

The next generation of environmental law: Environmental accountability and beyond in the draft Environment (Principles and Governance) Bill

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Introduction

In the face of Brexit, the foundations of the next generation of environmental law are being laboriously constructed. A framework to provide for the survival of the environmental accountability of public authorities (who in turn hold private operators to account) is a crucial part of the future of environmental law, and the focus of this briefing.

Most of our environmental law has its origins at EU level, including standards on such things as nature conservation and air quality, and processes by which certain environmentally significant decisions are made. The EU (Withdrawal) Act 2018 shall ensure that existing environmental law survives as 'retained' law when the UK leaves the EU. There are fights being had and still to be had over 'tidying up' some of this retained law, and some elements of EU law (the recitals, accompanying guidance) are going missing.² Further, legislation that can currently be amended only through the EU's legislative process, including its democratic and expert elements, shall after Brexit be easily amended by do-

mestic delegated legislation.³

As important as substantive and procedural environmental standards, and not addressed by the 2018 Act, is the broader legal architecture provided by the EU. Amongst other things, EU law provides a number of mechanisms to enhance the accountability of Member State governments for their environmental obligations. This briefing focuses on the future of government accountability within environmental law. Many academic discussions of accountability begin by observing how prevalent, misused or important the word, or idea, 'accountability' is, and there is of course an enormous literature. Trying to make sense of this proliferation is an important academic endeavour,⁴ but for current purposes, I am content to appeal to a relatively simple core to accountability. Following Mark Bovens, I take the view that accountability requires public (in my case) authorities literally to account for themselves by articulating reasons for their actions and decisions, to another actor.⁵ I pursue this further below.

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2. For interesting data on the process, [see here](#).

3. Environmental law is frequently in the form of delegated legislation in the UK, not because it is mere 'technical' detail, but because it has been subject to expert and democratic scrutiny during the law-making process at EU level. See ClientEarth, *Report: The Withdrawal Bill: Destination and Journey* (2017). On policy 'dismantling' at EU level, see Viviane Gravey and Andrew Jordan, 'Does the European Union have a Reverse Gear? Policy Dismantling in a Hyperconsensual Polity' (2016) *Journal of European Public Policy* 1180.

4. See eg Mark Bovens et al (eds), *The Oxford Handbook of Public Accountability* (OUP, 2014).

5. Mark Bovens, 'Analysing and Assessing Accountability: A Conceptual Framework' (2007) 13 *European Law Journal* 447.

Accountability has been a consistent theme throughout the Brexit and environment debate. Initially, government insisted that judicial review and parliamentary scrutiny provide all necessary accountability.⁶ That attitude changed however, and in December 2018, the Department for Environment, Food and Rural Affairs (DEFRA) published its draft Environment (Principles and Governance) Bill,⁷ designed to ‘establish a new domestic framework for environmental governance and accountability as the United Kingdom (UK) leaves the European Union (EU)’.⁸ That shift in approach has been the result of many factors, which may include the governing Conservative Party’s identification of ‘green’ measures as a way to attract younger voters, and a new Secretary of State, as well as the pressure maintained by the environmental NGO sector (amongst others). The draft Bill is currently going through a pre-legislative scrutiny process. DEFRA has said that a ‘full Environment Bill’ shall be published in 2019, including these principles and governance measures, ‘alongside a broader set of measures on environmental protection and improvement.’⁹

The draft Bill contains three main elements. First, it contains a weak and troubling statutory framework for a set of environmental principles.¹⁰ Second, clause 6 requires the Secretary of State to prepare an ‘Environmental Improvement Plan’ (EIP), discussed briefly below; the 25 year environment plan published in 2018¹¹ will be the first EIP. And third, it establishes the Office for Environmental Protection (OEP), to respond to the ‘governance gap’ brought about by the loss of European Commission scrutiny after Brexit. In this briefing, I focus on this third strand of the draft Bill, and the potential for the OEP to enhance the environmental ac-

countability of public authorities.¹² This briefing clearly does not exhaust the discussion; in particular, the OEP’s independence needs to be ensured far more rigorously than is currently the case.

