

A brief history of environmental law in the UK

Ben Christman describes how the current set of environmental laws were assembled.

Environmental law is of importance to everyone. It helps to ensure a healthy environment, human wellbeing and a sustainable economy. As Lord Hope stated recently, environmental law proceeds on the basis that “the quality of the natural environment is of legitimate concern to everyone”¹. UK environmental law has ancient roots, but is relatively young as a legal field². This article examines four key ages of UK environmental law and concludes with a forecast for the future.

INDUSTRIALISATION: PUBLIC HEALTH AND POLLUTION



The Industrial Revolution swept through Britain from the mid-18th century, resulting in the rapid urbanisation of the population as workers moved to settlements around increasingly mechanised industrial centres. Economic success was tempered by heavy social and environmental impacts, and UK environmental law is therefore rooted in a response to industrialisation.

Epidemics were rife in the early 1800s, primarily due to a lack of sanitation. On a visit through the wynds (narrow lanes) of Glasgow and Edinburgh, a Dr Arnott encountered disturbing scenes: human waste piled outside the houses, which led to his remark that the inhabitants were “worse off than wild animals”³. Chadwick’s horrifying report on public sanitation in 1842 paved the way for the Public Health Act 1848⁴. This created powers for central and local government to take steps to protect public health, marking the start of a proactive approach to public health in the UK⁵.

The use of coal as an energy source and the concentration of industrial production led to air and water pollution. Recognition of the need for the restriction of property rights and controlling self-interested conduct grew as it became clear that the absence of penalties for actions that adversely affected others left little incentive for polluters to clean up their act⁶. The first statutory response to industrial pollution was the Alkali Act 1863. It forged

a new and scientific role for the state in the Alkali Inspectorate (AI), an expert enforcer of the law that represented a highly innovative form of regulation. Soap, glass and textile industries had to register with the AI, and airborne emissions of muriatic acid were to be reduced by 95 per cent, with the remainder diluted. Focusing on one environmental medium (air), there was little recognition of the integrated nature of environmental problems; perversely, the Alkali Act led to increased water pollution as condensed gas products were released into watercourses⁷. Successive Alkali Acts passed over the following decades expanded the scope of the legislation to cover the pollution of air, land and water from chemical production, and air pollution from a number of related industries.

The underpinning regulatory philosophy was one of technological optimism: a confidence that scientific solutions could be applied to pollution problems to ensure a satisfactory outcome. This approach broadly continues today.

AFTER WORLD WAR II: PLANNING



Following the destruction of parts of Britain during World War II, rebuilding and reorganisation were desperately needed. The Attlee Labour government introduced the Town and Country Planning Act 1947 as a means of controlling the rebuilding process⁸. The law had two main features: local authorities had to produce their own local plans, which detailed land-use policies and proposals for certain developments; and planning permission was required from local authorities for developments to ensure that they accorded with the local plans (or any other “material considerations”). Highly centralised, the planning systems across the UK retain these key principles today.

Planning is now broadly accepted, but at the time it represented an unprecedented shift in the state’s

control over the use of private property, nationalising the development value of land in part because of an increasing recognition that property rights were limited by wider public interests. Thus the development of planning controls combined the promotion of public health and pleasant urban development, with the restriction of private interests.

Whilst not originally environmental in nature, planning has allowed for an increasingly considered, proactive approach to the environmental impacts of development. It provides for the locational control of developments (e.g. avoid siting incinerators beside nurseries) and the regulation of the intensity of any particular activity. The planning systems across the UK remain under-resourced, under-enforced and biased towards development, but nevertheless provide opportunities for minimising the environmental impacts of developments.

LATE 20TH CENTURY: SUSTAINABLE DEVELOPMENT, INTERNATIONALISATION AND NEOLIBERALISM.



The mid-20th century saw the birth of modern environmentalism and the development of a public environmental consciousness. Literature such as *Silent Spring*, *The Tragedy of the Commons* and *The Limits to Growth*⁹, catastrophic incidents such as the Great London Smog of 1952 and an increasing understanding of anthropogenic climate change showed the limits of a *laissez-faire*¹⁰ approach to environmental issues. The scene was set for large-scale state intervention and therefore the development of a comprehensive body of environmental laws.

International action drove domestic change. A succession of UN conferences initiated by the 1972 United Nations Conference on the Human Environment in Stockholm and the UK's accession to the EU in the same year proved critical moments. The Western mode of development was increasingly acknowledged as ecologically illiterate, and a shift towards sustainable development was prescribed. International laws concerning biodiversity, atmospheric pollution and climate change developed, enshrining principles such as the 'polluter pays' principle.

