



The evolution of regulatory thought in the UK over the last two decades: How does this reflect regulatory and academic thinking more widely?

by Dorota Galeza

Abstract

Over the last two decades, regulatory thought in the UK has not fitted the strict deregulatory and regulatory dichotomy and has taken a more mature approach that is apparent in the adoption of recommendations by the Better Regulation Task Force. Therefore, we can talk here about a certain evolution. However, certain path dependence elements have still been present. Regulation has not been free from populist initiatives that occurred before this period, especially in the area of enforcement, nor from overreliance on previously successful solutions. An interesting aspect of regulatory initiatives adopted over this period is that they are both of an 'integrative' and 'diffusive' in character. It is difficult to speculate which theme has dominated. There are certain specific characteristics of regulation in the UK that have been preserved, but in general, regulation has often been consistent with regulatory themes in other countries, but not with academic thought. This has particular dynamics. Interestingly enough, whereas in the area of the environment, the UK could be considered as a pioneer, in terms of initiatives taken by organisations to which the UK is a party, regulatory steps have been rather reactive and minimal in scope (Dorota Galeza¹).

1. Introduction

The study of history might sometimes be disillusioning.² In similar vein, Deakin has observed that "reading history in a teleological fashion, so as to confer an overly functional explanation on outcomes which could well have turned out differently."³ In this article, I try to avoid these mistakes. The evolution of UK corporate regulatory policy is characterised by certain periodic tendencies. During certain periods, regulators tend to adopt heavy regulatory approaches, whereas in other periods, regulators adopt a more deregulatory agenda. This is evidenced in a heavy regulatory touch in the 1970s and a deregulatory approach in the 1980s. These tendencies are often correlated with international and academic developments. I also discuss whether the UK has followed these simple regulatory approaches over the last two decades or whether it has designed an innovative approach, which shows that regulatory thought has evolved. This article also assesses whether the UK's regulatory policy over this period was aligned with developments in regulatory and academic thinking more widely. My aim is to indicate the shift in the UK's regulatory policy and I do not purport to provide a full overview of regulations adopted over the pertinent period. I also assess both evolutionary and path dependent processes in this area.

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² Richard A Posner, *Frontiers of Legal Theory* (Harvard University Press 2001) 147.

³ Simon Deakin, 'Legal Diversity and Regulatory Competition: Which Model for Europe?' (*Working Paper Series, WP 323 2006*) (<http://www.cbr.cam.ac.uk/pdf/WP323.pdf> , last accessed 20/08/2013) 9.

2. Overall policy trends in the UK

The stagnation in and the path dependent character of regulatory thought in the UK stems largely from the traditional British way of regulating, which cannot always be reconciled with the adoption of regulatory innovations.

In the late 1980s and to some extent in the early 1990s, the UK adopted the traditional British approach towards regulation, which Gray described as an “incrementalist [sic], tactical, fragmented, reactive, pragmatic, minimalist, decentralised, voluntaristic [sic], accommodatory [sic], informal, consensual, secretive, elitist, ... low priority ... and closed policy community”.⁴ The other characteristic of the traditional British approach is its policy style, which could be described as cooperative rather than adversarial. This is apparent in the exercise of substantial administrative discretion in a policy-making process that is usually associated with a “closed and expert policy community”.⁵ Carter and Lowe also distinguished a certain avoidance of principles in the UK policy style, which differentiates it from Germany, where the articulation of principles is fundamental to the policy style. They explained that it is not in any way “surprising that a concept which carries an explicit set of principles as baggage and which has radical implications for the operation of government has been only slowly and grudgingly accepted by the UK establishment.”⁶ In the mid 1990s, there was a shift in the UK’s regulatory policy towards providing more uniform, overall policies, which was aimed at setting out a consistent plan across the whole range of governmental activities.⁷ A good example of this trend is the adoption of uniform policy on the environment, which is evidenced in the implementation of a number of consistent, comprehensive and inter-related regulations and documents on the environment, such as the White Paper *This Common Inheritance* in 1990, the Environmental Protection Act 1990 and the government’s documents on sustainable development in 1990. Gray described this newly adopted approach in the following words: “comprehensive, strategic, integrated, proactive, principled, interventionist, centralised, legalistic, confrontational, formalistic, transparent, democratised and high profile.”⁸ Despite greater integration over the last two decades, we can observe only a limited shift in policy style. Weale *et al.* argued that it is “correct to talk about some change in the cooperative character of the regulatory style, it would be implausible to say that the style has changed to one of confrontation.”⁹ I would describe what has taken place as non-reciprocal coordination, which is a form of regulatory approach which assumes movement toward common rules without all parties considering they have a common interest in that movement.¹⁰ They also acknowledged limited shifts from the traditional administrative discretion, such as a growth of judicial review of administrative action, but as they noted, it has had little impact on corporate regulatory policy.¹¹ Carter and Lowe observed that “the Conservative government generally paid only lip-service to sustainable development, few new policies emerged, the rhetoric of sustainability remained an

⁴ Tim S Gray, ‘Introduction’ in Tim S. Gray (eds), *UK Environmental Policy in the 1990s* (Macmillan 1995) 1-3.

⁵ Albert Weale, Geoffrey Pridham, Michelle Cini, Dimitri Konstandakopoulos, Martin Porter and Brendon Flynn, *Environmental Governance in Europe* (OUP 2000) 180.

⁶ Neil Carter and Philip Lowe, ‘The Conservative government and sustainable developments in the UK: 1988-97’ in Stephen C. Young (eds), *The Emergence of Ecological Modernisation* (Routledge 2000) 181.

⁷ Robert Garner, *Environmental Politics: Britain, Europe and The Global Environment* (Macmillan 2000) 152.

⁸ Gray (n 4) 1.

⁹ Weale, Pridham, Cini, Konstandakopoulos, Porter and Flynn (n 5) 182.

¹⁰ John Braithwaite and Peter Drahos, *Global Business Regulation* (Cambridge University Press 2001) 25.

