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## **Brexit and Environmental Law: the layers of the onion**

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### **Prologue:**

#### **The 30<sup>th</sup> Anniversary of the United Kingdom Environmental Law Association**

It has been a privilege to be a member of UKELA since its early days and to have been part of the movement supporting legal responses to environmental challenges from the late 1980s to the present 30<sup>th</sup> anniversary. The Association was founded upon a common belief that laws have a key role to play in halting environmental decline. This faith has been maintained over the years though progressively tempered by an appreciation that law has its limits and must be recognised to operate alongside a range of social, economic, political and technical factors that delimit its sphere of effective operation. If environmental law is 'the law relating to environmental problems', it is necessary to look to other disciplines and lines of enquiry to ascertain what is to count as an 'environmental problem', why it should need to be regulated, and how it might best be regulated. Progressive appreciation of the importance of the 'what', 'why' and 'how' questions have marked the advancement of the Association and the increasing sophistication of its inputs into policy debates on the future development of environmental law.

Another key factor that should be noted on the 30<sup>th</sup> anniversary of UKELA is the dynamic character of environmental law. As thirty years have passed, the UK has changed markedly as a society and similarly in respect of its environmental problems. Recent decades have seen the decline of pollution from heavy industry and the rise of new kinds of environmental problem, rooted in consumption patterns and the cumulative impacts of lifestyle choices. Using law to address these new kinds of environmental problem involves markedly different kinds of approach to the regulation of the 'factory down the road'. Indeed, the mainly local character of environmental problems has been largely displaced by an appreciation that many of the greatest environmental challenges are international or global in character. It is only necessary to note the massive recent concern about plastic in the marine environment to appreciate that concerted and coordinated international action by all nations is a necessity if the problem is to be adequately addressed.

International problems call for international responses and the internationalisation of environmental law has been another prominent feature over the lifetime of UKELA. National laws focussed on industrial pollution have been superseded by a wide spectrum of measures adopted by international agreement, multilaterally or globally. Much international law is used to register little more than an 'agreement in principle' on the need to take action in respect of an environmental concern. However, some agreements have a much more specific content in terms of actions needing to be taken and the consequences of failing to take action. The high water mark in this respect is the contribution of the European Union which, over the lifetime of UKELA, has grown from the first tentative Treaty provisions providing for an environment policy to a massive programme of regulation affecting all aspects of environmental-impacting activities across the Member States. The momentous importance of this body of law for environmental and ecological protection cannot be overstated.

Inevitably, therefore, as the UK progresses towards Brexit, the future status of EU-originating policy approaches, laws, administrative arrangements and collaborative implementation and enforcement measures has become an all-encompassing concern. As far beyond the horizon as can be seen, the future of UK environmental law will be determined by the outcome of present Brexit negotiations. In this debate, as always, it is good to see UKELA playing its part to the full.

## Introduction

Whatever the reasons for the Brexit vote, opposition to the EU's environmental programme does not seem to have been a significant factor. For the purpose of informing the debate on the Referendum, the House of Commons Environmental Audit Committee undertook an inquiry on the *EU and UK Environmental Policy*.<sup>1</sup> This inquiry confirmed a broadly positive view of EU membership insofar as environmental policy was concerned. The general view of those who gave evidence was that EU membership had been beneficial for the UK environment. The Inquiry provided a forum for the airing of diverse concerns, relating to the need for more rigorous national implementation of EU measures and reducing burdensome costs upon business. However, the overwhelming majority of informants took the view that membership of the EU had improved environmental protection in the UK. Understandably therefore, the vote to leave the EU in the referendum of 23 June 2016 has not been seen as providing any mandate for major changes to the substantive content of environmental law or policy.

Given this background of general support for the EU approach to the environment, the Brexit vote is not seen to justify any lowering of environmental standards. Hence, the Government's 25 Year Environment Plan, published in January 2018, "looks forward to delivering a Green Brexit", involving improvements in environmental quality and biodiversity.<sup>2</sup> Beyond that, the Government seeks to ensure that "the new mechanisms we put in place as we leave the EU don't just maintain, but strengthen protection for the environment".<sup>3</sup> The green-Brexit challenge, therefore, may fairly be seen as the UK having as its baseline the need to keep as many of the environmental and ecological benefits of membership of the EU as possible following the UK's departure.

