



SPECIAL ISSUE ARTICLE

Brexit and the Environment Bill: The Future of Environmental Accountability

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Email: maria.lee@ucl.ac.uk**Abstract**

One of the key functions of environmental law is to amplify the voice of those seeking to hold the powerful to account for their environmental performance. Now that the UK has exited the EU's legal and institutional architecture, we turn to domestic law to glimpse the future of environmental accountability. This paper reviews the measures in the Environment Bill. Accountability measures are only ever as effective as the energy of those making use of them. This paper argues that environmental civil society needs to act strategically and collectively to shape the institutional arrangements provided by the (hoped for) Environment Act 2021.

1 | INTRODUCTION

The past and present of UK environmental law have been dominated by European Union membership, and if recent months and years have taught us anything, it is that prediction is vanity. The much-delayed Environment Bill, currently paused on its way through Parliament, provides, however, a glimpse of various possible futures.

For all its many failings, the EU has a large and distinctive body of law across the range of substantive and procedural environmental matters. The explicit weakening of environmental standards as 'retained' environmental law is unwound is rightly a concern about Brexit; the Prime Minister's trite reference to 'newt counting delays' in his summer 2020 'Build, Build, Build / Project Speed' speech, for example, suggests the vulnerability of the Habitats Directive (Johnson, 2020); in January 2021, we saw policy reversals on neonicotinoid pesticides and genetic editing (DEFRA, 2021a, 2021b). But in this paper, I will focus not on the many specific legal standards that are at risk, but on the legal architecture that underpins a government's accountability for its environmental commitments, and accordingly on

Part 1 of the Environment Bill (headed 'Environmental Governance'). One of environmental law's central roles is to provide a framework that assists, and amplifies the voice of, those trying to hold the powerful to account for their environmental performance. This is not an abstract or a purely technical phenomenon (Black, 2008). Structures for accountability create, encourage or emphasise particular relationships, which in turn shape understandings of the world and of the place of the accountability holders in it; bringing in the environmental voice is crucial.

The government's express vision for the Environment Bill is impressive: it is to be part of the delivery of 'a step-change in environmental protection and recovery', bringing 'urgent and meaningful action to combat the environment and climate crisis' (DEFRA, 2020a). But elsewhere in government, we see intimations of a 'de-regulatory agenda [...] blowing this way' and a 'curiously blasé' attitude to the environmental implications of international trade (Green Alliance, 2020, citing Debbie Tripley and Kierra Box). Part 1 of the bill is a sufficiently open-ended piece of framework legislation to allow for progress or regression in environmental protection. On Part 1 specifically, the express government vision is

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again positive: it is to ‘ensure government can be held to account for its actions’, and to ‘strengthen environmental accountability’ (DEFRA, 2020a). But the legal institutionalisation of this vision sits in the department of a Secretary of State who openly opines that there are ‘frankly too many lawyers’ in environmental protection (Green Alliance, 2020), confirming perhaps that avoiding what he calls the ‘perpetual legal jeopardy’ of EU membership may have been part of the purpose of Brexit. And again, elsewhere in government, proposed changes to the planning system (Ministry of Housing, Communities & Local Government, 2020), to (EU-derived) environmental impact assessment (Green Alliance, 2020), and to judicial review (Elliott, 2020; Ministry of Justice, 2020) suggest that certain routes for questioning and challenging government actions are in jeopardy. Importantly, any future Environment Act will be embedded in the broader constitutional, administrative and environmental legal framework.

In this paper, I first outline my approach to accountability, and the key environmental accountability issues around Brexit. I then briefly outline relevant parts of the English¹ Environment Bill. It has had a long gestation. Calls for new legislation began shortly after the 2016 referendum; a draft Environment (Governance and Principles) Bill was published for parliamentary pre-legislative scrutiny in December 2018; the first version of the bill received its second reading in the House of Commons in October 2019. This fell when the 2019 general election was called, but an almost identical Environment Bill was put before Parliament in January 2020. In March 2020, the bill was suspended due to the Covid-19 pandemic, and eventually returned to Parliament only in November 2020. The bill was paused again in January 2021, due to government concern that it could not complete all of its stages by the end of the parliamentary session. The intention is for the bill to resume its progress in the 2021 parliamentary session, and to have received royal assent before the UN climate change conference COP 26 (the Conference of the Parties to the UN Framework Convention on Climate Change) in Glasgow in November 2021.

