

## Independence and the Environment

Discussion in the run-up to the referendum on Scottish independence has so far included remarkably little detailed consideration of the practical implications for how aspects of Scotland will be governed. This article considers briefly the consequences of independence for environmental law, looking at four areas: the legal tools available to Scottish authorities, the additional subject areas that would come under Scottish control, the impact on relationships within and beyond these islands and the question of what, if anything, a Scottish Constitution should say about environmental rights.

Authorities in Scotland are already responsible for many environmental issues (and indeed have been since before devolution in many cases) so that constitutional change may seem to make little difference. Similarly, the powers in Scotland are limited by the extent to which so much environmental law comes from the European Union ('EU'), so that even with independence the scope for Scotland to go its own distinct way will be significantly constrained. Yet the granting of more powers to Scotland would produce a profound change in the range of mechanisms available to address environmental issues and create significant new legal, administrative and regulatory challenges. Most significantly, the transfer of full powers to Scotland would enable Scottish authorities to take an integrated approach across a whole range of government and legislative powers. There would be no need to worry about gaps created by the division between Edinburgh and London so that the full range of policy tools could be used across the full range of subjects, ensuring that all aspects of policy work together in a properly integrated and holistic approach.

### Legal tools

The Scottish authorities are already responsible for a wide range of environmental matters, but even within these areas they are constrained by aspects of the devolution settlement that limit the legal mechanisms available to them. In particular the use of economic instruments is limited. Although the Scotland Act 2012 ('the 2012 Act') is now devolving control over the landfill tax and it may be possible to incorporate some environmental factors into the stamp duty land tax which is also being devolved, the tax system is not generally available as part of the 'toolkit' for tackling environmental matters. At present the Scottish Executive is not able to introduce a new system of carbon taxes to help in meeting our climate change targets, nor can it adjust tax reliefs to give incentives to environmentally friendly activity or investment. This affects not just the big issues but all the minor details where small adjustments can alter the incentives and obstacles that can make the difference in how people invest and operate.

Similarly out of reach at present is any regulation of the financial markets and company law. Therefore it is not possible to impose environmental reporting or disclosure requirements on companies, nor duties to have greater regard to the environmental consequences of a company's activities or of the investments being made.

Environmental policy also restricted by fact that product standards, labelling and advertising, and consumer protection are all reserved matters that cannot be controlled in Scotland. Therefore it may not be possible to tackle environmental issues through consumer-based pressures. The unsuccessful legal challenges to some of the anti-cigarette and drink-pricing legislation shows that some initiatives might currently be acceptable, but that litigation shows the difficulties involved. If full power was transferred, this approach would become much more straightforward. Other mechanisms that would become available include import and export controls and emergency powers. Above all, though, there would no longer be the need to worry about the limits of powers and to compromise policies and goals to fit the powers available.

### Subject areas

Transferring all reserved matters to Scottish control would allow the development of Scottish policy and law across the whole range of environmental issues. This would replace the current complex patchwork of devolved matters, reserved matter and reserved matters transferred to the Scottish Executive by 'executive devolution'. The most obvious area here is possibly energy. At present most matters are formally reserved to Westminster, but many have transferred to the Scottish Executive by executive devolution; for instance, approval of power stations. Yet it still needed special legislative authority to enable SEPA to deal with the energy efficiency issues which have to be included in considering integrated pollution control permits. Total control of energy matters, including nuclear policy and full regulation of the electricity industry would obviously be significant given the prominence of energy matters in Scotland's environmental and economic policy.

Another major area would be control of all marine matters. At present there is again a complex patchwork, with Scottish control in some coastal areas under the recent Marine (Scotland) Act 2010, plus further control over some fishing matters, but matters further offshore are in the hands of the UK authorities. Independence would enable an integrated approach to be taken from the beach to the high seas.

Other areas currently split include transport. Speed limits are being devolved under the 2012 Act (this may be significant for greenhouse gas emissions), but the change would allow control of the whole rail system, new responsibilities for shipping matters and authority over air travel (supported by control over air passenger duty). Others may be less prominent, but can still have significant impact in odd corners of policy, such as the Crown Estate, with its extensive rights over the seabed, and defence, with the storage and use of various dangerous substances, substantial training grounds and the impact of aircraft noise in some areas. Further areas are perhaps of more esoteric interest, such as Antarctica and outer space.

