CHAPTER 17

UNITED KINGDOM

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17.1 Overview

As in many other modern regulatory states, environmental regulation in the United Kingdom (UK) is complex, and reflects a mixture of international, regional, and national obligations and has achieved a level of maturity with multi-layered governance systems and diverse regulatory approaches. The problem of complexity in environmental law is certainly not unique to the UK and the challenge of defining and analysing environmental law outside of any jurisdictional context has been noted.[1] There are, however, grounds for arguing that the complexity of UK environmental regulation goes beyond these conceptual challenges. In 2012, the United Kingdom Environmental Law Association (UKELA) criticized the state of environmental law in the UK as being *overly* complex, incoherent, and lacking in integration and transparency.[2] In doing so it identified multiple factors that suggested that the UK's approach to designing, making, and implementing environmental law created extra and unnecessary levels of complexity—to such an extent that it was difficult for those involved in environmental regulation to understand and interpret the law.

These criticisms provide some context for the pre-emptive defence that this chapter does not attempt to provide a comprehensive mapping of the conceptual contours of environmental law in the UK. Accordingly, the first section of this chapter considers the allocation of power for environmental regulation in the UK. It does so by considering three competing forces that have helped to shape the 'infrastructure' of environmental law in the UK. The second section provides an outline of the structure and substance of the core areas of environmental regulation in the UK. The aim here is to summarize the techniques employed in the UK to regulate environmental quality, land use, waste management, nature conservation, and industrial pollution control. The final section addresses implementation.

17.2 Allocation of Powers

This section considers three significant forces that have helped to shape UK environmental law. The first is historical; the second highlights the impact of external influences; the third force highlights two key internal factors, namely the evolving nature of the UK's Constitution and the emergence of new forms of 'environmental rights' and the constrained fragmentation of environmental law and infrastructure across the individual countries of a devolved United Kingdom.

17.2.1 The Forces of History

The first of these forces is historical, with the Victorian roots of environmental law influencing certain areas of modern environmental law, the institutional framework, and

[1] E. Fisher et al, 'Maturity and Methodology: Starting a Debate about Environmental Law Scholarship' (2009) 21 *Journal of Environmental Llaw* 213.

[2] UKELA, 'The State of UK Environmental Legislation in 2011–2012', available at: http://www.ukela.org.

elements of national regulatory style. Analysing how and why environmental laws emerged in the UK provides clues to the origins of identity, what we might term the 'DNA' of modern-day regulation.

From early times there were rudimentary local controls over small-scale pollution.[3] These controls supplemented the private law rights in nuisance that addressed neighbourly conflicts arising from the typically dirty, noisy, smelly existence of those living in Mediaeval England.[4] Throughout the early years of the nineteenth century, however, the intensive and uncontrolled industrialization and urbanization of English cities caused pollution on a much wider scale. In the face of escalating public health problems and widespread environmental degradation, the courts were asked to apply principles previously used to balance competing interests in neighbouring land to the much broader and extensive impacts of the industrial revolution.

The effectiveness of this judicial response has been the subject of debate.[5] Whilst nuisance law may have protected private property rights, the courts were unable to provide a consistent, coherent, and comprehensive response to the negative externalities of polluting industries. Accordingly, the state sought to fill the gap.[6] Although the scale of statutory intervention was significant, the substantive scope of individual statutes was narrow with little consideration given to the need for wider, more integrated solutions. These initiatives were not triggered by overarching environmental policy objectives but by a reactive, 'quick fix' pragmatism. This often led to the displacement of consequences of pollution.[7] The outcome was reactive and piecemeal legislation which although functional and effective in the context of the specific problems that were being addressed, were also inflexible and lacked substantive coherence.

This lack of substantive coherence was also reflected in structural arrangements. As different issues arose, more detailed layers of legislation and policy were added, resulting in a largely unplanned but complex environmental infrastructure. Thus, whilst the UK had relatively early pollution control regimes that had remarkably long lifespans, the effect was to produce a 'fragmented accretion of common law, statutes, agencies, procedures and policies'.[8]

The long history of environmental controls in the UK has also had an impact on modern regulatory style. The early pollution control schemes relied heavily upon technocratic, closed, administrative processes implemented through high levels of discretion in stark

[3] L. Etherington, 'Canons of Environmental Law: Pollution of Churches and the Regulation of the Medieval "Environment"' (2016) 36 *Legal Studies* 566.

[4] See E. Cockayne, *Hubbub: Filth, Noise & Stench in England* (New Haven: Yale University Press, 2007).

[5] See J. Brenner, 'Nuisance Law and the Industrial Revolution' (1974) 3 *Journal of Legal Studies* 403; J. P. S. McLaren, 'Nuisance Law and the Industrial Revolution: Some Lessons from Social History' (1983) 3 *Oxford Journal of Legal Studies* 155; and B. Pontin, 'Nuisance Law and the Industrial Revolution: A Reinterpretation of Doctrine and Institutional Competence' (2012) 75 *Modern Law Review* 1010.

[6] Notable examples include the Public Health Acts 1848 and 1875, the Alkali Acts 1863, 1874, and 1881, the Sanitary Act 1866, and the Rivers Pollution Prevention Act 1876.

[7] See M. Lobban, 'Tort Law, Regulation and River Pollution: the Rivers Pollution Prevention Act and its implementation' in J. Steele and T. T. Arvind (ed.), *Tort Law and the Legislature* (Oxford: Hart Publishing, 2012).

[8] N. Carter and P. Lowe, 'The Establishment of a Cross-Sector Environment Agency' in T. Gray (ed.), *UK Environmental Policy in the 1990s* (London: Macmillan Press, 1995), 40.

contrast to more modern participative processes backed by strict environmental quality standards and extensive judicial enforcement.[9]

17.2.2 External Forces—The Impact of the European Union

The effects of the legacy of the historical development of environmental law in the UK are subtle and embedded when compared to the direct impacts of membership of the European Union (EU). Most current environmental law and policy in the UK has been introduced to implement the requirements of European law.[10] The scale of the task of approximating European law has had a direct impact upon both the complexity of domestic law and the manner in which environmental law has been created in the UK. Many detailed European provisions are transposed directly into secondary legislation. This 'mirror image' approach has resulted in the large growth of secondary legislation in environmental law in the UK and is reflected in the substance of law.

When transposing the requirements of Directives, two relatively simplistic approaches have been taken to avoid problems of non-conformity. The first approach has been to replicate the wording of the relevant Directive without any further attempt to identify the best way of assimilating European law into domestic legislation (so-called 'copy out').[11] The second approach has been to draft domestic legislation in very broad terms, but with direct and specific references to the detailed obligations found in the relevant Directive.[12] These approaches ensure that no more and no less than the requirements of European law are effectively transposed but also mean that any lack of clarity or uncertainty within the original Directives are transmitted into national law.

Membership of the EU has brought other profound changes in environmental governance, regulatory style, and in the UK courts. The system of monitoring and enforcement of European obligations via the European Commission and the Court of Justice of the European Union (CJEU) has proven to be an effective tool.[13] European regulatory style has also provided the impetus for changing and/or the reshaping of traditional approaches to encompass regulatory innovation and a marked shift away from a pragmatic, flexible decentralized approach to a 'new formalism'.[14] Finally, the influence of European environmental law on the UK courts has also been transformative with the CJEU promoting a broader, more purposive approach to interpreting environmental legislation.

[9] Lobban, 'Tort Law, Regulation and River Pollution'.

[10] In considering the impact of leaving the EU in 2017, it was estimated that there were over 1,100 different pieces of European derived legislation that related to policy areas under the control of the UK Department of Environment, Food and Rural Affairs. The House of Lords European Union Committee, *Brexit: Environment and Climate Change* 12th Report of Session 2016–17, HL Paper 109, 10.