¹¹ *Ibid.*

almost alien language in the corridors of Whitehall, machinery of government reforms did little to transform the policy process".¹²

The apparent policy shift in the early 1990s created new dilemmas for British regulatory agencies, which from that point on would have to elect between a scientific and an administrative strategy. In my view, in the context of the environment, this could have been solved by a wider adoption of ecological modernisation. The further problem created by this policy shift is that of discretion, for example, in the exercise of participation policy by the Environment Agency.¹³

Furthermore, the other change in the UK's regulatory policy is the shift from national and sub-national bodies to international organisations, such as the European Union (EU) or the Conference of North Sea Ministers.¹⁴ This shift stems from the fact that the UK is now party to many international organisations, such as the EU, and therefore is obliged to follow the current tendencies. Apart from the direct impact on legislation of international bodies, there is also an important indirect effect of international organisations. International regulation has been a tremendous stimulus for UK regulatory policy to reconsider the rationale of its domestic policies. A good example of such policy learning is the Environmental Protection Act, which significantly modernised the UK's policy on pollution control.¹⁵ However, such openness towards regulatory innovations by UK government is an exception rather than a rule. In the late 1980s and early 1990s the impact of EU law was milder. Although, as evidenced in the Davidson review, the UK had a good track record of transposing EU law, it was uncommon for the UK's regulatory policy to exceed EU requirements.¹⁶ Gray justified this by the negative attitude of the UK government and the fragmented character of local government' contacts with European institutions.¹⁷

Nevertheless, the most significant reason why the UK changed its regulatory approach over the last two decades is that basic regulatory strategies did not seem to meet the current regulatory targets and therefore a new solution was required. Many commentators have argued that British regulatory thought has recently reached a certain degree of maturity,¹⁸ but I would disagree, as there is something like reflexive harmonisation involved. Maturity of regulation is very true in the case of the US, where there is either some form of regulation or nothing, but in the EU there are more subtle forms of regulation which, in my opinion, are still expanding. This form of harmonisation is "a process of discovery through which knowledge and resources are mobilized, the end point of which cannot necessarily be known."¹⁹ This form of harmonisation also enables the incorporation of some historical

¹² Carter and Lowe (n 5) 185.

¹³ Gray (n 4) 3.

¹⁴ Albert Weale, 'Environmental regulation and administrative reform in Britain' in G. Majone (eds), *Regulating Europe* (Routledge 1996)106.

¹⁵ Giandomenico Majone, 'The future of regulation in Europe' in Giandomenico Majone and Clare Tame (eds), *Regulating Europe* (Routledge 1996) 268.

¹⁶ Robert Thomas and Gary Lynch-Wood, 'Transposing European Union Law in the United Kingdom: Administrative Rule-Making, Scrutiny and Batter Regulation' (2008) 14(2) *European Public Law* 177, 210.

¹⁷ Gray (n 4) 5.

¹⁸ Robert Baldwin, Martin Cave and Martin Lodge, 'Introduction: Regulation – The Field and the Developing Agenda' in Robert Baldwin, Martin Cave and Martin Lodge, *The Oxford Handbook of Regulation*, (OUP, 2nd edn 2012) 5.

¹⁹ Deakin,(n 3) 5.

experiences. There is no single solution that could be achieved through harmonisation which is a measure to maintain a balance on the state and federal levels. Reflexive harmonisation combines instrumentalist and deregulatory theories of regulation, providing a certain new lens through which to look at regulation but it is uncertain whether it is the best one, as a system of decentralised law-making is not free from problems. This has not been tested in many areas, but this form of regulation resulted in extreme coordination failures in the case of capital markets and labour markets in the 1930s.²⁰

3. Deregulation or regulation?

I will now concentrate on the substance of the UK's regulatory policy over the last two decades. The last twenty years have proved difficult to classify in terms of deregulation or regulation. Over this period, there were both deregulatory and regulatory trends. The lack of new regulation did not necessarily mean deregulation per se, as especially the Conservative government was not very good in finishing its regulatory endeavours. For instance, in relation to legislation such as the Planning and Compensation Act 1991, it did not provide leadership for local government. As a result, "[n]umerous authorities introduce environmental audits, green strategies and local environmental charters quite independently of central government initiatives. Local authorities were contributing to the debate – and producing charters – well before the publication of the White Paper."²¹ In my view, this regulatory intervention is just an example of regulation which is not well thought out and which lacks clear aims.

Coming back to the original question, many commentators classed the aforementioned period as neoliberal, but there is also strong support for a different classification. Braithwaite claims that over the last two decades we have observed the establishment of regulatory capitalism. I am inclined to support this classification of the UK's regulatory policy. As noted by Braithwaite, the political economy of the Labour Party consists of more intrusive ideas of Keynesian welfarism as well as more *laissez faire* ideas.²² Therefore, we can observe a heavier regulatory touch in certain areas: e.g. there is an increase in the share of capital spending on environmental protection, which rose from 8 per cent in 1990 to 14 per cent in 1992.²³ But at the same time there were deregulatory endeavours, the most important of which appeared to be the Deregulation and Contracting Out Act 1994, which is still reminiscent of the previous Conservative government. The deregulatory agenda adopted in this piece of legislation was well-received by the Labour government and led to subsequent deregulatory initiatives, such as cuts in public involvement in the setting of discharge consents inserted into the Water Resources Act 1991.²⁴ Scott argued that these pieces of legislation contributed to the establishment of a regulatory state by means of withdrawing the state from key economic activities.²⁵

²⁰ Ibid 5-14.

²¹ Carter and Lowe (n 6) 176.

²² John Braithwaite, 'Neoliberalism or Regulatory Capitalism', (RegNet Occasional Paper No. 5. October 2005), available online at (http://papers.ssrn.com/sol3/papers.cfm?abstract_id=875789), last accessed on 10th of December 2009) 12.

²³ Neil Gunningham, Darren Sinclair and Peter Grabosky, *Smart Regulation: Designing Environmental Policy* (Clarendon Press 1998) 142.

²⁴ Chris Hilson, *Regulating Pollution: A UK and EC Perspective* (Hart Publishing 2000) 27.

²⁵ Colin Scott, 'Regulation in an age of governance: the rise of the post-regulatory state' in Jacint Jordana and David Levi-Faur (eds), *The Politics of Regulation: Institutions and Regulatory Reforms for the Age of Governance* (first published 1962, Edwards Elgar 2005) 149.

