

Beyond UKIMA: Challenges for Devolved Policy-Making in the Post-Brexit Era

Introduction

From inception to implementation, the United Kingdom Internal Market Act 2020 (UKIMA) has contributed to the considerable tension between UK and devolved institutions which has characterised the period since the Brexit referendum in 2016. This commentary will consider how this tension permeates a number of policy areas and how it affects devolved law and policy making. We shall focus on three discrete areas of law and policy: constitutional reform, human rights, and environmental protection. The unifying theme – as elsewhere in this special issue – is the aforementioned tension between UK and devolved institutions and the challenges faced by devolved institutions in pursuit of their policy goals. Some of these tensions and challenges – especially in the case of environmental protection – arise directly from the implementation of UKIMA. Others do not arise from UKIMA itself, but rather reflect the breadth of the tension and political divergence between UK and devolved executives which have arisen – or at least been exacerbated – since 2016, as well as the centralising tendency which dominates approaches to devolution at the UK level in that period.¹

1. The Constitution of Devolution

In this Section, our focus is on proposals for reform of the constitution of devolution, especially those recommended by independent Commissions of Inquiry in relation to Wales now extending over a twenty-year period. Proposals for reform to the constitution of devolution are, of course, particularly sensitive to the attitudes of UK-level institutions, since powers to amend the principal statutes establishing, empowering and constraining devolved institutions are reserved to the UK Parliament.² And while the post-Brexit era has brought new tensions, and arguably, in response a shift in approach from the devolved institutions, there is nevertheless continuity with pre-Brexit reform proposals. Perhaps the most significant tensions and challenges arise from the increasingly ambitious reform agenda, reflected in recent Commissions' terms of reference and recommendations.

¹ Conflict and centralisation have been notable and persistent features of Brexit-related law and policy-making (See the other papers in this issue, especially: Chris McCorkindale, UKIMA as red flag symptom of constitutional ill-health: devolved autonomy and legislative consent [citation]), but conflicts between UK and devolved institutions have also extended to policy issues which are not directly Brexit-related. Prominent examples, in addition to those discussed below, include the tensions arising over divergent responses to the COVID-19 pandemic and the UK government's decision to exercise its power under Scotland Act 1998, s.35 to block the Scottish Parliament's gender recognition reforms (SP Bill 13 Gender Recognition Reform (Scotland) Bill Session 6 (2022)). Of course, even those conflicts which do not concern Brexit directly may reflect shifts in political attitudes which can themselves be traced to Brexit (See, for a discussion of one such shift in political attitudes: Michael Kenny and Jack Sheldon, 'When Planets Collide: The British Conservative Party and the Discordant Goals of Delivering Brexit and Preserving the Domestic Union, 2016–2019' (2021) 69(4) *Political Studies* 965.).

² See, for example: Government of Wales Act 2006, Schedule 7B, Part 1, s 1(1).

As outlined elsewhere in this issue, a ‘hyper-unionist’,³ centralising attitude is redolent in UKIMA and has defined UK institutional attitudes to devolution in the Brexit era.⁴ One might, therefore, presume that UK institutions would be increasingly hostile to proposals to alter the structure of devolution, especially those which would expand devolved competence at Westminster’s expense. Indeed, it is tempting to perceive the same centralising attitudes at work in the short shrift given by the UK government⁵ to the Thomas Commission’s 2019 recommendations on devolution of powers over the Welsh justice system.⁶ Yet while the Brexit-era attitudes of Westminster institutions may well have contributed to this dismissive reaction, when it comes to the constitution of devolution – especially in Wales – there is a great deal of continuity between the rejection of the Thomas Commission proposals and UK institutions’ reactions to previous Commission-led recommendations for reform.⁷

Commission-recommended reform to devolution, especially in Wales, has a long history of lukewarm reception and partial implementation by UK governments of all political stripes. In particular, UK institutions have, since the outset of devolution, displayed a longstanding resistance to *expansionary* reform – reforms which expand devolved competences at the expense of UK institutions – deploying it only in cases of exceptional public demand or (Westminster-recognised) functional necessity. Such resistance was evident even in the Westminster response to the Richard Commission,⁸ established by the Welsh Assembly Government to review the widely derided original devolution arrangements under the Government of Wales Act (GoWA) 1998, and which recommended a wide range of both functional and expansionary reforms. At the functional end of the spectrum, there were recommendations to formalise the distinction between the Assembly and its government. At the more expansionary end, the Commission recommended legislative powers for Wales on a reserved powers basis, where there were no primary legislative powers before. The UK response, in the form of the GoWA 2006, implemented some of these recommendations, though changes were, in the main, limited to those of a primarily functional nature. The approach to the more expansionary, albeit functionally justified, recommendations relating to legislative competence was altogether more restrained. Legislative competence, in the form of the Assembly Measures regime,⁹ was on a conferred, not reserved, powers basis and the conferral of powers was envisaged to be glacially incremental. Welsh legislative power was to be subject to a high degree of central control. The more complete and independently exercisable legislative powers in GoWA 2006, Part 4, were not immediately available and would only be conferred

³ One characteristic of the post-Brexit phenomenon of ‘hyper-unionism’ is a more overtly interventionist and integrationist approach by the UK government. See: Kenny and Sheldon (n 2).

⁴ See note 1 above.

⁵ See, for example, government Ministers’ responses to Westminster Hall debates on the Thomas Commission recommendations: HC Deb 22 January 2020, vol 670, cols 154WH-159WH; HC Deb 29 November 2022, vol 723, cols 273WH-276WH.

