



ALL PARTY PARLIAMENTARY GROUP

Agroecology for Sustainable Food and Farming

MEETING NOTES

The Environmental Watchdog: The Legal Status of Post-Brexit Environmental Principles

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Panel

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Chair: Kerry McCarthy MP and Baroness Young of Old Scone

Introductions

One of the outcomes of the discussions surrounding the EU Withdrawal Bill – the role of which is to bring EU laws into UK law – was how these laws would be enforced and monitored. The environmental watchdog is an attempt by the Government to address some of these concerns.

Why is the Watchdog Needed?

Greener UK aims to ensure that Brexit doesn't leave the environment worse off than it was before – that existing environmental standards and protections aren't weakened and, where possible, improvements are made.

This environmental watchdog is a recognition of the need for robust oversight and enforcement, to fill the governance gap in environmental law that Brexit has created. However, there are concerns that the existing proposal does not go far enough to achieve this. The consultation document, as it currently stands, would afford a lower level of environmental protection than currently exists. This is because the consultation document only enshrines the principles in a policy statement – though the later amendment to the EU Withdrawal Bill commits the Government to enshrining them in law. The consultation document alone would require the Government to only 'have regard to' the principles. For the principles to be effective they must be operationalized with all public bodies having a duty to apply and integrate them.

The implementation of these principles must be enforced – if a public body does not apply them, there has to be consequences. To be effective these consequences must possess legal weight, otherwise the 'enforcement' would amount to little more than a written telling off that can be ignored. These legal consequences would replace the gap previously filled by the EU Courts, which could issue daily fines if their judgements were ignored or changes were not implemented.

Another issue is the need for a citizen complaints mechanism. The EU provides a free mechanism for citizens to raise complaints about breaches in environmental law. This is vital because it is most often citizens that are the ones to initially raise these breaches. After Brexit, this mechanism must remain present in the watchdog, free, accessible to all, and implemented within a reasonable timeframe.

There are also concerns with the jurisdictional scope of the proposed environmental watchdog. The consultation document only applies to central government in England - not public bodies, agencies, or the devolved assemblies. All of these have independent roles, responsibilities and activities that could

potentially cause environmental harm, so they too must be able to be held accountable for their actions. On the issue of devolution, it is vital that the watchdog must have a high level of co-design and co-ownership across all devolved authorities, with multiple accountabilities and decisions being made at the appropriate ecological scale. Though all devolved assemblies are saying the right things on this, there has yet to be evidence of the necessary work actually occurring.

Similarly, the legislative scope that the watchdog is able to oversee must be clarified. The consultation suggests that the watchdog won't cover climate change, which risks making this policy area separate to, and less robust than, the remaining body of environmental law.

On a practical level, detail must be provided on how the watchdog would actually function – and provide assurance of its organisational structure, longevity, funding and the nature of its accountability to Parliament. The watchdog must be provided with adequate resources and expertise.

It was important to have the environment raised as part of the EU Withdrawal Bill, with the need for enshrined environmental principles being recognized across both Houses of Parliament and all political parties. Thankfully, with the passing of the amendment there is now a minimum amount of principles that must be enshrined in primary legislation – though this should be seen as the minimum necessary as there is much more that is needed to be improved.

Legal Powers, Sanctions and the Watchdog

Rhetoric around 'world leading' begs the question of what counts as actually being world leading? Though EU institutions are good examples of environmental governance, they should not be replicated in the UK just for the sake of it. Instead, the UK should ask what the law and governance bodies were originally intended to achieve, and what would be the best way to realise these aims.

Law is one of the most effective ways of achieving environmental protection. But when the law is broken, consequences need to occur. A complaint must be able to be made, which is then responded to with a punishment. The environment is unique in that when an environmental law is broken, there is most often no-one specifically that is harmed. Instead, the harm is spread across large groups, geographical areas, animals and plant life. A unique method of enforcement is therefore needed for environmental law – and this was recognized by the EU when they set up their enforcement systems.

If environmental law is not enforced, the Government can essentially pick and choose which parts of the law they abide by. This renders the laws, in practice, useless. The watchdog must therefore be strong enforcement body – having meaningful abilities to take public bodies and government to court, alongside conducting inquiries, taking evidence, producing reports and so forth. The watchdog shouldn't 'have' to take public bodies to court (indeed, this should only be used as a last resort after other more conciliatory measures have been exhausted), but the threat of enforcement increases the likelihood of the initial measures being heeded and the appropriate measures taken. Whilst the EU uses the threat of fines on member states to ensure that they adhere to environmental laws, this system cannot necessarily be replicated in a domestic setting, nor may it be effective even if it could be – and it should not be replicated just for the sake of it.

Instead, the range of remedies, sanctions and conciliatory measures available to the watchdog should be as broad as possible, so that the watchdog and courts can choose the most appropriate and effective measure amongst them in the situation in question.