The bill is deeply flawed, and given the large government majority in Parliament, only amendments put forward or approved by government are likely to be made. But if it successfully moves to royal assent, it provides a framework for the environmental community to build accountability relationships. In an effort to do something more than simply comment on the weaknesses of the bill (Lee, 2019a, 2019b, 2019c; Lee & Scotford, 2019), I discuss the future beyond (hoped for) royal assent. The ‘governance gap’ framing of Brexit and Part 1 of the Environment Bill (governance used capaciously to capture the background frameworks, institutions, approaches that make environmental standards and rules meaningful²) has been in part an effort to provide a framework to assist environmental civil society to hold

the powerful to account (Abbot & Lee, 2021). In the final section of this paper, I argue that if environmental groups choose to become ‘repeat players’ (Galanter, 1974) in the architecture of the future Environment Act, they may be able to contribute to shaping the meaning and the life of that act.

Although the measures in the Environment Bill are problematic and limited, we should not forget how extraordinary the fact of Part 1 of the Environment Bill is. Brexit did not arrive as a problem labelled ‘governance’ or ‘accountability’. Indeed, government initially insisted that everything was fine: ‘it is the role of Parliament to hold the Government to account’ and ‘the UK courts are perfectly well able to deal with matters of enforcement. We won’t be needing to replace European courts’ (House of Lords European Union Select Committee, 2017, para 80). The strange political times of Brexit, an apparently greater electoral interest in the environment (or at least climate change) and extraordinarily persistent and skilled advocacy from environmental NGOs, who had unusual levels of access to DEFRA under Michael Gove, changed this (Abbot & Lee, 2021).

2 | ACCOUNTABILITY

Accountability has been a consistent theme throughout the Brexit-environment debate. There is of course an enormous literature on accountability, one of those ‘golden concepts that no one can be against’ and simultaneously (but not inconsistently) ‘a dustbin filled with good intentions’ (Bovens, 2007, pp. 448–449). For current purposes, following Bovens (2007), I take the view that accountability requires one actor literally to account for itself by articulating reasons or explanations for its actions and decisions, to another actor. In what follows, the party is a public authority, being held to account by variously another public authorities, Parliament or civil society. Civil society is a very broad category, including for example economic actors, but I am especially interested here in environmental NGOs.

This focus on a relationship (*someone* holds *someone else* to account for *something* specific) usefully forces us to attend to those doing the holding to account, and the difficulty of that task. As suggested above, accountability mechanisms in law can support and amplify their voice. Of the many possible forms of accountability, I focus on a broad distinction between legal and political accountability, involving legal or political actors, in a legal or political forum and with legal or political consequences.³ Political and legal accountability cannot be kept neatly apart: they involve the same parties and stories, and accountability in a legal forum can have political implications and vice versa. The strength of the accountability mechanism is in the ability of the party doing the holding to account to insist on an account and to engage in dialogue with the

powerful, and in the possibility of consequences, formal or informal, political or legal.⁴

The most prominent accountability question in the Brexit-environment debate has been that of ‘who watches the watchers’ – how government and environmental regulators are scrutinised so that environmental laws are not empty rhetoric. The European Commission's role in enforcing EU environmental law, including the ability to take a recalcitrant Member State to the Court of Justice, which can impose a fine, has received a great deal of attention in the Brexit-environment debate. Such hard-edged scrutiny and legal enforcement against governments (regulators) is probably unique to the EU system. The introduction of the Office for Environmental Protection (OEP) in the Environment Bill does however purport to do something to fill that gap, as discussed below.