⁶ Commission on Justice in Wales, ‘Justice in Wales for the People of Wales’ (The Commission on Justice in Wales, 2019)

⁷ For reasons of space, this Section focuses only on the most prominent Commissions of Inquiry prior to Thomas: the Richard Commission (Commission on the Powers and Electoral Arrangements of the National Assembly for Wales, ‘Report of the Richard Commission’ (The Richard Commission, 2004)) and the Silk Commission, Part I (Commission on Devolution in Wales, ‘Empowerment and Responsibility: Financial Powers to Strengthen Wales’ (The Silk Commission, 2012)) and Part II (Commission on Devolution in Wales, ‘Empowerment and Responsibility: Legislative Powers to Strengthen Wales’ (The Silk Commission, 2014))

⁸ Richard Commission (n 7)

⁹ Government of Wales Act 2006, Part 3

following a clear demonstration of both Assembly and public support, as indicated in a referendum in 2011. Significantly, the UK government rejected some of the most overtly expansionist proposals outright. Expansionary recommendations on issues such as the devolution of tax powers and the adoption of a reserved powers model of competence allocation were to be subject to the attention of further Commissions of Inquiry, and finally implemented many years later.

Similar trends can be discerned in UK institutional responses to the two Silk Commission Reports. The predominantly finance-related reforms recommended by Silk I¹⁰ – largely enacted by the Wales Act 2014 – reflected a UK government view that growing political power must be accompanied by financial accountability.¹¹ These changes were no doubt eased by the fact that in these respects Wales was following in the wake of reforms already enacted in relation to Scotland.¹² Again, additional powers – in this instance over income tax were to be subject to clear evidence of political and public demand in the form of a referendum, albeit this requirement was superseded by the Wales Act 2017.

As for Silk II,¹³ many of its expansionary recommendations were not implemented – youth justice competence being a prominent example. The most headline-grabbing reform enacted in the Wales Act 2017 was the shift to a reserved powers model, but this reform to the formal allocation of functions was not accompanied by a significant expansion in their breadth and certainly not to anything approaching the range of competence of the Scottish Parliament. This practice of essentially functional or formal tinkering fits with the UK institutions' tendency to accommodate non-expansionary reform much more readily. Indeed, the adoption of reserved powers for Wales was arguably driven by an anti-expansionary, centralising ethos in at least two respects: first, the list of reserved matters, with some exceptions, sought to replicate or even shrink pre-existing competencies.¹⁴ Second, one reason the reserved powers model, long resisted by UK institutions as a model for devolution to Wales, became suddenly attractive to a UK government was its potential to defuse the potentially expansionary effects of the UK Supreme Court's *Agricultural Sector (Wales) Bill*¹⁵ decision.¹⁶

Resistance to expansionary reform is not limited to Wales. But the dynamics of resistance to and accommodation of expansionary demands have been rather different in Scotland and Wales. As above, where modest expansionary demands have been accommodated in relation to Wales, functional considerations have typically been decisive. In Scotland, a sense of pro-unionist political necessity exerts

¹⁰ Silk I (n 7)

¹¹ Richard Rawlings, 'The Strange Reconstitution of Wales' (2018) Public Law 62-83

¹² See especially the Scotland Act 2012, which implemented recommendations made by the Calman Commission (Commission on Scottish Devolution, 'Serving Scotland better: Scotland and the United Kingdom in the 21st century' (The Commission on Scottish Devolution, 2009)). Indeed, for Laura McAllister the financial reforms to Welsh devolution bear a greater resemblance to the Scotland Act 2012 than to the Silk Commission's recommendations (Laura McAllister, 'The UK Government's recent approach to the Silk Commission has been inflexible and unimaginative' (*Democratic Audit*, 5 December 2013) < <https://www.democraticaudit.com/2013/12/05/the-uk-governments-recent-approach-to-the-silk-commission-has-been-inflexible-and-unimaginative/>> accessed 26 June 2023)

¹³ Silk II (n 7)

¹⁴ Elisabeth Jones, Matthew Richards and Alys Thomas, 'The Wales Bill: Reserved Matters and their effect on the Assembly's Legislative Competence' (National Assembly for Wales Legal and Research Briefing, 16-051, September 2016); Rawling (n 11)

¹⁵ [2014] UKSC 43

¹⁶ Rawlings (n 11)

considerable influence, as exemplified by the infamous ‘vow’¹⁷ inspired by unionist jitters in the run-up to the 2014 independence referendum and the subsequent Smith Commission¹⁸ and Scotland Act 2016. Wales, unlike Scotland, lacks this near-constant threat of independence and the consequent political capital when it comes to negotiating reform with Westminster.