[11] e.g. the schedules of development subject to environmental impact assessment in the Town and Country Planning (Environmental Impact Assessment) Regulations 2011.

[12] e.g. the Environmental Permitting (England and Wales) Regulations 2016.

[13] In evidence to the House of Lords Select Committee it was suggested that fear of infraction at a European level was a more significant driver for legislative and policy change then decisions in the domestic courts, see The House of Lords European Union Committee, *Brexit: Environment and Climate Change*, para. 70.

[14] R. MacRory, 'Shifting Discretions and the New Formalism' in O. Lomas (ed.), *Frontiers of Environmental Law* (Chichester: Wiley Publishing 1991).

17.2.3 Internal Forces—The (Weak) Constitutional Basis for UK Environmental Law

In the absence of a codified constitution, the UK has no basis for entrenched and legally enforceable substantive environmental values or norms which could shape national environmental infrastructure through clearly identifiable rights. But it would be wrong to think that constitutional forces play no role in allocating power for environmental regulation. Such power can be found in statutes and other sources of law and policy. For example, constitutionally significant statutes such as the European Communities Act 1972 and the Human Rights Act 1998 have given effect to the supremacy of European law and certain human rights principles. In addition, it is possible to identify other sources of law that have created procedural, derivative,[15] and what might be termed substantive rights which collectively form a weak constitutional basis for environmental rights. For example, procedural rights of public participation found in the Aarhus Convention and European legislation have been transposed into national legislation and been given legal effect through the courts.[16] Derivative environmental rights emerging from the 'greening' of human rights at the European level also have a weak constitutional role in the UK.[17]

Substantive environmental rights are much more difficult to identify, subject to two possible exceptions.[18] First, the integration of environmental principles—in particular duties connected to the principle of sustainable development—can be seen in diffuse forms, creating a patchwork of duties, objectives, and aims with these principles in mind.[19] Six key environmental principles are also incorporated into general national law and policy through the EU Treaty and individual Directives.[20] The challenge of translating such general principles into substantive legal rights in the national context is problematic. Whilst the national courts have, on occasion, interpreted certain Directives in a manner consistent

[15] Such rights are strictly derivative because 'the duty is not one of protecting the environment, but one of protecting humans from significantly harmful environmental impacts', see A. Boyle, 'Human Rights or Environmental Rights? A Reassessment' (2008) 18(3) *Fordham Environmental Law Review* 471. For use of such rights in the environmental context see *Lopez Ostra v Spain* (1994) 20 EHRR 277; *Guerra v Italy* (1998) 26 EHRR 357, and *Tatar v Romania* (2009) 21(3) *Journal of Environmental Law* 506; and more generally, I. Cenevska, 'A Thundering Silence: Environmental Rights in the Dialogue between the EU Court of Justice and the European Court of Human Rights' (2016) 28 *Journal of Environmental Law* 301.

[16] M. Lee and C. Abbott, 'The Usual Suspects? Public Participation under the Aarhus Convention' (2003) 66 *Modern Law Review* 80.

[17] Margin of appreciation means that it is difficult to establish derivative environmental rights under Art. 8 European Convention on Human Rights (ECHR) (the right to a private life); see *Powell and Rayner v United Kingdom* (1990) 12 European Human Rights Reports 355; *Hatton v United Kingdom* (2002) 34 EHRR 1; (2003) 37 EHRR 28.

[18] Perhaps mirroring the reluctance to develop such rights at the European level, see Cenevska, 'A Thundering Silence', at 320.

[19] A. Ross, 'Why Legislate for Sustainable Development? An Examination of Sustainable Development Provisions in UK and Scottish Statutes' (2008) 20 *Journal of Environmental Law* 35.

[20] Sustainable development is referred to in Art. 3 Treaty on European Union (TEU) and five other principles (i.e. relating to polluter-pays, precaution, prevention, integration, and rectification at source are found in Art. 191(2) Treaty on the Functioning of the European Union (TFEU).

with those principles,[21] the general view has been that such principles have no legal force but should be considered as policy objectives.[22]

The second method of embedding enforceable rights is through the creation of sufficiently clear and certain environmental targets in primary legislation. It has been argued that the Climate Change Act 2008 sets sufficiently clear targets for greenhouse gas (GHG) reduction to create a form of substantive rights in the UK's political constitution.[23]

17.2.4 Internal Forces—Constitutional Complexity in a Devolved UK

Whilst the weak basis for constitutional rights across the UK as a whole resides mostly in drawing inferences from various sources of law, there is a much more obvious and direct influence of the allocation of power across the individual countries of the United Kingdom. The ongoing process of devolution in the UK has shifted responsibility for large portions of environmental law and policy away from the UK Parliament in Westminster to national executives in three of the four constituent countries.[24] This has set the scene for possible diversification and distinctiveness, although the overarching need to meet international and European obligations means that there are substantive limits to the variation.

The term 'UK environmental law' has always been somewhat misleading. Certainly, there has never been a single body of environmental protection laws that apply across the UK. But then again, the idea of a formal federal system of government would also not capture the complex constitutional framework for environmental law in the UK. Historically, the existence of separate and distinct legal systems in Scotland and Northern Ireland was reflected in slight differences in the development of relevant private law tools and statutory provisions.[25] Until formal devolution of environmental law-making powers in 1998,[26] the differences in statutory frameworks were, however, largely structural, or in the case of Northern Ireland, notable mostly for delays and inadequate implementation of the requirements of European law.[27] The fragmentation of environmental law-making has, however, accelerated post-devolution with separate law-making powers extended to all the constituent countries in the UK. This picture of non-uniformity in environmental laws is underscored by the fact that although the devolution of powers in the UK was comprehensive, the exact nature of law-making powers varies in each country.

[21] See *Downs v Secretary of State for Environment, Food and Rural Affairs* [2009] Environmental Law Reports 19.

[22] *R v Secretary of State for Trade and Industry, ex parte Duddridge* [1995] Environmental Law Reports 151.

[23] A. McHarg, 'Climate Change Constitutionalism? Lessons from the United Kingdom (2011) 2 *Climate Law* 469.

[24] i.e. Northern Ireland, Scotland, and Wales.

[25] e.g. the law of nuisance in Scots law does not distinguish between private and public nuisance, and is somewhat narrower in scope than in England and Wales see, G. Cameron, 'Scots and English Nuisance…Much the Same Thing?' (2008–9) 9(1) *Edinburgh Law Review* 98–121.

[26] Under the Scotland Act 1998, Government of Wales Act 1998, and the Northern Ireland Act 1998.

[27] K. Morrow and S. Turner, 'The More Things Change, the More They Stay the Same? Environmental Law, Policy and Funding in Northern Ireland' (1998) 10(1) *Journal of Environmental Law* 41.

Scotland has extensive powers to pass primary legislation on environmental matters, subject to certain areas 'reserved' for consideration by the UK Parliament.[28] In some cases, these powers have been used to implement EU and international obligations and therefore closely resemble aspects of legislation elsewhere in the UK,[29] but there have been significant examples where Scotland have sought to take the lead in going further than 'minimum compliance'[30] or through the use of innovative, integrative regimes[31] or unilateral setting of stretching environmental goals.[32]

Northern Ireland has similar powers to make primary environmental legislation,[33] but the instability of the political context has had a limiting effect on both the development of coherent environmental governance mechanisms and related laws. For example, the breakdown of the power-sharing agreement agreed as a precursor to devolution[34] and subsequent suspension of the Northern Irish National Assembly meant that little or no progress was made on implementing a separate body of environmental statutes from 2002 until 2007. Following a fresh agreement on power sharing, devolved powers in relation to environmental law have been utilized more regularly.[35] Notwithstanding increased legislative activity, particularly in the context of compliance with EU obligations, a combination of factors have contributed to serious criticisms of the state of environmental regulation and governance in Northern Ireland.[36] These factors, when combined with the political fragility of power, have meant that progress has been patchy at best and in many ways Northern Ireland is arguably is still some way behind the rest of the UK.[37]

Progress in Wales has taken a yet again different route post devolution across three quite distinct and progressive phases of transfer of legislative powers.[38] In the first phase, under the Government of Wales Act 1998, devolution of environmental law-making to Wales was

[28] Scotland Act 1998, ss. 28–30, 38 (as amended). Reserved matters are list in Sch. 5 and include areas that have environmental implications such as energy, transport, and fishing outside national waters.