EU membership has proved significant in compelling the UK to shake off its reputation as the 'dirty man of Europe'. EU water quality policy was instrumental in the introduction of absolute pollution limits for drinking and beach water; it forced the government's hand, requiring "substantially greater expenditure on sewage treatment

and disposal than would otherwise have occurred"¹¹. The proliferation of legislation in this period saw the UK's environmental legal architecture emerging, covering almost all environmental mediums. The dominant style was 'command and control': an environmental target would be identified (a threshold of pollutants in the air, for example), and a licensing system would be put in place to 'control', or enforce this command. Often penalties would be used to ensure compliance.

The rise of neoliberalism in the 1980s saw the 'command and control' approach challenged by a shifting preference for light-touch regulation, and increasingly criticised for its perceived inflexibility, inefficiency and costliness to businesses. Allied to this, regulatory budgets fell as the main British political parties sought to reduce the size of the state, limiting regulators' abilities to police laws. Organised industrial lobbying grew, increasing resistance to regulation¹³.

The breadth and quality of EU environmental law has heightened the profile of 'green' issues, helping to propel the environment up the domestic political agenda from the 1980s onwards¹².

The environmental law 'toolbox' developed apace, and environmental laws became less recognisable as neoliberalism intensified. Less intrusive forms of environmental law gained in popularity, such as economic and reflexive instruments. Economic instruments seek to mimic or harness market forces to pursue environmental goals. Typical economic instruments include 'green' taxes such as the landfill tax. This aims to discourage the use of landfill waste disposal by taxing landfill operators a set charge per tonne of waste, increasing annually (currently £72/tonne). Whilst the landfill tax has led to more recycling, it has also seen incineration and fly-tipping becoming increasingly attractive. The unpredictable nature of markets and the regressive social impacts of flat-rate taxes pose further problems for the use of economic instruments.

Reflexive laws require actors to adopt certain procedures that stimulate reflection, without specifying outcomes. Environmental impact assessments (EIAs) are reflexive in nature: they require those proposing developments that threaten "significant environmental effects" to carry out an assessment of the environmental consequences. A tool

not a rule, the assessment is fed into the decision-making process, but does not require a particular outcome. Conflicts of interest remain problematic because the party that stands to benefit from proceeding with the development also conducts the EIA and controls the information generated; occasionally the temptation to underestimate or ignore certain potential impacts has been irresistible.

21ST CENTURY: DEMOCRACY, DEVOLUTION AND DECARBONISATION

The increasing democratisation of UK environmental law is a commendable trend. Led by various international agreements to increase public involvement in environmental matters (particularly the Aarhus Convention¹⁴), there has been a shift towards more participatory environmental laws in the 21st century. Citizens now have rights to environmental information, a voice in environmental decision-making and access to legal remedies where environmental laws are broken. These represent a power shift in environmental decision-making, helping to level the playing field between citizens and the powerful entities that often inflict environmental harm.

Access to environmental information is now robust, with strong legal rights established and enforceable. Environmental information rights were introduced before broader information rights in the UK, helping to pioneer open government. Participation rights are less vigorous, and are often superficial (e.g. citizens are invited to submit comments on an activity, but decision-making rests with government).

The ability to use legal remedies to challenge decision-making has been the most contentious. Under the terms of the Aarhus Convention, the UK must ensure that procedures for citizens to ensure that environmental laws are upheld must not be “prohibitively expensive”¹⁵. Whilst well-resourced interest groups such as ClientEarth have pursued important test cases and challenged decision-making¹⁶, for most UK citizens the legal expertise needed to uphold environmental laws remains unaffordable. The Aarhus Convention’s ideal of a participatory environmental democracy is yet to be fully realised in the UK¹⁷.

Intertwined with democratisation, devolution was aimed at revitalising democracy across the UK and providing for the local control of public policy. Devolution was asymmetrical, with different powers given to each of the regional governments and legislatures to make laws. When combined with the differing political, economic and geographic circumstances in each of the devolved regions, devolution has resulted in something of a disintegration of UK environmental law.

Scotland can legislate in relation to the environment and planning, but its impact is limited by its inability to access many of the fiscal levers that influence environmental outcomes. Holyrood has been lively, legislating to designate two Scottish National Parks, transforming Scotland’s water management system, and applying ‘Strategic Environment Assessments’ to almost all Scottish public plans and strategies¹⁸. Scotland has often outshone Westminster in making more pro-‘green’ laws, but the Scottish outlook remains stubbornly “closer to “business as usual” than to one that truly respects environmental limits”¹⁹.



▲ Growing from Victorian seeds, a sprawling environmental law environment in Britain.

