

Environment, Climate Change and Land Reform Committee

EU Environmental and Animal Welfare Principles

Written submission from Dr Annalisa Savaresi and Professor Gavin MacLeod Little, Stirling Law School, University of Stirling

This note addresses the five questions/points raised by the Environment Climate Change and Land Reform Committee Inquiry on EU Environmental and Animal Welfare Principles.

1. How important are the EU principles of: the precautionary principle, preventive action, environmental damage should as a priority be rectified at source, the polluter should pay, and animal sentience?

Environmental law is underpinned by a set of principles, which may be defined as policy statements ‘concerning how environmental protection and sustainable development ought to be pursued.’¹ These principles are not only found in EU law, but also feature in a host of national and international environmental law instruments all over the world. Environmental principles concern typically how the law is made (for example, through public consultation and participation), how it is enforced (for example, by guaranteeing access to justice to certain groups or interests), and its substantive content (for example, when they are incorporated into legislative instruments or into the design of regulatory structures and processes).

EU environmental law hinges on four core substantive principles, which feature in a host of EU instruments and policy documents, as well as in Article 191.2 Treaty on the Functioning of the European Union (TFEU):

‘Union policy on the environment shall aim at a high level of protection taking into account the diversity of situations in the various regions of the Union. It shall 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*.’

These principles largely originated in OECD legal instruments² and have since become embedded in the law of all EU Member States. They are binding on the EU legislature and on Member States when they implement EU law. As noted in a leading EU environmental law textbook:

‘European environmental law principles may not have practical legal force in and of themselves. They are transposed into secondary law. It is their (incorrect) application

¹ E Fisher et al, *Environmental Law: Text, Cases and Materials* (Oxford University Press 2012), 402; and G Little, “European Environmental Law” in McManus Ed., *Environmental Law in Scotland* (W.Green/SULI 2015), paras. 19.4 - 19.33.

² AC Kiss and D Shelton, *Manual of European Environmental Law* (2nd ed. Cambridge University Press, 1997), at 41 and 43; and P Birnie, A Boyle and C Redgwell, *International Law and the Environment* (3 edition, Oxford University Press 2009) 83–4; and A Boyle, E Morgera and A Savaresi, Environment, in University of Edinburgh Law School, *OECD Standard-setting* (report commissioned by the Organisation of Economic Cooperation and Development, 2015).

and interpretation in conjunction with secondary law that gives rise to citizens and corporations calling upon the principles to support their individual positions. Hence despite their trumpeted value as “principles”, in the law in practice, individual citizens or corporations need transposition of said principles in secondary law to argue that such secondary law has infringed the principles.³

The remainder of this note therefore considers these principles’ continued relevance and application after Brexit. The note does not consider two additional principles commonly listed as part of EU environmental law, but which are not included in the scope of the present enquiry, namely: the *integration principle* (i.e. that environmental protection requirements should be integrated into other policy areas); and the *principle of sustainable development* (i.e. that of ‘development that meets the needs of the present without compromising the ability of future generations to meet their own needs’⁴). Please also note that we are not commenting on animal sentience: we are experts in environmental protection, rather than animal welfare.

The precautionary principle and the prevention principle

The precautionary principle seeks to assess and manage the risk of adverse environmental outcomes where scientific understanding is not complete,⁵ while the prevention principle addresses risks that are known and likely to occur when carrying out a certain activity or as a result of inaction.⁶ These interconnected principles are not exclusive to EU law, but are included in a series of international environmental law instruments and declarations.⁷ Yet their status in international law differs: while the principle of prevention is undisputedly part of the body of customary international law binding on all states, the precautionary principle is not.⁸ After Brexit, all environmental law principles included in customary law and international treaties which the UK is a party to will continue to guide UK law-makers and regulators.⁹ The application of these principles will however vary, depending on the terms of those treaties and on state practice. The important issue is, therefore, whether the EU’s understanding of these principles will continue to influence Scottish and UK law-makers and regulators in the way that it currently does.

For example, the precautionary principle is specifically mentioned in Article 3.3 of the United Nations Framework Convention on Climate Change.¹⁰ In EU law, however, the precautionary principle is not confined to climate change, but applies to all areas

³ G van Calster and L Reins, *EU Environmental Law* (Edward Elgar 2017), 17.

⁴ Sustainable development is a particularly important principle in EU law and policy. It is provided for in Articles 3 and 21 of the Treaty on European Union (“TEU”) and Article 11 of the Treaty on the Functioning of the European Union (“TFEU”).

⁵ G Little, ‘BSE and the Regulation of Risk’ [2001] *The Modern Law Review*, 730-756.

⁶ van Calster and Reins n 3 above, 34.