[29] e.g. Nature Conservation (Scotland) Act 2004.

[30] e.g. Environmental Assessment (Scotland) Act 2005, s. 4(4) which covers the assessment of 'Strategies' as well the Plans and Programmes required under the Strategic Environmental Assessment Directive.

[31] e.g. the Water Environment and Water Services (Scotland) Act 2003 introduced river basin management planning in the UK.

[32] e.g. Climate Change (Scotland) Act 2009 setting a stretching interim target for CO_2 reduction of 42 per cent as against the target of 34 per cent for the UK as a whole.

[33] Northern Ireland Act 1998, ss. 5–7. Exceptions are found in Sch. 2 and matters reserved to the UK Parliament in Sch. 3.

[34] Under the 'Good Friday Agreement'.

[35] Northern Ireland (St Andrews Agreement) Act 2006, the Water and Sewerage Services (Amendment) Act (Northern Ireland) 2010, and the Wildlife and Natural Environment Act (Northern Ireland) 2011.

[36] There have been many long-standing criticisms of governance arrangements including significant overlaps in responsibility for environmental matters and the failure to separate environmental regulators from government departments with primary responsibility for environmental policy, see further, S. Turner, 'Laying the Foundations for a Sustainable Northern Ireland: The Review of Environmental Governance' (2008) 58(4) *Northern Ireland Legal Quarterly* 423.

[37] It is notable that over ten years after a comprehensive review of environmental governance in Northern Ireland, no progress had been made on the central recommendation to create an independent Environmental Protection Agency, see S. Turner, 'Laying the Foundations for a Sustainable Northern Ireland: The Review of Environmental Governance' (2007) 58(7) *Northern Ireland Legal Quarterly* 422.

[38] P. Bishop and M. Stallworthy (eds.), *Environmental Law and Policy in Wales: Responding to Local and Global Challenges* (Cardiff: University of Wales Press, 2013).

initially limited to secondary legislation and therefore the historical links to UK (and English) primary legislation were retained.[39] Enhanced legislative powers were granted in 2006,[40] but unrestricted primary law-making powers were finally granted in 2011.[41]

In pursuing a policy of prioritizing a broad conception of sustainable development, there have been significant administrative restructuring and legislative initiatives in Wales that promote an overarching philosophy of sustainable development and the integration of environmental protection across a range of different policy areas.[42] In particular, since 2015, and although relatively late in terms of full legislative competence, Wales has arguably done more than other UK countries in seeking to establish a distinctive identity in terms of environmental law and policy.[43]

Whilst it is certainly arguable that the process of devolution has accelerated the fragmentation of environmental law and policy within the four constituent countries, nevertheless, there is still a value and purpose in analysing the *United Kingdom*'s model of environmental law. Any fragmentation of law-making powers is still constrained to a certain extent by several key factors. All foreign policy issues, including negotiation of environmental obligations from international agreements or most critically from membership of the EU are non-devolved. Thus, the common core running through all legislation across the devolved countries in the UK comes from obligations under European environmental law. Even with a UK outside the EU, it is likely that there will be advantages in seeking to maintain a stable and harmonized core of UK environmental law to avoid imbalances that might have distorting effects for those who are regulated and detrimental environmental impacts.[44]

17.3 Structure and Substance of Environmental Law

'UK environmental law' is used here as a convenient 'catch-all' phrase that collates a core of statutes, regulations, formal and informal policies, and guidance dealing with pollution control and waste management, environmental quality standards, nature conservation, and

[39] Government of Wales Act 1998, s. 22 and more generally, V. Jenkins, 'Environmental Law in Wales' (2005) 17(2) *Journal of Environmental Law* 207.

[40] Government of Wales Act 2006, Sch. 7.

[41] Whilst further amendments to the scope and extent of legislative competence have been added under the Wales Act 2014 and Wales Act 2017—the latter of which established Wales' legislative competency on the same footing as Scotland (i.e. moved from being a conferred matters model to a reserved matters model).

[42] e.g. the formation of the main environmental regulator in Wales, Natural Resources Wales, integrated the main pollution control agency (Environment Agency, Wales), nature conservation body (Countryside Council for Wales), and the Forestry Commission.

[43] Well-Being of Future Generations (Wales) Act 2015, Environment (Wales) Act 2016, and the Planning (Wales) Act 2015, which meet the obligation to 'make appropriate arrangements to promote sustainable development', see Government of Wales Act 2006, s. 79(1) and H. Davies, 'The Well-Being of Future Generations (Wales) Act 2015—A Step Change in the Legal Protection of the Interests of Future Generations?' (2017) *Journal of Environmental Law* 165.

[44] e.g. following the devolution of powers to raise taxes on the landfill of waste to Scotland, similar rates of taxation have been maintained in order to avoid incentives to import/export waste around the UK.

land use planning. The focus here is on this core but with a recognition that the boundaries of this core are somewhat arbitrarily drawn. Thus, this coverage is subject to several general qualifications. First the limited coverage excludes many relevant areas of substantive law and policy outside this self-defined core.[45] Second, the laws covered tend to emphasize traditional top-down, command and control regulation at the expense of more integrative forms of environmental law and policy that emphasize governance and shared responsibility. Third, devolution of law-making powers means that any summary of the structure and substance of 'UK' environmental law cannot capture the breadth of variation in law and policy across the individual countries. Therefore, unless specified, the focus in this section is on the law in England but with a reminder that the laws in the other countries of the UK may vary, but not significantly.

17.3.1 Industrial Pollution Control

Industrial pollution control in the UK is regulated under an integrated system that attempts to streamline a wide range of substantive obligations into a single permitting procedure for prescribed industrial installations and waste management activities.

The Environmental Permitting (England and Wales) Regulations 2016[46] provide an umbrella framework for pollution control permits that standardizes procedural requirements and impose a general duty on regulators to 'exercise . . . relevant functions so as to achieve compliance with' a range of European Directives including the Industrial Emissions (IPPC) Directive and miscellaneous Directives on waste management and environmental quality.[47]

Primary responsibility for larger scale (and riskier) operations rests with the Environment Agency with local authorities playing a residual role for smaller scale activities.[48] Where the IED (IPPC) Directive is engaged, permit conditions must be set by reference to the 'Best Available Techniques' which link to European-wide reference documents that set emissions limit value (ELV) standards for classes of installations.[49] There is provision for standardized permits with a single requirement to comply with a set of pre-agreed conditions for non-complex operations.[50] Operating an industrial installation covered by the Regulations without a permit or in contravention of the conditions of a permit is a criminal offence.[51]

17.3.2 Air Quality and Climate Change

Legal and policy measures on air quality are complex and diverse featuring a mixture of industrial emissions controls,[52] product standards for motor vehicles,[53] and local initiatives

[45] Including areas such legislation dealing with historically contaminated land, noise, chemicals regulation, agriculture, energy including renewables, transport, and animal welfare.

[46] Made under the Pollution Prevention and Control Act 1999, ss. 2, 7(9), and Sch. 1.

[47] See Sch. 7–22 where this phrase is used in conjunction with separately identified Directives.