Before turning to the draft Bill’s approach to the OEP, I briefly speculate below on possible futures for English environmental law, and then discuss accountability as a concept and a mechanism. Accountability is not a simple answer to the environmental challenges of Brexit. Done badly, the OEP shall fail. But even good accountability mechanisms can fail. They depend on the underpinning standards to which authority is being held to account, on the strength and persistence of all of the actors involved, and on the broader political culture’s appreciation of the importance of environmental protection. But if not sufficient in themselves, accountability mechanisms are a necessary part of ensuring that fine words of environmental ambition are meaningful in fact. The role of law is to provide as robust a structure as possible to allow all of the other parts of the relationship to work.

6. House of Lords Select Committee, *Brexit: Environment and Climate Change*, 12th Report of Session 2016–17 HL Paper 109. Government Response 16 April 2017; Department for Exiting the EU, *The Repeal Bill: Fact Sheet 8: Environmental Protections*, in ‘Frequently Asked Questions’.

7. Five further documents accompany the draft Bill: an Explanatory Memorandum (attached to the draft Bill); an Information Paper on the Policy Statement on Environmental Principles; a Statement of Impacts; a Policy Paper; and a Memorandum from DEFRA to the Delegated Powers and Regulatory Reform Committee.

8. Explanatory memorandum, *ibid.*, para 1.

9. Memorandum from Defra to the Delegated Powers and Regulatory Reform Committee, above n 7, para 3.

10. See Maria Lee and Eloise Scottford, ‘Environmental Principles After Brexit: The Draft Environment (Principles and Governance) Bill’ (January 25, 2019); Mary Dobbs, ‘Environmental Principles in the Environment Bill’.

11. HM Government, *A Green Future: Our 25 Year Plan to Improve the Environment* (2018).

12. For more discussion of the OEP, see Maria Lee, ‘The New Office for Environmental Protection: Scrutinising and Enforcing Environmental Law after Brexit’ (January 8, 2019), on which parts of this briefing are based. See also evidence provided for pre-legislative scrutiny: Scrutiny of the draft Environment (Principles and Governance) Bill inquiry and Draft Environment (Principles and Governance) Bill inquiry.

A new generation of environmental law

The current generation of UK environmental law is thoroughly European, having evolved for over forty years in accordance with the EU's approach to environmental protection. It is too soon to say how the next generation of English environmental law will develop.¹³ Brexit itself is subject to many unknowns,¹⁴ and over time the UK may stay fairly close to much EU environmental law for the purposes of maintaining trade. The government continues to promise that leaving the EU will not lead to a diminution of environmental standards, or of accountability.¹⁵ But the ideological complexion of government is far from stable, and pressure towards de-regulation would not be surprising. A 'second half' of the Environment Bill, containing legally binding environmental targets and objectives, is expected later in 2019. Much will depend on that.

Notwithstanding efforts to insist on the development of environmental standards with 'hard' legal edges, it is perfectly plausible that English environmental law shall develop in a direction where flexible and discretionary language is the norm.¹⁶ For example, government or regulators may be subject to an obligation to take reasonable steps, or to endeavour, to achieve an environmental outcome, rather than to an obligation to achieve an outcome.¹⁷ There may also be good reasons for ambitious but open ended environmental standards (good ecological quality, best available techniques), rather than fixed quantitative lines between compliance and non-compliance. EU law enjoys problematic,

but highly developed, processes and spaces for including expertise and stakeholders in the articulation of the detail of these open ended standards, most famously 'best available techniques' under the Industrial Emissions Directive and water standards under the Water Framework Directive.¹⁸ There is a danger that they will be relegated to a more closed administrative space after Brexit. Again, the second half of the Bill will be crucial in setting expectations for new environmental standards.

The nature of accountability is of course heavily dependent on the nature of the standard to which a body is being held to account, so the progress of substantive environmental law over the next generation will shape accountability. If we couple increasingly flexible standards with a traditional 'English' approach to judicial review, we may find the future of environmental protection largely in the hands of the administration or the executive. The English courts have a strong (although not absolute) tendency to defer to administrative judgments of what is achievable, by contrast with the CJEU, which has consistently rejected any attempt to rely (unless provided for in the legislation) on practical, political or economic difficulties to excuse a breach of environmental standards.¹⁹

The key issue in what has come to be known as the Brexit 'governance gap'²⁰ is the question of who watches the watchers, how we can scrutinise government and environmental regulators to ensure that environmental laws are not empty rhetoric. There are a number of elements to this, not all of which are addressed

13. The draft Bill applies UK-wide in respect of reserved matters, and to England only for all other matters. See Colin Reid, 'All in it together – but not yet? Devolution in the Environment Bill'.