⁷ For example, Rio Declaration, Principle 15; 1992 United Nations Framework Convention on Climate Change (UNFCCC); 1992 Convention on Biological Diversity; and the 2000 Protocol on Biosafety.

⁸ M Schröder, ‘Precautionary Approach/Principle’ *Max Planck Encyclopaedia of International Law*.

⁹ A Savaresi, ‘The Impact of Brexit on Environmental Protection in Scotland: Some Early Reflections’ (2017) 22 *Edinburgh Law Review* 115, 116.

¹⁰ UNFCCC, Article 3.3.

of environmental law and policy, covering food and human, animal and plant health.¹¹ In this context, it is worth noting that the UK's catastrophic experience of BSE/variant CJD in the 1980s and 1990s¹² was a major factor in the development by the EU of an holistic approach to the precautionary principle.¹³

EU institutions have referred to the precautionary and the prevention principles to interpret the scope of obligations under a host of EU environmental law instruments, concerning diverse matters, such as air quality, chemicals, flooding, major accidents and waste.¹⁴ In some legislative instruments, most notably in relation to the release of genetically modified organisms into the environment, the precautionary principle has been incorporated formally into the law as the basis for regulatory decision-taking, and of regulatory design.¹⁵ The Court of Justice of the European Union (CJEU) has specifically relied on the precautionary and the prevention principles to decide complex points concerning the definition of waste in EU law, and in interpreting the requirement for appropriate assessment in relation to proposed development affecting special conservation areas in the EU Natura 2000 network.¹⁶ Even though the EU has significantly developed and refined the normative content of the precautionary principle, criticism of the application of the principle in the EU often relates to the wide room for manoeuvre institutions have in applying the principle.¹⁷ Calls have therefore been made for even greater normative definition of this principle in EU law.¹⁸ Whether Scotland and the UK will continue to view the principle in such a broadly-based way post-Brexit is a matter of political choice.

It is nevertheless worth noting that the influence of the EU's interpretation¹⁹ of the precautionary principle has extended significantly beyond the boundaries of the EU, notably in the Agreement on the Application of Sanitary and Phytosanitary Measures concluded within the framework of the World Trade Organisation. Insofar as it is enshrined in international agreements that the UK is party to (or will become a party

¹¹ Although Article 191(2) TFEU does not require scientific assessment of risk as a precondition for taking precautionary action, such requirements have been introduced via several EU secondary legislation instruments.

¹² Little, n 5 above.

¹³ See e.g. Regulation (EC) No 178/2002 of the European Parliament and of the Council of 28 January 2002, laying down the general principles and requirements of food law, establishing the European Food Safety Authority and laying down procedures in matters of food safety [2002] OJ L31/1, art 220.

¹⁴ C-180/96 United Kingdom v. Commission [1998] ECR I -2265 at 99; Case C-9/00, Judgment of 18 April 2002, *Palin Granit*, para 22 and 23. See also Case C- 457/02, Judgment of 11 November 2004, *Niselli*, para 33; Case C-188/07, Judgment of 24 June 2008, *Commune de Mesquer*, para 38.

¹⁵ Directive 2001/18/EC. See also G Little, 'The Regulation of Genetically Modified Organisms as an Environmental Risk' in McManus Ed., *Environmental Law in Scotland*, (W Green/SULI 2007).

¹⁶ Joined Cases C-418/97 and C-419/97 *ARCO Chemie Nederland v Minister Van Volkshuisvesting* [2000] ECR I-4475 and Case C-127/02 *Landelijke Vereniging tot Behoud van de Waddenzee and Nederlandse Vereniging tot Bescherming van Vogels* [2004] ECR I-7405

¹⁷ van Calster and Reins n 3 above, 31.

¹⁸ As evidenced for example, in EU Commission, Study on the precautionary principle in EU environmental policies (2017), 95: <https://publications.europa.eu/en/publication-detail/-/publication/18091262-f4f2-11e7-be11-01aa75ed71a1/language-en>

¹⁹ EU Commission, 'Communication from the Commission on the Precautionary Principle' (Communication) COM (2000) 1 final.

to) following Brexit, the EU's interpretation of the precautionary principle will therefore continue to have some influence on UK law-makers and regulators.

The principle of rectification of pollution at source and the polluter pays principle

Like the prevention and precautionary principles, the rectification of pollution at source and the polluter pays principles are interconnected, but they only operate once prevention has failed and environmental damage has occurred. As such, these principles are essentially policy tools for allocating the costs of and responsibility for pollution or environmental damage. The rectification of pollution at source principle seeks to reduce environmental impacts as close to the source of pollution as possible, whereas the polluter pays principle requires those causing environmental damage to bear the cost of, among other things, remediation or clean-up, rather than the taxpayer.

