Brexit unlikely to give UK free rein over green laws

On whichever terms Brexit occurs, a raft of international treaties means that when it comes to formulating environmental laws the UK may find that no country is an island

By Richard Macrory

Post-Brexit, the legal status of EU environmental law within the UK will depend on the nature of the final agreement negotiated. Norway, for example, as part of the European Economic Area, has access to the EU single market. Though not covered by EU agriculture and fisheries law, it is bound by all EU environmental legislation, with the exception of those covering habitats and birds. There is a special European Free Trade Association (EFTA) Court which must follow the principles of the Court of Justice of the EU (CJEU), but national courts are not obliged to refer cases to it in the way that the highest courts are meant to refer issues of doubt to the CJEU. There is an EFTA Surveillance Authority with equivalent powers to the European Commission to bring enforcement actions against EFTA members, but the EFTA Court has as yet no equivalent powers to the CJEU to impose financial penalties on member states who do not comply with its judgments.

International treaties

But should the UK agree a more detached model, it may be that EU environmental legislation will no longer be legally binding within the country. It does not follow, however, that the UK will have a completely free hand in how it develops its environmental law because it has already ratified almost 40 international environmental treaties.

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There are then two important legal questions that need to be addressed before assessing the significance of this body of international environmental law post-Brexit. First, to what extent will the UK, if it leaves the EU, be bound by such treaties where the EU was also a party? Second, what legal impact will these treaties have within the national legal system?

In some areas such as trade, the EU has exclusive competence to ratify international treaties, and should the UK leave the EU it will no longer be bound by such treaties. But in many areas including the environment, treaties have been so-called ‘mixed agreements’ where both member states and the EU are signatories because they both have competences in the areas covered by the treaty in question. According to European Commission figures published this year, the number of environmental treaties that the EU has ratified is double the number of trade agreements, and represent the highest proportion of any sector.

If the UK leaves the EU it may be that it will still be automatically bound by the non-EU parts of the mixed agreement. The problem here is that the ratification documents rarely define the division of competences with any precision – quite deliberately to avoid international negotiations being entangled in internal EU disputes over competences.

Provisions under the Vienna Convention on Treaties deal with succession and the rights of withdrawal following a ‘fundamental change of circumstances’ but they do not appear to directly address the circumstances of a country leaving a regional grouping.

A smoother way forwards may be for the UK to agree to shoulder all the responsibilities under the treaty in question, perhaps under a protocol. Some have argued that this will require all parties to assent to the agreement – both third countries and the other EU member states.

Recognition in national law

Whatever the precise nature of international obligations eventually assumed by the UK, one then must ask whether they have legal purchase within the national system. EU law is distinct because under the European Communities Act 1972 it essentially forms part and parcel of UK national law. As to international law, some jurisdictions such as the Netherlands have a ‘monist’ system of law which allow the obligations under international treaties to be invoked in national proceedings. In contrast, the UK has long operated a ‘dualist’ system, meaning international treaty provisions cannot be pleaded directly before national courts – national legislation must implement the treaty in question.

But international treaty obligations that have not be incorporated into national law can still influence national proceedings. They may be used to help the courts resolve ambiguities in the national law, on the assumption the UK meant to comply with its international obligations. More recently the courts have gone rather further where human rights under the European Convention on Human Rights are involved, and have been prepared to look at other treaties covering the same field to help interpret convention rights. Common law principles have sometimes been developed in the light of international conventions.

Role of parliament

But the question remains fluid and it may be that in future the courts will be prepared to give more weight to unincorporated international treaties in ways that are not yet fully clear. One of the justifications for the UK's dualist system is that treaty ratification is a matter of executive action under the royal prerogative. Parliament has only been consulted on major treaties as a matter of convention. In contrast, countries that adopt a monist system also tend as a matter of internal constitutional arrangements to involve their legislature in approving treaties.

But the position has recently changed in the UK. Under Part 2 of the Constitutional Reform and Governance Act 2010, all treaties proposed to be ratified must be laid before parliament, and parliament now has the power to block indefinitely a government decision to ratify a treaty. Failure to exercise these blocking powers might be said to imply parliamentary approval of a treaty and justify a court in giving more weight to it than hitherto has been the case.

An intriguing new argument was put forward by a member of the Supreme Court last year. *R (on the application of SG) v Secretary of State for Work and Pensions* [2015] UKSC 16 concerned the legality of proposed caps on welfare benefits. One issue raised was whether provisions of the UN Convention of the Rights of the Child, which the UK had ratified, could be invoked directly. Lord Kerr noted that a reason for maintaining the dualist system was to protect citizens from the executive acting against their interests without parliamentary authority. But he felt that when the argument was that it was the government that had breached human rights law, "the justification for refusing to recognise the rights enshrined in an international convention relating to human rights and to which the UK has subscribed as directly enforceable in domestic law is not easy to find. Why should a convention which expresses the UK's commitment to the protection of a particular human right for its citizens not be given effect as an enforceable right in domestic law?"

For a British judge, this was a bold assertion and Lord Kerr was in the minority. But he could be ahead of his time, and how the courts will treat international environmental conventions post Brexit remains an issue of immense importance for the future development of the UK's environmental law. ■

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