14. Martin Nesbit and David Baldock, *Environmental Policy Risks and Opportunities of Different Outcomes from the Brexit Negotiations* (IEEP, 2019).

15. Eg Statement of Impacts, above n 7.

16. See the discussion of the move away from this in the context of EU membership, Richard Macrory, 'Environmental Law: Shifting Discretions and the New Formalism' in Owen Lomas (ed), *Frontiers of Environmental Law* (Chancery Law Publishing, 1991).

17. See Colin Reid, 'A New Sort of Duty? The Significance of "Outcome" Duties in the Climate Change and Child Poverty Acts' (2012) 4 *Public Law* 749.

18. Directive 2010/75/EU of 24 December 2010 on industrial emissions (integrated pollution prevention and control) [2010] OJ L334/17; Directive 2000/60/EC establishing a framework for Community action in the field of water policy [2000] OJ L 327/1. For discussion, see Maria Lee, *EU Environmental Law, Governance and Decision-Making* (Hart Publishing, 2014); Joanne Scott and Jane Holder, 'Law and New Environmental Governance in the European Union' in Grainne de Búrca and Joanne Scott (eds), *Law and New Governance in the EU and the US* (Hart Publishing, 2006).

19. Eg Case C-56/90 *Commission v UK (bathing waters)* [1993] ECR I-4109. Contrast *R (on the application of ClientEarth) v Secretary of State for the Environment, Food and Rural Affairs* [2012] Env LR 18 and *R (on the application of ClientEarth) v Secretary of State for the Environment, Food and Rural Affairs* [2015] 4 All ER 724. For a discussion of possible reasons for a relatively low level of success for environmental judicial review, see Ole W Pedersen, 'A Study of Administrative Environmental Decision-Making Before the Courts' (2019 *Journal of Environmental Law* advance access; note also that Pedersen observes no greater success in 'EU law' cases brought in the UK.

20. See eg Viviane Gravey, Andy Jordan and Charlotte Burns, 'Environmental Policy after Brexit: Mind the Governance Gap'.

here.²¹ The most high profile is the very powerful legal accountability mechanism provided by the Commission plus court enforcement process, which can extend to imposing financial sanctions on Member States for failure to comply with EU (environmental) law. Equally interesting and important, and perhaps more sustainable in a purely domestic context, are the 'lowly aspects' of accountability.²² EU environmental regulation routinely imposes obligations on public authorities to plan for and report on environmental law, publicly and to the Commission or the European Environment Agency, who in turn provide independent, resourced, expert review and judgment. Responses and further review subtly enhance the potential for accountability, and build the potential for iterative improvement of both domestic implementation and EU wide approaches.²³ The National Audit Office has recently found that 161 environmental obligations may no longer be reported after Brexit;²⁴ and even if obligations to report survive, there is a question about where those reports go. The publication of reports is important, but transparency does not equal accountability. If reports go into a void, they *become* red tape, in a self-fulfilling prophesy.

Accountability

I suggested above that the core of accountability is an obligation to articulate a narrative about public authority behaviour. There should be opportunities for third parties to follow up and question the account. We often expect sanctions to be attached to accountability mechanisms;²⁵ they need not be formal legal sanctions, but generally we expect judgments to be made, from which consequences may follow.²⁶ I follow Bovens and others in seeing accountability as being about a rela-

tionship: *someone* holds *someone else* to account for *something* specific.²⁷ This idea of a relationship usefully forces us to attend to those doing the holding to account. Holding others to account is extremely challenging. One of our central questions in the design of post-Brexit environmental law, and one of central roles for law, is to provide a framework that *assists*, and *amplifies the voice of*, account holders. That applies whether the accountability is legal accountability, or political accountability – simply put, whether accountability involves legal or political actors, in a legal or political forum and with legal or political consequences.

