REGULATING FOR SUSTAINABLE ELECTRICITY MARKET OUTCOMES IN BRITAIN: ASKING THE LAW QUESTION

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Introduction

A sustainable approach to electricity regulation may be taken to mean one which seeks to integrate social, environmental and economic objectives, and which encompasses the interests of future as well as current generations.[1] More specifically, according to the British energy regulator, Ofgem,[2] as well as protecting consumers' economic interests, it involves: managing the transition to a low carbon economy; eradicating fuel poverty and protecting vulnerable consumers; promoting energy saving; ensuring a secure and reliable electricity supply; and supporting improvement in all aspects of the environment.[3] This new regulatory paradigm contrasts with the market paradigm which dominated electricity regulation in many countries, including Britain and Australia, for much of the past two decades, and which focused on the pursuit of economic efficiency through competition or competition-substitutes. Nevertheless, while a sustainable approach rejects the claim that markets can supply all the answers to regulatory problems, and implies a more active role for government in shaping industry outcomes,[4] the market remains – at least for the time being – the context in which broader policy goals must be pursued. In turn, current market and regulatory structures betray the legacy of the post-war 'industrial model', which was primarily concerned with securing economies of scale, and expanding electricity networks and generating capacity to meet rising demand, through vertical integration and monopolisation, centralised networks and large-scale, often highly polluting, generating units.

Against this historical background, making the transition to sustainable electricity markets is likely to require fundamental and wide-ranging reforms. Although the shape of such markets is contested, and the precise changes needed will depend upon the context, they are likely to include some or all of the following:[5]:

- Improved financial and other support for low carbon generation;
- More stringent control of greenhouse gas and other harmful emissions;
- Changes to market rules and structures, for example, in wholesale markets to facilitate access by, and prioritise despatch of, low carbon generation or to reward excess capacity and demand-side reductions, or in retail markets to promote new business models focused on the supply of energy services rather than units of energy;
- Changes to network price controls, charging, access and operational rules, to facilitate investment in grid extensions and reinforcements and smart metering technology, to

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[1] See, eg, World Commission on Environment and Development (Brundtland Commission), *Our Common Future* (Oxford University Press, Oxford, 1987) p 8; OECD, *Governance for Sustainable Development: Five OECD Case Studies* (OECD, 2002) p 10.

[2] The Office of Gas and Electricity Markets.

[3] http://www.ofgem.gov.uk/Sustainability/Pages/Sustain.aspx viewed 3 April 2013.

[4] See Mitchell C, *The Political Economy of Sustainable Energy* (Palgrave Macmillan, Basingstoke, 2008) ch 9.

[5] See, eg, Patterson W, *Keeping the Lights One: Towards Sustainable Electricity* (Earthscan, London, 2007) Pt 2; Mitchell, n 4, pp 62-66.

remove barriers to renewables, distributed generation, combined heat and power, and micro-generation, and to cope with intermittency and two-way power flows;

- Increased interconnection between systems (where possible) to improve reliability and security of supply and reduce system costs;
- Measures to promote innovation, for example, in the development of low carbon generation technologies, smart grids, or electricity storage;
- Stronger measures to promote energy efficiency and conservation;
- New social programmes to protect vulnerable consumers against rising energy costs;
- Planning and associated reforms to reduce obstacles to investment in new infrastructure, whilst minimising adverse environmental impacts;
- Greater co-ordination between electricity and other energy markets, particularly transport and heat.

The scale of the regulatory challenge that this transition involves should not be underestimated.[6] For one thing, it requires massive investment in new generating capacity, network assets and demand-side measures. Not only has this need arisen in an era of financial crisis, but problems of capital intensity, sunk costs and long asset lives make investment in electricity assets inherently risky, hence requiring a high degree of financial and regulatory certainty. Combined with its network character, these factors also make the electricity industry particularly prone to problems of path dependency and technological 'lock-in'. Consequently, to set it on a new, more sustainable path urgent and concerted regulatory action is needed. However, there is a high degree of uncertainty about what precisely that path should be.[7] This is partly a question of the long timescales involved, and hence the difficulty of forecasting technological developments and behavioural changes, but it is also a feature of the concept of sustainability itself, which inevitably involves complex – and value-laden – trade-offs between its different elements, and is inherently dynamic.[8] In other words, it is not clear what industry model offers the optimum balance between economic, social and environmental goals; this is, moreover, inherently contestable and liable to change over time.

Further problems may include: hostile regulatory cultures, particularly within economic regulatory agencies still wedded to the market paradigm; the dispersal of legal and other regulatory or implementation capacities amongst a range of different agencies and actors;[9] and what Kuzemko describes as 'deskilling' – that is, the loss of energy policy expertise within government due to

[6] See generally Mitchell, n 4, ch 3; Mitchell C and Woodman B, 'Regulation and Sustainable Energy Systems', in Baldwin R, Cave M and Lodge M (eds), *The Oxford Handbook of Regulation* (Oxford University Press, Oxford, 2010).

[7] Eg, in 2008, Ofgem identified 5 distinct, but equally plausible development paths for the British electricity industry – *Long Term Electricity Networks Scenarios (LENS) – Final Report*, http://www.ofgem.gov.uk/Pages/MoreInformation.aspx?docid=5&refer=Networks/Trans/Archive/ElecTrans/LENS visited 27 April 2013.

[8] See Brundtland Commission, n 1, p 9. On strong and weak interpretations of sustainability, see eg Neumayer E, *Weak Versus Strong Sustainability: Exploring the Limits of Two Opposing Paradigms* (Edward Elgar Publishing, Cheltenham, 2nd revised edn, 2004).

[9] Which may include regulated companies as well as government bodies – see, eg, Black J, 'Decentring Regulation: the Role of Regulation and Self-Regulation in a Post-Regulatory World' (2001) 54 *Current Legal Problems* 103. My focus in this article is, however, on formal regulatory capacity.

deliberate strategies of depoliticisation following privatisation and liberalisation.[10] Finally, there may be significant political opposition to sustainable energy strategies, particularly decarbonisation policies, since their benefits are mostly long-term, but their costs to consumers and citizens in terms of rising prices and the amenity impacts of new infrastructure will be felt in the short-term.