In light of this brief history, UK institutional reluctance to transfer the additional functions recommended by the Thomas Commission may appear to fit with a longstanding trend of resistance to expansionary reform recommendations, especially where they are not perceived to be either functionally or politically necessary. Although there is continuity in UK attitudes to expansionary Commission recommendations, in the post-Brexit era we may be able to discern an increasingly overtly expansionist agenda from both Welsh government and the Commissions of Inquiry it has established. The Independent Commission on the Constitutional Future of Wales, which issued its final report in January 2024,¹⁹ is a good example. Its terms of reference, established by the Welsh government, are extremely broad, including consideration of ‘fundamental reform of the constitutional structures of the United Kingdom’, as well as ‘options to strengthen Welsh democracy and deliver improvements for the people of Wales.’²⁰ The Commission’s interim²¹ and final reports²² reflect this expansive remit, insofar as they consider both the possible expansion of devolved competences and radical constitutional reform, on a spectrum from entrenched or enhanced devolution, through federalism, to full independence. Ultimately the Commission concludes that each of these options for constitutional reform is ‘viable’,²³ albeit declining to ‘come to a view on which option is the right one for Wales [because] that choice is for citizens and their representatives’²⁴ – arguably a sensible recognition of the limits of its institutional competence.²⁵

Why is the approach to constitutional reform in devolved institutions becoming more expansionary, despite clear reluctance at the UK level to countenance reform of this nature? It may simply be there is less urgency, and indeed less scope, for a focus on glaring functional defects, owing to the extensive remedial work already undertaken. It may be that a build-up of frustration with the piecemeal, incremental, and sometimes incoherent approach to the constitution of Welsh devolution since its inception has inspired a push for more radical reform. The increasingly antagonistic relationship

¹⁷ David Clegg, ‘David Cameron, Ed Miliband and Nick Clegg sign joint historic promise which guarantees more devolved powers for Scotland and protection of NHS if we vote No’ *Daily Record* (16 September 2014) <<https://www.dailyrecord.co.uk/news/politics/david-cameron-ed-miliband-nick-4265992>> accessed 9 May 2023.

¹⁸ The Smith Commission, ‘Report of the Smith Commission for further devolution of powers to the Scottish Parliament’ (The Smith Commission, 2014)

¹⁹ The Independent Commission on the Constitutional Future of Wales, ‘Final Report’ (Welsh Government, 2024)

²⁰ Independent Commission on the Constitutional Future of Wales, ‘Broad Objectives’ (*Gov.Wales*, 19 October 2021) <<https://www.gov.wales/independent-commission-constitutional-future-wales/broad-objectives>> accessed 26 June 2023

²¹ Independent Commission on the Constitutional Future of Wales, ‘Interim report by The Independent Commission on the Constitutional Future of Wales’ (The Independent Commission on the Constitutional Future of Wales, 2023).

²² Independent Commission on the Constitutional Future of Wales (n 19)

²³ *ibid* 94

²⁴ *ibid* 94

²⁵ For an argument in favour of embracing a more constitutionally radical approach to reform of the constitution of devolution, see: Gareth S. Williams, ‘The illusions of parliamentary sovereignty’ (*Institute of Welsh Affairs*, 19 January 2024) <<https://www.iwa.wales/agenda/2024/01/the-illusions-of-parliamentary-sovereignty/>> accessed 24 January 2024.

between the UK and devolved governments may also be a contributing factor, exemplified by the UK government's post-Brexit centralising tendencies, its increasing willingness to breach the Sewel convention,²⁶ and by glaring political differences between Conservative-dominated UK institutions and devolved institutions controlled by progressive political parties.²⁷ In the case of Wales, in particular, the increased prominence of devolved institutions during the Covid-19 pandemic seems to have increased public understanding and support for devolution, and may have increased the Welsh government's confidence in confronting Westminster head-on.²⁸ The shift towards establishing more overtly expansionary remits for Commissions of Inquiry may also reflect an increasing recognition that even those Commission recommendations which are flatly rejected frequently at the UK level initially often have 'soft impacts' in the longer term:²⁹ they shape ongoing debates, becoming the benchmark for future reform.

At the time of writing, anti-expansionary, antagonistic attitudes towards devolved competences prevail within the UK government.³⁰ The Independent Commission on the Constitutional Future of Wales has laid the groundwork for demands for yet more expansionary reform, perhaps even fundamental reform to the UK Constitution in the form of federalism or independence. And while the Commission resiled from formally recommending any particular model for constitutional reform, it is clear in its recommendation for legislation to enhance and further constitutionally protect the powers of devolved institutions.³¹ The tension between UK and devolved institutions in relation to UKIMA seem destined to be replicated in the constitutional context. Whether a change in government will lead to a radical change in attitude is, at the very least, doubtful, given the history of UK governments of all political stripes resisting expansionary reform to devolution.

2. Human Rights

Human rights governance in the UK is similarly marked by divergence between UK and Welsh and Scottish devolved institutions. Whereas the UK government has increasingly sought to reduce the impact of its international human rights obligations in domestic policy, occasionally flirting with resiling from those obligations altogether,³² as discussed below, the devolved governments and legislatures have

²⁶ For examples, see: Institute for Government, 'Sewel convention' (instituteforgovernment.org.uk, 16 January 2018) <<https://www.instituteforgovernment.org.uk/explainer/sewel-convention>> accessed 26 June 2023

²⁷ For examples, see Sections 2 and 3 below.

²⁸ For an example, see **Gareth Evans, Commentary in this issue [add citation]**

²⁹ Laura McAllister & Diana Stirbu, 'Influence, Impact and Legacy – Assessing the Richard Commission's Contribution to Wales's Evolving Constitution' (2008) 44 Representation 209-224

³⁰ BBC, 'No more powers for Wales, says prime minister Rishi Sunak' (28 April 2023) <<https://www.bbc.co.uk/news/uk-wales-politics-65427011>> accessed 9 May 2023.

³¹ Independent Commission on the Constitutional Future of Wales (n 19) Chapters 4 & 5.

