Agenda - Y Pwyllgor Newid Hinsawdd, Amgylchedd a Materion Gwledig

Lleoliad:
Ystafell Bwyllgora 3 - Y Senedd
Dyddiad: Dydd Iau, 10 Mai 2018
Amser: 09.30

I gael rhagor o wybodaeth cysylltwch a:
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1 Cyflwyniad, ymddiheuriadau, dirprwyon a datgan buddiannau

2 Ymchwiliad i egwyddorion amgylcheddol a threfniadau llywodraethu ôl-Brexit: sesiwn ragarweiniol

(09.30 - 11.00) (Tudalennau 1 - 33)

Dr Victoria Jenkins, Athro Cyswllt - Ysgol y Gyfraith, Prifysgol Abertawe
Yr Athro Richard Cowell, Athro mewn Polisi a Chynllunio Amgylcheddol - Yr Ysgol Daearyddiaeth a Chynllunio, Prifysgol Caerdydd
Yr Athro Maria Lee, Cyfarwyddwr Canolfan UCL ar gyfer y Gyfraith a'r Amgylchedd - Coleg Prifysgol Llundain

Dogfennau atodol:
Briff Ymchwil
Papur tystiolaeth gan Dr Victoria Jenkins
Papur tystiolaeth gan yr Athro Richard Cowell
Papur tystiolaeth gan yr Athro Maria Lee

3 Cynnig o dan Reol Sefydlog 17.42(ix) i benderfynu gwahardd y cyhoedd o'r cyfarfod ar gyfer eitem 4

Egwyl

(11.00 - 11.15)

4 Ymchwiliad i effaith Brexit ar bysgodfeydd yng Nghymru: trafod cylch gorchwyl

(11.15 - 11.30) (Tudalennau 34 - 38)

Dogfennau atodol:
Y Cylch Gorchwyl Drafft

Mae cyfyngiadau ar y ddogfen hon

Evidence to the Committee on Climate Change, Environment and Rural Affairs, National Assembly for Wales,10th May 2018.

European Union Environmental Governance and Principles.

Dr Victoria Jenkins, Associate Professor, Hillary Rodham School of Law, Swansea University.

Introduction

There is now general agreement Brexit will result in a 'governance gap' in environmental law that must be addressed and that further thought needs to be given to the retention of EU environmental principles. Nevertheless, questions remain around the exact nature of the measures to be introduced. This paper highlights some of the key issues with specific reference to the existing position in Wales.

As Bryce and Macrory have suggested we need to 'rethink imaginatively' the issues for environmental governance in Wales. Much attention in Wales focuses on the Future Generations Commissioner for Wales (FGC) and the possibility of extending her role to that of an environmental advocate. This is not necessarily appropriate. In addition, the principles relating to the sustainable management of natural resources and sustainable development in Wales may be thought to exclude the necessity to adhere to EU environmental principles, but this is also not the case.

Environmental Governance

The Existing Functions of the EU Institutions

The key functions of the European Commission (the Commission) and the European Court of Justice (ECJ) in implementing and enforcing environmental legislation are as follows:

The Commission receives reports on the implementation of EU directives and deals with cases of non-compliance. This sometimes involves responding to individual complaints. These cases are often dealt with by negotiation but may result in action before the ECJ.

The ECJ has the power to hear cases of non-compliance with EU law brought either by the Commission or other Member States (MS). Failure to comply with the judgment of the ECJ may result in a fine. The ECJ may also be asked for a ruling on the interpretation of EU law where cases are brought by individuals in national courts directly applying EU law.

Although an individual may complain to the Commission there is no guarantee that it will act upon the information and there is no power for individuals to bring cases directly before the ECJ to enforce EU law against the MS.