In short, making the transition to sustainable electricity markets requires a high degree of regulatory commitment to secure the necessary investment in change, but such regulatory commitment is difficult to achieve. In light of these problems, this article discusses the role – and the limits – of law in supporting the transition to the new regulatory paradigm. In so doing, I draw upon experience in British[11] electricity regulation, which was once described as 'the poster child of global liberalisation'.[12] Although the regulatory regime never focused exclusively on efficiency – and energy policy goals were explicitly broadened beyond promotion of competition to include social, environmental and security of supply goals in 2003[13] – electricity liberalisation was nevertheless pursued further and faster than in most other countries, and the industry regulator was strongly committed to the market paradigm. As recently as 2007, the Sustainable Development Commission found that Ofgem's culture was still highly economistic;[14] social and environmental measures were regarded as market distortions to be kept to a minimum and their core objectives were not embedded into its mainstream thinking. More generally, government policies to promote non-market objectives were piecemeal, weak and of limited effectiveness.[15]

Since around 2008 to 2009, however, there has been a step change in British electricity regulation.[16] Although making competition work better is still a major regulatory objective, the regulator's duty to promote competition has been weakened,[17] and the government now describes its energy policy goals as threefold: 'to keep the lights on, to keep energy bills affordable and to decarbonise electricity generation.'[18] Reflecting these altered priorities, there has been a raft of regulatory, legislative and other policy changes aimed at promoting sustainable market outcomes, with further

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[10] Kuzemko C, *UK Energy Governance in the Twenty-first Century: Unravelling the Ties that Bind*, PhD Thesis, University of Warwick, October 2011, pp 218, 233-234, http://wrap.warwick.ac.uk/48684/ viewed 3 April 2013.

[11] I use Britain, rather than the United Kingdom deliberately, since the electricity industry in Northern Ireland is organised and regulated separately from the industry in England, Wales and Scotland.

[12] *The Economist*, 2003, quoted by Yarrow J, 'Where Next for Utility Regulation?', Beesley Lecture 2010, p 2, available at http://www.rpieurope.org/Beesley/2010/Lecture%201%20George%20Yarrow.pdf viewed 4 April 2013.

[13] Department of Trade and Industry, *Our Energy Future – Creating a Low Carbon Economy*, Cm 5761, (TSO, London, 2003).

[14] Sustainable Development Commission, *Lost in Transmission? The Role of Ofgem in a Changing Climate* (2007), pp 11, 25, 31, 36, http://www.sd-commission.org.uk/data/files/publications/SDC_ofgem_report%20(2).pdf viewed 1 March 2013. See also Bartle I and Vass P, *Economic Regulators and Sustainable Development: Promoting Good Governance*, CRI Research Report 18 (CRI, Bath, 2006).

[15] See McHarg A, 'The Political Economy of Regulation: Developments in British Energy Regulation Under Labour' in Barton B et al (eds), *Regulating Energy and Natural Resources* (Oxford University Press, Oxford, 2006), pp 157-164; Sustainable Development Commission, n 14; Bartle and Vass, n 14; Mitchell, n 4, chs 5 and 6.

[16] See Rutledge I, 'UK Energy Policy and Market Fundamentalism: A Historical Overview', in Rutledge I and Wright P, *UK Energy Policy and the End of Market Fundamentalism* (Oxford University Press, Oxford, 2010).

[17] Energy Act 2010, s 17(3).

[18] Department of Energy and Climate Change (DECC), *Electricity Market Reform: Policy Overview*, CM 8498 (London, TSO, 2012) p 7.

significant reforms still to come. Major changes include, *inter alia*: a fundamental overhaul of network price regulation to promote sustainable investment and innovation; new microgeneration feed-in tariffs; measures to promote carbon capture and storage; new statutory social tariffs; innovative measures to promote energy efficiency; planning reforms to facilitate major infrastructure projects; the introduction of a carbon price floor; and a planned roll-out of smart meters. Legislation currently before Parliament will also reform the wholesale electricity market to introduce new financial supports for low carbon generators, create a new capacity market, and set emissions performance standards for fossil fuel generators.[19]

Matters are, however, far from perfect. There are serious problems with investment in new generation capacity, and warnings of an imminent security of supply crisis as older plants come offline,[20] while energy prices and fuel poverty levels are rising. Moreover, the planned electricity market reforms have been criticised as being too slow and insufficiently radical, and there are mixed messages from the current government over its commitment to decarbonisation of the electricity system.[21]

Sustainable electricity regulation in Britain cannot therefore be regarded as an exemplar, but it nevertheless remains interesting as a case study in regulatory change. As such, it is particularly relevant for a country like Australia which followed Britain's lead in liberalising its electricity industry and adopting a 'light-handed' approach to regulation,[22] but which now faces similar pressures to address wider objectives, especially in relation to climate change. Accordingly, my intention is not to critique the specific measures that have been undertaken in Britain in pursuit of sustainability objectives.[23] Rather, my focus is on the meta-regulatory role of law: that is, its role in reorienting the regulatory regime towards sustainability.[24] I adopt this approach for two main reasons. First, given that the transition to a sustainable electricity market is likely to involve multiple and repeated regulatory interventions and adjustments over a prolonged period,[25] the general objectives of the

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[19] For an overview of recent and planned reforms see DECC, *Planning Our Electric Future: A White Paper for Secure, Affordable and Low-Carbon Electricity* Cm 8099 (2011), https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/48129/2176-emr-white-paper.pdf viewed 27 April 2013.

[20] See Buchanan A, 'Will GB's Lights Stay On and Will the Gas Keep Flowing? A Look at the Next Decade', 19 February 2013, http://www.ofgem.gov.uk/Media/keyspeeches/Documents1/LECTURE%20-%2019TH%20FEBRUARY%202013.pdf viewed 4 April 2013.

[21] See generally House of Commons Energy and Climate Change Committee, *Electricity Market Reform*, 4th Report, 2010 – 2012, HC 742; *Draft Energy Bill: Pre-Legislative Scrutiny*, 1st Report 2012 -2013, HC 275.

[22] Littlechild S, *The Regulation of British Telecommunication's Profitability* (Department of Industry, London, 1983); *Economic Regulation of Privatised Water Authorities* (HMSO, London, 1986).