When compared with the principles of prevention and precaution, these principles are embedded in a relatively limited set of international law treaties, concerning matters such as oil pollution or nuclear damage.²⁰ This in turn means that the UK international law obligations in this area are fairly circumscribed. The rectification of pollution at source and the polluter pays principles have, however, been used over the years to interpret the scope of obligations in a wide range of EU legislative instruments and policy areas, such as pollution prevention and control, industrial emissions, air and water quality, and waste.

2. How and where have these principles had an impact on environmental policy in Scotland?

The principles at issue in the present inquiry have had an influence on law and policy in Scotland and the UK mainly through the implementation at the domestic level of EU environmental legislation and related policies. They all featured in EU environmental law before the creation of the Scottish Parliament under the Scotland Act 1998. For example, the precautionary principle was included (directly or by implication) in the 1985 Environmental Assessment Directive and in the 1991 Pesticides Directive.²¹ As noted above, one of the most significant and controversial pieces of EU environmental legislation which has the precautionary principle at its core is the 2001 Directive on the Deliberate Release of GMOs into the Environment.²² The prevention principle, rectification of pollution at source principle, and the polluter pays principle also have a long history in EU legislation, dating back to the Single European Act of 1986. These principles are implemented in UK and Scottish environmental legislation on pollution prevention and control, industrial

²⁰ See e.g. 1992 Convention for the Protection of the Marine Environment of the North-East Atlantic; 1992 Convention on Civil Liability for Oil pollution damage. See also G Little, 'The Regulation of Nuclear Installations and Radioactive Substances in Scotland', in McManus Ed., *Environmental Law in Scotland*, (W Green/SULI 2009); G Little 'Compensation for Catastrophic Oil Spills: A Transatlantic Comparison,' [1997] *Lloyd's Maritime and Commercial Law Quarterly*, p.391-405, with J Hamilton; and G Little, 'The HNS Convention: A New Horizon in the Regulation of Marine Pollution', [1998] *Lloyd's Maritime and Commercial Law Quarterly*, 554-567.

²¹ Directive 85/337/EEC and Directive 91/414/EEC.

²² Directive 2001/18/EC.

emissions, air and water quality, and waste. The polluter pays principle is also the centrepiece of the EU law regime for liability for environmental damage.²³

3. Views on the appropriateness of retaining/adopting/enshrining these EU principles in law or alternative principles/approaches that could be adopted.

The four principles under consideration in this paper are not an EU ‘invention’,²⁴ but rather are a common feature of mature environmental law and policy all over the world.²⁵ In spite of their ‘universal and foundational’ nature, environmental law principles perform very different legal roles in different jurisdictional settings.²⁶ The issue is therefore not *whether* these principles ought to remain part of UK/Scottish environmental law and policy into the medium and long term, but *how* they will do so.

The current regime is founded on the inclusion of environmental principles in the EU treaties, as well as in EU environmental law instruments. These principles are therefore part of the formal, normative ‘constitution’ of the EU law. This requires legislators, policymakers, regulators as well as EU institutions to have regard to and implement them, and failure to do so appropriately may be sanctioned by the CJEU.²⁷ The stated intention of the UK Government (see 1 November statement by the UK Secretary of State for Environment, Food and Rural Affairs, Michael Gove) to dispense with legal underpinnings for environmental law principles altogether post-Brexit and to view them solely as interpretative principles to guide policy is therefore a significant departure from the current position.

As far as devolved Scottish environmental law is concerned, the UK Withdrawal from the European Union (Legal Continuity) (Scotland) Bill (‘the continuity bill’) – which has been passed by the Scottish Parliament and is at the time of writing awaiting the Royal Assent – deals specifically with environmental law principles. The continuity bill itself may be overtaken by political events if (as is looking increasingly likely) the Scottish and Welsh Governments are able to reach agreement with the UK Government and grant legislative consent to an amended version of the UK Parliament’s EU (Withdrawal) Bill. That said, Clause 13 B of the Bill, as set out below, seeks to provide for legal continuity and certainty for devolved Scots environmental law on and after the UK:

‘Section 13 B Section 11(1), 12 and 13(1) powers: guiding principles on the environment and animal welfare

- (1) In making provision in regulations under section 11(1), 12 or 13(1), the Scottish Ministers must have regard to the guiding principles on the environment and animal welfare.

²³ M Lee, *EU Environmental Law, Governance and Decision-Making* (Hart 2014) 130.

²⁴ See references in n 2 above.

²⁵ See for example E Scotford, *Environmental Principles and the Evolution of Environmental Law* (Hart 2017), 9.

²⁶ *ibid* 2.

²⁷ See for example, Joined Cases C-14/06 and C-295/06, Judgment of 1 April 2008, Parliament and Denmark v Commission ECLI:EU:C:2008:176.