Rather than considering how these functions can be replicated or added, to Bryce and Macrory have suggested that "Brexit offers an opportunity to rethink

imaginatively how we can handle more effectively the question of legal and political accountability in the environmental field." (Bryce A and Macrory R Brexit and Environmental Law: Enforcement and Political Accountability Issues (UKELA, 2017). The remainder of this document will, therefore, consider the possible roles for an 'environmental advocate' and how this relates to the existing situation in the UK and Wales.

An 'Environmental Advocate': from education and influence to political and legal accountability.

The case has been made for an 'environmental advocate' because the environment has no 'voice', but its protection is of significant public interest. An 'environmental advocate' could have a range of different roles:

- Promoting environmental protection among government actors and the wider community.

- Reporting on progress in the implementation of environmental laws and providing essential scientific data.

- Taking action where essential targets/objectives are not met – from recommendations, to alternative dispute resolution mechanisms and court action.

In fact, Bryce and Macrory has suggested that it may be better to have a number of different approaches and bodies rather than a single solution or 'environmental advocate'. They also note that there are different examples around the world which relate to both environmental protection and sustainable development. In Wales, the Future Generations Commissioner already exists as an advocate for sustainable development.

A Welsh Perspective: The Future Generations Commissioner for Wales (FGC)

The FGC fulfils some of the roles, outlined above, in acting as an advocate for sustainable development in Wales.

- She provides advice and assistance to public bodies and has powers to review their progress in meeting the 'well-being' objectives they have set themselves.

- She can make recommendations to public bodies on how to meet national goals and indicators which they must take all reasonable steps to meet (unless they have good reason not to or decide on an alternative course of action).

Although the FGC is important in sustainable development governance in Wales, the role of an 'environmental advocate' is very different for the following reasons:

- Environmental limits are, arguably, necessarily at the heart of sustainable development, but so too is the notion of integration. Environmental 'Resilience' is, therefore, only one of seven national goals for public bodies in fulfilling their duty to 'carry out' sustainable development.

- Sustainable development is a notion that is infinitely complex. Environmental concerns such as, climate change, are also fraught with complexity. However, environmental issues such as, tackling air pollution can often be 'broken down' to establish root causes in terms of individual pollutants. As a result, there is much greater capacity for 'sound scientific data' in the field of environmental protection to support certain approaches and to provide the basis for specific targets and standards to use in holding government to account (notwithstanding the need to accept a certain level of value judgement in creating any environmental standards or targets).

Reporting on progress: the need for sound scientific data

In Wales, there are already a number of reporting processes that relate to environmental protection:

- Natural Resources Wales (NRW) must produce a State of Natural Resources Report in every general electoral cycle. This provides scientific data, but also an analysis of the extent to which the sustainable management of natural resources in Wales is being achieved.

- All public authorities in Wales (including Welsh Ministers) must produce a plan setting out how they will seek to maintain and enhance biodiversity in the exercise of their functions and in so doing promote the resilience of ecosystems; and report on this every three years.

- Welsh Government must create national indicators on the achievement of the statutory well-being goals under the Well-being of Future Generations (Wales) Act 2015 and report on progress in achieving them. These indicators include several that relate to the 'Resilience' goal or the maintenance of a biodiverse natural environment with healthy functioning ecosystems.

These general provisions are no substitute for the detailed reporting required under EU legislation such as, reporting on the status of surface and ground water under Article 18 Water Framework Directive.

Reporting also helps us to understand the significance of specific approaches to environmental problems. For example, Article 18 Water Framework Directive requires the Commission is responsible for compiling reports on the success of river basin management plans.

In addition, there are reporting duties under some individual pieces of environmental legislation that relate only to the UK. There are, for example, requirements under s26B Wildlife and Countryside Act 1981 for Scottish Ministers to provide an annual wildlife crime report to the Scottish Parliament. Brexit may present the opportunity for some consolidation of these reporting requirements and those currently required by EU law.

Political and Legal Accountability

The compilation of data is effectively an executive function, but the simple act of publishing this information has an additional role in ensuring accountability. The information collated can also be used to underline targets and standards to which government can be held to account.