[23] For criticisms, see references in n 21; and for a general overview of relevant regulatory instruments, see Gunningham N, 'Regulation, Economic Instruments and Sustainable Energy', in Goldthau A, *The Handbook of Global Energy Policy* (John Wiley & Sons, Chichester, 2013).

[24] 'Meta-regulation' is often used narrowly to refer to public oversight of self-regulatory regimes – see Coglianese C and Mendelson E, 'Meta-Regulation and Self-Regulation', in Baldwin, Cave and Lodge (eds) n 6. But for its use to refer to the disciplining of public regulatory regimes, see eg Morgan B, *Social Citizenship in the Shadow of Competition: the Bureaucratic Politics of Regulatory Justification* (Ashgate, Aldershot, 2003). The idea of 'regulating the regulators' in this broader sense is usually associated with the enforcement of a light-touch regulatory model which seeks to minimise interference with the market, but it clearly need not be so limited – see Prosser T, *The Regulatory Enterprise: Government, Regulation and Legitimacy* (Oxford University Press, Oxford, 2010) ch 10.

[25] Cf. Bartle and Vass, n 14, p 16.

regulatory regime are at least as important as any specific regulatory instruments.[26] Indeed, for this reason, promoting good governance is regarded as a key element of sustainable development.[27] Secondly, it is at this meta-regulatory level that the law can make the greatest independent contribution to the achievement of sustainability. Whereas law plays a largely instrumental role in supporting specific regulatory interventions, giving legal expression to sustainability objectives by creating new institutions or general rights, powers and obligations may itself be regarded an important regulatory strategy.

The role of law should, of course, not be exaggerated. A decision to change the law requires a prior political commitment to sustainability which may be regarded as the key step, liable to produce a regulatory response irrespective of what the law says. Nevertheless, law potentially has three important functions to perform: first, reinforcing and maintaining political commitment; second, providing a means of co-ordinating dispersed regulatory capacities; and third, balancing competing requirements of regulatory certainty and flexibility. The article considers five legal techniques which, although not exhaustive of the ways in which law can promote regulatory change,[28] have been used to support the transition to sustainable electricity regulation in Britain. These are: the creation of new regulatory institutions; the imposition of new statutory duties; the creation of legally-binding targets; obligations to produce guidance, strategies and plans; and legal protections against regulatory change.

Institutional Design

Given the need to change regulatory culture and to integrate (both vertically and horizontally)[29] economic, social and environmental policies, an obvious means of reorienting regulatory regimes towards sustainable outcomes is to establish new institutions with new personnel and procedures, and wide-ranging responsibility for sectoral regulation. In fact, though, despite occasional calls to replace Ofgem with a broader energy agency,[30] there has been substantial institutional continuity in British electricity regulation, with no fundamental reform of the industry regulator since gas and electricity regulation were merged, and individual regulators replaced with a regulatory board, by

[26] See Fiorino DJ, 'Rethinking Environmental Regulation: Perspectives on Law and Governance' [1999] 23 *Harvard Environmental Law Review* 441.
[27] See, eg, Department of the Environment, Food and Rural Affairs, *The UK Government Sustainable Development Strategy*, Cm 6467 (TSO, London, 2005) p 16.
[28] Other techniques might include co-opting the courts as regulators, relying on general legal norms to impose sustainability obligations on regulated companies or individuals. This kind of litigation strategy was, however, effectively precluded in situations where a specific regulatory regime already exists by *Marcic v Thames Water Utilities Ltd* [2003] All ER 89. Alternatively, participatory techniques may be employed as a means of coping with uncertainty and enhancing public acceptability of sustainability measures. Again, with the limited exception of the new network price controls (see McHarg A, 'Evolution and Revolution in British Energy Network Regulation: From RPI-X to RIIO', in Roggenkamp MM et al (eds), *Energy Networks and the Law: Innovative Solutions in Changing Markets* (Oxford University Press, Oxford, 2012) pp 327-328, 330-332), this has not been a feature of the British experience. Indeed, in the context of land-use planning, participation rights have arguably been undermined – see nn 83-86 below and accompanying text.
[29] Bartle and Vass, n 14, pp 13-14.
[30] See in particular Helm D, *The New Regulatory Agenda* (Social Market Foundation, 2004), http://www.dieterhelm.co.uk/sites/default/files/TheNewRegulatoryAgenda.pdf viewed 4 April 2013. See also Owen G, *Energy Regulation and Sustainability Policy* (Sustainability First, 2004) p 30, http://www.sustainabilityfirst.org.uk/docs/2004/Econregfinalpdf.pdf viewed 4 April 2013.

the Utilities Act 2000. Ofgem's senior personnel have been unchanged since 2003,[31] and sustainable development is only one of several areas of expertise represented on its governing board. Similarly, the only relevant procedural change has been the imposition of a duty to carry out environmental impact assessments.[32]

There are several reasons why institutional reform has not played a more prominent role. First, the scope for vertical policy integration is limited by the multi-layered nature of energy policy, where relevant legal competences are shared between EU, national and devolved levels of government, and by the requirement under EU internal market legislation to have an independent regulatory authority.[33] Second, there has been an influential argument against integration of economic with social and environmental regulation, on the basis that this would undermine economic efficiency, and involve regulators in 'political' decision-making for which they could not be held properly accountable without threatening their independence.[34] On this model, it is for ministers or other specialist agencies to set social and environmental objectives through specific regulatory rules.

This argument is highly problematic, since it both over-estimates the neutrality of economic regulation and under-estimates the connections between economic, social and environmental objectives.[35] Unless sustainability objectives are built into the design of market and network rules, the effectiveness of social and environmental regulation is likely to be seriously compromised. Equally, the regulator's sectoral expertise means that it is well placed to contribute to the development of social and environmental measures.[36] Nevertheless, there are still valid objections to institutional integration. On the one hand, larger, more powerful regulatory organisations may reduce decision-making transparency and be harder to hold to account. On the other hand, there are advantages in terms of regulatory stability and certainty in maintaining existing institutions.