One half of this relationship, those to be held to account, can be identified in a fairly rough and ready way as environmental regulators, including agencies and central and local government. The account holders, those doing the holding to account of environmental regulators, are more complicated, and include the OEP, courts, parliament and civil society, itself including environmental groups, media, business and citizens. These multiple account holders render accountability complex and plural. They have the potential to provide deliberate or incidental support to each other, through their different knowledges and different constituencies. But equally, different actors may compete, with different ideas of the 'good' and how to achieve it.²⁸ Some will favour economic values, some will favour environmental values; some will seek to cooperate with the party being held to account, some will confront loudly. Accountability processes are not simple, and will not provide simple answers in our search for good environmental protection after Brexit. But space for accountability needs to be constructed, however laborious that is. Accountability cannot be left to chance in the hard battles ahead over environmental standards.

21. Maria Lee, *Environmental Accountability of Government after Brexit* (UCL European Institute, 2017).

22. In a different context, Carol Harlow, *Accountability in the European Union* (OUP, 2002).

23. Joanne Scott and Jane Holder, above n 18.

24. National Audit Office, *Environmental Metrics: Government's Approach to Monitoring the State of the Natural Environment* HC1866 Session 2017-19.

25. Carol Harlow and Richard Rawlings, 'Promoting Accountability in Multilevel Governance: A Network Approach' (2007) 13 *European Law Journal* 542 would not demand sanctions.

26. Bovens, above n 5.

27. Bovens *ibid*; Julia Black, 'Constructing and Contesting Legitimacy and Accountability in Polycentric Regulatory Regimes' (2008) 2 *Regulation & Governance* 137.

28. See the discussion of different 'legitimacy communities' in Black, *ibid*.

Where are we now? The Office for Environmental Protection (OEP)

Section 16 EU (Withdrawal) Act 2018 required the Secretary of State to publish a draft bill that, *inter alia*, contains:

(d) provisions for the establishment of a public authority with functions for taking ... proportionate enforcement action (including legal proceedings if necessary) where the authority considers that a Minister of the Crown is not complying with environmental law.

However flawed section 16 might be (and paragraph (d) is very narrow) its inclusion in the Act was a major achievement for environmental NGOs and their allies, keeping environmental governance on the agenda in a time of constitutional and political disarray. It resulted in the draft Bill introduced above. The focus here is particularly on the OEP's role in scrutinising, monitoring and reporting on environmental law and policy. The draft Bill contains three different spaces for the OEP to contribute to accountability: around policy; around compliance with environmental law; and around implementation of environmental law. I concentrate on the third, for fear that the possible power of such an unobtrusive little clause could easily be neglected.

First, the draft Bill puts in place a potentially progressive governance framework around nascent English environmental policy planning. Clause 8 requires the Secretary of State to 'prepare annual reports on the implementation of the current environmental improvement plan', which are to be laid before Parliament. For each annual reporting period, the OEP 'must monitor progress in improving the natural environment in accordance with the current environmental improvement plan', preparing a 'progress report', which it lays before Parliament.²⁹ The Secretary of State must in turn respond to that report, publish the response and lay it before Parliament. The statutory framework provides

clear and time-specific roles for government itself, for the OEP, and for Parliament. Scrutiny of government performance by Parliament, and by civil society generally, is assisted by the OEP's review of government reports. In addition to the annual reporting and monitoring, the draft Bill would introduce a five-yearly review and revision process, and requires a 'new plan' to be prepared in time to replace an 'old plan', with no gaps between them.

This framework provides important potential for political accountability for policy ambitions. Improvements should be made of course,³⁰ including with respect to the gathering and publication of data and information. Most importantly, the currently unspecified content of the EIP means that much policy could continue to exist outside of the EIP, and hence beyond the governance frameworks set out in the draft Bill.

