PUBLIC LAW IN A MULTI-LAYERED CONSTITUTION

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OFGEM, subject to the giving of notice and reasons. However, the Secretary of State has the power to reject proposed modifications.[85] This is not the end of the regulatory road, since the Competition Commission also has appellate powers, which allow it to override modifications to licensing conditions, if certain conditions are met.[86] Although this crucial licensing procedure has been standardised by the Act, it remains a complex process which only partly clarifies where ultimate authority lies between these competing agencies, and if the focus of decision-making is blurred, this makes it difficult to pinpoint where accountability is actually located.[87]

It is also important to note that the Act establishes a primary duty to protect the interest of consumers[88] and provides a greater element of consumer representation and consultation.[89] This stronger emphasis on consultation takes up an important New Labour theme which encourages participation and citizenship and which characterises many other initiatives that pervade central and local government,[90] but equally this can be seen as a response to dissatisfaction with the previous arrangements. In place of the Gas Consumers' Council and the Electricity Consumers' Council, the Act introduces a Gas and Electricity Consumers' Council which has a general remit for both obtaining and keeping under review information about consumer matters, and for making proposals and providing advice on such consumer matters to public authorities.[91] An important question—in terms of actual accountability—is what, if any, effect such consultation has on the eventual decision-making process itself, since under the Act the consultation only has to be taken into account.

A further issue which will be considered later is the placing in the Utilities Act 2000 of an increased emphasis on environmental considerations. For example, it contains new powers under sections 62–64 for the Secretary of State to make regulations to promote energy efficiency and to encourage the generation of electricity from renewable sources. The Secretary of State is required to issue periodic statutory guidance to the authority on the government's social and environmental objectives and suggest ways in which the authority might contribute to these objectives. The authority must take this guidance into account when it acts.[92] We will observe that the problem here is how this concern is reconciled with the regulator's other duties, and how this policy can be applied consistently throughout the United Kingdom in view of the division of competences which are central to the devolution arrangements.

[85] See C Graham, 'The Utilities Bill' (2000) 11(3) *Util Law Rev* (May-June) 94.

[86] See above n 75.

[87] This has important implications regarding the lobbying of interest groups. See conclusion.

[88] DTI, *A Fair Deal for Consumers: The Response to Consultation* (2000). See Graham, above n 51, 32.

[89] See Utility Act 2000 s 2 and 5.7 and part III. This now applies to all the utilities: see the Water Act 1999, discussed below.

[90] See White Paper, *Modernising Government* (Cm 4310, 1999); and John Morison, chapter 7 above.

[91] Water Act 1999, ss 18–19.

[92] Utilities Act 2000, ss 10–14.

UTILITY REGULATION AND DEVOLUTION

This section discusses utility regulation in the context of the recent devolution legislation and will reveal that looking at this issue from a territorial perspective further illustrates the complexity of the conditions of modern governance.[92a] In fact the former constitutional position (pre-1999) which was based on a single sovereign state tended to mask a situation which already recognised special territorial arrangements in which the regions enjoyed a certain amount of autonomy. Moreover, the privatisation measures by the Conservative Government were most obviously incomplete in Scotland, Wales and Northern Ireland. This was because of a combination of local hostility to privatisation proposals and because of differences in local conditions of operation of these industries. Since the change of government, devolution has been superimposed on to an already existing structure. This has resulted in an even more diverse and asymmetrical distribution of power between the various parts of the United Kingdom.

A further point to mention is that UK devolution might be regarded as part of a wider European trend[93] which is driven by economic imperatives such as the availability of EU funding on a regional basis.[94] There has been a growing interest in the region as a locus of political, economic and cultural activity which points to the declining capacity of the nation state, with the development of the idea of a Europe of the regions. The current phase of economic restructuring is typically seen as a significant factor in promoting a new role for regional government. Added to this is a view that economic efficiency is facilitated by encouraging regional variations. For example, it has been pointed out that regulatory change and innovation can be 'attributed to the competitive interplay between rival jurisdictions, seeking to develop a regulatory regime which is attractive to mobile factors of production, such as capital.'[95] Such competition can be linked to bringing decision-making closer to those affected by it. Further still, this can be more specifically associated with a growing interest in environmental sustainability. Environmentalists have coined the phrase 'think global act local,' but in reality this is often constrained by larger national and international forces. Nevertheless, there are obvious advantages in dealing with these issues at a local level.[96]

Turning first to the energy sector, regulation of gas and electricity is a matter that the devolution legislation does not deal with directly as an issue in its own right[97]

[92a] See n 30 above.

[93] For references to Spain and Italy, see J Hopkins, *Devolution in Context: Regional, Federal and Devolved Government in the European Union* (London, Cavendish, 2002).

[94] See P Leyland, 'Devolution, the British Constitution and the Distribution of Power' [2002] *NILQ*, Vol 53, n 4, 408–435 at p 428.

[95] Scott, above n 13, 341.