Wales and Northern Ireland have been less active lawmakers, for different reasons. The Welsh Assembly has a duty to make a scheme to show how it proposes to promote sustainable development²⁰, and has become a leader in doing this through policy. However, it has only had the ability to pass primary legislation²¹ since 2011, limiting its influence on environmental law²². Laws to promote active travel and make sustainable development the central organising principle for the Welsh Government are currently being discussed in Cardiff²³.

Political divides in Northern Ireland led to the suspension of devolution between 2002 and 2007. The legacy of the Troubles meant that until recently, the dominant concerns of the Northern Irish government were peace and security, with the environment historically a “non-issue”²⁴. Political stability has helped to drive change and the environment is now on the agenda in Stormont²⁵. The threat of EU fines forced the administration to update environmental legislation, but Northern Ireland’s new leaders have shown little commitment to delivering it in practice. Proposals for reform of the planning system within the Planning Bill that are currently being debated reflect a determination to establish the region as the UK’s capital of deregulated land management²⁶.

The legal limelight has shone upon climate change in the 21st century. Motivated by increasingly alarming reports from the Intergovernmental Panel on Climate Change

and a lack of action to reduce greenhouse gas emissions, a civil society and political coalition formed The Big Ask campaign. Their call for binding emissions-reduction targets was answered in the Climate Change Act 2008.

Symbolic and innovative, the Climate Change Act 2008 is the worthy accomplishment of a strikingly broad political alliance. The act requires the relevant Secretary of State²⁷ to ensure that the UK's net greenhouse gases are 26 per cent and 80 per cent lower than the 1990 baseline by 2020 and 2050 respectively – a huge task. To achieve this, the government must produce carbon budgets every



garden now governs the relationship between humans and the

five years that set out the maximum emissions for each period, aiming for gradual reductions in line with the long-term targets. The Act also created an independent Climate Change Committee to provide expert advice and analysis to the government. The philosophy of the act is that “this built-in series of duties, actions and reports will create the transparency, accountability and political pressure necessary to achieve the purpose of the legislation”²⁸.

The Act needs sustained political commitment to succeed, yet its operational reality has not been entirely heartening. Fears over the economic impacts of emissions reductions infuse discussions over carbon budgeting, despite the evidence surrounding the costs of business-as-usual emission patterns²⁹. Rumbles are being heard within mainstream political parties that the Act should be abolished after the next general election due to its perceived cost to businesses.

WHERE NEXT?

Environmental law is constantly evolving, occasionally succeeding and often failing, extraordinarily complex and frequently misunderstood. Growing from Victorian seeds, a sprawling environmental law garden now governs the relationship between humans and the environment in Britain. Its evolution has not been a linear process, often moving in various directions as a reaction to certain events without any obvious broader strategy or principles, and referenda concerning EU membership

and Scottish independence may add more twists to the tale. A 2012 UK Environmental Law Association (UKELA) report explained that environmental law requires careful pruning – it lacks coherence, transparency and sensible integration, and the process for making many environmental laws is flawed³⁰. Wading through the legal undergrowth may be lucrative for those selling legal advice; but for those subject to the law, identifying how to comply can be tortuous and expensive.

The nature of environmental concerns has changed. Industrial pollution and sanitation were easy victories with straightforward win-win solutions that often enjoyed broad political support. Environmental challenges are now more complex problems, often ‘wicked’. Climate change is the ultimate example: a symptom of many other ills, with consequences for both continuing current trends and taking action to reduce emissions, a vocal and well-resourced (yet often misinformed and numerically minor) opposition, phenomenal scientific complexity, a transboundary, long-term nature and no single obvious legal solution³¹. Tackling unsustainable consumption, the forthcoming push for fracking and remedying the various breaches of planetary boundaries³² will test environmental law further.

Politicians hold the purse strings and take vital decisions, making David Cameron’s pledge to lead “the Greenest Government ever” a promising moment. The superficial reality of this commitment has been exposed by the emergence of an increasingly fundamentalist form of neoliberalism. This evidenced by the intensifying red-tape discourse which neglects the benefits of regulation and gives undue weight to claims of the inconveniences that it creates³³, and is exemplified by George Osborne’s comments that environmental goals represent a “burden”³⁴ on businesses. Those who wish to take a strimmer to environmental protection may succeed in a critical vacuum, as “the environment dies away in silence”³⁵.

David Attenborough’s recent warning that “all is not well”³⁶ in the natural environment suggests that environmental governance in the UK has not been spectacularly effective. Environmental law remains a long way from reaching climax ecosystem status, and the current political atmosphere makes it likely that the Sisyphean³⁷ struggle for the legal protection of the environment will continue long into the future.

