regression in environmental standards
A key concern is that, outwith the EU, envionrmental standards could be lowered. Changes could be made to existing legislation implementing EU law on procedural environmental rights that undermine current standards, particularly in connection to access to environmental information and (to a certain extent) public participation in environmental decision-making and access to justice. Recent reforms have addressed some issues around access to justice: for example, reforms have made it easier for court actions on environmental rights to be raised in the public interest. However, NGOs are concerned that changes in Scotland have not gone far enough: for example, Scottish courts have not been quick to apply a new test that allows NGOs to take these cases to court, and further reforms are needed to the general rule that the losing party in court proceedings must bear the costs of the successful party even when it acted in the public interest. Furthermore, legal aid remains largely unavailable for most environmental cases.

A right to a healthy environment in Scots law
An opportunity to enhance the protection of environmental rights in Scotland has arisen with the creation of the First Minister's Advisory Group on Human Rights Leadership. The Group has explored ways for Scotland to:

- prevent going below the level of protection that is currently afforded by environmental rights under EU law;
- keep pace with future progressive developments regarding the protection of environmental rights in the EU; and
- become a leader in the protection of environmental rights.

The Group's report to the First Minister recommends statutory recognition of a right to a healthy environment. This overall right will have both substantive and procedural dimensions, combining the right of everyone to benefit from healthy ecosystems which sustain human well-being with the rights of access to information, participation in decision-making and access to justice. The report envisages that the content of the right to a healthy environment will be further fleshed out in an Act of Scottish Parliament, which will build upon international standards, including the Aarhus Convention and the UN Framework Principles on Human Rights and the Environment. Among these standards is the presumption that NGOs have sufficient interest to bring proceedings in environmental rights cases.

Environmental principles in law
The Scottish Government has thus far concentrated its efforts on the four principles named in the Withdrawal Agreement: the precautionary principle; the principle that preventive action should be taken; the principle that environmental damage should as a priority be rectified at source; and the 'polluter pays' principle.

By contrast, the UK Government's draft Environment Bill – which, when adopted, will apply only to the policy-making of UK Ministers – refers also to the principles of sustainable development, environmental integration, access to environmental information, participation in environmental decision-making, and access to justice in relation to environmental matters. The UK Government has been criticised for the following reasons:

- The portrayal of procedural environmental rights as policy drivers rather than legal obligations has been criticised for being at odds with their legal status under judicially enforceable provisions of EU law and the Aarhus Convention.
- the decision to flesh out these principles in a policy statement rather than a statutory instrument further undermines their legal status.

These criticisms must be taken into account by the Scottish Government as it develops its own framework for environmental governance post-Brexit, as well as the following considerations:

- the Scottish Government could follow the example of the UK Government with regard to the statutory recognition of the principle of sustainable development and the principle of environmental integration.
- both Governments could consider the value of an explicit statutory recognition of the objective of a high level of environmental protection, which can be found in several instruments of EU law (Arts. 114 and 191 TFEU, Art. 37 EU Charter and several instruments of secondary EU law). This would help counterbalance some of the implications stemming from the loss of the EU Charter.
- A more dynamic and comprehensive approach to environmental principles would account for their intimate links with legislative action on human rights.

Concern about scrutiny of environmental matters
The UK Government's draft Environment Bill makes provision for the establishment of an 'Office for Environmental Protection'. However, since environmental matters are largely devolved, this body would be able to ensure compliance only in those matters which are retained at UK level. The Office could potentially exercise functions more widely across the UK, but subject to the ongoing framework discussions with the devolved administrations. For its part, the Scottish Government could consider the possibility of either establishing a new, non-departmental public body or extending the powers of an existing public body to undertake scrutiny of environmental matters.

Less powerful remedies around reserved issues within the EU Charter
Finally, we reiterate the point made earlier regarding the remedies that will be available post-Brexit against acts of Parliament or Government which violate the procedural and substantive environmental rights protected under the ECHR. The Scottish Parliament and the Scottish Government are absolutely prohibited from acting in breach of the Convention. Any act of theirs that violates the environmental rights protected under the ECHR can, therefore, be declared invalid without the need to bring a case under the EU Charter. Since the same remedy is not available under UK law, the inapplicability of the EU Charter at UK level means that there will no longer be the possibility of acts in reserved issues (e.g., several powers related to energy) being declared invalid where they are incompatible with the environmental rights protected under the ECHR.

What happens next?

- On 14 November 2018 the UK and the EU agreed a withdrawal agreement, which remains, however, unratified. The agreement would have seen the UK leave the EU as planned on 29 March 2019. The UK Government has so far been unable to ratify the agreement and it is not clear whether it will enter into force at all. The withdrawal agreement is accompanied by a political declaration.

- For the UK Government to be allowed to ratify the withdrawal agreement, the European Union (Withdrawal) Act 2018 requires that the withdrawal agreement (plus the political declaration) is approved by the House of Commons and that the legislation implementing it – the European Union (Withdrawal Agreement) Bill – is passed. So far, the House of Commons has rejected the withdrawal agreement on three different occasions.
- The EU also has not yet ratified the withdrawal agreement. At EU level, ratification requires the approval of the European Parliament and a qualified majority in the Council.
- For this reason, the UK was unable to leave the EU as planned on 29 March 2019. The Brexit negotiating period was therefore extended until 31 October 2019.
- There remain three options for the UK at this stage:

1) leave with a deal, which requires ratification of the withdrawal agreement;
2) leave without a deal, which would happen automatically on 31 October 2019;
3) revoke the Article 50 notification, which – as the European Court of Justice has confirmed – the UK can do unilaterally at any point in time before Brexit.

- Once the withdrawal agreement has been ratified, the EU and the UK will start negotiating their future relationship. The political declaration negotiated alongside the withdrawal agreement contains a rough sketch. It currently envisages an association agreement between the EU and the UK.

This would mean that there would be a free trade agreement between the EU and the UK. The UK would agree to comply with EU rules in certain areas of trade. In addition, there would be a security partnership that would allow for cooperation in both internal and external security.

However, the political declaration is not binding and was kept deliberately vague so that another future relationship – be it closer or looser – is still a possible outcome.

Professor Elisa Morgera and Mara Ntona, May 2019

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