The idea of maintaining an EU approach towards the environment in a UK that has relinquished EU membership seems inherently contradictory. Nevertheless this appears to be the path on which the UK appears to be set, initially at least. Resolving the contradictions and putting in place a sufficient replacement for the diverse aspects of the EU's programme for environmental protection is no small task for the UK. Two rather fundamental notional questions need to be asked. First, what has been the contribution of the EU to environmental law in the UK? Second,

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<sup>1</sup> House of Commons, Environmental Audit Committee, Third Report of Session 2015-16, *EU and UK Environmental Policy* (2016) HC537, 23 March 2016 available at <https://publications.parliament.uk/pa/cm201516/cmselect/cmenvaud/537/537.pdf> and see the Government Response HC 644, 7 September 2016 available at <https://publications.parliament.uk/pa/cm201617/cmselect/cmenvaud/644/644.pdf>. These and other electronic sources referenced in this paper were accessed on 11 July 2018.

<sup>2</sup> HM Government, *A Green Future: Our 25 Year Plan to Improve the Environment* (2018).

<sup>3</sup> DEFRA, *Environmental Principles and Governance after the United Kingdom leaves the European Union* (2018) Foreword.

how might that contribution be replicated and retained within the UK legal order post-Brexit? Only when the first (stocktaking) question has been addressed can the second (substitution) question be meaningfully considered.

What is most telling about the stocktaking exercise is that it has revealed a sequence of distinct kinds of EU environmental contributions. From an initially rather simplistic and over-legalistic view of the EU's environmental role, the investigation has proceeded to focus upon rather more diffuse, but no less significant, aspects of the contribution. The need to secure a sufficiently green Brexit has therefore prompted an unpicking of the distinct features of the present EU arrangements - like the layers of an onion. The findings, so far, are that there are actually four distinct elements in the present arrangements that need to be considered in the green Brexit transition: rules, governance, strategy and regulatory culture.

The purpose of this paper is to investigate these four aspects of the EU contribution to environmental law and policy as successive stages in the green Brexit discovery process. What will become evident is that the stocktaking exercise shows a depth and sophistication in the EU environmental contribution which has raised increasingly challenging questions as to what extent (and whether) the replication and repatriation aim is genuinely feasible. In the final outcome, it is suggested that, at the very least, Brexit will inevitably result in a significant change of approach towards environmental and ecological protection. Whether this change is seen as a diminution or an enhancement will depend upon whether the mantra of 'taking back control' can be meaningfully applied to the inextricably international aspects of environmental protection which have arisen from EU membership.

## Rules

Initially at least, securing a sufficiently green Brexit was seen to involve enacting EU environmental legislation into national law, so that EU rules against pollution of water, air and land, and loss of biodiversity, should be simply replicated as national rules to the same effect.

In this vein, the response of the UK Government in respect of its approach to delivering Brexit came in the form of the Brexit White Paper, *Legislating for the United Kingdom's withdrawal from the European Union*.<sup>4</sup> This envisaged the enactment of a 'Great Repeal Bill' (subsequently termed the 'European Union (Withdrawal) Bill') to secure an orderly transition by converting the *acquis* of EU law into UK national law and the repeal of the European Communities Act 1972. Alongside this, it was recognised that a significant amount of 'EU-derived law' would cease to have its intended effect after departure, where, for example, the involvement of an EU institution, regime or system was envisaged by the relevant EU laws. In short, the initial task was seen as that of substituting national rules of law for corresponding EU rules, and making necessary 'corrections', so that the level

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<sup>4</sup> UK Government, *Legislating for the United Kingdom's Withdrawal from the European Union* (Cm 9946, March 2017). This had been preceded by a White Paper entitled *The United Kingdom's exit from and new partnership with the European Union* (Cm 9417, 2 February 2017) setting out the Government's vision of what it was seeking to achieve in negotiating the exit from, and new partnership with, the EU.

of environmental protection under pre-Brexit provisions would continue seamlessly post-Brexit.