³² Such threats have become increasingly prominent in relation to the UK government's policy under which those claiming asylum in the UK could be deported to Rwanda. See, for example: Matt Dathan, 'No 10 backs threat to leave rights convention' *The Times* (London, 28 September 2023) 1. As a result of the UKSC's decision that the policy is unlawful, due in part to its contravention of international human rights law (*R (AAA and Others) v Secretary of State for the Home Department* [2023] UKSC 42), the government is, at the time of writing, pursuing legislation which would at least partially insulate the policy from the application of various international human rights instruments as a matter of domestic law (see: Safety of Rwanda (Asylum and Immigration) HC Bill (2023-34) [38]).

sought both to expand the range of domestically applicable human rights treaties and to improve the efficacy of human rights protection. This divergence presents serious challenges in the post-Brexit era, particularly to devolved institutions seeking to promote the UK's international human rights commitments within the relevant territory.

The interface between devolved competences and human rights is complex, with international human rights standards serving as both limits on devolved competence and as a legitimate ground for devolved action. GoWA 2006 makes it unlawful for either Welsh Ministers or the Senedd (Welsh Parliament) to act in breach of the European Convention on Human Rights (ECHR).³³ While the Human Rights Act 1998 (HRA 1998) makes it unlawful for any public authority in the UK to act in a manner which is incompatible with select articles of the ECHR,³⁴ it preserves the principle of Parliamentary sovereignty by expressly excluding the UK Parliament from this prohibition.³⁵ Similarly, as international human rights treaties (with the exception of the ECHR) are not incorporated by UK legislation, there is no domestic legal requirement on either the UK government or Parliament to comply with the UK's wider international human rights obligations. However, when it comes to devolved legislation, the UK Secretary of State has power to intervene to prevent action by Welsh Ministers³⁶ or enactment of Senedd legislation³⁷ which they deem to be in breach of the UK's international obligations, which will include human rights treaties to which the UK is a State party. The exercise of devolved executive and legislative functions in Wales is therefore framed by the requirement of compliance with human rights. The same may be said of Scotland, where similar restrictions apply.³⁸ In Northern Ireland, in addition to the HRA 1998, courtesy of the Belfast (more popularly, the Good Friday) Agreement's endorsement of the incorporation of the ECHR into domestic law,³⁹ human rights play an even more prominent role.

While GoWA 2006 establishes limits on the powers of Welsh Ministers and the Senedd, it does not prevent either institution from taking steps to progress human rights. The framing provided by GoWA 2006 and the HRA 1998 provides a floor rather than a ceiling on how far Wales can go to implement human rights through law. In fact, GoWA 2006 confirms that the Senedd is competent to enact legislation to 'observe and implement' the UK's international obligations.⁴⁰ The Welsh Ministers are also given power to promote economic, social, environmental well-being in Wales, including by introducing Bills to the Senedd.⁴¹ Similarly, arrangements for devolution in Scotland mean that devolved institutions are able to progress human rights through law and policy.⁴²

An increasingly prominent feature of human rights governance in the UK is divergence between the UK government and devolved governments in Wales and Scotland. The UK Conservative Party leadership – as well as many backbenchers – has consistently displayed frustration, and sometimes

³³ Government of Wales Act 2006, ss 81 and 108A.

³⁴ Human Rights Act 1998, s 6. This prohibition is limited to articles of the ECHR and relevant optional protocols made part of UK law by Human Rights Act 1998, s 1 and sch 1.

³⁵ Human Rights Act 1998, s 6(3).

³⁶ Government of Wales Act 2006, s 82.

³⁷ Government of Wales Act 2006, s 114.

³⁸ Scotland Act 1998, ss 29, 35 and 57.

³⁹ Northern Ireland Office, *The Belfast Agreement: An Agreement Reached at the Multi-Party Talks on Northern Ireland* (Cm 3883, 1998) 16-20.

⁴⁰ Government of Wales Act 2006, sch 7A, para 10.

⁴¹ Government of Wales Act 2006, s 60.

⁴² Scotland Act 1998, sch 5, para 7.

outright antipathy, towards the HRA 1998 since its enactment.⁴³ This hostility is not limited to the HRA, with party leaders expressing dissatisfaction with ECtHR case law,⁴⁴ even if they usually stop short of criticising the ECHR itself as opposed to its interpretation. While this antipathy pre-dates the Brexit era, it certainly persists and has arguably concretised, with rhetoric in some cases translating into action (or at least plausible threats of action). Prominent examples include the abandoned (for now) British Bill of Rights Bill,⁴⁵ tussles over the European Court of Human Rights' power to issue injunctions in relation to the controversial Rwanda asylum policy,⁴⁶ as well as continued flirtation with the notion of departing the ECHR altogether.⁴⁷

On the contrary, the Welsh Government has a longstanding commitment to using its executive powers and the legislative competence of the Senedd to progress human rights in Wales. This commitment has been given effect through policy initiatives which reference human rights, in particular for groups given special protection under international human rights law. Recent examples include the introduction of a Race Equality Action Plan which promotes the objectives of the UN Convention on the Elimination of All Forms of Racial Discrimination,⁴⁸ and the Framework for Independent Living, which is underpinned by the social model of disability promulgated by the UN Convention on the Rights of People with Disabilities (UNCRPD).⁴⁹ More broadly, the Welsh Government's current Programme for Government (2021-26) includes a commitment to incorporate the Convention on the Elimination of Discrimination Against Women (CEDAW) and the UNCRPD into Welsh Law to promote social justice.⁵⁰

⁴³ Proposals to review or reform the HRA 1998 in some way feature in every Conservative General Election manifesto since 2001.