Other less dramatic but equally significant EU legal mechanisms assist in efforts to challenge (and demand an account of) strategically or neglectfully weak implementation. The ‘vigilance of individuals concerned to protect their rights’ has long been a central part of the EU effort to enhance legal implementation in Member States (European Court of Justice, 1963, p. 13), and duties of effectiveness and adequate remedies underpin domestic judicial review.⁵ In the famous *ClientEarth* litigation for example, even government agreed that it was in breach of its substantive air quality obligations, but EU law duties to take ‘all necessary measures to secure compliance’ were central to the provision of a remedy (UK Supreme Court, 2015). There appears to be no intention to maintain the EU contribution to judicial review. On the contrary, the intention seems to be to limit judicial review (Elliott, 2020). Nor are the binding rules on access to justice contained in some environmental directives (e.g. Official Journal of the European Union, 2010, 2012) guaranteed to survive the end of the transition / implementation period.

Beyond direct recourse to the courts, routines of planning, reporting and reviewing pervade EU environmental law. These have the potential to provide an architecture of transparency that sharpens the capacity of those seeking to hold government politically to account, as well as providing information that may lead to legal accountability. The reports are in principle scrutinised by the European Commission or the European Environment Agency, as well as being available to all Member States, the other EU institutions and the public. Planning and reporting obligations are often detailed, focusing attention and rendering visible particular issues, such as breach or risk of breach of legislation, or the lawful use of derogations and exceptions. Under Section 8 of the EU (Withdrawal) Act 2018, statutory instruments can be used to tidy up ‘any failure of retained EU law to operate effectively’, or ‘any other deficiency in retained EU law’ (Craig, 2019). That might include, for example, obligations to report to EU institutions. But

rather than domesticating these reporting measures, they have been removed from UK law,⁶ with moreover limited parliamentary or public scrutiny. The bill does not provide a substitute, but does include more generic reporting obligations, without the specificity of EU law. If well used however, these provisions may provide some accountability supporting transparency.

The value of accountability measures depends in part on the nature and quality of the underpinning standards to which the authority is being held to account, and Brexit also raises significant questions about the evolution of environmental standards and rules. EU legislation frequently requires the European Commission to consider proposing amendments at a specified date, in detailed ‘review and revision’ provisions.⁷ Again, these have been removed rather than amended in the tidying up of retained law under the Withdrawal Act (Jordan & Moore, 2020). Beyond legislation-making, the EU approach to environmental standard-setting is far from perfect. The UK has however become accustomed to expert knowledge being pooled at EU level, and arrangements for (often limited) stakeholder participation at that level, for example in the detailed articulation of open-ended environmental standards such as ‘good ecological quality’ or ‘best available techniques’ (Abbot & Lee, 2015).

There is a danger that the development of environmental law will be relegated to a more ad hoc and closed administrative space, and it is no simple task to build the capacity and institutions necessary for effective environmental law and policy making. A partial response can be found in the Environment Bill's structured framework both for developing policy through ‘Environmental Improvement Plans’ (EIPs)⁸ and for setting environmental targets in law. A policy or target setting framework is not itself an accountability measure. But an obligation on government to produce plans and targets does create potential for an accountability relationship to develop around that production. The Environment Bill is, however, open ended on substance, as discussed below, and on coverage,⁹ which limits the support it can provide to accountability.

3 | THE ENVIRONMENT BILL

If it becomes legislation, Part 1 of the Environment Bill will put in place a target setting and monitoring framework, set up an environmental policy process through EIPs and establish the OEP to monitor and advise government. The bill also contains a weak, executive-driven set of provisions on environmental principles, which I will not discuss here (see Lee & Scotford, 2019; Fisher, 2020).

This section examines first the bill's provisions on the OEP, and its potential contributions to political and legal accountability. It then turns to the framework for

reporting and reviewing, which again has a strong role for the OEP, and finally to the institutional arrangements for target and policy setting. Given the size of the government majority in Parliament, significant improvements to these provisions, which have been through a number of iterations over more than three years, are unlikely.