[96] J Tomaney and N Ward, 'England and the "New Regionalism"' [2000] *Regional Studies* 471, 473.

[97] See the Scotland Act 1998, Sch 5 which lists energy and transport under reserved matters but environmental regulation up to the three mile offshore limit as devolved. In addition, powers over land-based operations in support of offshore oil and gas operations under the Offshore Petroleum Development (Scotland) Act 1975, and functions under the Pipe-lines Act 1962 relating to approval of land-based pipe-lines beginning and ending in Scotland, are devolved to the Scottish Executive under SI 1999/1750.

and it is apparent that the changes in administration were not linked to any discernible strategy for the containment of functions and powers, including those by regulators that are exercised across borders and within the United Kingdom.[98] The respective statutes simply specify which areas remain under the control of the Westminster government and which fall within the remit of the devolved executives. So if political power is being divided up by means of devolution, it follows that the accompanying mechanisms for accountability remain a matter of concern. In certain ways, devolution adds to the accountability problem by distributing at least some of this responsibility more widely to the ministers in the new executives and to the devolved Parliaments and assemblies. Indeed, we shall soon see that the organisation of the utilities and the scheme of regulation is significantly different in Scotland, Wales and Northern Ireland.

Perhaps the most obvious divergence arose from the strong resistance to privatisation of the water industry in Scotland, which resulted in the plans eventually being shelved. But in addition to this, there are some significant variations across the energy sector. Although economic regulation of gas and electricity in Wales is on the same footing as in England, the situation is different in Northern Ireland where electricity was privatised in 1992, with the formation of Northern Ireland Electricity. This company deals with power procurement by means of contracts that were formed prior to privatisation. This was undertaken in a manner that keeps power generation distinct from distribution and transmission. This means that trading conditions in Ulster are different from the remainder of the United Kingdom. Northern Ireland Electricity is a monopoly which is regulated by Ofreg, the same regulator as for gas. The company has been able to charge higher prices than elsewhere in the United Kingdom.[99] Also, there have been disputes over price controls between the Director-General for Electricity Supply and the Competition Commission.[100]

Electricity regulation in Scotland is a reserved matter but market conditions differ somewhat from those in the rest of the United Kingdom. First, the industry was not broken up into different companies when it was privatised, although since privatisation the structure and control of the power companies has been radically transformed.[101] Secondly, Scotland was originally left with a fully integrated system of generation and distribution provided by Scottish Power and Scottish Hydro-Electric. Thirdly, the Electricity Act 1989 sets out to guarantee that urban

[98] For topical in depth discussion of the issue of accountability and regulation, see eg, G Majone, 'The Regulatory State and its Legitimacy Problems' (1999) 22 *Western European Politics* (No 1, January) 1–24; C Scott, 'Accountability in the Regulatory State' (2000) 27 *Journal of Law and Society* (No 1, March) 38–60 particularly at 48.

[99] C Graham, *Regulating Public Utilities* (Oxford, Hart Publishing, 2000), 113–14.

[100] *Ibid* at 51 and 113 for further details.

[101] For example, Scottish Power has taken over other utility companies, most notably MANWEB and Southern Water. This has turned it into a cross-sector utility player not only across the United Kingdom but also the North West USA. It provides electricity generation, transmission, distribution and supply services. It also supplies gas, provides water, wastewater, telephone and Internet services. Scottish Hydro-Electric has been absorbed by Scottish and Southern Electric, another large utility conglomerate which is active across the energy sector in England and Wales.

and rural consumers in Scotland would be charged on a common basis with the rest of the United Kingdom and that competing suppliers in Scotland should not be put at disadvantage.[102] Graham has pointed out that the appointment by Offer/Ofgem of a Deputy Director-General for Scotland provides evidence of a territorial dimension to regulation and he further suggests that the allocation of competences under the Scotland Act 1998 has the potential to affect the task of regulation itself. For example, the onset of competition in the relationship between customers and utilities will increasingly be a question for Scottish private law, falling under the competence of the Scottish Parliament, while regulation is left with the national regulator. Such incongruities, Graham argues, make the case for a separate regulatory system for electricity in Scotland, reporting to a minister from the Scottish Executive.[103]

The Utilites Act 2000 attempts to ensure that consumer interests in Scotland and Wales are dealt with on a local basis by giving the Gas and Electricity Consumer Council the function of obtaining and keeping under review information about consumer matters, and this involves canvassing the views of consumers in different areas. The Council is obliged to establish one or more committees for both Wales and Scotland to perform this task and the Act also requires the Council to maintain at least one office in each of England, Wales and Scotland at which consumers may apply for information.[104]