⁴⁴ For example, see: 'Cameron Sickened by Prisoner Vote' *The Times* (London, 3 November 2010) <<https://www.thetimes.co.uk/article/cameron-sickened-by-prisoner-vote-j3zf67bbm2t>> accessed 27 June 2023. It is worth noting that this rhetoric is not always limited to the Conservative Party. See for example, in relation to the ECtHR jurisprudence relating to the deportation of foreign terror suspects: Joshua Rozenberg, 'Clarke raises issue of quitting rights convention' *Telegraph* (London, 9 September 2005) <<https://www.telegraph.co.uk/news/uknews/1497978/Clarke-raises-issue-of-quitting-rights-convention.html>> accessed 27 June 2023.

⁴⁵ For an overview of the proposals, see: Ministry of Justice, 'Human Rights Act Reform: A Modern Bill of Rights, Consultation Response' (*Gov.Uk*, 12 July 2022) <<https://www.gov.uk/government/consultations/human-rights-act-reform-a-modern-bill-of-rights/human-rights-act-reform-a-modern-bill-of-rights-consultation>> accessed 26 June 2023. For the Welsh government's response: Welsh government, 'Written Statement: UK Government Bill of Rights' (*Gov.Wales*, 22 June 2022) <<https://www.gov.wales/written-statement-uk-government-bill-rights>> accessed 26 June 2023.

⁴⁶ Tim Baker, 'Rishi Sunak calls for change to rules that stopped Rwanda deportation flight in meeting with European court chief' (*Sky News*, 16 May 2023) <<https://news.sky.com/story/rishi-sunak-calls-for-change-to-rules-that-stopped-rwanda-deportation-flight-in-meeting-with-european-court-chief-12882318>> accessed 26 June 2023

⁴⁷ For recent examples: Adam Forrest, 'Suella Braverman sparks new government row after calling for UK to quit ECHR' *The Independent* (London, 5 October 2022) <<https://www.independent.co.uk/news/uk/politics/suella-braverman-european-convention-human-rights-b2195809.html>> accessed 26 June 2023; Jessica Elgot, 'Tory MPs to push for UK exit from European convention on human rights' *The Guardian* (London, 5 February 2023) <<https://www.theguardian.com/politics/2023/feb/05/tory-mps-to-push-for-uk-exit-from-european-convention-of-human-rights>> accessed 26 June 2023.

⁴⁸ Welsh Government, *An Anti-Racist Wales: Race Equality Action Plan for Wales* (WG41912, 2022), 109.

⁴⁹ Welsh Government, *Action on Disability: The Right to Independent Living* (WG38772, 2019), 6.

⁵⁰ Welsh Government, 'Programme for Government – Update' (*Gov.Wales*, 7 December 2021) <<https://www.gov.wales/sites/default/files/publications/2022-01/programme-for-government-update-december-2021.pdf>> accessed 26 June 2023

This commitment builds on innovative (for the UK) devolved legislation in 2011 to incorporate the UN Convention on the Rights of the Child (UNCRC) into Welsh law.⁵¹ This places a duty on Welsh Ministers to have due regard to specified provisions of the UNCRC in the exercise of their functions.⁵² Since 2011, sectoral legislation has seen both the UNCRC and the UN Principles on Older Persons incorporated in the field of social services;⁵³ and, the UNCRC and UNCRPD incorporated in the field of additional learning needs education.⁵⁴ In both these sectors, authorities exercising functions under the applicable legislation are required to have due regard to incorporated rights.

While there have been advances in the promotion and recognition of human rights in Wales, there is ongoing concern about a persistent ‘implementation gap’ between the rights set out in international law, and the experience of people in Wales: in particular, the experience of those from disadvantaged or discriminated groups, for example, women, disabled people and people from black and minority ethnic groups.⁵⁵ These concerns led the Welsh Government to commission research in 2021 to examine ways to strengthen and advance equality and human rights in Wales.⁵⁶ The research took place against the backdrop of the UK Government’s commitment to reform the HRA 1998 which attracted widespread criticism from the Welsh Government as well as civil society stakeholders in Wales (and elsewhere in the UK), who argued the proposed reforms were as largely regressive, unnecessary and unwelcome.⁵⁷

The report, submitted to the Welsh Ministers in August 2022,⁵⁸ advanced 40 recommendations for measures to strengthen and advance equality and human rights in Wales on: leadership, policy and guidance, impact assessment, support for advocacy, and raising awareness of human rights. Key amongst these recommendations was for the Welsh government to bring forward legislation to incorporate international human rights treaties through a Human Rights (Wales) Bill which would make rights enforceable by individuals before a court or tribunal.⁵⁹ The recommendations were all accepted in full or in part by the Welsh government in May 2022,⁶⁰ and a Human Rights Advisory Group chaired by the Welsh Minister for Social Justice, with members from civil society, has been established to monitor progress on their implementation (July 2022). Significantly, the recommendations on incorporation were accepted without qualification leading the Welsh government to set up an independent Legislative Options Working Group (LOWG) to bring forward proposals on legislation to incorporate international

⁵¹ The Rights of Children and Young Person (Wales) Measure 2011.

⁵² *Ibid*, s 1.

⁵³ Social Services and Well-being (Wales) Act 2014, s 7.

⁵⁴ Additional Learning Needs and Education Tribunal (Wales) Act 2018, ss 7 and 8.