The approach adopted in Britain has therefore been something of a compromise. While Ofgem has been given some new responsibilities for social and environmental programmes, these involve implementation rather than policy development, and are organised separately from its regulatory functions. Instead, (as will be discussed below) policy integration has been sought primarily through changing Ofgem's statutory duties to require it to give greater priority to sustainability objectives, and by ministerial guidance to achieve greater alignment with broader energy policy goals.

More significant institutional change has, however, taken place at ministerial level, with the establishment of a combined Department for Energy and Climate Change (DECC) in October 2008. This was a very important development, which not only created a strong advocate for sustainable energy policies within government, but also had implications for Ofgem, since it ceased to be answerable to ministers in the pro-market business department. Nevertheless, institutional integration can never be complete, and important policy levers remain with other departments. In

[31] There have, however, been some key personnel changes further down the organisation which are regarded as having been important in permitting a change in regulatory direction.
[32] Sustainable Energy Act 2003, s 6.
[33] Directive 2009/72/EC, Art 35.
[34] For the classic statement of this position see Foster CD, *Privatisation, Public Ownership and the Regulation of Natural Monopoly* (Oxford, Blackwell, 1992); and for a recent restatement see Yarrow, n 12.
[35] See Bartle I and Vass P, 'Independent Economic Regulation: A Reassessment of its Role in Sustainable Development' (2007) 15 Utilities Policy 261, at 264. See also Mitchell and Woodman, n 6.
[36] Bartle and Vass, n 14, p 2.

particular, the Treasury continues to exercise substantial influence in energy policy, both through controlling taxation, and in setting departmental budgets and agreeing aims and objectives. Indeed, there have been significant recent disagreements between DECC and Treasury ministers, especially in relation to renewable energy subsidies and support for gas-fired generation.[37]

Statutory Duties

A key method used to promote sustainable electricity regulation in Britain has been amendment of Ofgem's general statutory duties. The current set of duties originated in the Utilities Act 2000, which sought to establish both a comprehensive set of duties and a hierarchy amongst them. Thus the Act distinguished between the regulator's 'principal objective' to protect consumers (wherever appropriate by promoting competition), a range of secondary duties, to which it is obliged to have regard in the performance of its principal objective, and a set of tertiary objectives, to be promoted insofar as consistent with the principal objective and secondary duties. Although the subsidiary duties included obligations to protect vulnerable consumers, secure a diverse and reliable supply of electricity, promote energy efficiency, and have regard to environmental impacts, as well as to take account of ministerial social and environmental guidance,[38] attempts to insert a specific reference to sustainable development were rejected by the government.[39]

Subsequently, however, the statutory duties have been repeatedly amended to increase the priority to be given to sustainability objectives. The Energy Act 2004 first inserted a new tertiary duty requiring the regulator to carry out its functions in the manner 'best calculated to contribute to the achievement of sustainable development'.[40] In 2008, this was promoted to the status of a secondary duty, and the principal objective was amended to make clear that it included the interests of future as well as current consumers.[41] In 2010, the principal objective was further amended to specify that consumer interests mean 'their interests taken as a whole, including (a) their interests in the reduction of electricity-supply emissions of targeted greenhouse gases and (b) their interests in the security of the supply of electricity to them.'[42] Finally in 2011, reflecting its status as a national regulatory authority under EU law, Ofgem was given an additional obligation to pursue the objectives of the third internal electricity market directive,[43] which requires it to promote, *inter alia*, 'a competitive, secure and environmentally sustainable internal market'.[44]

Although statutory duties are sometimes purely symbolic, the close attention paid to the structure and wording of Ofgem's general duties suggests that changes have been intended to make a difference to its regulatory decisions.[45] However, administrative law scholarship[46] suggests that there is no straightforward relationship between legal obligations and administrative decision-

[37] See in particular a leaked letter from the Chancellor of the Exchequer, George Osborne, to the Secretary of State for Energy and Climate Change, Ed Davey – *Financial Times*, 23 July 2012.
[38] Electricity Act 1989, ss 3A and 3B.
[39] Owen, n 30, p 19.
[40] Energy Act 2004, s 83.
[41] Energy Act 2008, s 83.
[42] Energy Act 2010, s 17.
[43] Electricity and Gas (Internal Markets) Regulations 2011, SI 2704/2011, reg.27(b).
[44] Directive 2009/72/EC, art. 36(a).
[45] See, eg, Sustainable Development Commission, n 14, p 26.
[46] See, eg, Halliday S and Hertogh M (eds), *Judicial Review and Bureacratic Impact: International and Interdisciplinary Perspectives* (Cambridge University Press, Cambridge, 2004).

making, whereby statutory instructions are automatically translated into concrete outcomes. Legal duties are not the only factors influencing decisions, and they may sometimes be only weakly determinative of administrative behaviour. Nevertheless, organisations might respond to new statutory duties for several reasons: first, for normative reasons, because they coincide with their pre-existing institutional culture; second, for instrumental reasons, because they risk enforcement action if they do not comply; or third, for symbolic reasons, to acknowledge the political message that the legal change embodies.

In Ofgem's case, at least initially, there was clearly no prior normative commitment to sustainability objectives. Instrumental reasons for responding to new statutory duties also seem to be weak. Although regulatory decisions are subject to judicial review, it is highly unlikely that a claim based on breach of the general duties would succeed. While decisions are sometimes overturned on procedural grounds or in cases involving narrow points of interpretation, the extent of the regulator's discretion, the wide range of factors to be taken into consideration, and the nature of the decisions to be made mean that the courts are, generally speaking, reluctant to interfere with substantive regulatory choices.[47] Moreover, the vagueness of sustainable development duties makes them particularly difficult to enforce.[48]

In fact, there is no case to my knowledge in which the application or interpretation of Ofgem's general duties has ever been an issue. Nevertheless, it is an organisation which displays an unusually high degree of legal consciousness, treating its principal objective in particular as a key reference point in justifying its decisions. Unlike many other government agencies, it has particularly strong reasons to fear judicial review, since it deals with powerful, well-resourced companies for whom its decisions often have substantial financial consequences. The threat of judicial review – costly and disruptive in itself, even if ultimately unsuccessful – therefore forms a constant background to its decisions, making it unusually cautious about legal risk.[49]

But there are other reasons why Ofgem might be especially attentive to its statutory duties. For instance, statutory duties may be more significant for regulatory commissions than for individual regulators, because they provide coherence which might otherwise be lacking.[50] Given perennial criticisms about inadequate accountability, demonstrating compliance with statutory duties is also an important touchstone of legitimacy for an independent regulator. Further, new statutory duties create an expectation of change, and provide a peg upon which to hang public criticism.[51] In other words, there are strong reasons to expect sustainability duties to have an impact for symbolic reasons.