The OEP is at the centre of accountability mechanisms in the bill. I discuss its formal powers below. Its effectiveness as an institution of accountability is however equally dependent on its independence from government and its capacity (hence resourcing). The bill provides that the OEP ‘must act independently and impartially’ (Clause 22(2)(a)), and that ‘In exercising functions in respect of the OEP, the Secretary of State must have regard to the need to protect its independence’ (Schedule 1, paragraph 17). Its principal objective is ‘to contribute to (a) environmental protection, and (b) the improvement of the natural environment’ (Clause 22). Notwithstanding this statutory recognition of the importance of OEP independent pursuit of environmental protection and improvement, it will face real challenges in maintaining independence from government. Schedule 1 provides that the chair of the OEP is appointed by, and can be removed by, the Secretary of State, who also controls the body’s funding.¹⁰ Government proposed an amendment to the bill in Committee stage, allowing government to issue guidance to the OEP on its enforcement policy, to which the OEP must have regard (House of Commons, 2020). While this is a common arrangement for non-departmental public bodies, it does not recognise the special role of the OEP (specifically to scrutinise *government*) and reinforces concern that government does not intend to relinquish control over the OEP. The absence so far of major political objections to the setting up of the OEP are a little surprising. But there are many quieter ways of preventing it from becoming too inconvenient as an institution of accountability.

4 | THE OEP: ‘ENFORCEMENT’ AND POLITICAL ACCOUNTABILITY

The OEP has ‘enforcement’ functions and ‘scrutiny and advice’ functions. The OEP’s scope for action on enforcement is very narrowly drawn around ‘failures by public authorities to comply with environmental law’ (Clause 28). A ‘failure to comply with environmental law’ means ‘unlawfully failing to take proper account of environmental law’ or ‘unlawfully exercising, or failing to exercise, any function [...] under environmental law’.¹¹ This is an odd definition, tautologous, but also suggesting that law is something to be taken account of, rather than complied with. More fundamentally, it suggests a narrow approach to the OEP’s enforcement powers, and probably implies that any discretionary, flexible or

aspirational language in the underpinning environmental law at issue will not be subject to OEP enforcement. This narrow scope is reinforced by the need for there to be a ‘serious failure’ (undefined) to comply before the OEP can take any action (Clauses 30, 32, 33).

The OEP may investigate information that ‘indicates’ a ‘serious’ ‘failure to comply’ (Clause 30). It *must* report on the investigation, and it *may* publish the report. Following investigation, if it has ‘reasonable ground for suspecting’ a serious failure to comply, it can issue an information notice, describing an alleged failure and requesting information from the public authority; the recipient must respond (Clause 32). A ‘decision notice’ may then be issued if ‘(a) the OEP is satisfied, on the balance of probabilities, that the authority has failed to comply with environmental law, and (b) it considers that the failure is serious’. Again, the recipient public authority must respond. The notice process is not designed to be public. On the contrary, Clause 40 emphasises its confidentiality.

And finally, under the bill as published in 2019 and 2020, the OEP could have applied to the Upper Tribunal for ‘environmental review’ (Clause 35). The government said that the turn to the Upper Tribunal rather than the High Court, would ‘have a number of benefits compared to that of a traditional judicial review in the High Court. In particular, taking cases to the Upper Tribunal is expected to facilitate greater use of specialist environmental expertise’ (Environment, Food & Rural Affairs Committee, 2019). In fact, the Upper Tribunal was required to apply ‘the principles applicable on an application for judicial review’. This discourages a creative judicial approach, and reinforces the narrow scope of the whole OEP enforcement process, which is likely to be dominated by procedural issues, and only rarely touch on the substance of environmental decision making. More recently, a government amendment during Committee stage has removed the role of the Upper Tribunal (House of Commons, 2020), turning OEP ‘enforcement’ into a normal process of judicial review before the High Court. This is at least an anticlimactic end to this lengthy¹² new process. At best, the bill adds the possibility that the OEP will have greater expertise, public-centredness, and resources than other applicants for judicial review. That is not to say that other applicants necessarily lack these attributes, just that they could be planned into the new institution; there is no guarantee that that will be the case. The more structured process for engaging with the public authority may also be a benefit of the new system. But the OEP’s status and attributes, as well as dialogue between the OEP and the noncompliant public authority, bear an enormous weight.