This new line of policy was followed by the Labour government, with a slight terminological and philosophical shift from 'deregulation' towards 'better regulation'.²⁶ The new agenda was created by the setting up of the Better Regulation Task Force (BRTF) in 1997.²⁷ Despite this bright, appealing name, the Labour government's policy did not substantially enhance the deregulatory discourse from the Conservative era, as endorsed in the 1994 Act. On the contrary, the original positive deregulatory initiatives were, to some extent, ruined by poor implementation. The deficiencies were not sufficiently addressed, but led to certain populist moves duplicating the successful legislation from 1994 rather than tackling the problem of its enforcement. The 1994 Act was followed by the Regulatory Reform Act 2001 and the Legislative and Regulatory Reform Act 2006. The British Chambers of Commerce (BCC) claimed that these acts duplicated the 1994 Act and were therefore unnecessary.²⁸ It also argued that the 2001 Act hindered deregulation, rather than simplified it. The 2001 legislation lacked the simplicity of the 1994 Act and therefore could have had an adverse effect on deregulation.²⁹ BCC went as far as to contend that "Parliament has erected insurmountable barriers to deregulation whilst maintaining a supine posture when facing new regulation."³⁰ However, there are strong academic voices saying that these subsequent *ad hoc* regulatory initiatives did not affect the overarching character of deregulation over the last decades. In general, it appears that deregulation in the 1990s has a different character to that in the 1980s, as it had the greatest effect *ex ante* rather than *ex post*. This stemmed from the idea that deregulation should be adopted to prevent cumbersome legislation from being put onto the statute book in the first place, because it is easier to do so than to deregulate it afterwards.³¹ Gunningham and Grabosky argued that this novel form of deregulation is the beginning of a 'third phase' of regulation, which still requires government intervention, but only on a selective basis and in close cooperation with a range of market and non-market solutions.³² The aim of this new regulatory paradigm is to transcend the regulation-deregulation dichotomy and offer a much broader perspective on the scope of regulation.³³ Therefore, the traditional regulatory discourse on the extent of regulation and deregulation was largely replaced by questions of the quality of regulation. As put by Gunningham and Grabosky, "the fundamental issue is not *how much* government we have, but what *kind* of government."³⁴ Similar observations were made by Osborne and Gaebler, who argued that "we do not need more government or less government, we need better government."³⁵

²⁶ Robert Baldwin, 'Is better regulation smarter regulation?' (2005) *Public Law* 485, 486.

²⁷ *Ibid.*

²⁸ Tim Amber, Francis Chittenden, *Deregulation or Deja Vu? UK Deregulation Initiatives 1987/2006* (British Chambers of Commerce 2007) 20.

²⁹ Tim Amber., Francis Chittenden and Deming Xiao, *The Burden of Regulation: Who is watching out for us?* (British Chambers of Commerce 2007) 10.

³⁰ *Ibid.*

³¹ Hilson (n 24) 27.

³² Gunningham, Sinclair and Grabosky (n 23) 11.

³³ *Ibid.*

³⁴ *Ibid* 10.

³⁵ David Osborne and Ted Gaebler, *Reinventing Government*, (Addison-Wesley 1992) cited in Neil Gunningham, Darren Sinclair and Peter Grabosky, *Smart Regulation: Designing Environmental Policy* (Clarendon Press 1992) 10.

This progressive vision of the UK's regulatory policy could be easily contrasted with a more nihilistic interpretation of the discourse on current British regulatory policy. Hood presented a plausible case for 'genteel millenarianism', which criticised the idea that we have entered another era. According to Hood, "there is nothing new under the sun" and modern concepts such as the new public management or governance are nothing more than an amalgamation of concepts adopted earlier in history.³⁶ Although I see truth in these claims, I do not agree with this observation, as it negates evolution in the UK's regulatory policy which, as noted by Hood, might not be in any respect innovative, but is nevertheless more responsive to changes in society and the environment and in this respect, it can be described as 'better' or 'smarter'.

These deregulatory initiatives were consistent with regulatory trends elsewhere and were well-received by academics. Nevertheless, certain commentators criticised deregulation on the grounds of its lack of public accountability. For instance, Prosser argued that the perception that deregulation would remedy inefficiency and unaccountability of public ownership is illusory, especially in the UK, where there is no established theory of public accountability. Therefore, according to Prosser, deregulation has no chance of operating in a responsible way.³⁷

4. Shift towards a better quality regulation

The regulatory shift over the last two decades is most apparent in the policy adopted by the Blair government, which Gunningham called a "purportedly 'reformist' neo-liberal"³⁸ approach. The most significant regulatory endeavours made by this government are two reports from 2005, 'Reducing Administrative Burdens'³⁹ and 'Regulation - Less is More: Reducing Burdens, Improving Outcomes'.⁴⁰ This approach by the Labour government was consistent with the approaches adopted in other countries including both conservative (George W Bush in the USA, Stephen Harper in Canada and John Howard in Australia) and Labour (Australia and Canada) governments.⁴¹ It also appears that these proposals are to some extent aligned with responsive and reflexive law theories. The Labour Party's proposal was also well received by certain academics, who valued voluntary regulation.⁴² Others considered this policy to be a cornerstone of the institutionalisation of the post-regulatory state.⁴³ Nevertheless, there are academics who criticised this regulatory approach on

³⁶ Micheal Moran, 'Review Article: Understanding the Regulatory State' (2002) 32 *British Journal of Political Science* 391, 409-410.

³⁷ *Ibid* 408.

³⁸ Neil Gunningham, 'Environmental Law, Regulation and Governance: Sifting Architectures' (2009) 21(2) *Journal of Environmental Law* 179, 199.

³⁹ Philip Hampton, 'Reducing Administrative Burdens: Effective Inspection and Enforcement' (Her Majesty's Treasury 2005).

⁴⁰ Better Regulation Task Force, 'Regulation - Less is More: Reducing Burdens, Improving Outcomes' (A BRTF report to the Prime Minister 2005) <<http://archive.cabinetoffice.gov.uk/brc/upload/assets/www/brc.gov.uk/lessismore.exec.summary.pdf>> assessed 1 December 2009.