⁵⁵ See, for example: Equality and Human Rights Commission, ‘Is Wales Fairer?’ (*Equality and Human Rights Commission*, 25 October 2018) <<https://www.equalityhumanrights.com/en/publication-download/wales-fairer-2018>> accessed 26 June 2023

⁵⁶ Simon Hoffman et al, ‘Strengthening and advancing equality and human rights in Wales’ (*Gov.Wales*, 26 August 2021) <<https://www.gov.wales/strengthening-and-advancing-equality-and-human-rights-wales>>

⁵⁷ See note 37 above.

⁵⁸ Hoffman et al (n 48)

⁵⁹ *Ibid*, recommendations 1 and 25.

⁶⁰ Welsh Government, ‘Welsh Government response to the ‘Strengthening and Advancing Equality and Human Rights in Wales’ research report’ (*Gov.Wales*, 23 May 2022) <<https://www.gov.wales/sites/default/files/publications/2022-05/response-report.pdf>> accessed 26 June 2023.

human rights in Welsh law. At the time of writing the LOWG has completed its initial scoping of options, although it's report to Welsh ministers is yet to be published.

The steps being taken to advance human rights through devolved legislation in Wales mirror developments in Scotland, where two distinct processes are underway to incorporate international human rights in Scots law. Based on recommendations from an Advisory Group on Human Rights Leadership in 2018 the Scottish First Minister established a National Taskforce for Human Rights Leadership to make recommendations human rights leadership in Scotland.⁶¹ The Taskforce reported in March 2021, making numerous recommendations on incorporation of international human rights and on enforcement.⁶² The Scottish Government then announced it would introduce a new human rights bill by 2026, which would incorporate four UN human rights treaties directly into Scots law, as well as a bespoke rights to a healthy environment.⁶³

Separately, Scotland is moving towards incorporation. In March 2021 the Scottish parliament unanimously passed the UNCRC (Incorporation) (Scotland) Bill to incorporate the UNCRC into Scots law so that the rights guaranteed may be enforced before a court or tribunal.⁶⁴ However, the UK government challenged the legality of the Bill before the UK Supreme Court, arguing that certain sections were outside devolved competence of the Scottish parliament. The Supreme Court found that provisions included in the Bill which would have enabled a court to strike down UK legislation as incompatible with the UNCRC, and a requirement for courts to 'read down' the legislation so as to limit its application to devolved public authorities, were beyond the legislative competence of the Scottish parliament.⁶⁵ While the decision of the Supreme Court means a revised Bill will need to be drafted and passed by the Scottish parliament, the judgment nevertheless confirms that devolved governments and legislatures have the power to incorporate international human rights into devolved law.⁶⁶ Moreover, it provides implicit guidance to devolved institutions as to how wider international human rights commitments can be incorporated without exceeding devolved competence.

3. Environmental Protection

In policy areas such as environmental protection, tension between UK and devolved governments arguably undermines the cultivation of the relationships required to make the co-operation, newly necessitated by Brexit, work. In the case of environmental protection, both the necessity of co-operation

⁶¹ Scottish Government, 'Human Rights Leadership: national taskforce' (*Gov.Scot*) <<https://www.gov.scot/groups/national-taskforce-for-human-rights-leadership/>> accessed 26 June 2023.

⁶² *Ibid.*

⁶³ Scottish Government, 'New Human Rights Bill' (*Gov.Scot*, 12 March 2021) <<https://www.gov.scot/news/new-human-rights-bill/>> The four conventions are: International Covenant on Economic, Social and Cultural Rights; Convention on the Elimination of All Forms of Discrimination against Women; Convention on the Elimination of All Forms of Racial Discrimination; Convention on the Rights of Persons with Disabilities.

⁶⁴ Scottish Government, 'United Nations Convention on the Rights of the Child implementation: introductory guidance' (*Gov.Scot*, 19 November 2021) <<https://www.gov.scot/publications/implementing-united-nations-convention-rights-child-introductory-guidance/>> accessed 26 June 2023.

⁶⁵ *Reference by the Attorney General and the Advocate General for Scotland - United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Bill; European Charter of Local Self Government (Incorporation) (Scotland) Bill* [2021] UKSC 42.

⁶⁶ *Ibid* [4].

and the tension and distrust between central and devolved governments can, at least in part, be traced to UKIMA itself. This section will situate the impact of the UKIMA on environmental protection in the wider context of the consequences of Brexit.

Multi-level governance is particularly important in the context of environmental protection. Environmental protection is a devolved function in Scotland, Wales and Northern Ireland, but prior to Brexit EU environmental law provided a shared framework of rules across the four nations of the UK. Bringing back power to the UK raised important questions as to how these nations would collaborate in seeking to address environmental challenges going forward. The responses, both in terms of the development of UK collaborative frameworks and exceptions for environmental objectives under the UKIMA, are subject to criticism.