[48] Regulation 32.

[49] See http://eippcb.jrc.ec.europa.eu/reference/.

[50] Regulations 26–7.

[51] Regulation 38.

[52] Under the Environmental Permitting (England and Wales) Regulations 2016.

[53] See EC Regulation No. 443/2009.

intended to address pollution hotspots.[54] The central framework for policy can be found in the UK's National Air Quality Strategy introduced under the Environment Act 1995 and given legal force under the Air Quality Regulations 2010.[55] The Regulations set out alert thresholds and target values for pollutants in the Directive on ambient air quality and Cleaner Air for Europe (known as the CAFE Directive).[56] The Regulations impose a strict legal duty on the Secretary of State to 'ensure' that the EU limit values are not exceeded.[57] In practice, however, the obligation to secure compliance with this duty is delegated to the Environment Agency and local authorities using general pollution control powers and local powers to manage air quality.[58] The gap between a centralized, strict legal duty to ensure that the targets are met and the delegation of local responsibility for meeting those targets has proved to be problematic. The inadequacy of the air quality plans and the lack of progress in meeting the obligations under the CAFE Directive were the subject of a successful challenge before the Supreme Court and CJEU which affirmed that the failure of the UK Government to take *all necessary measures to* secure compliance with the targets was in breach of the requirements of the Directive.[59]

The UK has taken an innovative approach in embedding the national climate change targets within primary legislation. The Climate Change Act 2008 fixes medium- and long-term emissions reduction targets and makes provision for five-yearly carbon budgets that are scheduled to run until 2032.[60] These budgets provide a focal point for integrated action across different policy areas including renewable energy, transport, energy efficiency, and the reform of the energy markets. The Act also established the independent Committee on Climate Change which is responsible for monitoring progress towards the targets in addition to providing independent advice on carbon budgets.[61] Whilst this was a bold initiative that reflected a very specific commitment to action, there are differing views over the extent to which the targets are binding over future governments, or just what remedies would be available should the targets not be met.[62] Whilst the Climate Change Act sets out the targets to be achieved, the operative measures to reduce emissions of greenhouse gases utilize a range of approaches. These include market-based mechanisms under the EU emissions trading scheme and economic instruments such as a tax on non-domestic users of energy to incentivize energy–efficiency measures.[63] This tax is blended with self-regulatory measures in the form of climate change agreements with various industrial sectors featuring high energy users agreeing to reduce energy use and carbon dioxide emissions in exchange for a

[54] e.g. a congestion charging scheme in London introduced under the Greater London Authority Act 1999, s. 295.

[55] Environment Act, s. 80.

[56] Directive 2008/50/EC on ambient air quality and cleaner air for Europe; Air Quality Regulations 2010, Schs. 2–5.

[57] Ibid., Part 3. [58] Environment Act 1995, Part IV.

[59] Case C-404/13, *R(ClientEarth) v Secretary of State for Environment, Food and Rural Affairs* (ECLI:EU:C:2014:2382); and *R(ClientEarth) v Secretary of State for Environment, Food and Rural Affairs* [2015] UKSC 28.

[60] Climate Change Act 2008, Part 1, ss. 1–10. [61] Ibid., Part 2.

[62] See C. Reid, 'A New Sort of Duty? The Significance of 'Outcome Duties' in the Climate Change and Child Poverty Acts' (2012) *Public Law* 749; McHarg, 'Climate Change Constitutionalism?'.

[63] The UK Climate Change Levy introduced under the Finance Act 2000, s. 30.

discount on a Climate Change Levy applied to energy bills.[64] Emissions from transport are addressed through specification standards and differential taxation for new vehicles and different types of fuel.[65]

17.3.3 Water Quality

Water quality in the UK is managed under the broad umbrella of meeting obligations under European legislation—notably the EU Water Framework Directive.[66] There is no overarching strategic planning document. Individual emissions standards are used for certain 'dangerous substances' but in general, environmental quality standards have been adopted based upon the use of the receiving waters.[67] Overall responsibility for achieving these standards lies with the Secretary of State for Environment, Food and Rural Affairs, although certain duties are delegated to the Environment Agency. In practice the operational responsibilities for maintaining water quality and pollution control rest with the Agency. The Agency is obliged to consider water quality standards when setting conditions in environmental permits and to monitor and vary such conditions as appropriate.[68]

The Permitting Regulations prohibit 'causing or knowingly permitting any water discharge activities' unless such activities are authorized by an environmental permit.[69] A 'water discharge activity' includes the discharge of 'poisonous, noxious or polluting matter', waste matter, or trade or sewage effluent into inland freshwaters, coastal or territorial waters.[70]

Under previous legislation the concept of 'polluting matter' has been construed broadly.[71] The concepts of causation and knowingly permitting have been explored extensively in the case-law under previous legislation, being interpreted in an increasingly purposive and broad fashion.[72] This has resulted in criminal liability being established with only minimal causal connections between an activity and any resulting entry into controlled waters.[73] The potential impacts of such a broad, purposive interpretation of criminal liability are somewhat mitigated through a selective approach to enforcement.[74] A wide range of remedial and civil sanctions that impose clean-up requirements or seek to recover the costs of clean up following pollution incidents supplements criminal sanctions.[75]

[64] i.e. voluntary agreements made by UK industrial sectors to reduce emissions over two-year periods in return for discounts on the Climate Change Levy, see http://www.gov.uk/guidance/climate-change-agreements.

[65] Under EC Regulation No. 443/2009. [66] Directive 2000/60/EC.

[67] e.g. for drinking water see the Water Supply (Water Quality) Regulations 2016.

[68] Environmental Permitting (England and Wales) Regulations 2016, Sch. 21.

[69] Regulation 12(1)(b). [70] Schedule 21, para. 3(1).

[71] *NRA v Biffa Waste Services* [1996] Env LR 227; *R v Dovermoss* [1995] Environmental Law Reports 258.

[72] *Empress Car Company (Abertillery) Ltd v NRA* [1998] Environmental Law Reports LR 396.

[73] *Express Ltd (t/a Express Dairies Distribution) v Environment Agency* [2003] Environmental Law Reports 29.

[74] Although for major industrial operators the position has changed dramatically with the adoption of more stringent sentencing guidelines, see section 17.4.5 and *R v Thames Water Utilities* [2015] Environmental Law Reports 36.

[75] Water Resources Act, s. 161 and the civil sanctions regime under the Regulatory Enforcement and Sanctions Act 2008 (below).

Pollution from aggregated non-point emissions sources such as from agricultural activities, transport, and urban run-off are not subject to the permitting requirements. The most serious water quality issues from diffuse sources in the UK come from high levels of nutrients and pesticides from agricultural operations. The UK has mainly adopted a zoning approach in relation to nitrate pollution from agricultural sources.[76] Unlike waste management and air pollution where market-based mechanisms have been increasingly adopted, economic instruments have not been used to any great degree.[77]

17.3.4 Waste Management

Waste management regulation in the UK has historically concentrated on the regulation of the final disposal of waste in large landfill sites. Over recent years, much greater effort has been put into a broader, mixed regulation approach. This is largely a result of European law but dwindling capacity in landfill has also been an influential factor. These initiatives appear to have been successful with a marked decline in waste production and landfill and a significant rise in recycling rates. However, the increase in the export of waste to non-EU countries suggests that displacement activities have also played a role.[78]

The overarching aims of waste management policy can be found in the national waste plans for the devolved countries of the UK.[79] These plans provide high-level policy guidance and have no legally binding effects but do help structure discretionary decision-making at a national and local level.