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[47] See, eg, Rawlings, R, 'Changed Conditions, Old Truths: Judicial Review in a Regulatory Laboratory', in Oliver, D, Prosser, T and Rawlings, R (eds), *The Regulatory State: Constitutional Implications* (Oxford University Press, Oxford, 2010).

[48] See Jenkins V, 'Placing Sustainable Development at the Heart of Government in the UK: the Role of Law in the Evolution of Sustainable Development as the Central Organising Principle of Government (2002) 22 Leg Studs 578; Ross A, 'Why Legislate for Sustainable Development? An Examination of Sustainable Development Provisions in UK and Scottish Statutes' [2007] 20 JEL 35.

[49] Sustainable Development Commission, n 14, p 37; DECC, *Ofgem Review: Final Report* (2011), pp 48 – 49, https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/48134/2151-ofgem-review-final-report.pdf viewed 4 April 2013.

[50] See Owen, G, 'Sustainable Development Duties: New Roles for UK Economic Regulators' (2006) 14 *Utilities Policy* 208, at 215.

[51] Owen , n 30, p 27; Ross, n 48, p 64.

Although caution needs to be exercised in attributing changes in regulatory practice to changes in statutory duties,[52] there is indeed evidence of Ofgem attempting to respond to its increasing sustainability obligations. For instance, the Energy Act 2004 prompted the establishment of a sustainable development committee at board level and the publication of an annual sustainable development report. More substantial changes followed the 2008 Act, including an organisational restructuring to create a new sustainable development division, a major reform of network price regulation to deliver long-term sustainability objectives, and the launch of Project Discovery, which involved a fundamental reassessment of whether current market arrangements were capable of delivering secure and sustainable energy supplies. Most recently, following the 2010 Act, Ofgem has reviewed its impact assessment procedures to ensure a more systematic and transparent approach to considering issues with long-term strategic or sustainability implications.

While the initial response was limited and fairly superficial,[53] this perhaps reflected the relatively weak political commitment which the 2004 Act duty embodied: it was low down the regulator's list of priorities, it was enacted only as a result of parliamentary pressure,[54] and it was not reinforced by revised social and environmental guidance.[55] As sustainability obligations have strengthened, they appear to have produced a more significant organisational shift. While Ofgem still stresses its limited control over the delivery of sustainability objectives, it now sees itself as having a 'responsibility to facilitate change, by engaging in the debate, trying to persuade relevant players to make changes where required and contributing information and expertise where we can.'[56]

However, there are limits to what can be achieved through general statutory duties alone. First, the broader the duties, the greater the flexibility to respond to changing understandings of what sustainability requires, but the less effective they are in securing policy integration across government.[57] For example, DECC concluded in 2011 that there was still insufficient alignment between regulatory decisions and government strategy.[58] As Owen puts it, if the government is seeking specific outcomes that regulatory actions can affect, it is still relying to some degree 'on a regime where the regulator is sympathetic.'[59]

Secondly, it has been argued that, since sustainability provides a framework for decision-making rather than a set of concrete objectives, substantive obligations need to be supported by appropriate procedural requirements for consultation, reporting and scrutiny.[60] Ofgem does report specifically on sustainability issues on a non-statutory basis, but it has no obligation to consult on what its duties require (and has not done so).[61] While it does consult extensively before making formal regulatory decisions, consultation exercises tend, unsurprisingly, to be dominated by regulated companies. Ofgem does make some effort to compensate, for example, through the

[52] Eg, change may have happened anyway, given overlap with pre-existing duties; it may occur in anticipation of legal change; or the regulator may misinterpret what is required – Bartle and Vass, n 14, p 10.
[53] Sustainable Development Commission, n 14; Bartle and Vass, n 14, pp 24-27.
[54] See Owen, n 50, p 213.
[55] Bartle and Vass, n 14, p 38.
[56] http://www.ofgem.gov.uk/Sustainability/Pages/Sustain.aspx viewed 4 April 2013.
[57] Ross A, 'It's Time to Get Serious – Why Legislation is Needed to Make Sustainable Development a Reality in the UK' (2010) Sustainability 1101, at 1115-1116.
[58] N 49, p 24.
[59] N 30, p 25.
[60] Ross, n57, p 1108.
[61] Bartle and Vass, n 14, p 1.

appointment of a non-statutory sustainable development advisory group, but there are no systematic statutory arrangements for representation of sustainability interests, as there are, for instance, for consumer interests. In addition, scrutiny arrangements are weak. Until 2011, the widely admired Sustainable Development Commission performed general advisory and scrutiny functions across government. However, it fell victim to an austerity-driven 'bonfire of the quangos'.

Legally-Binding Targets

Another notable way in which the law has been used to support the transition to sustainable energy markets in Britain is through the setting of legally-binding targets. Targets impose duties on ministers rather than the regulator, and provide harder-edged commitments to achieve specific outcomes by a specified date.

The first targets relevant to the energy sector to be adopted were for the eradication of fuel poverty, amongst all households in England and Scotland by 2016, and in Wales by 2017, and amongst vulnerable households by 2010.[62] The Climate Change Act 2008 then imposed a set of overarching targets to reduce greenhouse gas emissions by 26 per cent compared with 1990 levels by 2020 and by 80 per cent by 2050, along with an obligation to set legally-binding 'carbon budgets' at five yearly intervals.[63] In 2009, the EU Renewables Directive[64] required the UK to increase the share of final energy consumption from renewable sources in the electricity, heat and transport sectors by 15 per cent by 2020. Although the directive does not specify targets for each sector, the government is obliged to set indicative sectoral targets, which for renewable electricity is around 30 per cent.[65] In 2012, the EU Energy Efficiency Directive[66] set a binding target for a 17 per cent reduction in EU-wide energy consumption by 2020. At present, Member States are only obliged to set indicative national targets,[67] but they could face mandatory targets if, following a European Commission review in 2014, their progress is judged to be inadequate. Finally, the Energy Bill currently before Parliament contains a power to set a decarbonisation target for the electricity industry by 2030.[68] As a compromise between DECC and the Treasury, which opposes the target,[69] it is currently intended that the power will not be exercised (if at all) until 2016, once the carbon budget for 2028 to 2032 has been set. However, a cross-party amendment has been tabled which would convert the power into a duty to set a target by 2014.