This plan has now been given broad effect through the European Union (Withdrawal) Act 2018, which gained Royal Assent on 26 June, though it will come into operation at a date to be determined. The Act converts EU law as it stands at the time of Brexit into domestic law and preserves UK laws implementing EU obligations. The Act also provides for secondary legislation to enable corrections to be made to allow EU law to operate 'appropriately' after the UK's departure. In addition, the Act enables domestic law to reflect the content of a withdrawal agreement under Article 50 of the Treaty on European Union, subject to the prior enactment of a statute by Parliament approving the final terms of withdrawal. Hence, insofar as environmental law is concerned, the Act takes as a baseline the need to convert existing EU environmental law into UK law.<sup>5</sup>

The initial perception of Brexit being secured by repatriation of environmental rules seems to have been the main preconception in early work on the Brexit transition. The then Environment Minister, Andrea Leadsom, giving evidence before a Parliamentary committee,<sup>6</sup> took the view that about two-thirds of EU environmental legislation could be brought into UK law with mere technical changes, but this might not be possible for the remainder. On that basis, continuing work was needed to ensure that those measures that were 'difficult' to transpose into national law continued to function effectively after leaving the EU. However, the Minister was rather unspecific on the reasons why the problematic third of EU environmental legislation was difficult to translate into national law. Nevertheless, the general view of the Government at this stage seems to have been that translation of EU into national law was a matter of lesser or greater technical 'difficulty', rather than something which raised insuperable issues of principle.

Some basis for this view might be found in the appreciation that much EU-originating laws have found their way into national law through the transposition process that is required to give effect to EU environmental directives in national law. The need for legal certainty<sup>7</sup> requires that explicit and precise duties upon competent national authorities must be formally set out as binding legal obligations. There are innumerable examples of UK secondary environmental legislation that serves this purpose.

However, some caution is needed in supposing that all EU-originating laws are of this kind. EU environmental directives typically impose obligations directly upon member states (as opposed to competent national authorities) and these obligations do not need to be transposed into national law. Hence, where an obligation falls upon a government itself, it would not be necessary to transpose this into national

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<sup>5</sup> DEFRA, Environmental Principles and Governance after the United Kingdom leaves the European Union (2018) Foreword.

<sup>6</sup> House of Commons, Environmental Audit Committee, The Future of the Natural Environment after the EU Referendum, Sixth Report of Session 2016-17, HC599 2017, particularly evidence given on 25 October 2016. See also, Anon., 'Government may not transpose third of EU environmental law' Environment Analyst 26 October 2016, available at <https://environment-analyst.com/50553/government-may-not-transpose-third-of-eu-environmental-law>.

<sup>7</sup> For references to the extensive EU caselaw on the legal certainty requirement, see, S. Kingston, V. Heyvaert and A. Čavoški, European Environmental Law (2017) p.78.

law since directives are already addressed to the member states and therefore binding upon them. For example, where a directive requires a member state to provide the Commission with a periodic monitoring report on the state of some aspect of the environment, that obligation would be binding irrespective of transposition into national law.

The key point is that the EU approach towards the environment extends some way beyond the kinds of obligation that are customarily transposed into national law. Possibly, this is what the former Minister had in mind when referring to EU laws that were 'difficult' to transpose into national law. Nonetheless, at this early stage, there seems to have been some playing down of the weighty issues of principle surrounding how 'non-transposed' aspects of EU legislation might be incorporated within national law following Brexit.

## **Governance**

A second reason for doubting the characterisation of the EU environmental contribution in terms of a set of substantive legal rules (of the kind that may be seen in legislation transposing EU directives into national law) is that these rules actually presuppose a background of administrative arrangements which are relied upon for their effective operation. Specifically, EU-derived national laws assume, without explicitly stating, a context of supra-national scrutiny and enforcement mechanisms. Breach of an EU-derived law will be subject to the scrutiny and overseeing role of the European Commission leading, in the most extreme cases, to the imposition of a sanction by the Court of Justice of the European Union. This governance background to EU-derived laws sets them apart from purely national laws in rather fundamental ways.