⁴¹ Gunningham (n 38) 199.

⁴² John Blundell and Colin Robinson, 'Regulation Without the State ... The Debate Continues' (The Institute of Economic Affairs 2000) 29.

⁴³ Scott (n 25)145.

different grounds. Hood, Rothstein and Baldwin argued that 'better regulation' principles, as adopted in the Blair government's Better Regulation Task Force (BRTF), are often incompatible and do not provide any practical guidance on the appropriate approach in the case of a clash between these principles. Furthermore, Hood, Rothstein and Baldwin in their analysis of BRTF also refer to the Nobel laureate Herbert Simon's critique of administrative theory in the 1940s, in which he criticised such sets of 'contradictory proverbs', without practical guidance on suitable regulatory policies when tradeoffs between principles occur.⁴⁴

On the whole, even if many aspects of Better Regulation did not appear to serve the purpose for which it was intended, there are certain initiatives established in this legislation that appeared to push the deregulatory debate forward. The important regulatory innovation established by Better Regulation was post-implementation assessments of regulation which, although they did not act as an *ex ante* catalyst in the long run, could facilitate a more responsive regulatory approach.⁴⁵ In my opinion, this is the best element of this regulation, showing that regulatory thought is moving forward, as regulatory impact assessments (RIAs), though not tested outside the US, have proved very successful and do not duplicate the responsibilities between of the government.

5. The RIA and Cost-Benefit Testing of Regulation

Over the last two decades, we can also observe certain scientific innovations in the assessment of regulatory efficiency. The UK's regulatory policy was originally slow to adopt more scientific assessment methods. Nevertheless, in the mid 1990s, the UK's regulatory policy became more receptive to economic evaluation, adopted in other countries such as the USA. It was, nevertheless, a slow process. This is apparent in a gradual adoption of a stricter cost-benefit analysis in the environmental context.⁴⁶ However, over this period, the UK's regulatory policy took more decisive steps towards a new method. The old method of appraisal was replaced by Departmental Better Regulation Units (DBRUs), run centrally by the Cabinet Office Better Regulation Unit, which now requires all UK and EC regulatory proposals to be submitted to regulatory appraisal incorporating a compliance cost assessment (CCA).⁴⁷

A shift towards more economic methods of assessment is particularly apparent in treating the RIA as the central aspect of 'better regulation'. However, it is unclear whether RIAs could be considered as an improvement on the previous modes of regulatory evaluation. Similar methods of regulatory scrutiny were also adopted in other regulatory regimes, such as in the EU. Despite the consistency of RIAs with other regulatory assessment methods, they do not appear to fully reflect modern academic thinking, such as principles of smart regulation, proposed by Gunningham and Grabosky,⁴⁸ as RIA does not seem to facilitate the use of regulatory mixes and regulatory innovations. Baldwin noted that RIAs are measures best suited for assessing a single regulatory instrument, rather than wider policy mixes, as combinations of instruments cause calculation difficulties. Therefore,

⁴⁴ Herbert A Simon, 'The Proverbs of Administration' (1946) 6 *Public Administration Review* 53; Christopher Hood, Henry Rothstein and Robert E Baldwin, *The Government of Risk: Understanding Risk Regulation Regimes* (OUP 2004) 180.

⁴⁵ Thomas and Lynch-Wood (n 16) 211.

⁴⁶ Steven Sorrell, 'The Meaning of BATNEEC: Interpreting Excessive Costs in UK Industrial Pollution Regulation' (2002) 4 *Journal of Environmental Policy & Planning* 23, 28.

⁴⁷ Robert Baldwin and Martin Cave, *Understanding Regulation: Theory, Strategy and Practice*, (OUP 1999) 87.

⁴⁸ Gunningham, Sinclair and Grabosky (n 23).

Baldwin argued, it is extremely likely that officials would be deterred from creating policy mixes and would be inclined towards a single instrument solution that is more likely to pass an RIA.⁴⁹ These claims are also supported by empirical evidence.

Despite the emphasis placed on the scientific method, envisaged in this proposal, RIAs did not enhance the UK's regulatory policy. As established by the British Chambers of Commerce, RIAs did not work well in practice and their impact on the UK's regulatory policy was largely limited to box-ticking.⁵⁰ The information provided in RIAs was often not complete. For instance, "[t]he majority of RIAs (54.3%) stated either that costs to business were insignificant or could not be qualified because there was no data available. Almost one in eight RIAs (11.7%) did not mention business costs. The majority of RIAs (71.1) claimed benefits to business, but only 39% quantified them."⁵¹ Since the RIA process is not conducted with the rigour originally anticipated when RIAs were adopted, there is convincing evidence that "RIAs continue to be used to facilitate regulation rather than challenge the need for it or the quantum."⁵² This is evidenced in an increase in the number of regulations, which has risen gradually "from about 130 in the late 1990s to about 360 for the year to 30th June 2007."⁵³ However, there are some improvements in the quality of regulation. As noted by the BCC, "[e]ach regulation has a purpose and many contribute to the national well being."⁵⁴ Apart from RIAs, there are also problems with cost-benefit analysis, which is not quantified by departments with equal intensity.⁵⁵

Even if RIAs and cost-benefit evaluation did not yield positive results in the UK, these methods of assessment are consistent with wider regulatory thought. The tendency towards cost-benefit testing was also apparent in other regulatory systems. The UK system is strongly influenced by a sophisticated American model of cost-benefit appraisal.⁵⁶ Despite the popularity of this economic model of assessment, cost-benefit testing is not well-received by academic commentators. Although there are strong advocates of this method of economic evaluation, who have praised it especially on the grounds of its democratic accountability and legislative mandate,⁵⁷ cost-benefit testing has been subjected to an insightful critique of its implementation problems.⁵⁸

6. 'Integration' or 'diffusion'?

Despite the general emphasis on deregulation over the last two decades, the UK's corporate regulatory policy, similarly to other regulatory regimes in the developed world, was also subject to

⁴⁹ Baldwin (n 26) 503-504.

⁵⁰ Amber., Chittenden and Xiao (n 29) 7.