### Relationships

An independent Scotland would have quite different relationships with the world outside its own borders. At the international level it would be a separate member of the UN and other international organisations and treaty networks. As such it would negotiate separately over future climate

change agreements, treaties on marine pollution, biodiversity conservation, international trade in wildlife, etc. Yet it has to be appreciated that although Scotland would have a separate voice, it may not be a very strong one. At the Copenhagen Climate Conference in 2009 even the EU as a whole was sidelined by the deal struck by the USA, China, India, South Africa and Brazil. Scotland on its own will have to struggle to make its voice heard.

The EU is extremely important in environmental law since so much of the law is based on EU initiatives. An independent Scotland would have a separate, distinct voice in negotiations, but again there is the question of how strong any of the smaller nations can be. Scotland would also have to take full responsibility for any non-compliance with EU law. The devolution Concordat already says that Scotland has to pay for any liability incurred for a failure to meet EU law within devolved responsibilities, but part of the independence negotiations would have to be checking what potential areas of non-compliance are being inherited along with the currently reserved powers.

Of course there is also question-mark over Scotland's future in the EU, whether on its own or as part of the UK. In each case we are promised at least some renegotiation, with the risk of departure. Nevertheless, this may not make that much difference. The experience of Norway is that despite not being a member of the EU in practice it complies with the vast majority of EU law to ensure its ability to trade with the EU and beyond, with countries which are familiar with EU standards.

Relationships within the current UK would also be affected. Although for Scotland there are separate agencies such as SEPA and SNH, and of course a separate government, in practice a lot of co-operation between authorities within the UK. How would this be affected by splitting the UK? For instance would the Joint Nature Conservation Committee survive to provide advice on covering all of the UK and for all the seas around us? Would it perhaps become a model for formal co-operation structures across other fields? How much sharing of knowledge, data and expertise would continue?

There is a very long list of bodies that would be affected. Some, such as the Forestry Commission are already operating on a largely devolved basis (especially the with recent reforms in Wales), but they would have to be completely split. This would affect specialist bodies such as those in the nuclear industry: the Nuclear Decommissioning Authority, and the Office of Nuclear Regulation within the Health & Safety Executive. Would these continue as shared bodies with complex control arrangements and finances, or would separate Scottish versions be created? Does the latter option risk spreading expertise too thinly?

In all of this there is the simple issue of scale in doing everything separately. Could Scotland on its own provide the resources and expertise to ensure the appropriate level of service in all the areas currently overseen by UK bodies? On the other hand, the split-up of the UK would allow the formation of new relationships, sharing activities with some or all of the rest of the UK, for example the recent relaunch of Netregs as a partnership with Northern Ireland, or with other neighbours.

## Constitution

A final issue is what form any new Scottish Constitution would take. Most constitutions written in recent decades say something about the environment. Even if they are silent, experience in other countries is of the potential for provisions such as the 'right to life' to be interpreted as requiring a certain quality of life, requiring clean air, clean water and a decent environment free from harmful pollution.

If the constitution were to include some express environmental provisions, there is a range of options. Some constitutions mention protection of the environment, but say that this is a responsibility of the state with no enforceable rights for individuals. Some mention the right to a clean environment, but in a way that makes it more of an aspiration than a concrete right that can be vindicated today. Others do provide citizens with a concrete constitutional right to a clean environment but there are problems over what this means in practice and how it can be enforced in the face of diffuse pollution and environmental degradation arising from a large variety of causes. Alternatively, the constitution could provide rights for nature itself, as Ecuador has done:

'Nature ... has the right to integral respect for its existence and for the maintenance and regeneration of its life cycles, structure, functions and evolutionary processes.'  
'Nature has the right to be restored.'

Whatever is chosen, a lot will then depend on how the courts interpret and apply this and other constitutional provisions so that the extent to which the Scottish courts are willing to serve as champions of environmental rights becomes an important question.

## Conclusion

The more one thinks about the consequences of independence, the more there is to disentangle after centuries of union. The detailed considerations have implications for what our environmental policy should be, for how that policy can be put into effect and for relations with the rest of the UK, with the EU and internationally. There is great potential for success or failure and above all the opportunity to respond to environmental issues in a holistic and integrated way. An independent Scotland could show environmental leadership and use its powers to bring about a new vision of the future, or the pressures of being a small country in a globalised economic world could produce an inward-looking focus squeezing out wider concerns. There may not be clear answers to the questions, but everybody should be thinking about them.

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