The appreciation that EU environmental law involves considerably more than nationally transposed legal rules was highlighted by Lee and Fisher<sup>8</sup> who drew attention to the important combination of substantive and procedural measures that are needed to secure satisfactory levels of environmental and ecological protection. The point is well made that much of what is commonly termed 'environmental law' is actually about 'environmental governance'. This involves public institutions that have appropriate responsibilities for directing, regulating, authorising, guarding and being subject to duties in respect of securing environmental protection. Not least significant amongst the diverse bundle of environmental governance obligations is the range of measures that may be applied to call governments to account for shortcomings in the performance of their diverse environmental protection roles. When the significance of environmental governance is appreciated, it is apparent that the green Brexit is about far more than the substantive environmental laws that need to be translated into national legislation. It is also about the national replication of environmental infrastructure that accompanies EU environmental measures, particularly the range of mechanisms for securing governmental accountability. As

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<sup>8</sup> M. Lee and L. Fisher, 'Environmental Governance after the EU: the Need for Accountability: An Expert Review', OUPBlog 28 November 2016. See also M. Lee, 'Brexit: Environmental Accountability and EU Governance', OUPBlog 17 October 2016 and M. Lee, 'Brexit and environmental protection in the United Kingdom: governance, accountability and law making' (2018) *Journal of Energy & Natural Resources Law* 1.

the authors put it, in ‘taking back control’ “we forget the infrastructure of environmental accountability at our peril”.

The realisation that challenging aspects of Brexit are actually about institutional responsibilities and safeguards, rather than substantive rules of environmental law, is also taken as a key focus of the UKELA Report, *Brexit and Environmental Law: Enforcement and Political Accountability Issues*.<sup>9</sup> This is concerned with the post-Brexit environmental duties of government and public bodies, particularly how these might change to encompass the supervisory, reporting and enforcement roles of the European Commission and the adjudicative and sanctioning roles of the Court of Justice of the European Union. A particular difficulty is seen to arise in securing accountability of government and public bodies and in providing a national counterpart of the citizen’s complaints procedure that arises under EU law. As the UKELA Report notes, the sanctioning power of the Court of Justice will cease to apply after Brexit and it is difficult to see what national provisions could be put in place to serve as a counterpart. It is suggested that a specialised national body should be established to oversee the implementation of environmental law and to replace the supervisory role of the European Commission as the ‘guardian of the treaties’. However, what legal form the post-Brexit environmental supervisory body should take is not apparent, despite an illuminating survey of various ombudsman and parliamentary commissioner roles, and specialised environmental courts, from different jurisdictions that might serve as models for the UK.

In response to the concerns about post-Brexit loss of environmental governance, the present Environment Minister, Michael Gove, has been active in developing proposals for environmental governance to fulfil some of the roles noted above. A recent consultation on *Environmental Principles and Governance after the UK leaves the EU*<sup>10</sup> envisages the publication of a Bill in the autumn of 2018 which will create “a new, world-leading independent environmental watchdog to hold government to account on our environmental ambitions and obligations”.<sup>11</sup> The overarching aim is that the new body should bolster domestic environmental governance framework by providing an enhanced national approach to oversight and enforcement. The objectives for the new body are that it should:

- act as a strong, objective, impartial and well-evidenced voice for environmental protection and enhancement;
- be independent of government and capable of holding it to account;
- be established on a durable, statutory basis;
- have a clear remit, avoiding overlap with other bodies;
- have the powers, functions and resources required to deliver that remit; and
- operate in a clear, proportionate and transparent way in the public interest, recognising that it is necessary to balance environmental protection against other priorities.<sup>12</sup>

Beyond sketching out these objectives in the most general terms, the Consultation Document gives little indication as to how the present powers of the EU Commission and the Court of Justice might be paralleled within the national arrangements. The

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<sup>9</sup> UKELA July 2017, available at <https://www.ukela.org/content/doclib/317.pdf>.