⁵¹ *Ibid* 17.

⁵² *Ibid* 9.

⁵³ Tim Amber, Francis Chittenden and Stefano Iancich, *The British Regulatory System: Six Annual Impact Assessment report* (British Chambers of Commerce 2008) 17.

⁵⁴ *Ibid* 4.

⁵⁵ *Ibid* 19.

⁵⁶ Baldwin and Cave (n 47) 86.

⁵⁷ Cass R Sustein, 'Cost Benefit Analysis and the Separation of Powers' (1981) 23 *Arizona Law Review* 1267.

⁵⁸ Baldwin and Cave (n 47) 92.

many developments in terms of environmental policies, politics and a heavier regulatory touch in this area.⁵⁹ In general, the UK's regulatory approach was more associated with integration rather than diffusion. This is primarily evidenced in legislative efforts that expressly refer to integration such as pollution legislation, but nevertheless certain commentators argue that the UK's regulatory policy is also 'diffusive'. Steele and Jewell considered sustainable development as a 'diffusive' regulatory trend.⁶⁰

6.1. Diffusion

I will first discuss 'diffusive' movements. In the early 1990s, the UK's regulatory policy shifted towards outlining the general principles and aims to which agencies were commonly subjected. The aim of these "diffusive" movements was to achieve an appropriate contribution to the attainment of "sustainable development".⁶¹ A pivotal incident in this respect was the publication of *Sustainable Development: the UK Strategy* in January 1994,⁶² which could be considered as a weak form of ecological modernisation.⁶³ The adoption of "Sustainable Development" certainly shows that British policy has changed. Nevertheless, the early incorporation of the ideas of sustainable development in Britain did not fully reflect academic thought. British post-Rio documents were not well-received by commentators such as Andrew Lees of Friends of the Earth, who argued that they 'repacked old commitments'⁶⁴ and lacked 'any meaningful targets and timetables'.⁶⁵ Therefore, nothing new was achieved. As noted by other commentators, the traits of the traditional British approach were still evident. This is most apparent in "the tendency to displace questions about policy into questions about the structures of the process".⁶⁶ The UK's "sustainable development" strategy, contrary to the Dutch National Environmental Policy Plan, has been centred on "changes in policy process and machinery rather than ... [concentrating] on the development of an elaborately calculated set of planning targets."⁶⁷ This could be compared to the general approach adopted by the Conservative government that treated environmental protection as "a luxury add-on".⁶⁸ This approach can be contrasted with a strong approach towards ecological modernisation.⁶⁹

⁵⁹ Weale (n 14) 106.

⁶⁰ Jenny Steele and Tim Jewell, 'Law in Environmental Decision-Making' in Jenny Steele and Tim Jewell (eds), *Law in Environmental Decision-Making: National, European and International Perspective* (Clarendon Press 1998) 3.

⁶¹ Environment Act 1995, s. 4(1); Jenny Steele and Tim Jewell, 'Law in Environmental Decision-Making' in Jenny Steele and Tim Jewell (eds), *Law in Environmental Decision-Making: National, European and International Perspectives* (Clarendon Press 1998) 7.

⁶² Carter and Lowe (n 6) 174.

⁶³ Peter Christoff, 'Ecological modernisation, ecological modernities' in Stephen C. Young (eds), *The Emergence of Ecological Modernisation: Integrating the Environment and the Economy* (Routledge 2000) 220.

⁶⁴ Gamer (n 7) 175.

⁶⁵ *Ibid.*

⁶⁶ Weale, Pridham, Cini, Konstandakopulous, Porter and Flynn (n 5) 183.

⁶⁷ *Ibid.*

⁶⁸ Carter and Lowe (n 6) 174.

⁶⁹ Christoff (n 63) 220.

6.2. Integration

Diffusion is not the only strategy adopted by the UK government. The UK's regulatory policy over the last two decades also has indicated a tendency towards certain integrative movements. Even a diffusive concept of sustainable development was treated in a more integrative way under the Labour government. The Labour Party removed the organisational and ideological impediments that hindered the adoption of a more ecological approach by corporations.⁷⁰ These changes are most apparent in the reform of the institutional structure accountable for the formulation and implementation of standards for environmental legislation, in particular in the early 1990s.⁷¹ The revolutionary changes in the UK's environmental policy under the Labour government are consistent with a progressive environmental transformation in other social democratic countries, such as Germany (Schroeder's Social Democrats) and the US (Clinton's Democrats). However, they are not aligned with developments in conservative countries.⁷²

I would now like to focus on the substance of these integrative changes. The first shift is related to the adoption by the UK of the concept of integrated pollution control (IPC), which is centred on two principles - the requirement to choose the 'best practicable environmental option'⁷³ (BPEO) and the principle of 'best available technology not entailing excessive costs' (BATNEEC).⁷⁴ Weale, *et al.* claimed that these principles are elements of a traditional British way of thinking, as BPEO and BATNEEC differ from the requirements adopted in the other countries. They also argued that these concepts are an attempt to "domesticate" an intentionally recognised principle of precaution.⁷⁵ BPEO especially could, to some extent, be considered as a counterpart of the principle of precaution adopted in Germany. Nevertheless, it appears that both principles were not entirely compatible. This was apparent when the UK allowed Shell to dispose of the Brent Spar oil rig in the Atlantic. This decision was criticised by governments and academics as inconsistent with the principle of precaution.⁷⁶ Carter and Lowe also observed that in this respect the British government had a difficulty incorporating "the precautionary principle, because it conflicts with the dominant role that natural scientists have played in the process of policy advice."⁷⁷ In my view, there is scope for retaining a traditional British approach in this respect.

Apart from such conflicts with the principle of precaution, BPEO and BATNEEC have other deficiencies. As argued by Sorrell, the BATNEEC principle has certain strategic limitations in comparison with mandatory requirements. Sorrell claimed that revolutionary "clean technology"

⁷⁰ Gamer (n 7) 176-177.

⁷¹ Weale (n 14) 106.

⁷² Benjamin J Richardson and Stepan Wood, 'Environmental Law for Sustainability' in Benjamin J Richardson and Stepan Wood (eds), *Environmental Law for Sustainability: A Reader* (Hart Publishing 2007) 7.