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SOURCES

1. Lord Hope, in *Walton (Appellant) v The Scottish Ministers (Respondent)* (Scotland) [2012] UKSC 44, para 152.
2. The Book of Deuteronomy (written circa 7th century BCE and influential in the development of Christianity) provides advice on sanitation. The law of 'nuisance', developed over centuries by judges, provides tools for landowners to challenge activities that affect the enjoyment of their property.
3. Chadwick, E. (1842) *Report on the Sanitary Condition of the Labouring Population of Great Britain*. Clowes and Sons, London, pp23–24.
4. *Ibid*.
5. See Hamlin, C., and Sheard, S. (1998) Revolutions in public health: 1848, and 1998?, *British Medical Journal* **317**(29) 587, and Fee, E., and Brown, T. M. (2005) *The Public Health Act of 1848*, *Bulletin of the World Health Organization* **83** (11), p866.
6. Coyle, S., and Morrow, K (2004) *The Philosophical Foundations of Environmental Law: Property, Rights and Nature*. Hart Publishing, Oxford, p134.
7. Holder, J., and Lee, M. (2007) *Environmental Protection, Law and Policy: Text and Materials* (2nd edn). Cambridge University Press, Cambridge, pp330–331.
8. It was also seen as an incremental step towards Labour's pursuit of nationalising land. See Cocks, R., (2001) Enforced Creativity: Noel Hutton and the New Law for Development Control, 1945–47. *The Journal of Legal History*, **22** (1), p21. Planning laws existed from the Housing, Town Planning, Etc. Act 1909, but until the Town and Country Planning Act 1947 came into force the planning system remained fragmented, planning was locally exercised with little powers of initiative for central government and the planning system was haunted by the 'compensation bogey'. See Cullingworth, B., and Nadin, V., (2006) note in *Town and Country Planning in the UK* (14th edn). Routledge, Oxford, Chapter 2.
9. Rachel Carson documented the impact of pesticides and chemicals on the environment in *Silent Spring* (1963), Hamish Hamilton, London; Garrett Hardin explained that unchecked self-interested human behaviour can threaten shared resources in *The Tragedy of the Commons* (1968), *Science* **162** p1243; Donella Meadows *et al* warned of the dangers of infinite population growth on a planet with finite resources in *The Limits to Growth* (1972), Universe Books.
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15. *Ibid*, article 9(4).
16. For example: *R (on the application of ClientEarth) (Appellant) v The Secretary of State for the Environment, Food and Rural Affairs (Respondent)* [2013] UKSC 25, where ClientEarth challenged the UK Government's failure to comply with EU law on air pollution.
17. See Day, C. (2011) Tackling barriers to environmental justice: Access to environmental justice in England and Wales: a decade of leading a horse to water. In: *Aarhus and Access rights: the New Landscape*. London, 10 October 2011, WWF, and Church, M., Tipping the Scales: Complying with the Aarhus Convention on Access to Environmental Justice, Friends of the Earth Scotland.
18. The National Parks (Scotland) Act 2000, the Water Environment and Water Services (Scotland) Act 2003 and the Environmental Assessment (Scotland) Act 2005 respectively.
19. Reid, C. (2011) 'Environment and Sustainable Development', in Sutherland, E., Goodall, K., Little, G., and Davidson, F. (eds.) *Law Making and the Scottish Parliament: The Early Years*. Edinburgh University Press, Edinburgh, p337.
20. Government of Wales Act 2006, S79.
21. Primary legislation refers to the laws passed by a Parliament, whereas secondary legislation refers to the laws that are made by designated persons (usually government ministers) who are authorised to act by primary legislation.
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25. Legislation to tackle climate change is being discussed in Northern Ireland. See UK Committee on Climate Change (2011) *The Appropriateness of a Northern Ireland Climate Change Act*, and information on the pre-consultation on the need for a Northern Ireland Climate Change Bill, available on the Department of the Environment NI's website at www.doeni.gov.uk/ni_climate_change_bill.htm (Accessed 30 July 2013).
26. Available on the Northern Ireland Assembly's website at www.niassembly.gov.uk/Assembly-Business/Legislation/Primary-Legislation-Current-Bills/Planning-Bill/ (Accessed 30 July 2013).
27. Currently the Secretary of State for Energy and Climate Change, Ed Davey MP.
28. ClientEarth (2009) *The UK Climate Change Act 2008 – Lessons for national climate laws: An independent review*. ClientEarth, London, p6. This recognises the difficulty of compelling members of government to ensure emissions reductions targets are met, and the interest of MPs to refuse to agree to be subject to possible sanctions when passing the legislation.
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