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Devolution and Environmental Law in Scotland – A Reflection

Dr Sarah Hendry, University of Dundee.¹

At a Glance

- **The Scotland Act 1998 established a new Scottish Parliament, with powers to legislate in the environment and implement relevant EU law; This enabled much-needed reform to many areas of Scots law neglected by Westminster, with significant work in water law, both water resources and water services;**
- **Institutional differences and some policy divergence are also evident in other areas, but there is also ongoing collaboration at a technical level;**
- **The impacts of Brexit may see more rapid and substantial differences in future.**

Introduction

In 1997, there was a referendum in Scotland – one where 'Yes' prevailed, and restored a Scottish Parliament for the first time since 1707. On the back of Tony Blair's second election victory, but more importantly, on the back of the Constitutional Convention – a decade of sustained cross-party, cross-civic endeavour as to what sort of governance structure would best suit a Scotland still part of, but still different from, the UK.² When the Scotland Act 1998 was enacted,³ the opportunity was there to redress decades, maybe centuries, of legislative neglect. Practitioners and academics of my generation remember the days when essential Scottish law reforms were tagged on as schedules to barely-relevant English laws,⁴ or in the 'Miscellaneous Provisions' (Scotland) Acts,⁵ where the prior law simply could not be left unreformed any longer.

Every student of law in Scotland knows that the Treaty and Act of Union preserved certain fundamentals of what had been the Scottish state – the Church, local government, education, and the private law. The latter is important in the story of modern environmental law, for again, as every student knows, before there was the environment there was property, and before there was public law, there was private liability. Thus some aspects of modern environmental law, including water law, with its roots in property rights, developed separately from English law. The 19th century saw much bringing together of law across the UK jurisdictions, not just through the courts but in the new areas of statutory law emanating

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² See, for a brief account of key dates, <http://www.gov.scot/About/Factfile/18060/11550>

³ Scotland Act 1998 c.46.

⁴ See, e.g., Schedules 21 and 22 to the Water Act 1989 c.15, which otherwise did not apply in Scotland.

⁵ See, e.g., the Law Reform (Miscellaneous Provisions) (Scotland) Act 1985 c.73, which dealt variously with contract law, remedies for leases, civil procedure, criminal courts, crofting tenure and children's panels; and still had room for 13 (even more) 'miscellaneous and general' provisions at the end.

from the industrial revolution – everything from health and safety to corporate law. The same cause led to early regimes for air pollution and waste, and these were often made uniformly, or, reflected similar principles in different enactments for different local government contexts, for example in public health.⁶ Water remained stubbornly divergent, despite the best endeavours of the 19th century courts.⁷

By the early 20th century, the pressure on Parliamentary time, combined with the effect of a monolithic constitution in homogenising policy, reduced the value of regional differences. Post-war Scottish planning acts were separate from, but similar to, those in England and Wales.⁸ By the late 20th century, an added complexity came with membership of the EEC; around the same time, ‘the environment’ became a thing, as the young might say. Transposition of environmental law was carried out by Whitehall departments, and the civil servants in the Scottish Office implemented rules that were made uniformly.

The Scotland Act and the devolution settlement – water, water everywhere

On 1 July 1999, the new Parliament took responsibility for environmental law, and also for the transposition of EU law within its areas of devolved authority, i.e., everything that was not ‘reserved’. This still left some anomalies, for example energy was reserved, as was competition law, both areas with significant effects on ‘the environment’ and on the implementation of environmental law. Nonetheless the opportunity was there for the Scottish Parliament to take a different approach to environmental matters and in its early days it did so. This was significantly helped by the more varied political composition resulting from a broadly-proportional electoral system. The first Parliament had one Green MSP, the second (the so-called ‘rainbow Parliament’) had seven. The first and second Parliaments were Labour–LibDem coalitions, the third had a minority SNP government supported by the Greens. From the beginning, there was a more consensual style of politics, and one area of consensus was the environment. Tony Blair did much to move the UK state away from being seen as the ‘dirty man’ of Europe, but Scotland still felt there was something to prove – and as we have seen in the EU referendum, there is at least a perception that Scotland is more European than other parts of Britain.

Given that Scottish water law had always maintained a separate legislative structure, and therefore been neglected, it is unsurprising that it was an early focus; this was to be the case for both water resources and water services law. Further, at the same time as the Parliament was being established, the EU Water Framework Directive (2000/60/EC, WFD)⁹ was being implemented. Senior staff from the Scottish Environment Protection Agency (SEPA) were in Brussels working on its lengthy development process, and returned convinced that this was one area where the new Parliament could make its mark. Meantime, on the services side, the decision not to divest to the private sector in Scotland had left us

⁶ See McManus, F. (2007) ‘Victorian Foundations of Environmental Law in Scotland’ in McManus, F. (Ed.) *Environmental Law in Scotland* Greens / Sweet & Maxwell.