⁷³ Gunningham, Sinclair and Grabosky (n 23) 49.

⁷⁴ Weale, Pridham Cini, Konstandakopulos, Porter and Flynn (n 5) 176.

⁷⁵ *Ibid* 180.

⁷⁶ *Ibid* 179.

⁷⁷ Carter and Lowe (n 6) 182.

solutions, such as residue gasification at oil refineries achieved by mandatory requirements, could never be achieved by IPC.⁷⁸

Despite the deficiencies of the principles of IPC in general, Jordan aptly noted that “[t]he system of IPC currently evolving in the UK is as much a symptom of a changing style of regulation as a new legal form of regulatory control.”⁷⁹ In my opinion, the effectiveness of this approach is enhanced by its reflexive character, as it compels government to disclose information on pollution control and chemical hazards.⁸⁰ Nevertheless, as noted by Weale, it is important not to exaggerate the force and the speed of these developments. The system of integrated pollution control raises much controversy.⁸¹ Weale claimed that there is a significant antagonism between “the functional independence of an effective pollution control body and the requirements of political accountability.”⁸² Furthermore, the integrated pollution control system did not seem to set the terms of the relationship between the public and industry. Weale argued that it is plain that regulation implies co-operation; nevertheless, it is hardly likely that a system of 'regulatory negotiation' would be created. This distinguished the UK's system from the one adopted in the US and Canada, where the process of 'regulatory negotiations' enables representatives of public interest groups to participate in the setting of regulatory standards.⁸³ However, even if the UK's system of integrated pollution control would not achieve the level of participation adopted in the American and Canadian systems, the process of implementation of the UK's regulation still provides great opportunities for policy learning.⁸⁴

Finally, it is unclear whether IPC has an equal impact on the whole industry. Mehta and Hawkins argued that IPC caused structural bias in favour of larger firms.⁸⁵ Nevertheless, on the whole IPC appeared to be a successful innovation. Skou Anersen and Liefferink have even claimed that a highly developed system of pollution control in the UK created an important regulatory legacy, which distinguished the UK's regulatory policy from environmental 'latecomers' such as southern EU countries.⁸⁶ However, the UK's movement towards integration lags behind that of the pioneers in integration, such as the Netherlands, which forged integration into wider policy areas via the National Policy Plan.⁸⁷ These successes were subsequently enhanced by a more radical form of legislation via a report issued in 1998 by the Royal Commission on Environmental Pollution, under the title *Setting*

⁷⁸ Sorrell (n 46) 37.

⁷⁹ Andrew Jordan, “Integrated pollution control and the evolving style and structure of environmental regulation in the UK”, (1993) The Centre For Social and Economic Research on the Global Environment Working Paper 93-01423.

⁸⁰ Micheal Purdue, ‘Integrated Pollution Control in the Environmental protection Act 1990: A Coming of Age of Environmental Law?’ (1991) 54(4) *Modern Law Review* 534, 548.

⁸¹ Weale (n 14) 127.

⁸² *Ibid* 128.

⁸³ *Ibid* 127.

⁸⁴ *Ibid*.

⁸⁵ Alex Mehta and Keith Hawkins, 'Integrated Pollution Control and its Impact: Perspectives From Industry' (1998) 10(1) *Journal of Environmental Law* 61, 75.

⁸⁶ Mikael Skou Anderson and Duncan Liefferink, 'Introduction: the impact of the pioneers on EU environmental policy' in Mikeal Skou Andersen and Duncan Liefferink (eds), *European environmental policy: the pioneers* (Manchester University Press 1997) 5-6.

⁸⁷ Weale, Pridham, Cini, Konstandakopoulous, Porter and Flynn (n 5) 183.

Environmental Standards. This report encouraged abandoning the traditional secretive and informal approach to regulation. Dryzek *et al.* argued that democratisation would bring progress in more than the mere consultation of stakeholders, and would also try to incorporate citizens into this process. In its discursive democratic prescriptions, the report is aligned with strong ecological modernisation, and it was not obvious whether any of its recommendations would be implemented, considering the unclear role of citizens in the process of sustainable development in the UK.⁸⁸

Despite the relative success of IPC and pollution control, not every integrative action and departure from traditional British thinking has brought positive results. A less successful example of a move towards integration is the creation of a cross-sectoral Environment Agency in April 1996.⁸⁹ The formation of this agency caused much controversy, as it meant breaking with the traditional incremental and fragmented mode of British administration and replacing it with very novel organisational structures.⁹⁰ However, despite all these regulatory efforts, the Environment Agency proved to be a rather regressive legislative step. McMahon argued that the formation of the Environment Agency caused a “*mismatch* between the institutional form and the cultural identity.”⁹¹ He claimed that the effect of this is the failure to form distinct organisational aims that could lay the cornerstones on which an organisational culture could develop. The current lack of organisational culture in the Environment Agency has contributed to the absence of a sense of mission-commitment. It could be argued that a sense of mission-commitment might be developed over time.⁹² However, there is little evidence of such a process.⁹³

The creation of an environmental agency in the UK was consistent with regulatory innovations in other countries. I would even argue that it is an example of a less successful legal transplant that, due to the lack of appropriate consultation, was not correctly implemented in the UK. I am not arguing that legal transplants are bad *per se*; in the case of regulations, there is no invisible hand as with markets. This means that law does not develop naturally and human intervention is mandatory.⁹⁴ But on the other hand, some sort of advanced technique, like new institutional economics, needs to be adopted. Therefore, the UK Environment Agency could be easily contrasted with more successful cross-sectoral environmental agencies in certain countries, primarily those that created this institution independently. A good example is the US's Environmental Protection Agency, whose organisational

⁸⁸ John S Dryzek, David Downes, Christian Hunold and David Schlosberg, with Hans-Kristian Hernes, 'Ecological Modernization, Risk Society, and The Green State' in Arthur PJ Mol, David A Sonnenfeld and Gert Spaargaren (eds), *The Ecological Modernisation Reader: Environmental reform in theory and practice* (Routledge 2009) 241-242.

