

## WALES, DEVOLUTION, BREXIT AND ENVIRONMENTAL LAW:

### Summary

The constitutional clash between the governments of the United Kingdom, Scotland and Wales over Brexit legislation may be heading for resolution in the Supreme Court unless continuing negotiations between the governments are successful, according to announcements by the UK government on 17 April 2018.

The immediate cause is the passage in March 2018 by the Parliaments in Cardiff and Edinburgh of their own “Continuity” legislation, which may or may not be within the legislative competence of each devolved Parliament, but which certainly clashes with the intended framework of the UK government’s [European Union \(Withdrawal\) Bill](#). The UK government has said that it will challenge these Bills in the Supreme Court, unless agreement is reached in negotiations which may result in this devolved legislation being withdrawn.

Threatened litigation in the Supreme Court brings to a head two conflicting trends, first the strong measures to devolve really significant further powers to Wales and Scotland; and secondly, the destination of powers being repatriated to the UK from Brussels after Brexit.

The governments of Wales and Scotland argue that these powers should be returned directly to them where they relate to devolved areas. The UK government had intended that such powers should first be returned to the UK government, with a view to their being re-allocated to the devolved parliaments in devolved areas, but with restrictions and limitations that would ensure that in key areas, the UK remains a single market, with consistent rules, rather than risking fragmentation which will make future trade agreements even more complicated than at present.

Responsibility for legislation on the environment was one of the first matters to be transferred to the legislative competence of the Welsh Assembly under the original devolution legislation in 1998. Environmental legislation in Wales continues to develop with significant differences from the rest of the United Kingdom and England. However, environmental laws in Wales raise many of the same questions on fundamental issues, such as how they are to be enforced effectively, once Brexit happens and the European Commission and Court of Justice of the European Union are no longer available as part of the enforcement picture<sup>1</sup>.

### Original devolution settlement and development of environmental law in Wales

Responsibility for legislation on the environment, and also, very importantly for Wales, the related areas of agriculture, fisheries and food, was part of the original devolution settlement of powers on the then Welsh Assembly under the original [Government of Wales Act 1998](#).

Devolution of further powers has continued at some pace, and the trend is for remaining restrictions on the exercise of relevant powers, for example over water supplies from Wales to areas of England, to

---

<sup>1</sup> For further background, see also the UK Environmental Law Association report ‘*Wales, Brexit and Environmental Law*’ by Victoria Jenkins, University of Swansea (UKELA, 18 October 2017).

be removed, or re-cast in favour of jurisdiction in Cardiff. In the [Government of Wales Act 2006](#), 'Assembly Measures' included agriculture, fisheries, food and rural development and the environment.

Following the 2011 referendum and the [Silk Commission Report](#), the National Assembly for Wales was given further financial powers under the [Wales Act 2014](#), which will see it able to exercise income-tax varying powers from 2019.

The [second part of the Silk Commission Report](#) dealt with proposed changes to the Assembly's legislative powers, and resulted in the [Wales Act 2017](#). The fundamental change introduced by the Wales Act 2017, which came fully into force on 1 April 2018, was the move to a "reserved powers" model. In other words, and more like the Scottish Parliament, the National Assembly for Wales can now legislate in any area which is not specifically reserved to the UK Parliament. This is a change of great constitutional significance, and represents a major shift in the balance of power between London and Cardiff.

Meanwhile, the environment has remained squarely within the National Assembly's remit, and it has begun to enact a series of specifically Welsh pieces of legislation relating to the environment and associated topics. These include, most notably the [Planning \(Wales\) Act 2015](#), the [Well-Being of Future Generations \(Wales\) Act 2015](#) and the [Environment \(Wales\) Act 2016](#), which sets out a framework for Natural Resources Wales and for Sustainable Natural Resource Management.

## European Union (Withdrawal) Bill

The UK government published the European Union (Withdrawal) Bill in 2017, and it began its tortuous process through Parliament, supported by a government with a wafer-thin majority when combined with the votes of the DUP. The express aims of the Bill include the repeal of the [European Communities Act 1972](#), as the basis for all European Union law in the UK, and the withdrawal of the UK from the jurisdiction of the Court of Justice of the European Union, with all European Union law being brought into UK law as an interim measure.

It soon became clear that there were at least two major fault lines in this flagship Bill from the Brexit legislative programme. First, in seeking to transfer to 'UK law' the entire *acquis communautaire* or body of European Union law, the Bill took very wide and very controversial powers to correct "deficiencies" in EU law transferred in this way. These now famous 'Henry VIII clauses' allowing Ministers very wide scope to make changes to legislation through regulations, (see clauses 7, 9 and 17 of the Bill), have set up a clash between Parliament and the executive over whether this is a fair and proportionate use of delegated powers, or an unacceptable way or circumventing Parliamentary oversight.