The central definition of 'waste' in UK law has been the subject of extensive litigation in the national and European courts. This litigation generally reflects the uncertainties created by underlying policy and regulatory tensions.[80] The definition of waste involves a seemingly simple question as to whether a particular item has been 'discarded'.[81] Whilst this covers consignment to a waste management activity, namely disposal, recycling, and recovery, it has not always been straightforward to distinguish between the subjective and objective view of whether an item has been discarded. The courts have tended to construe the definition broadly in adopting a precautionary and restrictive approach but limited any individual decision to the specific facts of any case.[82] Thus, there is yet to be a definitive test

[76] Originally under the Water Resources Act 1991, s. 94 and then subsequently under the Nitrate Pollution Prevention Regulations 2015.

[77] Contrast this with ongoing developments in other European countries. See T. Bocker and R. Finer, 'European Pesticide Tax Schemes in Comparison: An analysis of Experiences and Developments' (2016) 8 *Sustainability* 378; C. Rougoor et al., 'Experiences with Fertilizer Taxes in Europe' (2010) 44 *Journal of Environmental Planning and Management* 877.

[78] European statistics show that the export of all notified waste from the UK rose from 36,000 tonnes in 2001 to nearly 4.2 million tonnes in 2014, see http://ec.europa.eu/eurostat/statistics-explained/index.php/Waste_shipment_statistics.

[79] See the National Waste Management Plan for England available at: http://www.gov.uk/defra.

[80] E. Scotford, 'Trash or Treasure: Policy Tensions in EC Waste Regulation' (2007) 19 *Journal of Environmental Law* 367.

[81] Article 3(1) Directive 2008/98/EC.

[82] *R v W* [2013] Environmental Law Reports 15.

or set of principles laid down and the case law is 'uncertain, contradictory, vague and very difficult to apply'.[83]

Waste operations including the recovery or disposal of waste fall within the general requirement for an environmental permit under the Environmental Permitting (England and Wales) Regulations 2016.[84] The Environment Agency has overall responsibility for determining applications and for monitoring and reviewing permitted activities. The Agency has wide enforcement powers to vary, suspend, or revoke permits.[85] Carrying out waste activities without a permit or in non-compliance with permit conditions is a criminal offence.[86] In keeping with a compliance-focused enforcement policy, criminal enforcement is seen very much as a last resort.[87]

Control over any party in the waste chain (including individuals) is applied through a more general 'duty of care' underpinned by a statutory Code of Practice.[88] The duty requires every party in the waste chain to take reasonable steps to ensure the safe management of waste from production to final disposal. Breach of the duty is a criminal offence.[89]

17.3.5 Nature Conservation and Landscape Protection

In very general terms, there is a dual approach to nature conservation in the UK with laws that seek to designate key protected sites alongside provisions that prohibit any direct and indirect interference with protected species of individual animals and plants. The designation of nationally and internationally important sites relies heavily on an approach using administrative and financial mechanisms that emphasize the importance of active management of protected habitats.[90] Species protection relies on extensive prohibitions under the criminal law, subject to certain exemptions via licensing systems.[91]

Nature conservation law and policy is administered by specialist agencies in each country of the United Kingdom.[92] These agencies have responsibility for identifying and notifying protected sites and species and have powers to enforce the law, through criminal prosecution where relevant.

The main statutory provisions relating to both species and habitats protection can be found in the Wildlife and Countryside Act 1981, an Act that has been updated through various amendments and supplementary secondary legislation—particularly to accommodate changes in European law.[93] These changes, along with a range of international and other designations,

[83] E. Lees, *Interpreting Environmental Offences. The Need for Certainty* (Oxford: Hart Publishing, 2013) 76; judicial comment in *R(OSS Group Ltd) v Environment Agency* [2007] Environmental Law Reports 8.

[84] Regulations 2(1) and 12(1). [85] Regulations 36–7. [86] Regulation 38(1).

[87] There were fifty-four waste prosecutions brought by the Agency in 2015, see Environment Agency, 'Regulating the Waste Industry: 2015 evidence summary', available at: http://www.gov.uk/government/publications/regulating-the-waste-industry-2015-evidence-summary.

[88] Environmental Protection Act 1990, s. 34 and Waste Duty of Care: Code of Practice, available at: http://www.gov.uk/government/publications/waste-duty-of-care-code-of-practice.

[89] Environmental Protection Act 1990, s. 34(6).

[90] Wildlife and Countryside Act 1981, Part II. [91] Ibid., Part I.

[92] Natural England, Natural Resources Wales, Scottish Natural Heritage, and the Northern Ireland Environment Agency.

[93] e.g. under the Countryside and Rights of Way Act 2000 and Natural Environment and Rural Communities Act 2006.

have created a patchwork of protected sites and landscape areas under national and European law with complex, often overlapping systems of regulation.[94]

The two most significant national designations are the National Nature Reserve (NNR) and the Site of Special Scientific Interest (SSSI), with the former largely being managed by the nature conservation agencies (e.g. Natural England) and the latter being within private ownership with certain limits on operations and activities that may be undertaken on the land.[95] These designations overlap with international and European designations including Special Protection Areas and Special Areas of Conservation.[96] They are selected on scientific grounds using criteria determined by the Joint Nature Conservation Committee (JNCC) which is the main statutory advisor to the UK government and devolved administrations.[97] European sites have overarching legislative objectives in terms of maintaining or restoring important habitat types and habitats of species to a favourable status. This requires stability of a species' or habitat's range over the long term.[98] These objectives are considered in the context of the assessment of any potential operations or development that might impact on European sites.

The distinction between national sites and European sites is also material when considering procedures for consenting activities and/or development on such sites. For national sites, owners and occupiers must apply for consent before undertaking any operations listed in the original notification of designation. Where consent is refused, the operations cannot go ahead.[99] For European sites, there is a more complicated process requiring an 'appropriate assessment' of the impact on the conservation objectives from a proposed plan or project including any proposed mitigation or compensation measures.[100] In this context the term 'plan or project' includes broader strategic plans as well as individual development proposals that could impact on the integrity of a European site.[101]

17.4 Implementation Framework

It will come as no surprise that the structure of the administration of environmental law in the UK is complex and lacks general coherence. Responsibilities for environmental matters are spread widely across a diverse range of administrative bodies. Moreover, devolution has added further parallel layers of administration with increasingly distinctive and sophisticated governance arrangements at the national level in the countries of a devolved United Kingdom.[102] As a consequence it is difficult to identify an underlying rationale for how and why the current

[94] The statutory advisor to the UK Government, the Joint Nature Conservation Committee (JNCC) list over thirty designations at http://jncc.defra.gov.uk/page-1527.

[95] This focus on managerial responsibility is the key distinction between these two designation because in practice all NNRs are designated as SSSIs.

[96] Under the Directive 2009/147/EC (Wild Birds) and Directive 92/43/EEC (Habitats) respectively.

[97] Available at http://jncc.defra.gov.uk.

[98] Ibid.

[99] Wildlife and Countryside Act 1981, s. 28E(3).

[100] Conservation of Habitats and Species Regulations 2010, reg. 61.

[101] See Case C-6/04 *Commission v United Kingdom* [2005] ECR I-9017.

[102] e.g. whilst the national environmental enforcement agencies in England, Wales, and Scotland have common areas of responsibility (e.g. in relation to pollution control functions) they also differ significantly in terms of the breadth of areas covered and individual governance arrangements.

structural arrangements have emerged, other than as pragmatic and incremental response to different political priorities at different stages in the evolution of environmental law.