⁸⁹ *Ibid* 225.

⁹⁰ Neil Carter and Philip Lowe, 'The Establishment of a Cross-Sector Environmental Agency' in Tim S Gray (eds), *UK Environmental Policy in the 1990s* (MacMillan Press 1995) 38-40.

⁹¹ Robert K McMahon, 'Changing the organization but maintaining the culture: the centrality of organizational mission to the reform process. An overview of the United States Environmental Protection Agency and the Environment Agency for England and Wales' (2004) 13 *Strategic Change* 324, 331.

⁹² *Ibid* 331-332.

⁹³ SCETRA. House of Commons Select Committee on the Environment, Transport and Regional Affairs, *The Environment Agency*, (6th Report, Her Majesty's Stationary Office, 2000)

⁹⁴ Alan Watson, *Legal Transplants: An Approach to Comparative Law* (University of Georgia Press 1993) 108.

structure is more old-fashioned (the adoption of stove pipes) but nevertheless better, due to the greater mission-commitment of its workers.⁹⁵

7. Policy mixes

The shift from a strategy of dispersion of pollution towards a direct regulatory system of pollution control was only a beginning in the UK's new regulatory policy. The scope of regulation was broadened to no longer be restricted to state regulation, but began to encompass new forms of intervention, such as self-regulation or cooperative forms of dialogue between the regulators and the regulated.⁹⁶ Deregulatory initiatives opened up possibilities for adopting new forms of regulatory intervention, which did not aptly fit the classical conception of regulation, understood as state regulation. Moran claimed that these changes in state structures were the most revolutionary upheavals in the UK's regulatory policy.⁹⁷ This observation appears to be very correct. Recently, in the UK, we can observe the adoption of novel regulatory solutions, as well as other more subtle changes in the regulatory regime, such as the implementation of a range of policy instruments that are designed to create a cooperative link with a variety of social interests.⁹⁸

Nevertheless, the changes in the UK's corporate regulatory policy were not rapid and there are many factors that hindered regulatory progress. A very difficult aspect of the UK's corporate regulatory policy is its overreliance on command-and-control regulation, which has dominated British regulation since 1970. Unfortunately, the last two decades have brought little change in this respect, as there have been very few deregulatory initiatives. Insightful critiques of the UK's static regulatory regime are provided by two high level reports published in the same year which considered inertia as a prevailing strategy for a range of important sustainability matters.⁹⁹ However, overreliance on command-and-control regulation is not peculiar to the British regulatory system and is well-reflected in regulatory systems of other European countries.¹⁰⁰ Furthermore, certain regulatory systems, such as in the USA, are even more reliant on command-and-control.¹⁰¹ Nevertheless, this British regulatory inertia and overreliance on command-and-control regulation certainly does not reflect current academic trends, which are very critical of command-and-control.¹⁰²

The deficiencies of this overreliance were to some extent remedied by the improvements made to command-and-control regulation. Over the last two decades, there have been instances of

⁹⁵ McMahon (n 91) 331.

⁹⁶ Christine Parker, 'The Pluralization of Regulation' (2008) 9(2) *Theoretical Inquiries in Law* 349, 350-351.

⁹⁷ Moran (n 36) 410.

⁹⁸ Daniel J Fiorino, 'Rethinking Environmental Regulation: Perspectives on Law and Governance' (1999) 23 *Harvard Environmental Law Review* 467, 491.

⁹⁹ Environmental Data Services Ltd., 'Sustainable Development Advisors Take Government To Task' (1997) *ENDS Report* Number 264, 7, cited in Neil Gunningham, Darren Sinclair and Peter Grabosky, *Smart Regulation: Designing Environmental Policy* (Clarendon Press 1998) 18.

¹⁰⁰ Gunningham, Sinclair and Grabosky (n 22) 17.

¹⁰¹ David Vogel, *National Styles of Regulation: Environmental Policy in Great Britain and the United States* (first published 1947, Cornell University Press 1986).

¹⁰² Keith Hawkins, *Law as Last Resort* (Oxford University Press 2002), 13-16; Eric W Orts, 'Reflexive Environmental Law' (1995) 89 *Northwestern University Law Review* 1227, 1235-1242.

more flexible use of command-and-control regulation. A good example is the permitting of systems, which enable legislative reviews at fixed intervals or when certain events occur. Such policies were implemented *inter alia* in The Pollution Prevention and Control (England and Wales) Regulation 2000, S.I. 2000/1973 and the Environmental Protection Act 1990, s 6(6).¹⁰³ Furthermore, command-and-control regulation was also enhanced by improvement in its enforcement. For instance, the Environment Agency in England and Wales, having discovered that it did not have suitable resources to inspect all firms, stressed the importance of targeting, by holding that “regulatory effort is directed towards those whose activities give rise to or risk of serious environmental damage, where the risks are least well controlled or against deliberate or organised crime. Action will be primarily focused on lawbreakers or those directly responsible for the risk and who are best placed to control it.”¹⁰⁴ The enforcement of command-and-control regulation has always been a controversial issue, so the adjustments made by the Environment Agency are sometimes criticised as deregulatory.¹⁰⁵ I agree with this classification. Nevertheless, I do not perceive this as a disadvantage. This strategy was a reminder of the policy adopted by the Environmental Protection Agency in the USA during the Reagan period, which proved to be very successful.¹⁰⁶

Apart from improvements made to command-and-control regulation, there are other positive changes in the UK’s corporate regulatory policy, which over the last two decades, has become more conducive to policy mixes. Government support for these regulatory innovations was given in the BRTF’s report from 2000, *Alternatives to State Regulation*,¹⁰⁷ in which it was recognised that state regulation is not always the best measure to achieve policy goals. This approach was further developed in the BRTF’s *Imaginative Thinking for Better Regulation*¹⁰⁸ from 2003, which divided regulatory strategies into five categories: classic regulation; no intervention; incentive-based systems; information and education; self-regulation and co-regulation.¹⁰⁹ The regulatory shift towards policy mixes did not end with government endorsement of new policies, as there are good examples of the adoption of innovative regulatory instruments that complement command-and-control regulation, such as economic instruments in the form of supply-side incentives like soft loans or tax concessions for the use of environmentally-friendly technologies. A good example of this strategy is the Environmentally Sensitive Areas Scheme, which anticipates payments on a per hectare basis for habitat conservation.¹¹⁰ Furthermore, in 2001 the UK implemented a “system of negotiable, transferable emission permits as an adjunct to the government’s new climate change levy.”¹¹¹ Nevertheless, the impact of such instruments was often limited, because such regulatory experiments

¹⁰³ Colin T Reid, 'Regulation in a changing world: review and revision of environmental permits' (2008) 67(1) *Cambridge Law Journal* 126, 133.