Brexit has had profound implications for environmental protection in the UK. Environmental law in the UK has been largely framed by EU law for more than 40 years.⁶⁷ Thus the current devolution settlement has always operated against a legal framework that has, at least notionally, secured a common baseline applicable across all of the nations of the UK, regardless of increasingly divergent governance provision in this sphere. As well as concerns about the arrangements for the retention of EU law post-Brexit the following key considerations have arisen:

- the need to ensure environmental laws in the UK continue to apply the EU environmental principles of prevention, precaution, rectification at source and the polluter pays;⁶⁸
- the need to replace the Commission's role in enforcing environmental laws against the UK government in the Court of Justice; and,
- the impact of new trade arrangements with the EU and other countries.⁶⁹

Unlike some other areas of policy there is a strong argument in favour of UK collaboration on environmental protection, especially on the island of Britain, though acknowledging that the Scottish and Welsh borders with England differ in many important ways. In any case, nature does not respect political and administrative boundaries. It is also important in ensuring that the UK as a nation state can respond effectively to its commitments under international environmental agreements, of which

⁶⁷ There are estimated to be more than 1000 pieces of EU retained law applicable in the UK (Greener UK and Wildlife and Countryside Link, 'Written Evidence to the Public Bill Committee on the Retained EU Law (Revocation and Reform) Bill Session 2022-2023' (*Parliament.UK*, 29 November 2022) <<https://publications.parliament.uk/pa/cm5803/cmpublic/RetainedEULawRevocationReform/memo/REULB98.htm>> accessed 26 June 2023.

⁶⁸ Here there is already divergence in provision with, for example, the prevention and precaution principles already enjoying domestic legal status as principles of sustainable management of natural resources under ss 4 (e) and (h) respectively of the Environment (Wales) Act 2016.

⁶⁹ For further discussion, see: Colin Reid 'The Future of Environmental Governance' (2019) 21(3) *Environmental Law Review* 219; Chloe Anthony, *Post-Brexit Legal Frameworks for Environment and Trade* (United Kingdom Environmental Law Association, 2023) <<https://www.ukela.org/UKELA/ReadingRoom/Publications/Latestbriefing-paper-from-UKELA-Post-Brexit-legal-frameworks-for-environment-and-trade.aspx>> accessed 26 June 2023.

there are many.⁷⁰ These issues were identified as key concern long before Brexit became a reality.⁷¹ Many of the existing common frameworks relate to environmental protection, but there is an argument that there should be more.⁷² This is not withstanding the need to ensure that devolved nations have discretion within these broad frameworks to adapt law and governance frameworks to more local environmental conditions. For Wales, the central role played by sustainable development in the devolution settlement⁷³ and its consequent role in shaping the law, this issue is particularly acute.

Common frameworks and institutional arrangements for intergovernmental co-operation in the UK post-Brexit are, arguably, the best means of achieving this balance between co-ordination and devolved autonomy. The way in which common but differentiated approaches might work is clearly exemplified by the introduction of new arrangements for agriculture payment systems post-Brexit. It is clear that farming in the highlands of Scotland's and uplands of North Wales may present different challenges to farming in the lowland fens of North-East England. Following the UK's exit from the Common Agriculture Policy, Scotland, Wales and England are all developing systems that create a framework for funding around the provision of 'public goods' including ecosystem services as well as food production; albeit in different ways and with varying timescales.⁷⁴ Thus, shared environmental objectives for agricultural payment systems, broadly defined, might have fairly easily been agreed in a collaborative approach by the four nations of the UK.

A collaborative approach will only be successful with a political will to achieve 'true' collaboration on all sides, and it will not always be appropriate if there is an urgent need for a particular measure. In reality, UK common frameworks have been created through a process that has been criticised as a fairly weak form of intergovernmental cooperation.⁷⁵ The development of common frameworks for environmental protection have also largely focused narrowly on direct impacts of environmental laws on the 'level playing field' in terms of trade. A top down, centralist approach is also evident in the context of the UKIMA as it applies to devolved action on environmental protection. The significance of environmental laws to trade in the EU was recognised early in the development of the

⁷⁰ *Brexit and Environmental Law: The UK and International Environmental Law after Brexit* (UK Environmental Law Association, 2017)

<<https://www.ukela.org/common/Uploaded%20files/brexit%20docs/international%20env%20law%202017.pdf>> accessed 26 June 2023

⁷¹ Robert Lee 'Always Keep a Hold of Nurse: British Environmental Law and Exit from the European Union' (2017) 29(1) *Journal of Environmental Law* 155.

⁷² Victoria Jenkins, *A New Perspective on UK Common Frameworks: the opportunities for the Sustainable Management of Natural Resources in Wales* (Senedd Research, 2018) <<https://research.senedd.wales/research-articles/new-publication-a-new-perspective-on-uk-common-frameworks-the-opportunities-for-the-sustainable-management-of-natural-resources-in-wales/>> accessed 26 June 2023

⁷³ Karen Morrow, 2008 'Actualising Sustainability in the United Kingdom – Recent Developments in Devolved and Local Government' pp171-183 in K. Bosselmann, R. Engel and P. Taylor (eds.) *A Guide to Governance for Sustainability- Issues, Challenges and Successes* Environmental Policy and Law Paper No. 70, IUCN, The World Conservation Union.

⁷⁴ Agriculture Act 2020, Agriculture (Wales) Bill 2022 and Farming and Food Production Future Policy Group: Recommendations to Government (Draft) (2021).

⁷⁵ Jo Hunt and Rachel Minto, 'Between Intergovernmental Relations and Paradiplomacy: Wales and the Brexit of the Regions' (2017) 19 (4) *British Journal of Politics and International Relations* 647

European Union;⁷⁶ but so too was the need to allow Member States some discretion in developing approaches to environmental protection. Hence, following the judgment in *Cassis*, the Court of Justice accepted that environmental protection could be an exception to the rule on mutual recognition as long as the measures were both necessary and proportionate.⁷⁷ The UKIMA takes a very different approach. The exceptions to the principle of mutual recognition created by the UKIMA are very narrowly defined as measures related to the following:

- Threats to human animal or plant health defined as legislation that is specifically aimed at the:
 - prevention or reduction of the movement of a pest or disease
 - prevention or reduction of the movement of unsafe food or feed
 - Or is a response to a public health emergency.
- Chemicals
- Fertilisers and pesticides.⁷⁸

In all other circumstances devolved governments must request a specific exemption from the UK government.⁷⁹ Such an exemption has been requested by both the Scottish and Welsh governments for their single use plastics legislation.⁸⁰ It is interesting that this legislation provided the first opportunity for the Welsh Government to provide a specific exemplar to pursue a court action challenging the legislation in this regard.⁸¹ However, this route to challenge was not sought.