As the uncertainty over the decarbonisation target indicates, despite the proliferation of legally-binding targets, their merits are disputed. In their favour, they have three potential benefits. First,

[62] Warm Homes and Energy Conservation Act 2000; Housing (Scotland) Act 2001, s 88.
[63] The Climate Change (Scotland) Act 2009 imposes at 42% target for 2020 on the Scottish Ministers, along with an obligation to set annual targets.
[64] Directive 2009/28/EC.
[65] DECC, *UK Renewable Energy Roadmap: Update 2012*, https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/80246/11-02-13_UK_Renewable_Energy_Roadmap_Update_FINAL_DRAFT.pdf viewed 5 April 2013.
[66] Directive 2012/27/EU.
[67] The UK is aiming for a 9 – 11% cut in energy demand by 2020 – DECC, *The Energy Efficiency Strategy: The Energy Efficiency Opportunity in the UK* (2012), https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/65603/6928-the--energy-efficiency-strategy-statistical-strat.pdf viewed 5 April 2013.
[68] More accurately, a target for the carbon intensity of electricity generation.
[69] See Osborne, n 37 above.

and most importantly, they can be an effective way of securing policy commitment. Setting a legally-binding target has high symbolic value, raising the political profile of the issue in question and providing clarity about the future direction of policy as well as relative priorities between potentially conflicting objectives. A clear target and timetable for action creates a greater sense of urgency to take practical action, and it also acts as an important reference point for all of those implicated in delivery of the goal. In all cases, the energy-relevant targets appear to have had a galvanising effect on policy-makers, prompting serious reappraisal of relevant policies and leading to substantial new initiatives.[70]

The second benefit is that a target sets a clear standard against which ministers can be made accountable for the success or failure of their policies. Legal targets are more difficult to ignore than policy targets, and less vulnerable to definitional shifts, although much depends on how precisely the target is defined. The fuel poverty targets are problematic in this respect, since not only is the statutory definition of fuel poverty vague,[71] but the targets are only to be met 'so far as reasonably practicable'. In fact, having missed the interim target and admitted that the 2016 target is unachievable, the government is proposing to change the way in which fuel poverty is measured in England.[72] Nevertheless, the existence of the target remains useful in focusing attention on the problem, highlighting the gap between ambition and reality. As with statutory duties, targets provide an anchor for public criticism. The climate change targets are especially effective in this regard given the existence of the Committee on Climate Change, which is an independent statutory body responsible for advising on and scrutinising climate change policies. For example, in September 2012, the Committee published an open letter criticising government statements on the desirability of expanding gas-fired generation[73] as being incompatible with long-term carbon targets, and supporting calls for the adoption of a decarbonisation target.[74] This undoubtedly strengthened DECC's hand in its dispute with the Treasury, and scuppered the latter's attempt to abandon the decarbonisation target altogether.

The final benefit of targets is that they increase policy stability and hence investor certainty. The more focused the target, the greater the certainty it provides, and this is the key argument for adding the decarbonisation target on top of the more general renewables and climate change

[70] See: *UK Fuel Poverty Strategy* (2001), http://webarchive.nationalarchives.gov.uk/+/http://www.berr.gov.uk/files/file16495.pdf viewed 5 April 2013; *The UK Low Carbon Transition Plan: National Strategy for Climate and Energy* (2009), http://webarchive.nationalarchives.gov.uk/20100509134746/http:/www.decc.gov.uk/en/content/cms/publications/lc_trans_plan/lc_trans_plan.aspx, visited 5 April 2013; *The UK Renewable Energy Strategy*, Cm 7686 (2009), http://www.official-documents.gov.uk/document/cm76/7686/7686.pdf viewed 5 April 2013; *Energy Efficiency Strategy*, n 67.

[71] A person is in fuel poverty if they are 'a member of a household with a low income living in a home which cannot be kept warm at a reasonable cost.'

[72] DECC, *Fuel Poverty: Changing the Framework for Measurement* (2012), https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/66570/6406-fuel-poverty-changing-the-framework-for-measureme.pdf viewed 5 April 2013.

[73] DECC, *Annual Energy Statement 2012* (2012), para 2.36, http://www.gov.uk/government/uploads/system/uploads/attachment_data/file/65633/7086-annual-energy-statement-2012.pdf viewed 5 April 2013.

[74] Letter to Edward Davey MP, 13 September 2012, http://hmccc.s3.amazonaws.com/EMR%20letter%20-%20September%2012.pdf viewed 5 April 2013. See further Letter to Edward Davey MP, 25 February 2013, urging the government to amend the Energy Bill to require the target to be set by 2014, http://www.theccc.org.uk/wp-content/uploads/2013/02/Ed-Davey-February13.pdf viewed 28 April 2013.

targets. By committing to outcomes rather than specific policy mechanisms, targets also strike a balance between certainty and flexibility, ie, by providing reassurance that the goal will remain unchanged even if the means to achieve it are altered. Nevertheless, there remains a tension between certainty and flexibility. For instance, the renewable energy directive contains mechanisms which allow member states to enter into arrangements to count renewable energy production in other member states towards their national targets. While this provides flexibility to meet the collective targets in the most cost-effective manner, it undermines certainty for investors in any particular country.