17.4.1 Central Government

In central government responsibility for environmental law, policy, and decision-making has always been spread across different departments.[103] At the time of writing, responsibility for the core of environmental law and policy in the Westminster Parliament is led by the Department for Environment, Food and Rural Affairs (Defra). Other environmental responsibilities are divided amongst a range of departments including the Department for Communities and Local Government (DCLG);[104] the Department of Business, Energy and Industrial Strategy;[105] the Department of Transport; the Treasury;[106] and the Ministry of Justice.[107]

The diffusion of policy across different departments raises the challenge of coordinated responses to environmental problems. In 1970, the creation of an integrated Department of the Environment[108] was driven by a desire to achieve 'better policy coordination through the departmental integration of closely related functional responsibilities'.[109] A pattern of 'tinkering' with different policy areas in a cycle of integration and separation has followed since that time depending upon different elected governments' views of the priority of environmental protection. This 'tinkering' with central responsibilities can have a symbolic significance. An example of this symbolism can be seen in the evolution of responsibility for climate change within UK central government. In 2008, the creation of the Department of Energy and Climate Change (DECC) through the merger of the relevant sections of the environment and business departments was widely seen as a symbol of the prioritization of two key policy areas. Eight years later and following extended criticism of whether a separate department was efficient or necessary,[110] DECC was unceremoniously abolished and climate change policy now sits within the Department of Business, Energy and Industrial Strategy. Whether this represents a reduction of the national commitment to being a global leader on climate change or further integration within a large, more influential government department is debatable.

[103] e.g. pollution control responsibilities for the Alkali Act and successors were moved between the Board of Trade, the Local Government Board, the Ministry of Health, the Ministry of Housing and Local Government, and finally the Department of the Environment on its creation in 1970.

[104] With responsibility for town and country planning.

[105] Energy and climate change.

[106] Environmental taxation such as the Landfill Tax and Climate Change Levy.

[107] Access to justice matters.

[108] Claimed to be the 'World's first such Governmental department' see D. Russel and A. Jordan, 'Environmental Policy Integration in the UK' in A. Goria, A. Sgobbi, and I. von Homeyer (eds.), *Governance for the Environment: A Comparative Analysis of Environmental Policy Integration* (Cheltenham: Edward Elgar, 2010), 158.

[109] M. Painter, 'Policy Co-ordination in the Department of the Environment, 1970–1976' (1980) 58(2) *Public Administration* 135.

[110] Evidence of this can be seen in an unsuccessful Private Members Bill to abolish DECC, see the Department of Energy and Climate Change (Abolition) Bill 2015–16.

Central control is normally exercised by government departments through a combination of new legislation, policy variation, and individual decision-making. Environmental laws are often framed in such a way as to provide for wide powers to be delegated to the Secretary of State to exercise legislative or quasi-legislative functions. For example, the Secretary of State for the Environment, Food and Rural Affairs has general powers to issue 'directions of a specific or general character' to the Environment Agency in exercising any of its functions.[111] Although laws provide the framework for power, they have little to say about *how* such powers should be exercised. Hence, the role of policy is paramount here. The practical application of policy is seen through a centralized power to determine appeals against certain decisions.[112]

Accountability for the effectiveness of environmental law and policy is maintained through scrutiny by several cross-party Parliamentary Select Committees and the House of Commons Environmental Audit Committee.[113] These Committees undertake regular inquiries into different environmental policy areas. In doing do they invite evidence from external witnesses (including academics, practitioners, and non-governmental organizations (NGOs)) as part of a process of scrutinizing the effectiveness of law, policy, and practical implementation. The recommendations of these Select Committees are influential when the government is considering changes to law and policy.

17.4.2 Local Government

In keeping with a long history of devolving certain decisions to the local level, several operational aspects of environmental law and policy are decentralized to local authorities. The most significant of these is the role of the local planning authority with responsibility for strategic plan-making and individual development control decisions. Local authorities also have responsibilities for other environmental functions such as air quality management, waste collection and recycling, statutory nuisances, and identifying and cleaning up contaminated sites.

17.4.3 Specialist Agencies

In keeping with a fragmented approach to environmental regulation, specialist public agencies are generally divided functionally and geographically in each of the constituent countries of the UK.[114] In England and Scotland there are two main regulators dealing with pollution control, namely the Environment Agency (EA) and the Scottish Environment Protection

[111] Environment Act 1995, s. 40.

[112] In the planning system, appeals are heard by the Planning Inspectorate on behalf of the Secretary of State, ensuring that central policy guidance is overseen.

[113] http://www.parliament.uk/business/committees/committees-a-z/commons-select/environment-food-and-rural-affairs-committee/ and www.parliament.uk/business/committees/committees-a-z/commons-select/environmental-audit-committee/.

[114] A broad description fails to capture the degree to which there are exceptions and anomalies. e.g. the Drinking Water Inspectorate has responsibility for drinking water quality in England and Wales and private water companies have regulatory responsibility for trade effluent discharges to sewers.

Agency respectively. Nature conservation functions are undertaken by Natural England and Scottish Natural Heritage. Wales (Natural Resources Wales) and Northern Ireland (Northern Ireland Environment Agency) have a single integrated regulator with overall responsibility for both pollution control and nature conservation along with other associated activities (e.g. marine licensing and fisheries). The major distinction here is that NRW is an independent public body whilst NIEA is an executive agency within the Department of Agriculture, Environment and Rural Affairs.[115]

This diversity of responsibilities reflects the influence of history and the fragmenting effect of devolution. For example, in England, the EA and Natural England represent the latest iterations of a long sequence of mergers of smaller, more specialized agencies with different areas of responsibilities and cultures. The EA has overall responsibility for a wide range of functions including pollution control regulation, water resources, flood management, and fisheries and is subject to a wide range of duties, aims, and objectives, with the principal aim of 'attaining the objective of achieving sustainable development'.[116] Perhaps as a consequence of the breadth of functions of the Agency and the diffuse nature of these aims and objectives, it suffers from the criticism that it lacks a distinctive regulatory identity.[117] In other words it is often difficult to differentiate between the EA's role in policing compliance from its role in advising polluters or its role as a potential champion of the unowned environment. Although the Agency is independent of government it does not pursue a distinctively individual or aggressive policy agenda.

17.4.4 The Role of Courts and Tribunals

Courts and tribunals fulfil a number of different but complementary roles in adjudicating environmental disputes in the UK. The usual caveat applies here, namely that in a multi-jurisdictional United Kingdom there are structural differences in the court systems. Starting at the lowest level, there are specialist administrative tribunals that determine decisions on miscellaneous land use planning and environmental appeals. These decisions are heavily influenced by the application of central and local policies. Moreover although such decisions can involve the consideration and application of legal principles, they carry no legal significance and are subject to review in a specialist Chamber of the civil High Court.[118] In comparison to civil law countries, therefore, the lack of a specialized administrative court system is notable. At the next level, powers to determine criminal liability and sentencing for offences under environmental law rest mainly with the Magistrates' Court and the Crown

[115] Leading to criticisms about legitimacy and accountability, see Turner, 'Laying the Foundations for a Sustainable Northern Ireland'.

[116] Environment Act 1995, s. 4(1); other duties and objectives can be found in ss. 5–9.

[117] D. Bell and T. Gray, 'The Ambiguous Role of the Environment Agency in England and Wales' (2002) 11(3) *Environmental Politics* 76.

[118] The Planning Inspectorate decides a wide range of environmental appeals including appeals against refusals of planning permission under the Town and Country Planning Act 1990; under the Environmental Permitting Regulations 2016; under the Environmental Damage (Prevention and Remediation) England Regulations 2015; and against refusals of Hazardous Substances consent under the Planning (Hazardous Substances) Act 1990.

Court.[119] Civil courts also determine private law claims with environmental dimensions (e.g. nuisance) and fulfil an appellate function for statutory rights of appeal.[120]

In terms of their influence on environmental jurisprudence, however, these courts play a subsidiary role when compared to the High Court's jurisdiction over the judicial review of administrative powers and duties found in environmental legislation.[121] The role of the courts in this context tends to be supervisory and not necessarily adjudicatory of the substantive merits of decisions. There is deference to technical fact-finding and the interpretation and application of policy when exercising administrative discretion by specialist regulators.[122] There is also an emphasis on due process and general administrative principles of substantive illegality as opposed to say the 'correct' application of environmental principles or of any notions of environmental justice in its own right.

