

***The Future of Environmental
Governance in Northern Ireland,***

23rd July 2018,

Workshop Report



Introduction

On 23rd July 2018, [Dr. Viviane Gravey](#) (School of History, Anthropology, Philosophy and Politics, Queen's University Belfast) and [Dr. Mary Dobbs](#) (School of Law, Queen's University Belfast) hosted a one-day intensive workshop in the School of Law, Queen's University Belfast. The event was organised in association with [Nature Matters NI](#) and generously sponsored by both Nature Matters NI and Queen's University Belfast.

The purpose of the [workshop](#) was in order to discuss the future of environmental governance in NI, with specific reference to DEFRA's consultation document on environmental governance and principles post Brexit and facilitating submissions to the consultation. Although the DEFRA document is initially targeted at England, there was a significant need for such discussions to occur. Firstly, NI and the island of Ireland generally has a pretty torrid history for environmental governance and so a discussion at any time is worthwhile; secondly, there is likely going to be a significant environmental governance gap created on Brexit for the whole of the UK; thirdly, the focus of the DEFRA document is one that merits consideration as the basis for common frameworks; fourthly, it will have cross-border effects even if the subsequent legislation is only applicable in England; and fifthly, it may end up applying by default to NI especially in light of there being no operational Assembly in Stormont currently. Even without these considerations, this document is significant enough for England alone to merit debate amongst those concerned by the state of the environment.

Consequently, this workshop brought together stakeholders from across NI, the ROI and beyond, with individuals from organisations and bodies such as Arup, CCGHT, Coastwatch (Ireland), Community Places, DAERA, the Farmers Journal, the Human Rights Consortium, Keep Northern Ireland Beautiful, Marine Conservation NI, Nature Matters NI, NIEL, NI Open Government Network, the North South Ministerial Council, Ulster Wildlife, Woodland Trust and a range of academics from across the disciplines (biological sciences, law, planning and politics) in QUB, DCU and Newcastle University.

The workshop looked beyond what was explicitly contained within the consultation document to address 4 crucial, interlinking focus points: common frameworks, cross-border issues, principles and compliance. In advance of this, the organisers, in conjunction with Dr. [Ciara Brennan](#) (School of Law, Newcastle University) and [Attracta Uí Bhroin](#) (Facilitator for the [Environmental Law Implementation Group at](#) the Irish Environmental Network), prepared and provided a draft briefing paper on these issues. The [workshop programme](#) was then structured to enable 'lightning' introductions on each focus point by Brennan, Dobbs, Gravey and Uí Bhroin, followed by intense discussions by all participants in small groups, before re-joining to discuss the issues as an overall group. The group feedback and analysis was extensive and valuable.

The following paragraphs provide a general outline of some of the main ideas drawn from the discussion – they should however not be thought to be representative of the entire group's position and variations of opinion did exist,

especially considering that there were approximately 60 people in attendance. In each case, the initial lightning talk linked in to the outlines provided in the draft briefing paper.

The *session on common frameworks* commenced with Gravey outlining the concept of a common framework, how this operates under the EU currently, the various (limited) proposals and discussions on common frameworks within the UK post Brexit relevant to the environment (ranging from no framework to the use of legislative frameworks) and the issues of transparency and representation raised by the UK-Welsh Agreement on creating common frameworks. It was noted that the DEFRA proposal is only applicable initially to England and non-devolved environmental matters 'without prejudice to ongoing framework discussions' (p.3); but common frameworks and governance issues would benefit from being addressed together, as different forms of regulatory cooperation (the frameworks) will require different governance underpinnings. Critically, whilst the DEFRA proposal does note the permeable nature of the environment and the desirability of a 'joined up approach', the devolved administrations are left to create their own, engage in co-designing a proposal on principles and a new environmental body based on the consultation document, or potentially have it imposed upon them unilaterally if necessary (e.g. if NI continues to have no operational executive).