The reason these provisions were included was to address one of major criticisms of targets which is that they are inflexible and hence inefficient because they do not let the market decide, for instance, what the appropriate generation mix should be or how best to respond to the costs of climate change. These are the central arguments used by the Treasury against adopting the decarbonisation target[75] and extending the EU renewables target beyond 2020.[76] To some extent, these kinds of criticisms are based on an unduly optimistic view of the ability of markets to deliver sustainability objectives (if not outright hostility to such objectives) and hence underestimate the scale of the barriers that need to be overcome. Nevertheless, there is clearly some truth in the related argument that targets can be arbitrary. While the climate change and decarbonisation targets are underpinned by scientific advice, the EU targets in particular are more reflective of what is politically acceptable rather than objectively defensible, although making targets legally binding arguably brings greater realism and therefore credibility to the target-setting process. Targets are also potentially distorting in focusing attention on issues which are subject to targets at the expense of those which are not, which seems inconsistent with the integrated and holistic approach that sustainability demands. One answer might be to adopt more targets, but having too many may undermine their symbolic value, and hence their motivating force.

A final criticism of legally-binding targets is that they are in practice impossible to guarantee, since their achievement depends on a range of factors some of which are beyond government control. This is clearly evident in relation to the fuel poverty targets, where the gains from measures to combat fuel poverty, largely focused on improving the thermal efficiency of dwellings, have been wholly outweighed by energy price rises, which are partly attributable to rising world gas prices, and to unavoidable investment in replacement generation and network assets, and only partly to the specific effects of government policies.

This raises the question whether targets can in any meaningful sense be legally binding. None of the targets specifies any enforcement procedures or sanctions for breach, and there is considerable scepticism about the possibility of judicial enforcement.[77] In fact, in *R (Friends of the Earth) v Secretary of State for Energy and Climate Change* [2009] EWCA Civ 810, the Court of Appeal refused to grant a declaration that the government was in breach of statutory duty when it admitted that

[75] Osborne, n 37.
[76] *UK Comments on 2050 Energy Roadmap to European Commission*, http://www.scribd.com/doc/89227104/UK-Comments-on-2050-Energy-Roadmap-to-EU-Commission-5 viewed 5 April 2013.
[77] See McHarg A, 'Climate Change Constitutionalism? Lessons from the United Kingdom' (2011) 2 *Climate Law* 469, at 477–480; Reid C, 'A New Sort of Duty? The Significance of Outcome Duties in the Climate Change and Child Poverty Acts' [2012] PL 749.

the interim fuel poverty target would be missed. The decision was based primarily on the absence, as a matter of statutory construction, of any absolute duty to meet the target. However, the court was also reluctant to second-guess the government's views on what was reasonably practicable, and in particular was unwilling to interfere with departmental budget allocations. The other targets are perhaps distinguishable because they are stated in unqualified terms, and arguably should be treated by the courts as setting overriding government priorities.[78] Nevertheless, the prospects for direct judicial enforcement are probably slim, albeit they might still have some legal relevance as the basis for relevant considerations or irrationality challenges where government decisions are wholly incompatible with meeting targets, or for procedural challenges in cases of failure to comply with supporting reporting obligations.

However, the focus on the legal enforceability of targets perhaps misses the point. Their purpose is to secure progress towards a policy goal, rather than to ensure strict compliance,[79] and as with general statutory duties, the symbolic value of setting – or refusing to set – a legally-binding target may be more important than the prospect of judicial enforcement. Clearly governments do regard the creation of legal targets as being significant, otherwise they would not object to them or haggle over their terms. In addition, again as for general duties, the supporting procedural obligations to consult on and publish strategies for delivering the targets and for reporting on and scrutiny of progress are at least as important as the substantive obligations to comply with targets. As I have argued in relation to the climate change targets,[80] it is the very elaborate supporting process of setting carbon budgets, publishing plans for meeting the budgets, reporting annually on progress, scrutiny by the Committee on Climate Change, and duties to respond to its recommendation which are the really important and innovative aspect of the Climate Change Act, because they maintain political attention on emissions reduction and help to embed it in government decision-making.

Guidance, Strategies and Plans

In fact, procedural obligations to produce policy statements, strategies, action plans and so on are frequently used as a commitment-forcing mechanism independently of associated targets. These require ministers or the regulator to be more specific, not just about their policy goals, but about the particular means by which those goals with be secured, thus providing additional clarity and certainty. Typically, the actual content of the strategies etc has no legal status, but there are two exceptions.

The first is the system of ministerial social and environmental guidance put in place by the Utilities Act 2000, to which Ofgem is obliged to have regard in its decision-making. The first set of guidance was published in 2002 and revised in 2004 and 2010. The guidance was intended to address concerns about the legitimacy of Ofgem taking account of social and environmental matters, and to ensure alignment between government policy and regulatory decision-making. However, the government has recently concluded that it has been of limited effectiveness, due to: its weak legal status in comparison to Ofgem's other duties; weak arrangements for accountability; the fact that it has not always been kept up to date; and its limited scope (eg it does not cover security of supply

[78] See McHarg, ibid; Reid, ibid.
[79] House of Commons Public Administration Committee, *On Target? Government by Measurement*, 5th Report, 2002/03, HC 62, paras 76, 118, 124.
[80] See n 77.

issues);[81] to which can be added the relatively vague content of the guidance, at least in its earlier versions. Arguably, the major impact of the guidance has actually been to *reduce* the pressure on Ofgem to pursue non-economic goals, because it states that decisions with major financial implications are to be made by ministers rather than the regulator. The guidance will therefore be abolished by the Energy Bill and replaced by a new Strategy and Policy Statement (SPS) which will set clear outcomes to which Ofgem will be expected to contribute. The regulator will have to specify how it intends to achieve the outcomes, report annually on progress, and inform ministers if an outcome is unachievable. There are also stronger provisions for consultation and parliamentary approval of the SPS, and restrictions on the circumstances in which it can be revised. The stated aims are to provide greater clarity over government policy, greater alignment between government and regulator, and greater predictability for investors, with less need for *ad hoc* government intervention.[82]

The second exception is the system of National Policy Statements (NPS) adopted for England and Wales under the Planning Act 2008.[83] Six, very detailed NPS on energy infrastructure were approved by Parliament in July 2011,[84] following public consultation and strategic environmental assessment, which set out the need for investment in particular types of energy infrastructure, and specify the considerations to be taken into account in development applications. Objectors may not question the merits of policies set out in the NPS, and there is a statutory presumption that decisions will be made in accordance with them.[85] The system thus aims to reduce planning delays for nationally important infrastructural developments, and to provide developers with greater certainty as to the criteria that will be applied.