The OEP enforcement process is much more restricted than the role of the commission and court at EU level. The confidentiality of the earlier stages limits the public reach of the process, preventing the OEP’s

demands for account from feeding into other potential political account holders in civil society or Parliament. Further, we should note that the bill is silent on the ways in which EU law contributes to the enhancement of Member State judicial review. Beyond the bill, the indications are that judicial review is vulnerable to potentially sweeping legislative restrictions (Elliott, 2020). The OEP is no substitute for the possibility of judicial review by civil society. Moreover, the impact of any future legislative restrictions to *judicial* review on new 'environmental review' may be determined beyond the terms of the bill.

Moving on from enforcement, Clause 26 provides for the OEP to act in support of political accountability. The OEP 'must monitor the implementation of environmental law' and 'may report on any matter concerned with the implementation of environmental law'. Any reports must be published and laid before Parliament. The Secretary of State must respond, publish the response and lay the response before Parliament within three months. Clause 26 provides a potentially important forum for political accountability, with more generous scope than the enforcement provisions discussed above. In particular, it could reach into the exercise of discretion by public bodies. Rather than being limited to policing and 'enforcing' the line between compliance and deviance, account holders can ask whether this is really the best, the most effective, the most ambitious, the most efficient way of implementing the law. By contrast with the enforcement measures, the interpretation and application of flexible, discretionary and aspirational language can be interrogated.

5 | PLANNING, REPORTING AND ACCOUNTABILITY

As mentioned above, myriad planning and reporting requirements in EU legislation have simply been removed as part of the process of correcting 'deficiencies' in retained law. The Environment Bill does contain some more generic obligations. OEP reports on the implementation of environmental law are discussed above. Further, the Secretary of State reports to Parliament on the targets set under Clauses 1 and 2 (Clause 5) and on EIPs (Clause 8). Reasoned reports have a number of possible functions. They can have internal effects, encouraging more systematic reasoning, potentially drawing attention to otherwise overlooked interests (e.g., Schauer, 1995). Providing an account, articulating a story about an institution and its behaviour, may make a powerful contribution to constituting the self-understanding of that organisation (e.g., Black, 2008), and some would even go so far as to argue that they can generate cultural change (e.g., Holder, 2004). They can also have external effects, allowing outsiders to assess the exercise of power. Government is opened to

external scrutiny and to the possibility of being required to account for its actions.

In addition to these Secretary of State reports on government's own performance, under Clause 25 the OEP must 'monitor progress' on both EIPs and targets, and follow the Secretary of State's report with its own annual progress report, which is laid before parliament; government must respond, specifically including a response to any recommendations for improvement, and that response must also be laid before Parliament. The OEP's role is to provide independent expert assessment of government performance, and we have an architecture that could provide for dialogue. As well as the internal and external roles for reporting, it can enable learning, a collaboration to improve environmental performance. There is tension between the different roles (Bovens, 2010), and different accountability actors will seek to construct these activities differently.

Reporting is not a simple or a passive exercise (Fisher, 2010); the artefacts by which environmental performance is to be made visible must be actively created, and institutions and processes must be put in place for transparency to underpin accountability. This requires an independent OEP and government resources, which are not guaranteed. Both Parliament and environmental groups need also to devote sufficient financial, human and political resources to the accountability process.

6 | ACCOUNTABILITY FOR WHAT?

The policy and target framework in the bill was introduced above. The first EIP is the *25 Year Plan*, published before even the first iteration of the bill (HM Government, 2018). In addition to the annual reports discussed above, the Secretary of State must review the EIP every five years and revise the plan if 'appropriate'. Clause 1 of the bill allows or requires the Secretary of State to set 'long term' ('no less than 15 years') legal targets for the environment, and 'it is the duty of the Secretary of State to ensure that' those targets are met;¹³ interim targets are to be set by policy in the EIPs (Clause 13).