Key points from the discussion of this session included:

- It was recognised that there are considerable political and legal challenges to surmount in creating common frameworks, but nonetheless these are essential for environmental protection generally and especially post Brexit;
- A broad need for a range of common frameworks within the UK – encompassing standards, principles, definitions and potentially approaches or even compliance mechanisms, but with sufficient flexibility to allow for regional variation;
- The desirability for common frameworks to extend in some fashion between the UK/NI and the ROI/bordering EU States also (this arose in later discussions also). There was strong support for continued cooperation N/S on a range of environmental issues: invasive species, nature conservation, air pollution, water pollution, and control of water resources etc. Existing N/S institutions, such as the Lough Agency, were mentioned as examples of cooperation across two jurisdictions;
- The need for common frameworks was noted as being due in particular to the permeable nature of the environment and the irrelevance of territorial borders in such a context. They would also be necessary due to international commitments being created at the UK level, whether these be directly turned to the environment or indirectly through for instance trade. Further, some issues are very clearly transnational or global issues, such as climate change;
- Common frameworks were seen as a key tool to avoid the risk of a race to the bottom (enabling regulatory shopping), and to avoid the adoption of competing objectives trumping the environment. At a time of flux such as

Brexit, the environment needed clear protections and clear responsibilities;

- There were concerns whether the devolved regions would have sufficient resources (staff, expertise, money) to develop policies and laws, where they already struggle to implement and enforce existing laws. This raised questions of practicability – what could NI do on its own as the smallest UK nation?
- The governance of these frameworks was seen as very important. First, devolved regions need a significant say in their content and adoption (to help ensure appropriate and acceptable). Second, these need to be via legislative means, giving them legal and political weight. Third, there needs to be some mechanism to enforce these frameworks – this may involve a UK wide body (or beyond) and links in to later discussions on cross-border matters and compliance.

The *session on principles* commenced with a brief overview by Dobbs on the nature of legal principles, their significance currently within the UK/EU and the main strengths and weakness of the proposals. The relationship with the EU Withdrawal Act and the White Paper on the future relationship between the UK and the EU was also highlighted. The participants then considered what content should be in the proposed legislation and/or policy statement and what the scope should be – in doing so, they were asked not to limit themselves automatically to the proposal, but consider what ideally they would like and to consider also objectives, rights and duties.

Key points from the discussion of this session included:

- The principles and their definitions should be encompassed within the legislation;
- Further detail should be provided in a policy statement that facilitates implementation and provides guidance;
 - Together these should help provide legal and political support of the principles, legal certainty, and still retain some necessary flexibility for their operation;
- A wide range of principles should be included – going well beyond the core environmental principles encompassed in the consultation document and even beyond the table provided in the draft briefing paper, e.g. accountability and effective deterrence;
- In identifying and defining these principles, it is also necessary to look beyond those established in the early environmental documents, e.g. a transgressor principle (rather than polluter pays), net environmental gain and best overall environmental option;
- Relevant objectives such as sustainable development (with mention of the SDGs) should be included, alongside a high level of protection and improvement of the environment, and non-regression;
- It might be suitable to encompass a range of rights within the legislation also – relevant to the environment directly, e.g. right to a clean and healthy environment or animal rights, as well as those related to access to justice and due process;

- It is necessary to encompass corresponding duties that should be targeted at anyone engaged in environmental regulation at all stages and not simply the Ministers in undertaking their functions;
- These duties should also go beyond the notion of 'have a regard to', e.g. 'environmental policy and law should strive to achieve the following objectives and be based on the following principles';
- The cross-border issues within the UK and with the ROI in particular highlight the need for a series of principles on this front; and
- These same issues also link back to the first session and the arguments for a common framework of principles (amongst other things) at least within the UK and preferably also with the ROI.

Brennan introduced the *session on compliance* by outlining the existing EU compliance and accountability mechanisms – specifically the role of the EU Commission and CJEU, but also the range of background mechanisms and legal principles that ensure transparency and political accountability, as well as the effectiveness of the domestic measures. Depending on the eventual Brexit deal, the UK may lose out on part or all of these mechanisms, leading to considerable governance gaps. This is a serious concern for all of the UK, rather than just England. Further, Brennan highlighted how it is even more significant for NI considering its very poor history with compliance – this has improved somewhat since NI has been made responsible for fines imposed for breach of EU environmental law, but still remains poor. Brennan raised a number of questions for consideration in relation to NI, including how effective the current EU mechanisms, whether devolution, direct rule or an all-island approach to governance might be more effective (especially post Brexit), and whether something can be done about it before Brexit occurs. She concluded by outlining some broader considerations on the potential 'independent environmental watchdog' and the implicit enhanced role for judicial review as outlined in the consultation document – would they be helpful for England, NI or the UK as a whole?