17.4.4.1 *Access to Justice*

The term 'access to justice' in the context of environmental matters in the UK is generally used when considering the adequacy and availability of public law remedies for private individuals and representative groups (e.g. NGOs). Unlike other European countries, there is no significant link between individuals or representative groups and the enforcement of civil or criminal environmental law.[123] The extent to which courts and judicial review play a *sufficient* or normative role in UK environmental law has been the subject of lengthy debate.[124] In that debate, two main themes dominate. The first is procedural, namely whether judicial review provides adequate access to justice for claimants challenging environmental decisions. This involves questions of the adequacy of the implementation of obligations under the Aarhus Convention and European law and the extent to which there are procedural hurdles to bringing environmental claims.[125] In the UK the most significant of these hurdles are whether a claimant has a 'sufficient interest' to bring a claim; whether the time limits for bringing a claim are unduly restrictive; and whether the procedural rules on paying the costs of litigation are unduly punitive for individual parties. The second theme is institutional and structural, namely the extent to which any inherent limitations of the

[119] With the severity of the offence and level of available sanctions determining which layer considers which offences.

[120] e.g. appeals against abatement notices can be heard at the Magistrates Court under the statutory nuisance provisions in Part II of the Environmental Protection Act 1990, s. 79.

[121] This includes both general powers of judicial review and statutory rights of appeal against decisions on questions of law e.g. Town and Country Planning Act 1990, s. 288 provides for challenges against planning decisions.

[122] e.g. in relation to nature conservation site designation see *R (Western Power Distribution Investments Ltd) v Countryside Council for Wales* [2007] Environmental Law Reports 25; *Fisher v English Nature* [2005] Environmental Law Reports 10.

[123] N. Sadeleer, G. Roller, and M. Dross, *Access to Justice in Environmental Matters* ENV.A.3/ETU/2002/0030 11.

[124] P. McAuslan, 'The Role of Courts and other Judicial Type Bodies in Environmental Management' (1991) 3(2) *Journal of Environmental Law* 195; H. Woolf, 'Are the Judiciary Environmentally Myopic' (1992) 4(1) *Journal of Environmental Law* 1.

[125] UN/ECE Convention on access to information, public participation in decision-making and access to justice in environmental matters (Aarhus Convention). The EU position is complex with no general Directive on access to justice (see COM/2003/0624) but individual provisions in specific Directives e.g. Art. 25 Directive 2010/75/EU on Industrial Emissions (IPPC).

current role of the courts could be addressed through the introduction of a specialist environmental court.

17.4.4.2 *The Requirement of a 'Sufficient Interest'*

In the UK there is a relatively liberal approach taken in relation to who can bring an environmental judicial review claim.[126] In general a claimant must demonstrate that they have a 'sufficient interest' in the subject of the proceedings.[127] Historically, this concept was narrowly construed.[128] This meant that representative challenges to decisions affecting the unowned environment by NGOs or individuals would not necessarily meet the requirement of 'sufficient interest'.[129] In a series of decisions liberalizing this requirement in public interest litigation, the courts shifted away from a rights-focused to an interests-focused approach. It was recognized that representative challenges to environmental decisions invariably involved breaches of public law and the importance of the public interest in such decisions meant that any individual member of the representative group would have a 'sufficient interest' regardless of whether any private right existed.[130]

17.4.4.3 *Time Limits*

The second barrier to access to justice in the UK is the requirement to bring a claim for judicial review within certain time limits and in some cases to do so 'promptly' even within the specified time limit.[131] The specific time limit for general environmental judicial review claims is three months from the date on which the grounds for bringing the claim first arose.[132] In challenges to planning decisions there is a strict six-week time limit.[133] The requirement for claimants to act 'promptly' even within the general three month time limit was criticized as being vague and uncertain by the Aarhus Convention's Compliance Committee.[134] Subsequently, it was found to be in contravention of the legal principles of certainty and effectiveness by the European Court with a corresponding interpretation

[126] There was a period when the rules on standing were interpreted in an 'unduly restrictive' fashion in Scotland but the Supreme Court took the opportunity to regularize the position in *AXA General Insurance v Lord Advocate* [2011] UKSC 46, applied in the context of an environmental case in *Walton v Scottish Ministers* [2013] Environmental Law Reports 16 and then incorporated into formal procedure under the Court of Session Act 1988, s. 27B(2).

[127] Senior Courts Act 1981, s. 31(3), Judicature (Northern Ireland) Act 1978, s. 18(4), and Court of Session Act 1988, s. 27B(2)(a).

[128] *R v Secretary of State for the Environment, ex parte Rose Theatre Trust* [1990] 1 QB 504 in which a newly formed group sought to protect a Shakespearean theatre.

[129] C. Hilson and I. Cram, 'Judicial Review and Environmental Law—Is There a Coherent View of Standing?' (1996) *Legal Studies* 1.

[130] These decisions have the effect of excluding only a 'mere busybody interfering in something with which (s)he has no legitimate concern': *Walton v Scottish Ministers*.

[131] Senior Courts Act 1981, s. 31(6) and the Civil Procedure Rules (CPR), r. 54.5.

[132] *R v Hammersmith London Borough Council, ex parte Burkett* [2003] Environmental Law Reports 6, in which the House of Lords held that in planning cases, the trigger date was the grant of the permission that was the subject of the challenge.

[133] This is the case under both the statutory appeal route and where a planning permission is challenged by way of general judicial review: CPR 54.5(5) and Town and Country Planning Act 1990, s. 288(3).

[134] Communication ACCC/C2008/33, available at: http://unece.org/env/pp/compliance/Compliancecommittee/33TableUK.html.

latterly in domestic cases.[135] This has the effect of ensuring that in cases involving European law, there is no requirement to act 'promptly' although there remains a residual requirement for 'promptness' for those aspects of a case that feature national rather than European law.[136]

17.4.4.4 *Costs and Funding*

The third and potentially the most significant barrier to access to justice in the UK is the extent to which the cost of public interest litigation in environmental matters complies with the requirement of the Aarhus Convention that access to justice should not be 'prohibitively expensive'.[137] The general presumption in the UK is that the loser in any civil or administrative action will pay both their own and the winner's costs unless there is a specific procedural rule or order by the judge that rebuts that presumption. Litigation is expensive and in true public interest cases, the risk of a liability for costs acts as a significant disincentive to potential claimants.[138]

The Criminal Justice and Courts Act 2015 introduced amendments that impose a presumptive costs limit of £5,000 per individual claimant or £10,000 for groups or companies in 'Aarhus Convention Claims'.[139] These fixed limits are not automatically applied to every Aarhus claim. There is power in the Rules to vary the limit on the costs if it would comply with the requirement to not make the proceedings 'prohibitively expensive'.[140]

These rules go some way towards implementing the Aarhus requirements and European law on costs in environmental cases. These changes were introduced after criticisms by the European Court that the previous rules were not 'sufficiently precise and clear enough' to ensure that proceedings were not 'prohibitively expensive'.[141] Arguably, the rules are still not fully Aarhus compliant as statutory planning appeals are not covered by either the fixed costs rules or the new ability for a court to make Costs Capping Orders in general judicial review claims (i.e. non Aarhus Convention Claims).[142] This anomaly has been criticized by the Court of Appeal and the Aarhus Convention's Compliance Committee,[143] but as the Convention is not directly effective in the UK courts, the government appears to have a discretion over manner in which the obligations are implemented.