To know whether an institution is world leading, the UK also needs to look around the world for examples of best (and worst) practice. Hungary, until 2012, had a Commission for Future Generations that possessed a constitutional right for future people to enjoy the environment. The Commission had strong and specific legal powers to enforce this, and worked with individuals, communities and politicians to use these in the most effective way. However, in 2012 Hungary's independence resulted in the Commission's powers being reduced and in some cases removed entirely. This emphasises the need for mechanisms to be put in place that prevent the watchdog's powers from being taken away with the arrival of a new Government or Secretary of State, and to restrict the day-to-day political meddling in the watchdog's work.

Another example is Colombia, where the court told the Government to improve on their intergenerational pact to save the forests and prevent climate change. Rather than just passing judgement, the court ordered the Government to work with people and communities to achieve this. Here, the court didn't just reprimand, but also provided a solution and a method to achieve this. This emphasises the need for the UK's regulatory system to be multifaceted and primarily cooperative, as opposed to being combative.

Though the ability for the watchdog to make recommendations for new laws is not as important as its ability to enforce existing laws and hold the Government to account on these, it is still crucial that, if we want to actually deliver an environment that is in better shape than how we found it, the watchdog is able to do this.

Finally, even if the watchdog possesses these powers, they are still useless unless civil society and citizens have access to them and are able to initiate the proceedings. Only if the watchdog integrates all of these concerns could it be truly considered 'world leading'.

The Principles and Politics of the Watchdog

Some see the UK leaving the EU as an opportunity to water down, or even remove entirely, the environmental principles currently enshrined in EU law. This is particularly true in the case of the precautionary principle, which in many cases is the principle which 'intervenes' first to oppose political and corporate interests. The precautionary principle states that if there is a possible but uncertain serious damage or harm that could result from a certain activity, we should err on the side of caution and not undertake said activity. Here, the burden of proof is reversed from having to show that an action does cause harm before it can be stopped, to requiring proof that the action does not cause harm before it is allowed to be started.

The precautionary principle is now more important than ever, due to the greater possibilities in areas such as synthetic biology. The EU's ban on neonicotinoids was motivated by the precautionary principle – 'just in case' they harmed bees, even though at the time there was conflicting research on the possibility of harm occurring. But it was this 'possibility' that motivated the EU to enact a ban. If the precautionary principle had not guided this decision, neonicotinoids may have been in use for several years – during which time irreparable damage could have been done to Europe's bee population. This is just one example of why it is so important for all the environmental principles, including the precautionary principle, to be embedded within the watchdog's terms of reference and duties, and for this watchdog to be able to oversee the entirety of Government.

One argument that has used to resist enshrining these environmental principles is that the principles themselves may change. This is false, because these principles should be thought of as constitutional - the foundation upon which policy decisions are made, rather than a policy in themselves. It is due to their necessity that requires them to be embedded in primary legislation, rather than a policy statement, so that they are subsequently difficult for Government to change or remove.

It is also important to understand the politics of the situation and how this can be used to our advantage. That the Letwin amendment to the EU Withdrawal Bill was accepted, shows that political support does exist and that it is backed up by public pressure. A key motivating factor in this public pressure was the principle of animal sentience. Animal sentience elicits a strong emotional response from the public, which can be quickly translated into tremendous pressure being placed on the Government. If the principle of animal sentience was considered inseparable from the other environmental principles, this would elevate them from a niche interest to a mainstream public concern. This is something which should be exploited to gain additional political leverage where possible.

Fish and the Principle of Animal Sentience

It is increasingly clear that fish are sentient, but there will always be some grey area regarding which species and groups of animals should be considered sentient. The precautionary principle allows us to lean in the direction of caution, so that we don't have to make a completely evidence-based decision in the moment whilst the evidence may be incomplete or uncertain. This enables us to counteract the potential for evidence-based decision making to be exploited by corporate interests – which often state that, because

something hasn't been proven harmful yet, even though it may be found to be harmful in the future, it should not be banned.

The Watchdog's Relation to Existing Bodies

The watchdog's creation should not demote existing environmental bodies, such as Natural England and the Environment Agency, to second class by taking over or directing their work. Instead, the watchdog needs to advocate on behalf of those bodies to central Government when they are unable to do their job effectively. However, on the opposing side, the watchdog should also be able to hold those bodies to account when they fail to carry out their job. The watchdog should play the role of the 'critical friend'.

Trade Agreements

Regarding possible future trade deals, the watchdog could be a helpful domestic body in ensuring that trade deals don't undermine our environmental standards, by legally holding the Government to account when a deal being negotiated threatens to inflict environmental harm.

However, under the current system there is no stakeholder engagement, transparency or consultation whilst negotiating trade deals. If this continues it would be impossible for the Watchdog to assess the trade deal until it was already near completion. This is why it is crucial that amendments are passed to the Trade Bill that require engagement, transparency and consultation to occur – which would fill the governance gap left by Brexit due to the UK's previous lack of need to have our own trade regulations. Similarly, though TTIP was negotiated for over a decade, it was only near the end, when it became public knowledge, that the pressure on Government increased to the point that the agreement was dropped. To support this, using examples of actual products (such as chlorinated chicken) is effective at garnering public attention and increasing interest in the 'higher level' principles which would ensure that these products don't reach UK supermarkets.

Contacts