Key points from the discussion of this session included:

- Judicial review is very important but is no panacea. It can prove very costly; the time periods may be too short to enable effectively actions to be taken and the decisions can come too late to make any difference. Further, judicial review focuses on procedural matters, not on environmental outcomes or the substantive decisions for the main part (Wednesbury unreasonableness). There is no 3rd party right of appeal [if not involved in the case earlier]. Weak cases being brought and lost can create risks of 'bad precedent' further undermining enforcement.
- Watchdog meant to be independent, but independence can, as seen elsewhere in the UK, also be curtailed overtime through funding cuts (even mid budget) effectively limiting actions where the government do not approve of specific stances. Further, there was concern that if the watchdog were to provide advice to the Government, this might undermine their independence.

- To ensure true independence to hopefully avoid regulatory capture, whilst still enabling accountability, a few steps could be taken:
 - guaranteed funding would be required that could not be cut by government;
 - the roles of advice and oversight could be separated clearly, with the watchdog purely having oversight of national and regional government bodies/agencies. Bodies/agencies would then provide oversight over individuals/business and also could provide advice;
 - the watchdog could comprise of a committee, with members appointed by and from stakeholder groups and not by Parliament/the government(s); and
 - the committee members could then be accountable within the committee itself (suggestions were also made about being also accountable to some extent to the original range of stakeholder groups/Parliament, but again this risk undermining independence and leading to regulatory capture).
- Concerns remained whether any watchdog could truly have teeth in light of the focus on soft measures and the application of parliamentary sovereignty (and crown immunity). The existence of a common framework between the regions, with a shared watchdog (overall, with potential satellite bodies), opportunities for the devolved administrations to engage in litigation in other regions, proper fines, etc was considered to potentially help strengthen the watchdog further.
- It would also be possible to provide training on environmental issues to judiciary and other individuals engaged in enforcing environmental law.
- Regarding NI specifically: the systemic problems of environmental governance in NI are well known and have been reported in many reviews over the last 20 years with next to no changes made to address them: lack of accountability in Stormont, lack of an independent environmental agency, lack of an environmental audit committee, limited experience and interest in environmental issues among the judiciary etc;
- To facilitate appropriate changes in NI, there is a need for an in-depth investigation and review of environmental governance and conditions in NI- this is required irrespective of the outcome of Brexit.
- Even without such a review, in light of past problems, NI arguably needs an independent agency, a watchdog *and* an environmental ombudsman.
- In order to strengthen environmental enforcement, a combination of fines, incentives and the removal of those incentives could be used. Here we could learn from the Common Agricultural Policy for example, use of cross-compliance, use of sanctions reducing grants etc.

Uí Bhroin commenced **the session on cross-border issues** by considering the concept of good governance, what we might expect of the consultation document and the central components of the document as it exists. A brief critique of the DEFRA Governance model proposed was outlined in light of the objectives stated in the consultation document. She then proceeded to consider it from the island of Ireland perspective – outlining key considerations relevant to environmental governance in NI and the ROI in particular, e.g. the GFA/Belfast Agreement and in particular Strand 3 structures, the December Joint Agreement (regarding flows

post Brexit) and the draft Article 50 Withdrawal Agreement and concerns on its focus on phytosanitary measures and reliance on the GFA/Belfast Agreement to address wider environmental considerations. Uí Bhroin also noted considerations of broader relevance to cross-border environmental governance such as the Aarhus and Espoo Conventions, as well as potential claims over biogeographic, epidemiological, broader environmental or economic linkages. A very fundamental question was raised for the discussants here: what, if anything, makes Northern Ireland sufficiently individual to justify especial concern from the perspective of cross-border issues?