<sup>10</sup> DEFRA, *Environmental Principles and Governance after the UK leaves the EU* (May 2018).

<sup>11</sup> *Ibid.* para.77.

<sup>12</sup> *Ibid.* para.79.

suggestion is offered that the new watchdog body should be empowered to issue 'advisory notices' where it is of the opinion that government is failing to implement environmental law and that the Government should be obliged to provide a response to such notices. Although advisory notices are regarded as the main form of enforcement mechanism, an alternative suggestion is that 'binding notices' could be issued to require Government to implement specified corrective actions, subject to a right of appeal. However, a major concern remains as to what would happen where a recalcitrant government still failed to act in accordance with such notices. The comparison with existing prosecution and sanctions being imposed at a supra-national level leaves the impression that the proposed national mechanisms for securing governmental compliance are far weaker than the EU measures needing to be replaced.

Section 16(2) of the EU Withdrawal Act 2018 requires draft legislation for the establishment of a public authority with functions for taking proportionate enforcement action (including legal proceedings if necessary) where a minister of the Crown is not complying with specified environmental laws. Whilst this seems to formalise the need to establish an enforcement body to take the place of the EU institutions post-Brexit, the rather unspecific reference to 'proportionate enforcement action' prompts (rather than answers) the same questions as to what kinds of action should be provided for in respect of a government that fails to meet its environmental obligations.

The final outcome of the consultation exercise and the form of legislation establishing and empowering the environmental enforcement body remain to be seen, but the indications are that its powers are likely fall some way short of the prosecution and sanctioning powers possessed by the EU Commission and the Court of Justice. It is difficult to see how the new environmental watchdog can be as effectively empowered to hold governments to account in meeting their environmental obligations as the Commission and Court under the present arrangements.

## **Strategy**

Stage three in the stocktaking exercise is the realisation that even if the substantive rules can be replicated and the governance powers made equally stringent, there is still something strategically different about EU environmental law which lacks a counterpart in national law: environmental policy principles.<sup>13</sup> The EU environmental programme differs from the traditional UK approach, in that laws are adopted in accordance with an explicit environmental policy which is based upon key environmental management ideas. Amongst the overall aims of the EU is that of working for the sustainable development of Europe and a high level of protection and improvement of the quality of the environment.<sup>14</sup> With a view to promoting sustainable development, environmental protection requirements are to be

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<sup>13</sup> On the environmental policy principles generally, see N. de Sadeleer, *Environmental Principles* (2002); R. Macrory, *Principles of European Environmental Law* (2004); and E. Scoford, *Environmental Principles and the Evolution of Environmental Law* (2017).

<sup>14</sup> Art 3(3) Treaty on European Union. On the legal aspects of sustainable development, see A. Ross, *Sustainable Development Law in the UK: from rhetoric to reality?* (2012).



integrated into the definition and implementation of EU policies and activities.<sup>15</sup> In pursuing these matters, the EU may adopt specific legislation founded upon its environment policy. This policy must be based on the precautionary principle and on the principles that preventive action should be taken, that environmental damage should as a priority be rectified at source and that the polluter should pay.<sup>16</sup> A key issue for the green Brexit, therefore, is about the maintenance of these strategic ideas in the post-Brexit UK approach to environment.<sup>17</sup>

The significance of the EU environmental policy principles is recognised by the EU (Withdrawal) Act 2018 which addressed the need for environmental policy principles in national law. Section 16(1) requires the publication of draft legislation setting out environmental principles, a formal statement with regard to the application and interpretation of those principles, and a statement of the circumstances in which ministers must have regard to them in making and developing policy. For the purpose of these requirements, the environmental principles (noted above) are listed alongside certain procedural rights encompassing public access to environmental information, participation in decision making and access to justice in environmental matters.<sup>18</sup>

However, making formal legal provision for policy principles, even in the qualified form envisaged in s.16(1), is rather unconventional in UK legislation which is largely concerned with enacting legal rules, rather than stipulating matters of policy. The unspecific character of the EU environmental policy principles, perhaps purposefully, sets them apart from legal rules. The ideas of precaution, prevention and making polluters pay have never been precisely defined. Similarly, the idea of sustainable development is understood in the broadest way possible: as requiring a fair distribution of the benefits of development across present and future generations. This generality can be seen to serve the purpose of securing the maximum level of political support for the principles and the greatest flexibility in their application. Equally, it emphasises the role of the principles as a broad guide to various kinds of action, including environmental lawmaking, whilst purposefully not giving rise to binding rights and duties of kinds that might be enforced by courts of law.