Regulating the Water Industry Post-Devolution

Before discussing the position following devolution, it is worth reminding ourselves that privatisation of water in England and Wales proved to be a very difficult undertaking. The water sector under public ownership had operated as a 'professional bureaucratic complex' with minimal state interference and a much less complex regulatory structure than was later imposed.[105] The Government's proposals were highly controversial because they introduced new conflicts between providing returns for shareholders and the need to invest in a crumbling infrastructure, and the equally important need to control charges. Moreover, the industry has been described as a natural monopoly *par excellence.* This is because prohibitive economic costs make it virtually impossible for potential competitors to install rival networks for distribution.[106]

Privatisation in England and Wales involved establishing a new structure for 10 public water authorities and 29 private water companies, and at the same time it called for related environmental and health implications to be adequately controlled.[107] The main task of economic regulation (as opposed to environ-

[102] Electricity Act 1989, s 3(2)(a) and (b). Tariff equalisation duty applies to northern Scotland.
[103] Graham, above n 99, 111, 112, n 10.
[104] See Utilities Act 2000, s 18.
[105] Maloney, above n 36, 629.
[106] *Ibid* at 631.
[107] See the Water Act 1989 and the Water Industry Act 1991.

mental: see later) following privatisation was performed by the Office of the Water Regulator (OFWAT) which in common with the other regulators is a non-ministerial government department independent of DEFRA. Under the Water Act 1991 the Director-General for Water Services (DGWS) was given two primary duties.[108] The first was to ensure that the functions of the privatised water and sewerage company met all reasonable demand and were properly carried out. The second was to ensure that water companies were able to finance the provision of these services by securing a reasonable rate of return on their capital.[109] Ofwat followed a similar regulatory pattern on pricing by controlling the annual increase by means of RPI minus X for a given number of years. If a water company contested this formula the Monopolies and Mergers Commission (MMC) had an appellate function in overseeing the regulation of charges by adjudicating on the pricing reviews of the DGWS. This role has led to a tendency for negotiated agreement and accommodation to avoid referral to the MMC. In fact it has been suggested that there has been too much readiness to reach a consensual outcome. In addition to this, the MMC performs an important role in England and Wales in respect to mergers, take-overs and licensing conditions.[110]

Furthermore, additional legislation was necessary in England and Wales to deal with the question of charging because the controversial objective set out earlier of extending metering was not attainable in the time span originally set out. Ofwat called for the Director-General's duty to protect the interests of customers to be made the regulator's single primary duty, putting customers' interests clearly at the heart of water regulation. The regulations and guidance following the Water Act 1991 assists with this by giving the Secretary of State powers partly to determine tariff schemes. This scheme of regulation has been modified by the Water Act 1999. It changes the emphasis by sanctioning an approach that gives the minister powers to make regulations, but also empowers the minister to issue detailed guidance to the regulator. The Secretary of State has the power to make regulations with regard to charging schemes and the Director-General for Water Services has been given power to approve charging schemes.[111] This guidance addresses some of the problems to do with reaching an accommodation between the conflicting considerations, and marks a shift in emphasis from the previous Water Act 1991.

[108] Under the Water Act 1989, the Director General for Water Services' secondary duties were to customers: (i) to ensure that no undue preference is shown; (ii) to ensure that there is no undue discrimination in the way companies fix and recover charges; (iii) that rural customers should not be at a disadvantage; (iv) to ensure that the quality of service is protected.

[109] The shortcomings of regulation were brought to prominence during the drought in Yorkshire in 1995. The local population suffered cuts in supply and the regulator responded by imposing penalties on Yorkshire Water. There was also a lack of sensitivity to consumer views, especially over the adoption of metering policies. See Ofwat, *Report on Conclusions from Ofwat's Enquiry into the Performance of Yorkshire Water Services* (Birmingham, 1996); Graham, above n 99, 114, 115.

[110] Maloney, above n 36, 639.

[111] Graham, above n 99, 57.

To a considerable extent the English water industry maintained a regional element which is determined by where the water comes from, in contrast to power which has a national grid that can distribute the supply on a national basis. But although the water industry has retained some characteristics of vertical monopoly with regard to extraction, distribution and supply, since privatisation the separate companies with responsibility for providing water services to the various regions in England have been rearranged through a number of mergers and take-overs (for example, Northumbrian Water, owned by French group Suez, and Thames, owned by Germany's RWE). The point to note here is that this has tended to confound the regulator's task in this field, since the Director-General is faced with informational asymmetries from the various companies which has meant that the information, technical knowledge and expertise required by the regulator is not necessarily available in the form required.[112]

Water in Wales

In Wales, the industry has a distinctive form of ownership. Glas Cymru/Welsh Water—the company that provides water and sewerage services to Wales and some adjoining areas of England—has emerged from exactly the type of corporate rejigging just alluded to. The company was part of the Hyder Group which was taken over by Western Power Distribution in September 2000. Glas Cymru then acquired Welsh Water from Western Power Distribution in May 2001. However, the water industry in Wales is under the same statutory regime of economic regulation as in England. The Government of Wales Act 1998 does not refer to water regulation but it does specify that the Welsh Executive is responsible for the environment.[113] Although the task of regulation remains with Ofwat following changes in ownership Welsh Water/Glas Cymru now has a unique commercial structure within the utility sector. It is a company limited by guarantee and owned and controlled by members instead of by ordinary shareholders. This means that it does not pay dividends in the normal way, allowing the advantages of any reduction in costs to be channeled directly for the benefit of its customers. After having restored ownership and control of the industry to Wales the company has set out its intention to both lower bills for its customers and to secure a £1.2 billion investment programme. This is financed by the efficient device of high quality bonds raised in the City. Because of a combination of efficiency and other organisational advantages, this corporate structure has been

[112] Maloney, above, n 36, 626.