Political accountability can be achieved by reporting to the UK Parliament or the National Assembly for Wales. The most appropriate body will depend on the issue at hand. For example, reporting on the status of surface and ground water could be carried out a devolved level even if the standards involved were set by a UK body. In contrast, reporting on river basin management plans might be better placed at the UK level in order to learn from approaches taken across the UK.

There may also be an argument for a Commissioner or Ombudsman for environmental protection. This may seem onerous given the existence of the FGC, but, for the reasons outlined above, the function of such a body would be very different. In light of the more specific standards and targets that exist in this field, it is arguable, that this person should also have stronger powers of enforcement than the FGC.

The powers of enforcement held by an 'environmental advocate' may include recourse to courts or tribunals. This is, arguably, particularly important in Wales where there is some evidence that individuals are less likely to take action than in other parts of the UK (Nason S Understanding Administrative Justice in Wales (2015).

Considering the options for access to justice to environmental cases in Wales after Brexit is inextricably connected to the debate regarding the future of administrative justice - as outlined by Nason. Actions can now be heard by the Administrative Court in Wales and there is a presumption that decisions from public authorities in Wales will be heard by this court. There is also a system of devolved tribunals, but, at present, appeals against fines or notices for environmental offences are dealt with by the First Tier Tribunal.

Administering justice at a devolved level can be advantageous in ensuring decisions are taken as close as possible to the communities they affect. Nevertheless, dealing with environmental cases at the UK level can help in developing specialist approaches which are, arguably, very significant in this context.

EU Environmental Principles

Article 191 Treaty on the Functioning of the European Union provides a number of objectives for EU environmental policies as well as key principles on which this should be based and issues to be taken into account. The core principles are:

- Prevention principle

- Principle that environmental damage should as a priority be rectified at source

- Polluter pays principle
- Precautionary principle.

It is important to identify these core principles because objectives such as, “prudent and rational utilisation of natural resources” are sometimes referred to as principles. These are not the same thing, as a principle is adopted to meet an objective. Similarly, “taking account of available scientific and technical data” is an obligation in policy making, but is not a principle. This distinction gains significance when considering the status of EU environmental principles.

Article 191 TFEU states simply that EU environmental policy must be based on these principles. They are not considered as a source of EU law in the same way as the general principles and nor do they provide legally enforceable obligations.

However, they may be referred to in the context of concrete provisions within EU environmental Directives such as, the requirement for MS to make decisions on the recovery of costs for water services under Article 9 Water Framework Directive in accordance with the polluter pays principle.

Perhaps most significantly they often appear in the preamble to EU environmental Directives and guide the interpretation of EU environmental Directives. A notable example, is the use of the precautionary principle in the context of the Habitats Directive. For example, in the case of Waddenzee, the ECJ held that the requirement for the assessment of proposed projects in Special Conservation Areas should not be excluded unless there is ‘no scientific doubt’ that there would be no adverse effects of the conservation objectives of the site.

This approach is facilitated by the teleological approach to interpretation of EU law adopted by the ECJ.

EU Environmental Principles and their application in the UK

The prevention, precaution and the polluter pays principle underline not just EU law but international law on environmental protection and are, indeed, generally understood to be a defining feature of EU law. The principles appear in the United Nations Rio Declaration and are clearly supportive of an overall approach to sustainable development.

After Brexit it is essential that these principles continue to guide the development of environmental law across the UK. To this end, they should underline the creation of common frameworks for action. Ensuring their application in the interpretation of environmental law is also important. This will be challenging given the tension between the teleological approach of the ECJ and the more literal approach in the UK courts.

Another consideration will be the extent to which these principles are subject to definition. There is no general agreement on this. The preventive approach, for

example, has been described as more of an aspiration than a principle whilst the precautionary approach is subject to multiple interpretations. The principles are not currently defined in EU law, but the case law of the ECJ is informative in this respect. See for example, the approach to the precautionary principle in the Waddenzee case.