⁷ See, e.g., Clark, B (2006) ‘Water Law in Scotland: The Water Environment and Water Services (Scotland) Act 2003 and the European Convention on Human Rights’ *EdinLR* Vol 10 60-101; or recently, Robbie, J. (2015) *Private Water Rights* Studies in Scots Law.

⁸ Town and Country Planning Act 1947 c. 51; Town and Country Planning (Scotland) Act 1947 c.53.

⁹ Directive 2000/60/EC establishing a Framework in the field of Water Policy

with an economic regulator on the OFWAT model,¹⁰ in charge of three regional authorities with wide variations in service levels and price projections; and a similar backlog of investment need, especially in wastewater, as had been the case in England in 1989. There was a happy confluence of necessity and enthusiasm.

The Scottish Parliament began by instituting a wide ranging inquiry into water and the water industry.¹¹ Although early legislative endeavours were quite properly targeted at some of the property law crying out for reform, including abolishing (most of) the remnants of the feudal system,¹² there was soon water legislation, and the appetite for this does not seem to have diminished, with no less than 5 Acts directly relating to water since 2002.¹³ After decades of drought, a legislative deluge – especially under the second of these, the Water Environment and Water Services (Scotland) ('WEWS') Act 2003. This implemented the WFD, and did so in style, and 9 months before the Directive deadline. Alongside transposition of river basin planning and abstraction controls, there was 'gold plating' (extending the existing 3 mile limit on land based pollution to all new controlled activities in coastal waters, rather than the 1 mile required; including wetlands in the definition of water environment). Perhaps more importantly, the new Controlled Activities Regulations¹⁴ repealed and replaced the existing rules on water pollution with a new, comprehensive approach to managing all water uses – abstractions, discharges, impoundments and river works – under a single, tiered and proportionate system of authorisation that reflected best international practice for water law reform. This work swept away scores of historic rules and remains something of which water folk in Scotland can be justifiably proud.

The current Scottish Government has maintained a keen interest in water, not just legislating regularly (which may or may not be a good thing) but through its 'Hydro Nation' strategy¹⁵ which seeks to maximise the (multiple) values of the resource at home and abroad, including through the governance model offered by Scottish Water, the public service provider. Scottish Water, created under the Water Industry (Scotland) Act 2002 by merging the three regional water authorities, had a shaky start with substantial price rises, difficulties managing its investment programme and disputes with its regulators. A decade later it is performing as well as the top quartile of English water plcs and is evidence, if such was needed, that the public sector can be regulated into efficiency and that it is indeed regulation, rather than ownership, that matters. This would not have happened without devolution.

Air and Waste

¹⁰ The Water Industry Commissioner had been established under the Water Industry Act 1999 c.9, one of the last pieces of Westminster legislation to apply to Scotland.

¹¹ Scottish Parliament Transport and Environment Committee Report No.9 of 2001 *Report on the Inquiry into Water and the Water Industry*.

¹² Abolition of Feudal Tenure (Scotland) Act 2000 asp.5.

¹³ Water Industry (Scotland) Act 2002 asp.3, Water Environment and Water Services (Scotland) Act 2003 asp.3, Water Services (Scotland) Act 2005 asp.3, Flood Risk Management Scotland Act 2009 asp.6, and the Water Resources Scotland Act 2013 asp.5.

¹⁴ Water Environment (Controlled Activities) (Scotland) Regulations, then 2005 SSI 2005/348, now SSI 2011/209.

¹⁵ See, generally, <http://www.gov.scot/Topics/Business-Industry/waterindustryscot/ScotlandtheHydroNation>

Moving briefly to waste and air, the situation was, and is, different. Legislation here had not been made separately for Scotland, though it might be differently enforced - for example under the Alkali Acts,¹⁶ for industrial air pollution. Rather later in the 20th century, for solid waste, Part I of the Control of Pollution Act 1974 made only slight distinctions for waste collection in Scotland.¹⁷ As the European Community became increasingly active in the environmental sphere, implementing legislation for waste and air used essentially the same substantive provision, especially under the Environmental Protection Act 1990,¹⁸ with reference to enforcement by different agencies and courts, and within different local government structures. In 1995, the Environment Act established SEPA along with the Environment Agency, in separate Parts and with a rather narrower remit, reflecting the prior roles of its constituent agencies, but with many similarities.¹⁹ However the devolution settlement meant there was the potential to move away from a UK approach in both air and waste and make some divergences in the way that EU law was transposed. For the most part, this still involved institutional and regulatory differences – for example, the split between enforcement by SEPA and by the local authorities for air pollution, was (and is) not the same as in England and Wales.²⁰