Second, clauses 17 to 25 of the draft Bill provide what are called 'enforcement' mechanisms. The OEP's scope for action in this part of the Bill is very narrowly drawn around unlawful acts or unlawful failures to act. This probably means that any discretionary or flexible language in the law takes us beyond the scope of the OEP's powers, and that attention will focus on the breach of procedural obligations. The exercise of discretion on enforcement by an environmental regulator will probably rarely be considered unlawful. It might in any case be a stretch to describe the mechanisms available to the OEP as 'enforcement'. It has powers of investigation, and may issue a report, including recommendations, and non-binding 'information' or 'decision' notices. The only legally binding part of the process is the power to take an ordinary judicial review action against the underlying unlawful act. The OEP is a new actor in judicial review, and new information in the form of investigations, reports and explanations shall be before the court. This could conceivably over time al-

29. Draft Clause 14.

30. See above n 12, and evidence submitted to Parliament, also n 12.

low for increasingly deep review of questions such as reasonableness.³¹ However, the limitations of judicial review are well known, and amplified in this case by the delay of the earlier steps in the process.³² There is much to be improved on in this part of the draft Bill.³³ Most importantly, if it is to provide genuine legal accountability, the OEP should be provided with powers to issue binding notices on public authorities, subject to appeal. However, if we set to one side a lack of tough 'enforcement' powers, and the associated diminution of legal accountability relative to EU membership, we might appreciate the structure for political accountability to parliament and civil society, aided by the expert judgment of the OEP.

And thirdly, under clause 15, the OEP 'must monitor the implementation of environmental law' and 'may report on any matter concerned with the implementation of environmental law'. These reports are to be published and laid before Parliament. Again, the Secretary of State must respond, publish the response and lay the response before Parliament. Clause 15 should allow parliament and the OEP to demand an account of action, and has the potential to enhance the knowledge and strength of civil society. It provides a potentially important forum for political accountability.

The differences between the three areas for OEP scrutiny, and the associated differences in accountability, need to be emphasised. EIPs are policy documents, and the accountability is entirely political, but potentially wide-ranging. 'Enforcement', accountability for the compliance with environmental law, revolves around lawfulness, but provides a very limited form of legal accountability (through judicial review). It is very different from accountability for the implementation of environmental law (under clause 15), which provides a far more generous scope for action, with the potential to reach into the exercise of discretion by public bodies. Rather than being limited to policing and 'enforcing' the

line between compliance and deviance, the OEP (and the other account holders supported by its expert reports) can ask whether this is really the best, the most effective, the most ambitious, the most efficient way of implementing the law. Looking to the particular English context, the OEP and other account holders can go beyond lawfulness and interrogate whether the authority's interpretation of 'endeavours', 'reasonable steps', etc, really stand up to questioning. Norms around these issues will be constructed and negotiated at the same time as they are implemented and monitored. Accountability here is political rather than legal.

Improving draft Clause 15

Clause 15 will not fulfil its potential as stands. It needs to be strengthened both by structured provision and generation of information and knowledge, and by structured opportunities for questioning and revisiting the accounts provided.

Reporting and transparency

On the face of the draft Bill, there is no routine and organised provision of data and information on implementation. This contrasts strongly with the routine requirement for planning for and reporting on implementation in EU environmental law. Reporting is of course resource intensive, and the seriousness with which reports are taken by those preparing and those receiving them, may sometimes fall short.³⁴ But there are a number of important roles for these sorts of transparency mechanisms.

First, obligations to plan and report may have internal effects, leading public authorities to reason more systematically, potentially drawing attention to otherwise overlooked interests, and contributing to countering

31. See eg *R (Bradley) v Secretary of State for Work and Pensions* [2009] QB 114 on the rationality of a decision to reject findings of an ombudsman.

32. See [David Wolfe QC's evidence to the EFRA Select Committee](#).

33. Above n 12.

34. See eg Steven Van de Walle and Floor Cornelissen, 'Performance Reporting' in Bovens et al, above n 4; National Audit Office, above n 24.

self-interest or haste.³⁵ More radically, but along the same lines, providing an account, articulating a story about an institution and its behaviour, can be powerful,³⁶ and some would even go so far as to argue that they may generate cultural change.³⁷ And we know that transparency does more than open the doors, but can change the way an institution operates.³⁸ We often think about the ways in which transparency demands can have unintended and undesirable impacts, for example focusing an organisation on the measurable rather than the important. But if we think strategically about this, we could adjust environmental reporting to a possible future English environmental law sensibility, by asking for a specific account of how the relevant public authority understands, intends to implement, and has implemented its more flexible obligations.