[135] Case C-406/08 *Uniplex (UK) Ltd v NHS Business Services Authority.*

[136] *R (Buglife) v Medway Council* [2011] Environmental Law Reports 27; also *R (Berky) v Newport City Council* [2012] Environmental Law Reports 35 in which the requirement for promptness applied to grounds of challenge brought in relation to alleged bias and irrationality.

[137] Article 9 Aarhus Convention, that requires access to environmental justice procedures that are adequate and effective and not prohibitively expensive.

[138] The same is also true in private interest cases where there is an overlapping public interest e.g. private nuisances, although the financial incentive to bring such cases may be slightly different.

[139] CPR, rr. 41–45 for 'Aarhus Convention Claims'. A defendant's costs in an Aarhus claim are limited to £35,000. There are slightly broader principles to limit costs in the case of statutory appeals to the High Court including claims brought against planning decisions under the Town and Country Planning Act 1990, s. 288; see CPR, rr. 52.19 and 52.19A.

[140] i.e. exceed the claimant's financial resources or be objectively unreasonable taking into account the circumstances of the claim (e.g. prospect of success, complexity, and the importance of the issues).

[141] Case C-530/11 *European Commission v UK* [2014] Environmental Law Reports D2.

[142] Criminal Justice and Courts Act 2015, ss. 88–90 and CPR, r. 46.17 in the case of general judicial review.

[143] *Secretary of State for Communities and Local Government v Venn* [2015] Environmental Law Reports 14; UNECE, Decision V/9n on compliance by the UK.

17.4.4.5 *A Specialist Environmental Court*

There has been a long history of calls for a specialist court in England to deal solely with environmental matters.[144] When a separate environmental court (of sorts) was finally created in 2010, the model adopted was hardly revolutionary. The Environment section of the General Regulatory Chamber of the First-Tier Tribunal was created originally to adjudicate on the civil sanctions regime.[145] The type of claims heard in the tribunal are some way away from the original vision of a specialist environmental court as a 'one-stop shop'. The volume of appeals has not been significant and an opportunity to transfer the high volume of planning cases to the Court was rejected on costs grounds.[146] Certainly, as long as the remit of the tribunal remains narrow, it is unlikely to have any material impact on domestic environmental law.

17.4.5 Enforcement

In keeping with its historical roots, the enforcement of UK environmental law remains firmly based on a discretionary, compliance model whereby regulatory agencies tend to seek to 'engage with business to educate and enable compliance' rather than sanctioning non-compliance in a rigid and legalistic fashion.[147] Thus, in cases where there are ongoing relationships between a regulator and regulated parties, there will often be a cooperative approach to non-compliance where negotiation and persuasion are used in preference to more formal action.

The discretionary element of enforcing environmental law is emphasized by the availability of a wide range of civil (i.e. non-criminal) sanctions under the Regulatory Enforcement and Sanctions Act 2008.[148] This legislation provides the Environment Agency[149] with flexible tools to deal with environmental offenders without having to bring a formal prosecution.

In contrast to this informal, flexible, negotiated style of compliance and the use of civil sanctions, the substance of environmental law makes widespread use of no fault or strict liability for criminal offences.[150] This is in keeping with the approach to criminal liability for other regulatory offences which have traditionally not been viewed in the same context as traditional crimes.[151] The potential unfairness of the strictness of criminal liability for

[144] P. McAuslan, 'The Role of Courts and other Judicial Type Bodies in Environmental Management' (1991) 3(2) *Journal of Environmental Law* 195; H. Woolf, 'Are the Judiciary Environmentally Myopic' (1992) 4(1) *Journal of Environmental Law* 1.

[145] Regulatory and Enforcement Sanctions Act 2008, Part III. The First-Tier Tribunal was created in the reorganization of the administrative tribunals system in the Tribunals, Courts and Enforcement Act 2007.

[146] Defra, Environmental Permitting—Consultation on Draft Environmental Permitting (England and Wales)(Amendment) Regulations 2013—a package of measures.

[147] Environment Agency, 'Enforcement and Sanctions Statement' (2014) 4.

[148] In England and Wales, the details are found in secondary legislation, see the Environmental Civil Sanctions (England) Order 2010 and the Environmental Civil Sanctions (Wales) Order 2010. The position is slightly different in Scotland under the Regulatory Reform (Scotland) Act 2014, Part 3.

[149] With SEPA and Natural Resources Wales having similar powers.

[150] The Law Commission, *Criminal Liability in Regulatory Contexts: A Consultation Paper*, Consultation paper, No. 195, available at: http://www.%20lawcom.gov.uk/project/criminal-%20liability-%20in-%20regulatory-%20contexts/.

[151] Ibid.

environmental offences is balanced out by the availability of civil sanctions, statutory defences that emphasize certain mitigating factors (e.g. due diligence to avoid the commission of an offence), and the scale of penalties that may be imposed by the courts to reflect the degree of blame or harm caused.[152]

Until relatively recently, the modest limits for fines in the lowest tier of the criminal courts (where many environmental offences are tried) combined with the moral ambiguity associated with the regulatory nature of environmental offences in the UK was reflected in relatively low sanctions, particularly fines for corporate offenders. Following sustained criticisms of the lack of a sufficient sanctioning and deterrent effect, sentencing guidelines have been produced that provide for a process in which fines are set by reference to variable factors including the size and culpability of a corporate offender along with the significance of the environmental harm caused. The guidelines have been endorsed in the Court of Appeal. In particular, the Court noted that in serious cases involving 'very large organisations', it would not be unreasonable to punish with a fine of up to 100 per cent of that company's annual pre-tax profit.[153] The practical impact of these guidelines have been seen in one example from the water industry. From 2005–13, Thames Water was the most heavily fined water company in the UK with overall fines totalling £842,500 from eighty-seven pollution incidents.[154] In 2017, it was fined for £20.3 million for a series of pollution incidents at sewage treatment works.[155]

17.5 Conclusion: Fragmentation and Integration? UK Environmental Law in Flux

The development of the UK model of environmental law is a story of incremental and pragmatic change. The current state of UK environmental law reflects a combination of historical influences on regulatory culture, the dominance of the approximation of European law, and the emergence of distinctive national legal identities within the countries of the UK. This cycle of fragmentation and integration continues with the UK's decision to leave the EU. The contingent nature of Brexit negotiations and the UK's place within Europe but outside the EU leaves the question of possible future directions for UK environmental law very much open.

On a basic level, the reductionist thoroughness of 'copy out' and referential techniques to transpose Directives means that European law will continue to play an influential role in the UK for some time after leaving the EU. Many key concepts in UK environmental law have only previously been interpreted through a European lens. Simplistic revisionism cannot deny the evolution of many domestic environmental laws through the European law making process and subsequent interpretations by the European courts. In this sense, the questions

[152] Ibid. [153] *R v Thames Water Utilities* [2015] Environmental Law Reports 36.

[154] 'Revealed: how UK water companies are polluting Britain's rivers and beaches', the *Guardian*, 3 August 2013.

[155] 'Thames Water hit with record £20m fine for huge sewage leaks', the *Guardian*, 22 March 2017.

about leaving the EU are not just about which laws still apply, they are also about how we make sense of domestic laws which have that in-built European context.

Moreover, membership of the EU has provided the stability for the UK to devolve environmental law-making powers in a way which encourages distinctive national approaches within the UK whilst maintaining a degree of substantive coherence. The absence of the constraining effect of European obligations may encourage further fragmentation in the countries of the UK. Certainly, there is evidence of greater clarity in the distinctiveness of environmental governance in Scotland and Wales that suggests that regulatory style may diverge notwithstanding similar substantive laws. Whether this type of structural fragmentation will help to address the issues of the complexity, incoherence, and lack of integration of environmental law in the UK as a single nation is quite a different matter.

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