[113] See Government of Wales 1998, s 22 and Sch 2(6) which provides that functions are to be transferred for the environment and water and flood defences). However, the Act allows intervention by the Secretary of State if the transferred environmental function has a serious adverse impact on water resources, water supply or the quality of water. (*Ibid* Sch 3 P II(6)). Schedule 3 P III recognises that water issues straddle England and Wales due to the flow of rivers and thus the Welsh Assembly will have some functions over cross-border areas.

proposed as a model that could be used more widely across the utility sector as an alternative to public ownership.[114]

Water in Scotland

Turning next to Scotland, in contrast to the position with gas and electricity, the Scottish Parliament was given legislative competence for the Scottish water industry, and the Scottish water regulator is made accountable to the relevant minister in the devolved executive.[115] The fact that the industry has remained under public ownership means that there is a distinct regulatory culture in Scotland. The main concern is promoting the interests of consumers and customers rather than that of investors or shareholders.[116] Moreover, the failure to introduce competition should not be regarded as a weakness in the sense that is the case for gas and electricity, since the monopolistic character of the industry has prevented competition from being introduced in the remainder of the United Kingdom. It has already been noted that the Scottish water industry, which had been under local authority control, managed to escape the very unpopular privatisation proposals of the Conservative Government. Nevertheless, its structure has been remodelled. The Local Government (Scotland) Act 1994 abolished regional councils and established three public sector water and sewerage authorities as public corporations within the public sector. It put in place a Scottish regional structure with three authorities, designed to achieve significant economies of scale and to ensure the provision of a high quality service and value for money. Their individual areas of responsibility were split to cover the north, east and west of the country. The authorities were placed under a duty to promote conservation and the effective use of water, while at the same time providing adequate water supplies throughout Scotland.[117] As part of these arrangements Scottish Office ministers (prior to devolution) remained responsible for regulation which was performed by means of an annual corporate plan setting financial limits and efficiency targets.[118]

[114] In the case of Northern Ireland the Water Service is an executive agency within the Department for Regional Development and it consists of a Chief Executive of Water Services with five other directors. The agency operates under the minister and Permanent Secretary and its stated objective is to provide water and sewerage services in a cost-effective manner to meet the requirements of customers. It also seeks to contribute to the health and well-being of the community and the protection of the environment but the Northern Ireland Water Service is not subject to a comparable regime of statutory regulation.

[115] See Scotland Act 1998, ss 52, 53 and 29.

[116] After the election in 1997 the Labour Government set up a review which identified five aims for the industry. These were to achieve local democratic accountability; to facilitate investment; promote efficiency; ensure continuity of water supplies and protect public health; and minimise disruption to the industry. It has been suggested that in certain ways Scottish regulation is superior. For example, (1) advice by the Commissioner on charging has to be published; (2) the minister has to give reasons for acceptance or rejection; (3) there is assessment of financial parameters; (4) superior forms of consultation are included. See T Prosser, 'Regulating Public Enterprises' [2001] *Public Law* 505, 519.

[117] Water Act 1999, s 65.

[118] See Prosser, above n 116, 515.

Recently, the Scottish Parliament has passed the Water Industry (Scotland) Act 2002 which makes provision to combine the three authorities into a single body to be called Scottish Water[119] which will have a Chief Executive and a board appointed by ministers of the Scottish Executive.[120]

Water regulation in Scotland is also divided in three ways: (1) the Water Industry Commissioner for Scotland is responsible for economic and customer service regulation of the water authorities; (2) the Scottish Executive is responsible for regulating drinking water quality;[121] (3) the Scottish Environment Protection Agency (SEPA) regulates discharges into the environment and is responsible for the control of pollution. The Water Industry Act 1999 introduced a Scottish economic regulator[122] whose role can be contrasted with his English/Welsh counterpart. Clearly, there is not the same pressure to distinguish distribution of efficiencies between shareholders and customers. Rather all benefits ultimately reside with the consumer. The Scottish Executive and Parliament, working in harness with the regulator, decide in what ways the benefits are going to be enjoyed by the consumer. The Water Commissioner for Scotland is required to provide the Scottish Executive with advice about the levels of charges set for the authorities[123] and s/he must also see that the drinking water quality and environment protection standards necessary to protect public health and the water environment are met. This calls for a substantial and ongoing investment programme,[124] although this still involves making a choice between some of the same considerations, namely environmental improvements, lower charges and reductions in expenditure. The Commissioner has a statutory obligation to promote the interests of customers of the water and sewerage authorities.