Many technical aspects emanate from the EU and are not open to negotiation, such as the air quality standards – but again the enforcement, and the surrounding planning processes, may be variable. There have been issues of substance where SEPA has on occasion taken a different view to the EA on the vexed question of the definition of waste. More recently, in a policy context, Scottish Government has been able to move ahead with its Zero Waste Plan, including new requirements on separating waste for business and commercial waste,²¹ as well as introducing charges for plastic bags ahead of similar moves in England (though not as early as in Wales).²² In climate change, which is part of the energy nexus (and hence has been a reserved matter) but also to do with planning, building control, land use and transport (all mostly devolved), the Climate Change Act applies to Scotland,²³ but the Scottish legislation²⁴ sets separate targets and places specific duties on Scottish public bodies.

Institutional capacity, regulatory reform and cross-border collaboration

It is arguable that away from water, activities in Scotland are still reflected in broadly similar initiatives in England (and increasingly different approaches, in Wales) – though certainly the devolved jurisdictions have been able to move more quickly on occasion. In other areas broadly relevant to ‘the environment’, such as land use planning and land use strategy, there were already different institutional contexts and these have expanded as a result of devolution, without any huge shifts or disruptions. In agriculture and fisheries, where the rules are set at EU level, there is only limited room for different approaches to

¹⁶ See e.g. Alkali etc. Works Regulation Act 1906 c.14 s.28.

¹⁷ Control of Pollution Act 1974 c.40, s.15. Part II, on water, remained in force in Scotland for many years and much amended, until the revision under WEWS and the Controlled Activities Regulations noted above.

¹⁸ Environment Protection Act 1990 c.43.

¹⁹ Environment Act 1995 c.25.

²⁰ Now, in the Pollution Prevention and Control (Scotland) regulations 2012 SSI 2012/360, as amended.

²¹ Waste (Scotland) Regulations 2012 SSI 2012/148, as amended.

²² Single Use Carrier Bags Charge (Scotland) Regulations 2014 SSI 2014/161. Similar rules were made in 2011 in Wales.

²³ Climate Change Act 2008 c.27.

²⁴ Climate Change (Scotland) Act 2009 asp.12.

implementation. This is also true in relation to biodiversity and nature conservation, but here the land use and institutional contexts perhaps make more difference and there has been some divergence. Although Scotland has been able to take initiatives, Scotland is a small jurisdiction – and whilst small may be beautiful, and may allow quick reactions, it can also bring a capacity gap. The Scottish Government, and Scottish agencies, have tiny real numbers of staff, compared to those in their UK or English counterparts (despite the swingeing budget cuts they have suffered). There are similarities as well as differences in our institutions and our legal systems, and our approaches to the EU and implementation of EU law. So it is not surprising that at a technical level there is continued collaboration, whatever political capital may be made of the differences. Responses to EU consultations may be much fuller in England, not just because they are giving a UK perspective. Further, in some areas England has taken the lead, though it has not always maintained it – for example in regulator-led enforcement regimes, only now being developed in Scotland under far-reaching reforms that will bring together regulation of water with waste and air.²⁵ To return briefly to water, it is interesting that despite the much earlier and more pro-active approach to the WFD, when it comes right down to the devilish detail, the technical expression of what is meant by ‘good ecological status’, the standards, conditions and limit values, and the modelling tools, were developed at UK level. The Environment Agency and SEPA will continue to work closely on the management of the Tweed and Solway border rivers, whether or not these become a true ‘international River Basin District’ at some future point.

So looking back, yes, devolution has made a difference. It has enabled a different approach where Scottish governments have chosen to take one, on specific policy matters. More importantly perhaps, it has facilitated much-needed reforms in many areas of Scots law, not just environmental, which were neglected prior to 1998. In a broader political sense it has allowed the development of a Scottish policy consensus in at least some areas (water being the obvious) and it is quite possible that this will continue incrementally in other areas. Looking forward though, the implementation of Brexit may see more rapid and dramatic shifts. If the UK remains but outwith the EU, then the essential technical coherence under EU laws will start to unravel – in which case we can only hope that Scotland will maintain that enthusiasm for the environment that characterised the early Parliaments. If Scotland seeks independence in order to remain within the EU, then there will be some interesting comparisons with how the rest of what-was-the-UK uses its new-found freedoms.

²⁵ Regulatory Reform (Scotland) Act 2014 asp.3.