Second, these sorts of reporting obligations allow outsiders to reach a view as to whether power is being exercised (broadly) legitimately. Regulators are opened to external scrutiny and to the possibility of being held to account. There are many ways of thinking about accountability,³⁹ any of which might be significant in post-Brexit environmental governance. For current purposes, I am concerned particularly with a possible democratic role for legal mechanisms enhancing accountability. This is sometimes presented as requiring a chain of accountability from the party being held to account, back to citizens. The difficulties of this approach are well known (the chain is long, and broken), but it remains a meaningful aspiration, and parliament is a key actor in the draft Environment (Principles and Governance) Bill. Formal accountability actors with no or tenuous links to citizens can also be important.⁴⁰ The UK Supreme Court has said that

without access to courts, 'laws are liable to become a dead letter, the work done by Parliament may be rendered nugatory, and the democratic election of Members of Parliament may become a meaningless charade'.⁴¹ Whilst this speaks to legal accountability specifically, it applies also to political accountability, and to a 'charade' of environmental probity. Because without the possibility of being held to account, words are cheap, and the rhetoric of good environmental intentions too easy.

Thirdly, planning and reporting processes, in support of monitoring and review of implementation, can enable learning. This brings together the internal and external perspectives, making space for different actors to collaborate around good implementation, including identifying what reasonable endeavours (etc) should look like. That is not to imply that a consensual view of what constitutes good implementation is always possible. But if we are to take environmental protection seriously, we need to embrace the idea that the administration does not hold all relevant knowledge, either on the epistemic elements of implementation, or on values, that is, what good regulation looks like.

A learning perspective recognises the complicated line between defining standards and applying them, moving away from an exclusively retrospective focus to accountability.⁴² Although learning is an important impact of a good accountability framework, there is an inherent tension. It is appropriate that clause 15 is limited to mechanisms of political rather than legal accountability, with no binding powers. But even the publicity and sanctions associated with political accountability could undermine as well as enhance

35. Frederick Schauer, 'Giving Reasons' (1995) 47 *Stanford Law Review* 633.

36. Eg Black, above n 27.

37. See eg Jane Holder, *Environmental Assessment: The Regulation of Decision-Making* (Oxford University Press, 2004).

38. Elizabeth Fisher, 'Transparency and Administrative Law: A Critical Evaluation' (2010) 63 *Current Legal Problems* 272.

39. See eg Ruth W Grant and Robert O Keohane, 'Accountability and Abuses of Power in World Politics' (2005) 99 *American Political Science Review* 29.

40. Often referred to as 'constitutional', 'institutional' or 'checks and balances' accountability. See eg Bovens, above n 5; Elizabeth Fisher, 'The European Union in the Age of Accountability' (2004) 24 *Oxford Journal of Legal Studies* 495.

41. *R (on the application of UNISON) v Lord Chancellor* [2017] WLR 409.

42. Bovens, above n 5.

learning and collaboration if ‘high levels of politicisation ... result in scapegoating, blame games, and defensive routines, instead of policy reflection and learning’.⁴³ As suggested above, the different account holding communities may have different ideas about ‘the good’, and how to achieve it.⁴⁴ There is also a danger that we shall find ourselves replicating some of the challenges faced at EU level, where elite actors often frame decisions around a particular type of expertise, to the exclusion of links to citizens. Whatever the tensions and difficulties, however, it is crucial that we put some external challenge and learning potential into the implementation of environmental law, including that inevitable part of environmental law which is drawn flexibly.

Structures for accountability

In addition to these mechanisms for information and knowledge provision and generation, if the law is to amplify the voice of account holders, draft Clause 15 also needs to provide a structure for the receipt, the response to, and ideally the debate of implementation of environmental law. Although the draft Bill empowers the OEP to ‘do anything ... it thinks appropriate for the purposes of, or in accordance with, its functions’,⁴⁵ the powers explicitly granted elsewhere in the draft Bill could be extended to the scrutiny of the implementation of environmental law. So the OEP should be able to undertake investigations in respect of the implementation of environmental law, currently limited to the ‘enforcement’ provisions. The duty of cooperation on other public authorities should be extended. An ‘information notice’, which essentially requires a public authority to set out its response to an allega-

tion, should be available for implementation as well as compliance. The OEP’s obligation to set out a strategy that prioritises its activities should also be extended to implementation. This list is not exhaustive. The point is that law can assist the multiple account holders in environmental protection by providing a formal structure for action.