- (2) Subsection (1) requires the Scottish Ministers to have regard to those guiding principles only so far as the Scottish Ministers consider them to be relevant to the provision being made in the regulations.
- (3) The guiding principles on the environment and animal welfare are—
- (a) the precautionary principle as it relates to the environment,
 - (b) that preventative action should be taken to avert environmental damage,
 - (c) that environmental damage should as a priority be rectified at source,
 - (d) that the polluter should pay,
 - (e) that regard must be had to the welfare requirements of animals as sentient beings.
- (4) Those principles are derived from the equivalent principles provided for in Articles 13 and 191(2) in Titles II and XX respectively of the Treaty on the Functioning of the European Union and accordingly they are to be interpreted, so far as appropriate, in a manner consistent with the interpretation of those equivalent principles by the European Court from time to time.’

Clause 13 B would seem to suggest that all of the EU environmental principles will effectively remain in force for devolved environmental law in Scotland post-Brexit. A closer inspection, however, suggests that duties are imposed on Scottish Ministers alone, whereas the EU Treaty principles are imposed on all EU institutions, including the legislature, and on Member States. Moreover, Scottish Ministers must *have regard* to the ‘guiding principles *only so far as the Scottish Ministers consider them to be relevant*’ [our italics]. In addition, the guiding principles are not necessarily exactly the same thing as the EU law treaty principles: rather, they are ‘*derived*’ from them, and are to be interpreted ‘*so far as appropriate, in a manner consistent with the interpretation of those equivalent principles by the European Court*’ [our italics]. There is accordingly potentially some wriggle room for post-Brexit Scottish Ministers, subject to the limitations on devolved competence in the Scotland Act 1998²⁸ and those existing under common law judicial review,²⁹ should they wish to diverge from the approaches taken by the EU or the CJEU. Presumably, in the event that the continuity bill comes into force, Scottish Ministers will in due course provide the environmental regulators (i.e. the Scottish Environment Protection Agency and Scottish Natural Heritage) with guidance and instruction on how they wish the environmental principles to be interpreted and applied by them in the exercise of their statutory functions.

As noted above, given that European environmental law principles do not have practical legal force in and of themselves, unless they are transposed into secondary

²⁸ I.e. Scottish Ministers would still be required to act in accordance with inter alia international law.

²⁹ Note that any challenge to the legality of Scottish Ministers’ decision-taking under common law judicial review would be unlikely to be successful unless it could be shown that there had been a serious procedural failure: the courts will be very reluctant to interfere with the actual substance of ministerial decision-taking where, for example, Scottish Ministers have decided that the guiding principles are not relevant.

law,³⁰ the provision in clause 13 B is likely to have a relatively modest effect on much post-Brexit Scottish environmental policy. That said, the creation of less muscular legal underpinnings for the principles (as in Clause 13 B) will increase the discretion of domestic decision-takers, policymakers and regulators. After Brexit, this enhanced discretion will in all likelihood be coupled with far greater lobbying from powerful vested interests and stakeholders than is the case at the moment, given that strategic environmental decision-taking and law-making is (still) taking place at the EU level. This may result over time in a relative loss of certainty and consistency in the interpretation and application of the principles, and the emergence of more *ad hoc*, piecemeal and arguably less coherent/effective systems of environmental protection. The counter-argument to this is that by giving Scottish Ministers and regulators a greater degree of discretion, domestic policy and regulation can be aligned more closely with public opinion on how best to balance environmental principles with, for example, facilitating economic development. In sum, therefore, if the continuity bill is not overtaken by events, it would seem that post-Brexit Scottish Ministers are likely to have marginally more flexibility in the application of core environmental principles than they do at present, but rather less than UK Secretaries of State will have. Whether or not this is a desirable state of affairs is fundamentally a political issue to be determined via the democratic process, rather than a legal one.

4. Views on if and how environmental principles could and should be enshrined in law in Scotland and enforced.

This question has been overtaken by the passing by the Scottish Parliament of the European Union (Legal Continuity) (Scotland) Bill, as discussed above.

5. Examples of where key environmental principles have been enshrined in domestic legislation elsewhere.

The principles at the centre of the present enquiry are mainstream in OECD Member States, and may be regarded as a common feature of mature environmental law and policy,³¹ although there is some variation in how they are interpreted and applied across jurisdictions. For example, the 1999 Canadian Environmental Protection Act's preamble sets out guiding principles and embodies them in the administrative duties of the government, with the exception of the remediation at source principle. In addition, the Swiss 1985 Environmental Protection Act specifically mentions the prevention and the polluter pays principles.

Prof Gavin MacLeod Little

Dr Annalisa Savaresi

Stirling Law School

University of Stirling

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³⁰ van Calster and Reins n 3 above, 17.

³¹ See for example E Scotford, *Environmental Principles and the Evolution of Environmental Law* (Hart 2017), 9.