In addition, the Water Industry Scotland Act 2002 sets up water customer consultation panels for Scotland which perform an important role as a conduit for customer views and has the general function of advising the Commissioner on the promotion of the interests of customers.[125] The Commissioner is required to have regard to any advice given to him by the panel in respect of the water authority.[126]

[119] See Transport and the Environment Committee,*Report of the Inquiry into Water and the Water Industry* (SP362) 9th Report 2001.

[120] Water Industry (Scotland) Act 2002, Sch 3.

[121] The Ministry for Transport and the Environment in Scotland cannot adequately discharge this role without also being integrated with water industry regulation. Also, this has to be understood by reference to the relevant Concordats discussed below. Part II of the Water Industry (Scotland) Act 2002 introduces a regulator for drinking water quality.

[122] Water Industry Act 1999, s 12 introduced a new Water Industry Commissioner for Scotland, appointed by the Secretary of State for Scotland (Sch 9A). The Commissioner has a 'general function of promoting the interests of customers of the new water and sewerage authorities.' See also C Roper, *Economic Regulation of the Scottish Water and Sewerage Industry* (London, HMSO, 2000).

[123] Water Industry (Scotland) Act 2002, s 33.

[124] From *Water Quality and Standards* (1999). See also Graham, above n 99, 113.

[125] See Water Industry (Scotland) Act 2002, s 2.

[126] See the Water Industry (Scotland) Act 2002. Under P I, s 1(2), the Commissioner has the general function of promoting the interests of customers of Scottish Water in relation to the provision of services by it in the exercise of its core functions. Under s 1(3), the Scottish Ministers may, after consulting the Commissioner, give the Commissioner directions of a general or specific character as to the exercise of the Commissioner's functions; and the Commissioner must comply with any such direction.

It should be remembered that the Commissioner advises the minister on charging schemes and that this advice is published. In doing so account has to be taken of considerations such as the economy, efficiency and effectiveness with which Scottish Water is using its resources when exercising its core functions.[127] The Secretary of State after consultation with the Commissioner is empowered to give binding directions of a general or specific character as to the exercise of his functions. It should be noted that the Commissioner has left the politically sensitive question of protecting low income consumers from increases in charges for the Scottish Executive to determine.[128] It has also been observed that on the basis of the information available the regulator advises the Scottish minister on charges, but final approval lies with the minister.[129] Recommendations are not necessarily accepted. A recent proposal for a firm price cap for two years and a highly likely price cap for a third year was not fully accepted by the minister.[130] Such an approach suggests that there is an on-going attempt to establish a link between service improvement and prices that are charged. Nonetheless, in these arrangements we can identify a channel of accountability between the regulator and the Scottish Executive, which in turn is answerable to the Scottish Parliament, and the consultation requirement introduces a process of mediation with the relevant diverse interest groups.

UTILITY REGULATION, CONCORDATS AND ENVIRONMENTAL PROTECTION

In this section it will be suggested that the dissipation of power has to be considered beyond privatisation and economic regulation. This is because the utility sector necessarily involves the overlapping and integrally related question of environmental policy and regulation.[131] As noted already, the statutory framework calls for environmental considerations to be taken into account by regulators and the privatised industries. In the first place, as we have already observed, this requirement has to be reconciled with other priorities (eg lower prices leading to higher consumption and less incentive for energy efficiency). Secondly, this becomes a more complex task when there is a separate regime of environmental regulation which imposes its own constraints on regulatory discretion. The backdrop to this is not merely a Climate Change Strategy[132] which applies to the whole

[127] Water Industry (Scotland) Act 2002, s 33(3).

[128] Prosser, above, n 116, at 518. The Commissioner has published a strategic review for 2002–06 which recommends continued charge capping, a single water authority, cost reflective tariffs.

[129] The minister must give reasons for accepting or rejecting any such advice.

[130] See Prosser, above, n 116 at 517. There have been data collecting problems which have impacted on the capacity to take decisions in this area.

[131] For example, the Scottish water industry strategic review for 2002–06 endorses a joint multi-agency project between the Water Industry Commissioner, SEPA and the Water Quality Regulator.