The limits of clause 15

As a standing body, the OEP will be able to take a strategic approach to developing shared views of good implementation. Obligations to respond mean that the OEP’s interventions cannot be lawfully ignored; the OEP’s considered approach may bring issues to public and political attention, assisting other political and legal account holders. We should however be modest about the role of law here. As necessary as good legal structures are, they are never sufficient. The temptation is to look for a hard hitting solution to the dilemma of sustaining environmental norms when times are hard. The power of draft clause 15 (and most of the other mechanisms built into the draft Bill) ultimately depends on the commitment and resources of all of the actors in the system, as well as the social, political and cultural context that determines the political salience of environmental matters. The OEP needs to be independent, and all parts of the system need to be adequately resourced. The OEP’s first challenge is to build sufficient legitimacy with a range of stakeholders to ensure that its conclusions carry real weight and authority. It is important also to remember that the OEP is not ‘the’ answer, and is not even the key account holder. It is just part of the accountability and learning process, supporting other

43. Mark Bovens, ‘Two Concepts of Accountability: Accountability as a Virtue and as a Mechanism’ (2010) 33 *West European Politics* 946, p 956.

44. Black, above n 27.

45. Schedule, para 5.

actors. Parliament and civil society must not overrely on the OEP.⁴⁶

Conclusions

Accountability is complicated, and it does not provide a panacea for our anxiety about the environmental implications of Brexit. I find myself in a complicated position, having spent over twenty years of my professional life finding much to criticise in EU environmental law's decision making processes and accountability mechanisms. But it is also true that the EU has some fairly robust, if imperfect, institutions for making and sticking with environmental norms.⁴⁷ We are all keen for simple solutions, but there are none. Even with the best accountability system, arguments will be lost. But 'skirmishes lost are still important: they keep our attention on malpractice and reflex mendacity'.⁴⁸ Some of these skirmishes may not take place at all without accountability mechanisms, and the possibility of accountability might alter the power balance in others. The maintenance of attention means that 'malpractice and mendacity', as well as simple incompetence, shall come at a price, and principled disagreement shall be in the open. It is a little banal to conclude that there no such thing as a perfect system of accountability, but taking that conclusion seriously helps us in the current practical task. Accountability is dynamic, a process, never achieved but always only potential.⁴⁹ We must demand constant institutional engagement with ever present challenges.

Liz Fisher and others tell us that behind any account of accountability lies a theory of administration;⁵⁰ these are not just technical exercises. On my account

clearly, institutions matter, law matters, and organisational convenience is secondary. I prefer environmental values to be developed in a public and collaborative way, and envisage technical and dry governance provisions as potentially progressive and democratic. It is quite plausible though that Brexit is precisely about escaping institutions and the inconveniences and costs of accountability, in a free-wheeling, de-regulated emphasis on trading beyond the EU.⁵¹ We should not underestimate the dangers.

46. See for example the concern that Parliament and civil society have over relied on the Committee on Climate Change, ClientEarth, *Mind the Gap: Reviving the Climate Change Act* (2016). As above, n 34, the use of material provided for the purposes of accountability is often the weak point.

47. It might also be that Member State accountability to EU institutions, EU institutions' accountability to each other, and EU experts' accountability to other experts, are more highly developed than EU accountability to its citizens for the detail of its policies.

48. Iain Sinclair, *Living with Buildings: And Walking with Ghosts* (Wellcome Trust, 2018), p 158

49. Fisher, above n 40, citing especially Anne Davies, *Accountability: A Public Law Analysis of Government by Contract* (OUP, 2001).

50. Fisher, *ibid*, p 511, citing Paul Craig, *Public Law and Democracy in the United Kingdom and the United States of America* (Clarendon Press, 1990).

51. See also Liz Fisher and Maria Lee, 'Environmental governance after the EU: The need to ensure accountability'.

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