The key limitation to the making and review of policy and targets is the lack of conditions on content or quality. Procedurally, the Secretary of State 'must seek advice from parties the Secretary of State considers to be independent and to have relevant expertise' when setting targets (Clause 3). This leaves external input almost entirely in the discretion of the Secretary of State. There is no consultation requirement in respect of EIPs, and the *25 Year Plan* was not subject to any formal consultation before publication. More substantively, the targets are *retrospectively* reviewed by the Secretary of State according to whether they cumulatively 'significantly improve the natural environment' (Clause 6).¹⁴

The ‘significant improvement test’ lacks clear criteria for assessment, which are complicated by its cumulative nature, and there is no provision for independent review. The Secretary of State publishes a report that is laid before Parliament. If the test is not met, the report must set out the steps that the Secretary of State intends to take. Further undermining any sense of direction to the targets, the bill explicitly allows for a weakening of existing targets, if the Secretary of State is ‘satisfied’ that meeting the target would ‘have no significant benefit’ or when, ‘because of changes in circumstances ... the environmental, social, economic or other costs of meeting it would be disproportionate to the benefits’ (Clause 3).

7 | THE FUTURE

Part 1 of the Environment Bill leaves considerable discretion and power in the hands of the executive (Fisher, 2020), which could be used for a progressive environmental future or for deregulation and environmental regression. The accountability frameworks in Part 1 are weaker than they should be, but are nevertheless significant institutional innovations. Even the best accountability measures depend on the strength and persistence of the actors in the system, and on the broader political culture’s appreciation of the importance of environmental protection. We have often seen environmental groups rallying around the creation of legislation, as they have the Environment Bill (Abbot & Lee, 2021), but without devoting resources to the less glamorous task of implementation.¹⁵ For example, Fuchs (2009) tells the story of how energetic NGO mobilisation for the development of EU chemicals regulation swiftly dissipated once the legislation had been passed. He goes further: ‘Firms and professional organizations seem to have gradually tamed the REACH regulatory system and its rules. The reverse seems to be the case for NGOs’ (Fuchs, 2009). Similarly, the huge and impressive campaign to develop the Climate Change Act 2008 (Carter & Childs, 2017) was followed by more limited engagement with its long term framework for accountability, which has largely been left to the Committee on Climate Change or Parliament.¹⁶ While these official bodies are crucial, the future of the Environment Act cannot be left to Parliament and the OEP; the perspective of environmental groups will enrich the understandings of the world that emerge through the rendering and hearing of accounts.

‘Implementation’ of legislation may imply a single and simple issue of compliance, so that the task is simply to keep an eye on things and cry foul occasionally. But I have more than that in mind. The Environment Act will be open ended legislation, and what it stands for will be shaped by those who turn up to the spaces it creates. Environmental groups have the opportunity to be the ‘repeat players’ in any future Environment Act, playing the long game rather than looking for immediate outcomes, and in that

way shaping the rules, including the rules of the game (Galanter, 1974). The line between defining standards and applying them, and so between retrospective accountability and something more forward looking, is blurred.

In arguing that environmental NGOs could shape the future of the Environment Act by using its accountability mechanisms strategically and collaboratively, I cannot and would not wish to set out what that collaboration or strategy should look like. These are difficult decisions, which will be contested within the community. But in this section, I raise some of the openings provided by the bill, and in so doing bring out again some of the strengths and weaknesses of the bill.

8 | ENGAGING WITH THE OEP

Members of the public can make a complaint to the OEP if they believe that a public authority has failed to comply with environmental law (Clause 29). Environmental NGOs are likely to make use of this, as they did their erstwhile ability to make a complaint to the European Commission, although the relative weakness of the Environment Bill enforcement process makes the OEP a less attractive interlocutor. But the community has the opportunity to act collaboratively and strategically so that the complaints before the OEP shape the expectations of the OEP and others: how active it is, the balance between negotiation and confrontation (between the OEP and public bodies), its public profile. Perhaps early complaints should be ‘winnable’ cases that empower the OEP, or big or overarching or popular issues that place the OEP at the heart of public environmental life. Or by contrast the strategy might be to challenge the OEP to be more ambitious and more independent of government, and force its gaze towards neglected, unpopular issues. The OEP will (should) guard its independence from environmental NGOs, just as it should from government and business. But they will shape an accountability relationship together, as they seek to hold each other and government to account.