Key points from the discussion of this session included:

- The island of Ireland as a whole faces shared challenges such as invasive species, protecting animal health (good cooperation in the past dealing with foot and mouth disease for example), tackling transboundary impacts of pollution and environmental crimes N/S (fuel laundering, illegal waste disposal, illegal quarrying and mining etc.). But why is it distinct?
- Uí Bhroin highlighted that from a regulatory perspective – NI is already treated differently to other parts of the UK.
- A return to the issues surrounding common frameworks: nature is permeable and this is applicable whether on the island of Ireland, on the island of Great Britain, or in the surrounding seas. Cross-border issues are relevant within the UK in all regions, looking internally and externally. Links to need for relevant principles also.
- However, it was generally considered that NI and the island of Ireland raised specific issues that need to be borne in mind by NI, the ROI and the UK as a whole. Some of these included:
 - The island of Ireland has a distinct environmental and geological history from Great Britain linked to continental drift and to the gradual ending of the ice-ages – it is a single biogeographic area with unique ecosystems which developed over time. This is still highly visible in landscapes and the native species present today.
 - The island is treated and needs to be treated as single epidemiological unit, and its high number of Protected Zones needs to be protected.
 - Farming, which is a major factor for environmental governance, also varies considerably in NI, with small farms predominately focused on grass and with unusual ownership (use of conacres). Considerable interconnectedness with ROI farming, but also export to GB.
 - Political/legal issues: land border of NI is with EU member state, whereas on GB is with other UK regions. Divergence very likely on island, yet NI can't negotiate itself (UK to play that role). Further, due to the GFA/BA, which includes the environment as one of six areas of cooperation, there are specific criteria for governance and the roles of institutions including the North South Ministerial Council. Consequently both North-South and East-West cooperation is required on this front.
 - Economic issues: NI is not wealthy and the Assembly may suffer from a lack of incentive to protect the environment. There are also

different tax systems between ROI and NI, which can incentivise fuel and illegal waste smuggling across the land border – likely to increase post Brexit.

- Historical context of environmental governance, in both ROI and NI: generally consider ‘green’, yet very poor compliance frequently. NI is sole region without independent agency. Historical influence of key businesses and industries over policy-making - the focus on economic development after the Troubles has sometimes been at the detriment of preserving and enhancing environmental quality. Concerns that NI and ROI might negatively influence each other.
- Security issues: environmental governance depends on access to relevant information. How can there be cross-border cooperation if bodies are dependent on information being shared by a foreign body/organisation? Post Brexit, will effective sharing occur between a non-EU state and a non-UK region? What if it is commercially sensitive or relevant to national security?
- While cross-border cooperation is key, it is currently showing its limits in Lough Foyle and Carlingford Lough: the contested nature of the marine border between NI and ROI undermines the work of the North/South Lough Agency, with unclear responsibilities for enforcement exploited by economic actors to escape oversight. While the sensitivities around this have been heightened recently, perhaps it also presents learning opportunities to develop common approaches and improve the associated governance regardless of jurisdiction.

Common themes that arose throughout the day were: a lack of confidence in the political will at any level within the UK, now or in the future, to take the necessary steps to protect the environment; a serious need for action to be taken now to prevent further environmental degradation and also to avoid considerable governance gaps arising post Brexit; a need for collaborative planning across the UK and with the ROI in order to develop some minimal common frameworks in light of the permeable nature of the environment and the numerous cross-border linkages; a need for some regional particularity and flexibility within the common frameworks; the need to recognise the numerous aspects that differentiate NI for the purposes of environmental regulation; a desire to be ambitious and think outside the box, e.g. in developing new principles, ambitious governance structures, and ensuring accountability of all involved; and a concern that the consultation proposals were too shallow and light-touch to provide any effective environmental governance in the future, especially in the context of the EU Withdrawal Act and the implications of a ‘no-deal’.

Finally, the very activities of this workshop highlighted the manner in which civil society is stepping up to try and fill the existing governance gap created by the lack of a NI government and conflicting messages on the Brexit negotiations, as well as the serious concerns that abound in relation to Brexit and environmental governance. The organisers would like to thank all of the speakers and participants for their enthused and valuable contributions throughout the day – it was a pleasure to work with you and we hope that everyone benefited as we did from the event.

The finalised briefing paper prepared for the purposes of this discussion is now available [online](#) – anyone is more than welcome to avail of it as relevant and appropriate.

Mary Dobbs & Viviane Gravey,
31st July 2018