EU Environmental Principles and their application in Wales

The Well-being of Future Generations (Wales) Act 2015 (FG Act) and Environment (Wales) Act 2016 provide a framework for environmental policy in Wales. Central to this are the principles of sustainable natural resource management (SMNR) and sustainable development.

The sustainable development principle, including the five ways of working, is now essential to the work of public authorities in pursuit of their duty to 'carry out sustainable development'. NRW also works within the framework of principles for SMNR. These are also central to the Natural Resources Policy that drives action in this regard across Wales.

As an essential part of the legislative framework in Wales, these principles do not simply underline policy making, but could be invoked to challenge the way in which public authorities and NRW carry out their functions.

The principles of sustainable development and SMNR in Wales now interrelate with the core environmental principles outlined in international and EU law. This forms a somewhat complex web of provisions, but, in the main, the principles in Wales are supportive of a preventive and precautionary approach. There is, however, a lack of attention to the polluter pays principle. This is potentially a point of divergence from the UK government which is keen to emphasise the latter. For example, the Agriculture White Paper suggests a new system of payment to farmers and land managers will be provided according to a "new baseline based on the polluter pays principle".

In order to adopt an effective multi-level governance approach to environmental protection across the UK it will be important to adhere to all three principles in policy making and the interpretation of environmental law.

NAW Climate Change and Rural Affairs Committee
Environmental Governance Arrangements Post-Brexit 10th May 2018
Information Note from Richard Cowell, Cardiff University

Information presented here draws in part on evidence submitted to the Environmental Audit Committee, available here http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/environmental-audit-committee/25-year-environment-plan/written/79279.html

Environmental Governance

1) What are the current key functions of the European Commission (EC), the European Court of Justice (ECJ) and other EU bodies in implementing and enforcing environmental legislation?

EU institutions have performed a number of important functions in UK environmental policy that are put at risk by Brexit. Most attention has been given to the powers of the EC and ECJ to take enforcement action against Member States, with the important provision for third parties to bring complaints and to issue fines for infractions. However, the key functions of EU bodies *also extend beyond enforcement*, to embrace:

- pooled expertise and specialist agencies (for example European Chemicals Agency);
- monitoring, policy evaluation and transparency (with the UK obliged to provide regular reports to the Commission on its ability to deliver against targets which, by being publicly available, can provide a basis for holding governments to account), with the European Environment Agency having a key evaluation role;
- delivering interpretations of EU environmental legislation and more detailed guidance;
- new policy formulation and strategic thinking

2) What type of domestic governance body will be needed to replace these functions post-Brexit?
3) What will the key functions of the body be? Will/can these mirror functions of the EU institutions? What additional powers should be considered?

The prospective new body promised in the UK Government's 25 Year Environment Plan has been described as 'green watchdog' but, as above, this scarcely captures

the important functions of the EC and ECJ, which are 'guide dog' as well as watchdog[1], and the proposals presently appear only to cover England.

If the goal is effective environmental policy, then all of the key functions listed above need to be institutionalised somewhere in the UK's environmental governance architecture. An independent body could be an appropriate portmanteau institution for housing functions on monitoring and enforcement. Conceivably, the UK (or the devolved nations) could set up a dedicated arbitration court to hear environmental cases; perhaps based on the New Zealand model; or revisiting older reflections on the merits of a UK 'Environmental Court'[2]. The current environmental tribunal for England and Wales seems only to address appeals by the regulated against regulatory action, not third party appeals. But *debates about a new body need to be widened to a process of identifying where all of the roles of EU environmental governance, including those beyond the remit of a new body, will be discharged*. Ongoing compliance with the Aarhus Convention is also germane to these tasks.

It should also be noted that *the ability of any future body to exercise a firm and effective implementation role will depend to a large extent on how UK environmental policy evolves as the EU's influences diminishes*. Action taken by the EC on monitoring and enforcement was made effective because EU legislation tended to have 'hard edges' e.g. firm, measurable targets and clear timetables for implementation. Should post-Brexit environmental legislation in the UK become more vague, more discretionary, more accepting of trade-offs, then holding governments to account for implementation failures loses its efficacy.