As discussed above, Clause 26 on the *implementation* of environmental law provides a more generous space for OEP action than the enforcement regime associated with complaints. Clause 26 does not have a complaints system, so environmental NGOs have no formal rights to ask the OEP to consider particular questions or to explain its choices. Although this is a serious limitation, if NGOs take Clause 26 seriously, they will insist on the OEP’s *obligation* to monitor even in the absence of a similar obligation (just a power) to report. They can question and engage with reports in such a way as to enhance dialogue on the interpretation and exercise of discretion by public bodies, seeking an account of how the relevant public authority understands, intends to implement, and has implemented its more flexible or aspirational obligations.

9 | ENGAGING WITH TARGETS

The environmental community is also no doubt ready to lobby and campaign around the setting of targets,¹⁷ as well as around any failure to meet targets. This is crucial, but beyond these set pieces of government action, the absence of formal consultation processes around the 'significant improvement test' or the content of and compliance with EIPs is a weakness of the legislation. But reports on EIPs and targets are public, and engaging with them in a consistent way may contribute to the shaping of expectations. Reporting more generally is only an environmentally progressive accountability tool to the extent it is used as such. The production and publication of various reports are legal obligations that can be insisted on, with clear and time-specific roles for government and the OEP. The process of reporting on targets and EIPs is slow, and it is easy to see how it could be presented as an empty compliance activity rather than a meaningful engagement with the challenges of environmental law and policy. If reports go into a void, they become red tape, in a self-fulfilling prophecy. If the environmental community scrutinises and engages with the process, however, the actors within the process (government, OEP, parliament) must also do so. As repeat players, the consistent raising of environmental groups' priorities may contribute to shaping the focus of future reports. We know that transparency is not passive, but can change the way an institution operates (Black, 2008; Fisher, 2010). We tend to be concerned about the undesirable distracting effects of transparency, focusing for example on what can be measured rather than what matters. But this idea that outsider insistence on particular questions might influence the underspecified content of reports and responses casts the interventionist potential of transparency in a more positive light.

10 | SHAPING THE FUTURE

Rather than relying on a future ability to use legal rights, environmental NGOs could use the structures and institutions in the bill so that those structures and institutions evolve in a way that enhances environmental accountability and the visibility of environmental performance. This is careful, quiet work, requiring considerable resources, including legal expertise. There are significant barriers (Abbot & Lee, 2021): legal expertise is generally thinly spread around the sector, the potential contributions of legal expertise are relatively poorly understood, and this sort of quiet work may be unattractive to ambitious legal experts. It may not appeal to sources of funding, be that a philanthropic or a membership model. And NGOs are most likely to become repeat players who can shape the rules if they

collaborate. Collaboration is difficult: it is resource intensive, reaching consensus on priorities and strategy can be challenging, and there may be a profile sacrifice for individual organisations, who may also sacrifice some of their own contacts with power.

In any event, the efforts of NGOs as repeat players are never guaranteed to 'work' and need a receptive public and political context that appreciates the significance of environmental goods. Further, it is important to acknowledge that the multiple account holders envisioned under the Environment Bill renders accountability complex and plural. The OEP, Parliament and civil society will all seek to hold government (and each other) to account. They have different capacities, including different formal rights to demand an account, different resources to call on and different consequences at their disposal. To some extent they support each other, but they also compete, with different ideas of the 'good' and how to achieve it.¹⁸ Whatever the tensions and difficulties, however, it is crucial that environmental perspectives contribute to shaping the future of this crucial piece of environmental law.