It is the non-justiciable character of the environmental principles that sets them firmly within the sphere of policy, rather than law, and this is evident from the way the environmental principles operate under the present EU arrangements. EU legislation on environmental quality and biodiversity protection will usually refer to relevant environmental principles in a preamble or recitals. There may be situations where ambiguities in the meaning of legislation need to be interpreted in the light of its purposes, expressed in terms of furtherance of the general environmental policy principles. Despite this, the environmental policy principles remain distinct from the legal rules. No one has ever been prosecuted for contravention of the environmental

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<sup>15</sup> Art 11 Treaty on the Functioning of the European Union.

<sup>16</sup> Art 191(2) Treaty on the Functioning of the European Union.

<sup>17</sup> R. Macrory and J. Thornton, 'Environmental Principles: will they have a role after Brexit?' (2017) *Journal of Planning & Environment Law* 907.

<sup>18</sup> Deriving from the Aarhus Convention: United Nations Economic Commission for Europe (UNECE) Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters adopted on 25 June 1998.

principles as such, but only for breaches of legal rules that have been adopted to give effect to the principles in precisely defined contexts.

Beyond serving as a basis for environmental policy and a guide to legislation, there have been issues raised in the past as to whether the environmental principles can bind either national governments or the EU institutions. As a matter of national law there has been a strong resistance of the elevation of policy principles into binding legal requirements. In the *Duddridge* case<sup>19</sup> a challenge was raised against the Energy minister who had failed to act in accordance with the precautionary principle by declining to adopt requirements on the location of power lines. The national court held that a government minister was not bound to exercise his powers in accordance with the EU policy principle. In effect, whilst the EU environmental policy principles might be binding upon the EU institutions, they are not binding upon national governments of member states. On the issue of EU institutions being bound by the principles, in the *Bettati* case,<sup>20</sup> the validity of EU legislation banning the sale of chemicals that might damage the ozone layer was challenged on the basis that EU environmental principles had been improperly applied as the basis for this legislation. Although the EU Court of Justice, broadly accepted that the Commission and Parliament were bound by relevant principles in formulating and adopting environmental legislation, it held that it would not be possible to challenge the validity of the legislation, except where there could be shown to be a “manifest error of appraisal”. In effect, the interpretation and application of the policy principles was something on which EU lawmakers should be given the greatest possible flexibility. The prospect that failure to adhere to the policy principles in adopting legislation could ever provide a basis for a challenge to the validity of that legislation, therefore, seems, at best, an extremely remote possibility. The upshot of this is that, at both national and EU levels, the courts have resisted the conversion of environmental policy principles into rules of law.

Given the emphatically extra-legal status of the environmental policy principles, it is curious that the UK Government has seen a need for them to be embedded into law, insofar as s.16(1) of the EU Withdrawal Act 2018 seeks to achieve this. Certainly, there are examples of UK public bodies, such as the Environment Agency and planning authorities, being bound to exhortatory obligations to ‘have regard to’ the need for sustainable development. However, the idea of central government as a whole being bound to any continuing statutory policy requirements, on the environment or anything else, is a novel departure. Governments come and go. Prospective governments have a free hand in using election manifestos to sketch out their plans for government in a way that they hope will be most attractive to the electorate. The idea of binding future governments on matters of policy seems alien to this process, demonstrating, perhaps, that there may be good practical political reasons for the separation of law and policy.

Beyond the curious constitutional status of the ‘statutory policy’ that is envisaged is the key question of whether this innovation would actually make any practical difference. Given the generality (or vagueness) of the EU environmental principles, is the obligation upon government to adhere to these principles likely to prevent a

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<sup>19</sup> *R. v Secretary of State for Trade and Industry Ex p, Duddridge* [1996] Env LR 325.