[132] See eg Royal Commission on Environmental Pollution (RCEP) Report (CM 5459, 21 March 2002).

of the United Kingdom, and includes an overall commitment by central government to achieve sustainable development by hitting environmental targets[133] but it also must be remembered that policy-making in this area takes place at a wider European and global level. Environmental initiatives require the implementation of the provisions of international treaties[134] and EU directives[135] which are imposed on national institutions.[136] The Concordat of European Union Policy Issues can be cited as an example of how the devolution arrangements fail adequately to resolve one of 'the symbolic issues of devolution,' namely the representation of the devolved administrations in EU policy formulation.[137]

However, we find that responsibility for many aspects of environmental policy has been given to the devolved executives. This runs counter to a recent trend which has seen administration of environmental policy veer incrementally towards central government (see eg Environment Act 1995 which took away the management of waste disposal from local authorities and gave it to the Environment Agency). Moreover, it has been recognised that given the type of physical and political considerations surrounding environmental issues, it is problematic, to say the least, to attempt a separation of powers as part of a devolved or quasi-federal system of government, since this is an area 'not readily susceptible to a vertical disaggregation of functions still less ... amenable to what might be described as horizontal compartmentalisation of responsibilities.'[138] In the following section we will see how the task of compliance with national and supranational strategies has been affected by spreading the burden more widely and by allowing standards to vary as between England, Scotland, Wales and Northern Ireland.

Environmental Regulation of Water

The water industry is taken to illustrate how environmental regulation overlaps with economic and other levels of regulation. At a supragovernmental level the imposition of EU directives has contributed to the regulation of the environmental aspects and an obvious tension is caused by regulatory responsibilities for environmental issues being divided and granted to the Environment Agency. At a national level the Department (DEFRA) has issued guidance about environmental concerns which make clear that 'the promotion of water efficiency and water conservation are essential steps in mitigating the environmental impact of society's

[133] See the 'Greening Government' initiative from the Department of the Environment, Food and Rural Affairs (DEFRA).

[134] Eg the 1992 United Nations Conference on Environment and Development and Kyoto Protocol 1997.

[135] See eg EC Directive 80/778 on quality of water supply, Urban Waste Directive 91/271 and Water Framework Directive 2001/60.

[136] See eg United Kingdom Response to European Commission White Paper on Environmental Liability: http://www.scotland.gov.uk/library3/environment/UKresponse.asp

[137] See R Rawlings, 'Concordats of the Constitution' (2000) 116 *LQR* 256, 272–73.

[138] R Macrory, 'The Environment and Constitutional Change' in R Hazell (ed), *Constitutional Futures: A History of the Next Ten Years* (Oxford, Oxford University Press, 2001), 178–95 at 179.

demand for water and in protecting the aquatic environment for future generations'.[139] It goes on to recommend a wide range of measures to reduce demand for water. These include: requiring water companies to reduce leakage from their pipes; providing free leak detection and repair services for household consumers; reducing demand by installing water-efficient equipment in the home and encouraging water efficiency audits. Further, there is a recommendation that water efficiency and reduction in demand should be rewarded by discounted rates for low income households who undergo audits. Any drive for efficiency to protect the natural environment has to be reconciled with charging on the basis of the volume of water used. It will already be evident that environmental implications flow from Ofwat's decisions, particularly to do with obtaining the right trade off between quality and price. Also, introducing meters for domestic customers has the potential advantage of lowering demand from consumers and benefiting the environment. But how can lower consumption be achieved without leading to a reduction in revenue, and what kind of incentive will there be for business customers who might require high volumes of use to maximise their industrial production? Resolving such questions may boil down to determining whether charging levels ought to provide sufficient revenue for satisfactory management of the infrastructure and environmental improvement. Another problem is that there is evidence to suggest that in England, where the profit motive is stronger, water companies have used an exaggerated projected cost of environmental obligations as a reason for justifying inflated charges to the Director-General for Water Services and have then managed to meet their environmental obligations for much less than estimated.[140]

In England and Wales, environmental regulation is carried out by the Environmental Agency[141] by means of fines and penalties to achieve enforcement compliance (rather than negotiated compliance) and in Scotland (SEPA) regulates discharges into the environment and is responsible for the control of pollution. This body was established in 1996 for the protection of the environment in Scotland. Its responsibilities cover air and water pollution, waste and radioactivity discharges and integrated pollution control and its task is performed in partnership with other players.[142] A ministerial group on Sustainable Scotland meets biannually to deliver a commitment to integrate the principles of environmentally and socially sustainable development into all government policies.[143]

[139] See Ministerial Guidance re Water Act 1999 http://www.defra.gov.uk/environment/consult/wia99regs/response/02.htm, at para 2.20.

[140] Maloney, above n 36, at 634.

[141] The Environmental Agency has responsibility for river quality and the quality of inland coastal waters; land drainage and flood control; management of water resources; fisheries; recreation and conservation; and the improvement and maintenance of non-marine navigation.

[142] For example, s 53 of the Water Industry (Scotland) Act 2002 requires the Scottish Ministers and Scottish Water, in exercising its functions, to further environmental conservation and enhancement of natural beauty.