So far, the exemptions that have been sought from the UKIMA on environmental grounds have been in relation to policy imperatives shared by all the devolved nation and supported by the UK government. Should there ever be an issue on which the governments of the different nations did not agree in terms of its environmental impact there may be a very different response. This could stifle the kind of innovation that we need in addressing environmental issues. Smaller nations of the UK may well be in a better position to trial such new approaches, effectively providing a 'legal laboratory' for other nations.⁸² Devolved nations are also sometimes able to be more agile in the introduction of such legislation.

The concerns outlined here are clearly demonstrated by the example of legislation banning the introduction of horticultural products containing peat. This has been promised by all the devolved

⁷⁶ The first environmental Directive introduced under the internal market provisions of the European Economic Community Treaty was Council Directive 67/548/EEC of 27 June 1967 on the approximation of laws, regulations and administrative provisions relating to the classification, packaging and labelling of dangerous substances.

⁷⁷ Case 120/78 *Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein* (1979) ECR 649 (*Cassis*) and Case 302/86 *Commission v Denmark* (1988) ECR 4607 (*Danish Bottles*).

⁷⁸ United Kingdom Internal Market Act 2020, sch 1.

⁷⁹ *Ibid*, s 10.

⁸⁰ The United Kingdom Internal Market Act 2020 (Exclusions from Market Principles: Single-Use Plastics) Regulations 2022/857.

⁸¹ Evans (n 23)

⁸² See for example, the way Wales and Scotland led on the introduction of charges for plastic carrier bags.

nations of the UK, in some cases for many years.⁸³ This action is desperately needed to address one of the most direct sources of peat destruction; peat being a resource that is increasingly recognised to be essential in addressing the climate and nature crises.⁸⁴ Like the use of single use plastics it is a measure that should be, and is, supported by all the nations of the UK and will impact on peat destruction not just in the UK, but abroad.⁸⁵ In this instance, the development of a collaborative framework may be an unnecessarily lengthy process given the simplicity of this single issue legislation focused on a the relatively simple mechanism of an outright ban. This could be introduced through UK legislation as a ‘trade measure’ but it is clearly of wider environmental concern. These issues are only likely to become more acute as climate change and increasingly divergent law and policy engagement with it⁸⁶ – including concerns around UKIMA’s restraints on action around regulating goods and services – provide yet another area of tension between Westminster and the devolved administrations. In this situation devolved nations should be able to introduce this legislation as a matter of urgency, without being impeded by the necessity of applying for a specific exemption from UKIMA.

Conclusion

This commentary has outlined challenges for devolved policy-making in a range of subject areas. Common themes across these policy areas – perhaps across most or all policy areas in the post-Brexit era – include substantial divergence in policy preferences between devolved and UK institutions, centralist or centralising tendencies at the UK level, and growing tension between the different levels of government. No doubt these three features of the devolution landscape are connected. Whether, subsequently to the next general election and a probable Labour government, increased political harmony can substantially reduce these tensions is at least doubtful. As devolved institutions (especially in Wales) become increasingly assertive of their constitutional legitimacy, their views of the appropriate bounds of devolved power, and their policy-preferences, tensions are likely to persist.

⁸³ The Department for the Environment, Food and Rural Affairs (DEFRA) introduced a policy framework in this regard, in England, in 2010. Department for the Environment, Food and Rural Affairs, *Consultation on Reducing the Use of Peat in the Horticultural Industry in England* (UK Government, 2010). It has now promised a ban for horticultural purposes by 2024. Department for the Environment, Food and Rural Affairs, *England Peatland Action Plan* (UK Government, 2021). In Wales and Scotland there have also been recent consultations on ending the sale of peat: Scottish Government, *Ending the sale of Peat in Scotland Consultation* (Scottish Government, 2023) <<https://www.gov.scot/binaries/content/documents/govscot/publications/consultation-paper/2023/02/ending-sale-peat-scotland-consultation/documents/ending-sale-peat-scotland-consultation/ending-sale-peat-scotland-consultation/govscot%3Adocument/ending-sale-peat-scotland-consultation.pdf>> accessed 26 June 2023; Welsh Government, ‘Retail sale of peat in horticulture in Wales to end’ (*Gov.Wales*, 5 December 2022) <<https://www.gov.wales/retail-sale-peat-horticulture-wales-end>> accessed 26 June 2023.

⁸⁴ See further: IUCN UK, ‘Peatland Benefits’ (*IUCN UK*) <<https://www.iucn-uk-peatlandprogramme.org/about-peatlands/peatland-benefits>> accessed 26 June 2023.

⁸⁵ Two-thirds of the peat sold in the UK comes from Europe. Department for the Environment, Food and Rural Affairs, *England Peatland Action Plan* (UK Government, 2021) 20.

⁸⁶ See, for example, UK Climate Change Committee, *Sixth Carbon Budget: The UK’s Path to Net Zero*, December 2020, p23.