4) What should be the core principles of the body? For example, independence, adequate resourcing, expertise? What governance arrangements are required?

Any new, effective environmental body requires significant levels of independence from government, adequate resourcing (the governance of which is itself a dimension of independence) and expertise. Achieving these requires nothing less than a *volte face* in the treatment of environmental bodies in the UK. The period since 2010 has seen a series of government moves, mainly at Westminster level, to cut the resourcing of environmental bodies with knock on effects for expertise; reduce their independence and remit and, in some cases, to cut them altogether e.g. Sustainable Development Commission, Royal Commission on Environmental Pollution. Governance arrangements are thus required that can establish the

[1] Davis H and Martin S (2008) *Public Services Inspection in the UK*, Jessica Kingsley.
[2] Grant M (2000) *Environmental Court Project*, Final Report, DETR.

requisite high level of independence, authority and *also permanence* – allowing long-term thinking and learning – that characterises the EC's environmental roles.

5) Should there be a single UK-level body or separate bodies for each part of the UK?
6) For a UK-level body, should it be accountable to Parliament and if it is a national body how should it be accountable to the devolved legislatures? What role should the devolved administrations play in setting it up?

Given the deep and profound connections between Brexit, environmental policy and devolution, it is very important that the devolved administrations have a major role in shaping how any such body is set up, alongside the Westminster government. There are also likely to be considerable returns from cross-UK collaboration, given that post-Brexit environmental legislation will be subject to various forms of Common Framework, the need to consider compliance with international conventions and possibly EU alignment, and the desirability of sharing expertise and back office functions. Collaboration in institutional design should also foster buy-in and cement the organisation's status.

There are arguments for either creating a single body at UK level or for separate bodies in each part of the UK: the former may score better on efficiency, cross-UK coherence and critical mass; the latter more on attunement to devolution. But attention should also be given to what kind of accountability relations are most likely to make the body effective, by giving it power, permanence and status: unity or separate bodies? Arguably a single UK body, but with a high level of corporate ownership from the constituent UK governments, might best foster the sense of joint accountability, mutual interest and collective importance that characterises the EC and ECJ and underpins their robust environmental action. It would foster a level of detachment from political vicissitudes in any given governmental arena. And if, as would often be the case, a failure of environmental policy in (say) England has repercussions for the rest of the UK, then a single body with multiple lines of accountability might best address spillover effects. The areas in which such a body might be called to act would of course reflect the legislation in each devolved government, itself a product of discussions on Common Frameworks.

7) Are there any existing bodies at UK or Welsh level that could adopt these governance functions? If so, what action is need to ensure they are ready to perform these additional functions?

There are existing bodies that could adopt these functions or which perform similar functions, but they are rarely perfect analogues. The use of the Planning Inspectorate to deal with planning appeals in Wales illustrates how technical aspects

of enforcement, against Welsh legislation and policy, can be performed by officers within a cross-border (England and Wales) body, but its major decisions are issued as recommendations to Welsh Ministers. The Office for Future Generations, charged with guarding the interests of future generations under the Future Generations (Wales) Act 2015, might be adapted *though it would be a major, transformative extension of its functions, and raise new questions about the scope for issuing sanctions for failure against governments*. The same challenge would need confronting if one were to extend the role of the Climate Change Committee to cover wider environmental issues. However, the CCC may offer more of a model in that Wales already relies on this body for monitoring and enforcement of policy, and the legislation is also designed in such a way – with measurable targets and timetabled action plans - that facilitate holding governments to account.

8) Does the body need to be in place on exit day? Or by the end of the transition period?