Both sets of statements are a welcome acknowledgment of the need for a high degree of clarity over government policy to aid the transition to sustainable electricity markets. However, they are limits to how much certainty they can deliver. Each performs a restricted function within the overall regulatory system. They are also limited in their specificity. For instance, the NPS deliberately refrain from setting out intended market shares for different generation technologies or dictating where grid reinforcements should take place, and it seems unlikely that the SPS, which will not be published until 2014, will be any more precise. In addition both statements are liable to change. It is explicitly envisaged, for example, that the SPS may be reviewed following a change in government. Finally, clarity and certainty may come at the expense of legitimacy, to the extent that the statements foreclose meaningful participation in specific regulatory or planning decisions.[86]

Legal Protection against Regulatory Change

[81] DECC, n 49, para 79.
[82] DECC, *Energy Bill Provisions for Ofgem Strategy and Policy Statement: Background Note* (2012), https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/65669/7202-energy-bill-provisions-for-ofgem-strategy-and-supp.pdf viewed 7 April 2013.
[83] N.b. planning law in Scotland is devolved. Although far less elaborate than the NPS for England and Wales, the Scottish Government has similar powers under the Planning (Scotland) Act 2006 to set strategic priorities through a National Planning Framework, which may also designate 'national developments' which are required in the public interest.
[84] https://www.gov.uk/government/publications/national-policy-statements-for-energy-infrastructure viewed 7 April 2013.
[85] Planning Act 2008, ss 104 and 106(1)(b).
[86] This has been a particular criticism of the planning reforms – see Lee M et al, 'Public Participation and Climate Change Infrastructure' (2013) 25 JEL 33.

A final way in which the law can assist with the transition to sustainable electricity markets is in providing protection for investors in sustainable technologies against regulatory change.[87] In general, there is a strong recognition in the United Kingdom of the need to protect vested interests when regulations are changed, and protections are often built into regulatory instruments via transitional arrangements or other techniques. For instance, the new contracts for difference to be introduced by the Energy Bill to support low carbon generation will use private law contracts rather than purely administrative arrangements in order to provide greater investor certainty. Sometimes, however, additional protection is required.

This issue arose in *Secretary of State for Energy and Climate Change v Friends of the Earth* [2012] EWCA Civ 28 in relation to a change in the feed-in tariff (FIT) for small-scale solar PV. The microgeneration FIT scheme was introduced in April 2010, but during 2011 it became apparent that the take-up of the solar FIT was much greater than expected, because installation costs had fallen substantially, making the FIT very generous. This threatened to exceed the so-called 'Levy Control Framework' imposed on DECC by the Treasury, which limits the amount of subsidy available for sustainable energy programmes. On 31 October 2011, DECC therefore launched a consultation which proposed, uncontroversially, to reduce the tariff as from 1 April 2012 (the tariff rate being determined by the year, from April, in which an installation becomes eligible). However, it also proposed to backdate the change to installations made after 12 December 2011 – ie, after the consultation had been launched but before the amending regulations were made. The reason was to prevent a late surge in installations to take advantage of the higher rate, and the government argued that the six weeks' notice of the change given in the consultation paper was a sufficient transition period. Friends of the Earth and others successfully challenged this as amounting to an unlawful retrospective interference with vested rights. The Court of Appeal held that it was inherent in the notion of a FIT that it guaranteed a rate of return on investment and that, in the absence of explicit statutory authority, the tariff rate could not be changed retrospectively.

This case is interesting because it illustrates the competing demands of regulatory certainty and flexibility. The essential reason for the change was to protect consumers against excessive price rises. There was also arguably no real unfairness to people planning to install solar PV because the FIT was higher than necessary to recoup their investment. However, the cost of the change in terms of the credibility of the FIT scheme was very high indeed. Given that regulatory risk increases the cost of capital and may deter investment altogether, it was therefore probably not in consumers' long-term interest.

Judicial intervention to prevent regulatory change is, however, likely to be rare. *Friends of the Earth* can be contrasted with *Tate and Lyle Sugars Ltd v Secretary of State for Energy and Climate Change* [2011] EWCA Civ 664, which concerned a change in support rates under the Renewables Obligation (RO). This is a green certificate scheme applicable to large-scale renewable generation, which provides varying support for different technology bands. Tate and Lyle disputed the way in which one of the technology bands had been calculated, arguing that they should have received a higher support rate. The government accepted that there had been an error, but decided to launch an early review of this technology band, taking into account up-to-date cost and revenue data, which

[87] See generally Boute A, 'The Quest for Regulatory Certainty in the EU Energy Market: An Analysis Through the Prism of Legal Certainty' (2012) *European Law Review* 675.

concluded that a lower support rate was now appropriate. Tate and Lyle applied unsuccessfully for judicial review. The Court of Appeal held that the review power was not limited to correcting the initial error, it was not part of the RO scheme that returns were guaranteed, and it was not unfair to deprive the company of a windfall.

Conclusion

As this survey of recent British experience of regulating for sustainable electricity markets indicates, the law can help to reorient regulatory regimes towards sustainable outcomes in a variety of different ways. While lawyers may typically think in terms of judicial intervention, British experience suggests that the role of the courts is relatively minor. Far more significant are the symbolic, institutional and procedural functions of law – bringing clarity, visibility and authority to political commitments, and embedding them within decision-making processes. Law is clearly not a substitute for political commitment, but legal and political commitments are mutually reinforcing: the stronger the legal framework, the harder it is to dismantle.

The British experience also suggests that the more specific the legal commitment, the more effective is it in promoting change. The British system is clearly moving towards recognition of the need for a much more interventionist role for government, directing rather than merely nudging the regulator and market actors towards particular outcomes. However, there is still a residual reluctance to plan the transition to a sustainable electricity system; to commit to a clear development path, and not merely a set of desirable objectives or outcomes. There are understandable reasons for wanting to maintain flexibility in terms of efficiency, democracy and sustainability itself. Yet given the scale and urgency of the task, planning may ultimately be unavoidable. The question then will be to consider the role of law in supporting an effective and legitimate electricity planning process.