11 | CONCLUSION

Brexit has been accompanied by an extension of executive power, generally (Craig, 2019) and in the administrative and environmental sphere (Fisher, 2020). That this was so even during the unusually (for the UK) independent Parliament between the 2017 and 2019 general elections may be telling of what lies ahead. Presumably, by the time this paper is published, the fate and detail of the Environment Bill will have been decided; such is academic writing. If the bill survives and becomes an Act, the accountability measures it provides are imperfect, although all too prone to be misrepresented as an enormous step forward, and likely to be set in a problematic context for accountability and for environmental NGOs. If it does not, the framework discussed above disappears. Deep engagement with the structures in law, however banal they may seem, that require an account to be given by those with power, will be important in either case.

The Environment Bill is not just (or even) filling gaps left by Brexit. Many hands have laboriously constructed a new approach to the legal architecture of environmental accountability. Although they are never sufficient in themselves, accountability mechanisms are a necessary part of ensuring that fine words of environmental ambition are meaningful in fact. And they go beyond that, shaping understandings of environmental law and actors within it.

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ENDNOTES

1. Most of the Environment Bill applies to England only. Part 1 applies to England only, with the exception of the possibility of extension of the OEP to Northern Ireland; Northern Ireland will be in a different position from the rest of the UK because of the Northern Ireland Protocol (Weatherill, 2020). See Clause 130 and Explanatory Notes. The Scottish Government has published the UK Withdrawal from the EU (Legal Continuity) Bill, which includes measures in some of the same areas as are discussed in this chapter (Reid, 2020). The Welsh Government is also promising legislation (Welsh Government 2019).
2. Some of the issues discussed here, especially the European Commission's hard-edged enforcement role, may not fit tidily into an academic understanding of governance. There is a vast literature on governance (see e.g., Enderlein, Wälti and Zürn, 2010; Levi-Faur, 2012); in environmental law (de Búrca and Scott, 2006; Gunningham, 2009).
3. Bovens (2007) calls accountability to civil society 'social accountability'. This distinction might be helpful, but it is not necessary here; civil society can seek political or legal accountability.
4. Bovens (2007), refers to 'consequences', avoiding the academic divisions on whether sanctions are a necessary part of accountability; much of the disagreement evaporates if informal sanctions are included.
5. Articles 4(3) (principle of sincere cooperation) and 19 (effective legal protection) TEU, developed and applied by the Court, including in European Court of Justice, 2015.
6. For example the Floods and water (Amendment etc.) (EU Exit) Regulations 2019 (SI 2019/558) Schedule 5 para 9 says of Directive 2000/60/EC establishing a framework for Community action in the field of water policy [2000] OJ L 327/1 that 'Article 15 is to be ignored'. The National Audit Office, 2019, reported that 161 environmental obligations may no longer be reported after Brexit.
7. On the iterative process this can create, see Scott and Holder (2005).
8. In the absence of EU Environmental Action Programmes.
9. The Secretary of State may set targets on any matter, which must include at least one on each of four priority areas, and an air quality target on PM2.5. What must be covered within the EIP is unspecified, save that it must 'set out the steps ... to improve the natural environment' (Clause 7).
10. It is anticipated that the chair will be subject to pre-appointment hearing by a relevant Select Committee, although without the power to withhold consent (as the first chair was). Government has also said that it will make multi-annual funding commitments to the OEP. The Bill is silent on both of these issues.
11. 'Environmental law' means 'any legislative provision' (so *prima facie* not international law) that is 'mainly concerned with environmental protection'; Clause 43.
12. Under Clause 36, the OEP can bring a judicial review without going through this process 'only if ... it is necessary ... to prevent, or mitigate, serious damage to the natural environment or to human health.'
13. On the complexities of these sorts of obligations, see Reid (2012).
14. The current consultation on targets is sensibly setting them with that review in mind (DEFRA, 2020b).
15. Vanhala and Kinghan (2019) see a similar danger with case law.
16. Which is of course not to say that there was no NGO activity, see e.g. ClientEarth (2016).
17. A consultation is underway (DEFRA, 2020b).
18. See the discussion of different 'legitimacy communities' in Black (2008).

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