This depends on the nature of the transition period agreement and which aspects of EU environmental legislation are included. If it is the entire EU environmental *acquis*, then risks of a governance gap are somewhat postponed[3], though the task of setting up an effective body, sensitive to the devolved governance setting, and recruiting appropriate staff, will be challenging even with any breathing space conferred by transition.

EU Environmental Principles

9) Should the core EU principles be retained once we leave the EU?

There is a strong case for retaining the core EU environmental principles and making sure that they are institutionalisedin the environmental governance architecture of the UK as we leave the EU. The principles – polluter pays principles, precautionary principle etc – have given EU environmental legislation a 'degree of coherence' and 'assist in the direction of legal interpretation where there are ambiguities or new situations'[4]. Instituting a clear commitment to aim for a high standard of environmental protection (as does the Lisbon Treaty) would facilitate effective application of the other principles.

[3] Carpenter J (2018) 'Transition deal gives UK breathing space on post-Brexit governance', *ENDS Report* 23rd March.

[4] Macrory R (2018) 'What role will environmental principles play post-Brexit?' *ENDS Report* 515, 1st February and Macrory R and Thornton J (2017) 'Environmental principles: will they have a legal role after Brexit?' *Journal of Planning and Environment Law* 907-913

The list of EU principles need not be regarded as exhaustive, and non-environmental EU principles with significant implications for environmental governance warrant consideration, too, notably subsidiarity. There are emerging principles that might also be considered. The idea of a 'non-regression clause' in various regulatory standards may be hard-wired into any future trade agreement with the EU.[5] Westminster has begun articulating principles of environmental 'net gain'. While distinctive, both speak to beliefs that after thirty years pursuing 'sustainable development', our guiding principles need to confront more sharply those policy areas where environmental degradation continues.

10) Should the principles be retained in legislation or through other means?
11) How should the principles be implemented and enforced?

These questions should be considered together, as the means by which the principles should be retained ought to be guided by consideration of the best scope to bring them to bear on decisions (i.e. implementation and enforcement).

However, there is much debate and uncertainty on this point. Enshrining the principles in legislation would appear to confer greater status on them than a policy statement. The Well-Being of Future Generations (Wales) Act 2015 institutes a set of duties for public bodies and provides one model. However, analysis of the utilisation of EU and other environmental principles in decisions suggests that principles enshrined in policy statements can be impactful; what matters is that policy statements are given clear legal relevance to decision-making, as in planning.[6] The risks of enshrining them purely in policy concerns is ensuring sufficient durability, and that the ambit of their potential application is not unduly narrow (e.g. confined to environmental matters).

This is an issue on which the NAW should draw on Welsh experience, since the sustainable development duty in the Government of Wales Act 1998 (Section 121) provides insights into the substantive effectiveness of broad principles. Assessments tend to show that this duty was patchy at best in mainstreaming sustainable development as a driver of concrete actions. The issue of implementation, then, returns us to the mechanisms created for ensuring compliance within the overall environmental governance architecture e.g. legal challenges and redress, discussed above.

[5] Barnier M 10th April 2018.
[6] Macrory and Thornton, op cit.

12) Should the principles be UK-level or bespoke to Wales?

Given their general nature, it is hard to see why Wales would necessarily seek to achieve a bespoke list of principles. Territorial variation would arise from the way in which they are applied to different circumstances, not from the principles themselves. There are precedents for the devolved governments elevating principles not considered by other parts of the UK – an example is the Scottish Government's commitment to 'environmental justice'.

13) To what extent are the principles already covered by existing domestic legislation? How would the retention of EU principles in domestic law interact with existing domestic principles?

The issue about interaction between EU and domestic principles is not substantively novel – by their nature, more than one principle may require consideration in a given case. The more significant principle, as above, is how to institutionalise EU principles in the UK's environmental governance architecture, that encourages their appropriate use. Creating an effective environmental body may be key to that.

As legal experts have noted, retaining EU environmental principles is not, in itself, likely to be a substitute for making sure that policies and legislation exemplify those principles.[7]

[7]Macrory and Thornton, op cit.

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