[143] The Northern Ireland Executive has a Department of the Environment with responsibility for planning control, the environment, pollution control and sustainable development. Once again, the department's strategic objectives are to conserve, protect and improve the natural and built environ-

In respect to the regulation of the environment we have recognised a primary role for public authorities but there has also been an emerging involvement of public interest groups. Such groups have brought environmental damage issues before the courts.[144] Indeed, there need to be effective ways to ensure that public authorities discharge their obligations to require the restoration of damaged environments. This should be related to supporting the availability of funding for litigation aimed at protecting the environment. It is suggested that where public authorities have functions that involve imposing requirements on polluters for remedying damage to the environment, public interest groups should be entitled to seek review of any failure of such authorities to discharge these functions adequately.[145] Finally, there is a consultation requirement and this is achieved by establishing consultative committees and a domestic consumers' panel of 2,250 members with a larger users' group.

CO-ORDINATING REGULATION

One of the most frequently declared objectives of the Labour Government has been to make sure that policy-making is more 'joined up and strategic.'[146] To achieve this, new initiatives have abounded in almost every area and at many different levels. Concordats and the Regulators' Joint Statement can be taken as two examples of a 'soft law' approach which are of particular relevance to this discussion. In essence this demonstrates evidence of multi-layered regulation of varying degrees of formality.

Concordats

Concordats between central government and the devolved administrations are a significant feature of the devolution arrangements which illustrate how the finer details have been resolved without resort to legislation. They can be regarded as a soft law technique[147] which has involved a mutual commitment to inform and consult closely over devolved and non-devolved matters.[148] Such arrangements also demonstrate the extent to which regulatory responsibilities are interrelated.

ment and place the concept of sustainable development at the head of the Department's policies which are to be promoted across the Northern Ireland executive.

[144] For an English case see *R v Inspector of Pollution, ex parte Greenpeace* [1994] 1 WLR 570 but it is worth noting that the rules of standing are narrower in Scotland, with a different concept of 'associational standing.' See Joanna Miles, ch 15 below.

[145] See eg United Kingdom Response to European Commission White Paper on Environmental Liability: http://www.scotland.gov.uk/library3/environment/UKresponse.asp

[146] R Rhodes, 'New Labour's Civil Service: Summing-up Joining Up' [2000] *Political Quarterly* 151.

[147] J Poirier, 'The Functions of Intergovernmental Agreements' [2001] *PL* 134, 144.

[148] See R Rawlings, 'Concordats of the Constitution' (2000) 116 *LQR* 256, 258. This article presents an in-depth critical evaluation of Concordats. See also M Laffin, A Thomas and A Webb, 'Intergovernmental Relations After Devolution' [2000] *Political Quarterly* 233.

There is an overarching Memorandum of Understanding between the UK government and the devolved administrations setting out more general principles which are supported by bilateral concordats between individual government departments and the devolved administration. The individual concordats are relevant to particular areas of policy-making. For example, if we turn first to Wales, we find that the Transport, Planning and Environment Group of the National Assembly of Wales has responsibility for environmental issues, including climate change policy, sustainable development and planning issues. The Welsh Executive is committed to the full integration of environmental and socially sustainable development throughout all government policy, but it faces similar problems of liaising with England. Thus a Concordat has been drawn up between the Cabinet of the National Assembly for Wales and the Department of Environment, Transport and the Regions to achieve an appropriate degree of co-operation. The Concordat sets out a mutual commitment to involvement and consultation when there is a possibility that a proposed policy or decision (eg on planning guidance) may have an impact on, or be connected with, a matter. This must be in good time and in adequate detail. There is a further commitment to share information, analysis and research and a procedure for dispute resolution.[149]

The closely related Concordat drawn up between the DTI and the Scottish Executive starts from the standpoint of acknowledging the high degree of interrelationship that exists in the energy sector, for example, noting that English and Welsh companies in the energy field are of key importance to the Scottish economy while the activities of companies located in Scotland are correspondingly important to the UK economy. The Concordat further acknowledges that wider issues connected with the energy industries, including international negotiations, also have an impact on Scotland and that the DTI needs advice on Scottish energy issues when considering UK energy policy. Such considerations require the DTI Energy Group and the Energy Division of the Scottish Executive to communicate and consult closely. It may sometimes be necessary for the Energy Division to consult widely within the Scottish Executive on energy policy matters which have broader (eg environmental) implications, and the Energy Division is DTI's initial point of contact with Scottish Executive on all such broader energy matters.

In essence, the Concordat recognises a reciprocal duty to consult when exercising the various overlapping strategic powers that have been divided up. On the one hand, the Scotland Act 1998 makes the generation, transmission, distribution and supply of electricity in Scotland, together with powers to license generation and supply of electricity in Scotland, a reserved matter for Westminster, but with the proviso that DTI ministers can only exercise these powers after consultation with the Scottish Ministers. On the other hand, the powers and duties under the electricity legislation listed in Appendix 1 to the Concordat are the subject of executive devolution (under SI 1999/1750). The Concordat specifies that before carrying

[149] See Concordat, Annex I which deals with sustainable development and environmental change and covers reservoir safety, management of cross-border river catchments, waste policy, inland waterways.

out any of these powers and duties that might have a UK application or may set a precedent, the Scottish Executive will consult the DTI.