<sup>20</sup> *Case C-341/95 Bettati v Safety Hi-Tech Srl* [1998] ECR I-4355.

government taking any action that it might take in the absence of the statutory statement of environmental policy? The likely answer to this is in the negative. Environmental policy principles remain massively important in guiding action but defy translation into legal obligations in any meaningful way. The most important factor will always be the political will of government to prioritise environmental protection and enhancement against other competing policy objectives. This is something which defies being embedded into law.

## **Regulatory Culture**

The fourth aspect of the stocktaking on EU contribution to environmental law concerns environmental culture. Even if the rules, governance and policy principles can be replicated in the post-Brexit national order, it is suggested that the approach of a detached UK may be, or become, 'culturally' different from that of the EU. Acknowledging that this observation is somewhat cryptic, the view offered is that adopting policies and enacting environmental rules, should be seen as the outcome of a process of inquiry that involves addressing a sequence of questions: why an activity is seen as environmentally harmful, precisely what activity is causing the harm and how should it be regulated. If so, a key issue with regard to the green Brexit is whether the EU-wide engagement with these questions should continue or whether they should become purely national concerns so far as the UK is concerned.

Whilst the UK has a comparatively long history of seeking to address environmental harm through law, this has tended to be a reactive response to the worst excesses of local industrial pollution and public health concerns. The UK model of an 'environmental problem' (of the kind addressed through law) has tended to focus upon an activity taking place in close proximity to its impacts (typically, the 'factory down the road'). The appreciation that many environmental impacts are the result of activities in remote locations, perhaps in other jurisdictions, is a relatively recent appreciation though it has become greatly more significant as a result of international collaborations in environmental matters, particularly at EU level. If environmental harms straddle national boundaries, it is entirely appropriate that they should be addressed through supra-national legal and policy actions by a body like the EU.

Within the EU, progress towards the formulation of environmental laws and policies is through dialogue between the member states, particularly on the why, what and how questions. This involves the sharing of technical expertise and reconciling national perceptions of the science, economics and intrinsic value of the environment and ecosystems. Ultimately, national views on environmental problems and the appropriate responses to these are brought within a regional international consensus which forms a basis for EU environmental policy and legislation. The concern is that this culture of moving forward through international consensus on environmental action will be replaced by a separate and distinct national environmental culture in UK post Brexit. For some, the idea of addressing environmental concerns through regional international collaboration and consensus is seen as a key strength of the EU approach and the prospect of a culturally detached UK 'going it alone' on the environment seen as a retrograde step.

Recognising that environmental 'regulatory culture' is a rather nebulous idea which is quite difficult to define with any degree of precision, some brief coverage should be

given of how this idea is manifested in practice. Whilst the role of regulatory culture can be seen to operate across a spectrum of activities, from policy formulation and the adoption of legislation to the approaches taken towards implementation and enforcement, some narrowing is needed for the present discussion. Perhaps the most graphic illustrations of the shared environmental regulatory culture of the EU are to be seen in the operation of the various cooperation bodies, networks and agencies established at EU level to enable information sharing, deliberation and decision making on environmental matters.

Although high profile political and economic concerns have been raised by the prospect of loss of key decentralised EU agencies from the UK post Brexit (particularly the European Medicines Agency and the European Banking Authority<sup>21</sup>) relatively less attention has been given to the role of the UK in a range of EU bodies with key roles in regard to the environment. However, a valuable discussion of the more specific environmental impacts of UK departure from EU environmental bodies is provided by the UKELA report, *Brexit and Environmental Law: The UK and European Cooperation Bodies*.<sup>22</sup> This Report investigates the role of 18 EU bodies with greatest relevance to environmental law, considering whether UK participation will be possible after Brexit and an estimation of the consequences of loss of involvement. The Report attaches the highest priority to continuing membership of the European Environment Agency, the European Chemicals Agency and the European Union Integrated Pollution Prevention and Control Bureau. The basis for UK having a continuing role in these bodies is quite intricate and heavily dependent upon whether the UK would continue to retain the relevant *acquis* of EU law and continue to accept the jurisdiction of the Court of Justice – matters which remain to be determined subject to the final departure agreement between the EU and UK. Also of potential relevance to the continuing roles of the UK in EU bodies is the application of Article 8 of the EU Treaty which provides that the EU “shall develop a special relationship with neighbouring countries, aiming to establish an area of prosperity and good neighbourliness, founded on the values of the Union and characterised by close and peaceful relations based on cooperation”. Again, the future ‘European Neighbourhood’ status of the UK, and the extent of ‘cooperation’ in environmental bodies, would need to be considered in the context of the departure agreement.