Secondly, the European Union (Withdrawal) Bill runs straight into the headwinds of devolution, by seeking to enact very wide and equally controversial restrictions on the way in which devolved Parliaments can amend "retained EU law". The way in which these clauses were drafted may have been legally effective but politically provocative. In any event, they were not welcomed by the First Ministers of Wales and Scotland Carwyn Jones and Nicola Sturgeon. They made a joint statement on 13 July 2017 describing the European Union (Withdrawal) Bill as a "naked power grab" by the Westminster government, which they could not support as it stood. Perhaps ironically, this statement was issued from Brussels, where the two leaders were paying their own visit to the EU chief negotiator Michel Barnier.

## Welsh and Scottish “Continuity” Bills

Initially, the UK government’s negotiations with the EU were supposed to be informed by a committee involving representatives of all the devolved administrations, with close coordination throughout. However, there were many complaints of a lack of real consultation, and complaints by some of those close to the process of a breakdown in trust in what has been, by any measure, a fractious and continually controversial negotiating process.

This distrust resulted in both the National Assembly for Wales and the Scottish Parliament tabling and then enacting, on 21 March 2018, their own “Continuity” Bills, which give them powers to enact and amend ‘returning’ EU legislation in devolved areas in their own Parliaments in the absence of agreement with the UK Parliament about how this will be done under its European Union (Withdrawal) Bill.

There is considerable uncertainty as to whether these “Continuity” Bills are within the legislative competence of the National Assembly for Wales and the Scottish Parliament respectively. The Scottish Bill was actually accompanied by a formal statement from the Presiding Officer of the Scottish Parliament expressing his view that the Bill was not within the legislative competence of that parliament.

## Supreme Court Challenge?

Building upon those doubts, UK government Ministers announced on 17 April 2018 that they would refer the two “Continuity” Bills to the Supreme Court for a legal view on whether they were properly within the devolved legislative competence of the two Parliaments in Wales and Scotland. However, both Welsh and UK government Ministers have given some indications that negotiations may result in this further case before the Supreme Court being withdrawn.

## Future developments: what is at issue

Following Brexit, there are some signs that the Welsh government will embark on a major codification of Welsh law, and this could result in a Welsh Environmental Code. The UK Parliament, meanwhile, can realistically expect to be busy for years to come with the enactment and re-enactment of environmental legislation, which will be competing for Parliamentary time with every other sort of legislation affected by Brexit.

What these debates have shown and underlined, is the very large extent to which powers have been devolved over the environment, and many very important related subjects in Wales, including agriculture, fisheries, food, forestry, most forms of energy, rural development and so on. All major businesses in Wales are affected by devolution and have to accommodate the new legal and legislative realities, from Horizon Nuclear Power in Anglesey, Airbus’ wing manufacturing plant in North Wales, to BAE Systems in South Wales. Devolution is also going to be a major issue for every piece of Brexit legislation, from control and allocation of fisheries quotas and the proposed Fisheries Bill, to the devolved administrations’ policies on a customs union, to the vexed question of the Irish border with Northern Ireland, and the impact this could have on the whole Withdrawal Agreement.

What is also becoming clear is that with devolved power comes much more devolved responsibility, and environmental law is a case in point. If there will no longer be recourse to the European Commission and the Court of Justice for the European Union for issues of enforcement

of EU law after Brexit, the question of what will replace that form of enforcement is not simply a question for the Westminster Parliament, but also for the Senedd in Cardiff. It will have to decide how the Welsh Government itself will be held to account if it fails or refuses to enforce environmental law; whether to continue to rely upon criminal law or to extend the use of civil and administrative law; how to hold regulators to account; which legal principles to include in environmental laws and how to apply them. Enforcement of environmental law is a major topic in itself, and will be the subject of a future article in this series.

There will also be a pressing need, once the UK and devolved administrations have had their arguments, negotiations or perhaps their day in court, to make a reality of the “common frameworks” to which each of them is committed. It is not going to help make any part of the UK an attractive place in which to do business if environmental laws are uncoordinated and strikingly different across the UK, nor would that help promote trade with the EU or other countries.

**William Wilson, Prospect Law Ltd**

*William Wilson is a specialist environmental, regulatory and nuclear lawyer with over 25 years experience in government, private practice and consultancy. He worked as a senior lawyer at the UK Department of the Environment/DETR/Defra, and helped to build up the environmental and nuclear practices at another major law firm, as well as running his own environmental policy consultancies. William has experience of all aspects of environmental law, including water, waste, air quality and industrial emissions, REACH and chemicals regulation, environmental protection, environmental permitting, litigation, legislative drafting, managing primary legislation, negotiating EU Directives and drafting secondary legislation.*

*Prospect Law is a multi-disciplinary practice with specialist expertise in the energy and environmental sectors with particular experience in the low carbon energy sector. The firm is made up of lawyers, engineers, surveyors and finance experts.*

*This article remains the copyright property of Prospect Law Ltd and Prospect Advisory Ltd and neither the article nor any part of it may be published or copied without the prior written permission of the directors of Prospect Law and Prospect Advisory.*

*For more information or assistance with a particular query please in the first instance contact the department paralegal Adam Mikula on 020 7947 5354 or by email on [adm@prospectlaw.co.uk](mailto:adm@prospectlaw.co.uk).*