The Concordat drawn up between the Department of Transport, Local Government and the Regions (now the Office of the Deputy Prime Minister) with the Scottish Executive which co-ordinates aspects of environmental policy operates on very much the same basis, and is composed in similar language to the Concordat with the DTI. It involves regular meetings between senior officials to discuss matters of mutual interest (Annex I deals with sustainable development and environmental protection). The split in responsibility for energy regulation has led to the devolved Scottish Parliament and Welsh Assembly each drafting a strategy for the environment concerning their respective parts of the United Kingdom. The Scottish Executive Environment Group has responsibility for policies regarding climate change and sustainable development. In March 2000 the Scottish strategy was published at the same time as the broader UK strategy was released. A major difficulty is that because energy remains the responsibility of central Government, many of the measures that might be necessary to combat climate change, either are not within the remit of the Scottish Executive, or if they are, need to be co-ordinated with the rest of the United Kingdom. This means that they will have to work in close partnership with DEFRA to develop those aspects of Scotland's climate change policy. Scotland has set up its own initiatives such as the Scottish Energy Efficiency Office to promote energy efficiency, and it has established its own Renewables (Scotland) Obligation.

In a somewhat different way a Concordat has also been employed to co-ordinate the implementation of the Utilities Act 2000. The Gas and Electricity Markets Authority and the Gas and Electricity Consumer Council have reached an agreement that recognises the need to work together closely to achieve the shared aim of protecting the interests of consumers effectively, which includes a commitment to regular meetings to consider issues ranging from price levels, company performance, compliance with licensing conditions, the selling practices of companies and consumer complaints.[150]

Regulators 'Joining Up'

The 'soft' law approach is not confined to Concordats but arises in regard to another interesting development, the Regulators' Joint Statement, which again is very much in line with the 'modernising government' theme of ensuring that the policy process meets people's needs.[151] This is realised by delivering policy in a consistent way across institutional boundaries. Essentially, it is an attempt to co-

[150] Memorandum of Understanding between the Gas and Electricity Markets Authority and the Gas and Electricity Consumer Council (November 2000).

[151] See N Williams, 'Modernising Government: Policy Making within Whitehall' (1999) 70 *Political Quarterly* (No 4) 452; and *Modernising Government* (Cm 4310 J1999) para 23 identifies the need to'align the boundaries of public bodies.'

ordinate the work of regulators by bringing them together in a number of different ways.[152] This initiative also implicitly reflects the complexity of the tasks confronting regulators in the current environment.[153] For example, we have already seen that the Office of Fair Trading exercises concurrent powers and is able to intervene in the process of utility regulation. In relation to this overlap, the statement commences by recognising the importance of the convergence of powers relating to reviewing prices and investigating anti-competitive agreements as a result the Competition Act 1998 and the Utilities Act 2000 (on this point there is also a European dimension). In order to address how such concurrent powers with the OFT are used, a Concurrency Working Party, chaired by the OFT, has been established. It seeks to promote a consistent and co-ordinated approach. It appears that this committee has assumed a prominent informational function by issuing guidance on the way powers under the Competition Act 1998 will be used. This is supported by guidelines which are published by other regulators on how such powers will apply in particular sectors.

In addition, there is a managerial dimension to this initiative, with regulators collectively expressing a desire for effective and efficient organisation and this aspect is to be co-ordinated by a group comprising of principal establishment and finance officers and chief operating officers of the regulatory organisations.[154] Also, there is a more general commitment to sharing best practice in relation to risk management, electronic data, recruitment and staff training, pay and grading structures.

The Regulator's Joint Statement has some practical use, but having recognised such affinities and the advantages to common approaches, it is important to be aware of the limitations of initiatives of this kind. Crucially, there is no procedure to resolve conflicts of interest and disputes that might arise. Also, such informal arrangements cannot adequately address the regulatory shortcomings originating directly from the many disparate pieces of legislation. There are obvious advantages in both providing a common regulatory framework (the Utilities Act 2000 was intended to apply more widely across a number of sectors) and in setting out more clearly the respective roles, responsibilities and the directions of accountability of the diverse and overlapping regulatory bodies. Thus it would seem that further legislation is required to deal with many of the remaining structural problems.

[152] There has been a general call for greater regulatory consistency which could be achieved by building on the co-ordinating regulation initiative with general practice statements.

[153] See the Regulators' Joint Statement, July 2001.

[154] WS Atkins, *Efficiency Review* (London, HM Treasury, May 2001), considered the working practices of OFTEL, OFGEM, OFWAT and ORR The Chief Secretary then made a statement on the WS Atkins review on 2 July 2001. These financial consultants recognised that regulators were professionally run organisations, whose costs were very small in comparison both with the revenue of the industries regulated and with the benefits received by consumers. Their report identified three main areas of concern relating to the information needed to judge efficiency, the cost of support services and staff structure.