Placed lower down the rankings of importance in the UKELA Report are the European Network for the Implementation and Enforcement of Environmental Law (IMPEL) and cooperation bodies established to secure the consistent implementation of particular directives, such as the body entrusted with formulating a Common Implementation Strategy (CIS) under the Water Framework Directive (2000/60/EC). By comparison to the European Environment Agency, the roles of these bodies are certainly far narrower, but nonetheless important in securing a collaborative and consistent approach to the interpretation and implementation of EU environmental law. IMPEL is an international association of environmental authorities which seeks to secure effective application of environmental legislation through raising awareness, capacity building, peer review and exchange of information and

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<sup>21</sup> See House of Commons Library, *EU Agencies and post-Brexit Options*, V. Miller, Briefing Paper 7957 (2017).

<sup>22</sup> UKELA, *Brexit and Environmental Law: The UK and European Cooperation Bodies* (2018).

experiences of implementation.<sup>23</sup> In practical effect, IMPEL has an invaluable role in securing a consistent approach to implementation and enforcement of EU environmental law across national competent authorities. Similarly, the Common Implementation Strategy for the Water Framework Directive,<sup>24</sup> seeks to ensure a consistent approach to interpretation of the Directive by sharing information, developing guidance on technical issues such as monitoring, determining the status of waters and the application of exemptions to the environmental objectives of the Directive. The extensive body of CIS guidance is vitally necessary to steer competent authorities towards a consistent understanding to the many technical issues that arise in giving practical effect to the Directive.

As must be stressed, the future participation status of the UK in the EU environmental bodies remains to be determined as a part of the final Brexit agreement and the issues surrounding this are of some complexity. Nonetheless, it is clear that EU bodies with an environmental law remit provide a vital function in securing international consistency in the application of the law. Moreover (and this is the more important point for this discussion) they do this in a collaborative way which progressively fuses disparate national experiences and perceptions of the environmental protection task into an increasingly unified EU approach. This approach of moving towards consensus through the exchange of information and experience, and deliberation on common way forward on environmental challenges serves a good illustration of the EU environmental regulatory culture in operation. The critical question, as regards the green Brexit, is about how much of this regulatory culture the UK will seek to retain and how far this will be possible within the terms of the Brexit agreement.

## **Conclusion**

The only aspect of Brexit that is uncontroversial is that securing it will be more complicated than was generally anticipated at the time of the Referendum. The implications of Brexit for environmental law and policy have revealed increasingly impenetrable levels of intricacy as the discussions have proceeded. In the search for a sufficiently green Brexit, hopefully the approach taken here, of putting the issues under the four headings of rules, governance, policy principles and regulatory culture, will have served to place an order upon the distinct kinds of challenge involved. What the discussion has shown is that the debate about the green Brexit has moved step by step from the more tangible aspects of the EU environmental contribution to the less tangible (but no less valuable). It is suggested that, as the contribution becomes more abstract, the challenge of replicating it within the UK becomes less achievable. The only certainty is that the final form of the green Brexit will prove a disappointment to the many for whom unrealistic expectations have been raised.

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<sup>23</sup> For more information on IMPEL, see <https://www.impel.eu/>.

<sup>24</sup> For more information on the CIS, see [http://ec.europa.eu/environment/water/water-framework/objectives/implementation\\_en.htm](http://ec.europa.eu/environment/water/water-framework/objectives/implementation_en.htm).