¹⁰⁴ Environment Agency, *Enforcement and Prosecution Policy* (Environment Agency 1998).

¹⁰⁵ Alastair R Lucas, William Tilleman, Elaine L Hughes, *Environmental law and policy*, (Emond Montgomery Publications Limited 1998) 359-361.

¹⁰⁶ Ian Ayres and John Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate* (Oxford Social-Legal Studies 1992) 8.

¹⁰⁷ Better Regulation Task Force, *Alternatives to State Regulation* (Cabinet Office 2002).

¹⁰⁸ Better Regulation Task Force, *Imaginative Thinking for Better Regulation* (Cabinet Office 2003).

¹⁰⁹ Baldwin (n 26) 499.

¹¹⁰ Gunningham, Sinclair and Grabosky (n 23) 312.

¹¹¹ Benjamin J Richardson and Stephan Wood, *Environmental Law for Sustainability: A Reader*, (Hart Publishing 2006) 290.

were sometimes wrongly implemented. For instance, the UK's SO₂ reduction programme did not facilitate inter-firm trading, as the reductions could have been obtained easily without it.¹¹² Even if these instruments are currently not very effective, we cannot underestimate their huge impact on regulatory policy. Braithwaite argued that the creation of markets for tradable pollution permits contributed to the establishment of regulatory capitalism, as it bridged “the privatisation of the public and publication of the private.”¹¹³

Apart from the incorporation of economic instruments, the evolution of the UK system was also apparent in the adoption of certain reflexive modes of regulation. A good example of this was the adoption in the UK of toll-free help-lines, such as the Department of Trade and Industry (DTI), which operates an Environmental Enquiry Point, “a one-stop-shop for companies wishing to obtain technical information relevant to improving their environmental performance.”¹¹⁴ This is a very focused service which covers technical matters, legal requirements, information about proposed standards and environmental conferences and seminars. The service may nevertheless be subject to certain charges, when an enquiry takes more than four hours to deal with.¹¹⁵ Another example of regulatory innovations in the UK is directly subsidised environmental audits for small and medium sized businesses that would otherwise not have sufficient resources to undergo audits.¹¹⁶ Furthermore, over the last two decades there have been a few instances of self-regulation, such as the Internet Services Providers' Association, established in 1996, that promotes competition and self-regulation.¹¹⁷ Nevertheless, as noted by some commentators, the UK's system of self-regulation has very often undermined the institutions of democracy and public accountability.¹¹⁸ Elements of reflexive law are also apparent in the adoption of responsible care, which is aimed at improving safety in chemical distribution.¹¹⁹

However, these few examples of the adoption of wider policy instruments were the exception rather than the norm. This is supported by the observations made by the British Chambers of Commerce, which noted that “[o]ther alternatives, such as self- or co-regulation, rules of conduct, economic instruments, information and education, guidelines and voluntary approaches are rarely given any serious consideration.”¹²⁰ Furthermore, policy instruments are rarely selected in a rational way and are often chosen according to institutional culture or habit.¹²¹ However, even if these novel

¹¹² Richard B Stewart, 'Economic incentives for environmental protection: opportunities and obstacles' in Richard L Revesz, Richard B Stewart and Philippe Sands (eds), *Environmental Law, The Economy, And Sustainable Development: The United States, the European Union and the International Community* (Cambridge University Press 2000) 218.

¹¹³ Braithwaite (n 22) 8.

¹¹⁴ Gunningham, Sinclair and Grabosky (n 23) 62.

¹¹⁵ John Holmes, *Managing into the 1990s - Manufacturing and the Environment: An executive guide*, (Department for Enterprise 1992) cited in Neil Gunningham, Darren Sinclair and Peter Grabosky, *Smart Regulation: Designing Environmental Policy* (Clarendon Press 1998) 62.

¹¹⁶ Gunningham, Sinclair and Grabosky (n 22) 122.

¹¹⁷ <http://www.ispa.org.uk> (last accessed 2008/2013).

¹¹⁸ Moran (n 36) 129-133.

¹¹⁹ Gunningham, Sinclair and Grabosky (n 23) 234.

¹²⁰ Amber, Chittenden and Iancich (n 53) 18.

¹²¹ *Ibid* 22.

policies have not been widely applied in the UK, their occurrence shows that the regulatory policy is shifting in a new direction – the post-regulatory state. The UK's regulatory policy of shifting from command-and-control regulation and adopting wider policy mixes is consistent with current regulatory trends, as expressed by the Organization for Economic Co-operation and Development in 1997: "instruments, while pervasive, are the least analysed [public management tool]. When they are analysed they tend to be studied individually rather than comparatively."¹²² Nevertheless, the UK's approach of policy mixes is not fully aligned with certain academic trends that advocate more specific regulatory policies. For instance, Gunningham and Sinclair argue that different regulatory instruments might interact differently with each other and not every instrument can complement every policy mix.¹²³ Such niceties are not yet well reflected in the UK's regulatory policy, as many new instruments are added on an *ad hoc* basis. For example, the UK's regulatory policy still mixes self-regulation with adversarial modes of regulation, such as command-and-control. Nevertheless, the UK's regulatory policy appears to more aptly reflect other popular theories such as reflexive law.¹²⁴ Many commentators have noted that the UK's regulatory regime is very receptive to reflexive law, there is relatively good cooperation between industry and regulatory authorities and the regulatory regime is not so much based on adversarial modes of regulation. Because of these inherent characteristics of the UK's regulatory system, the UK approach to the adoption of reflexive law differs when compared to countries with effective and comprehensive command-and-control regulation. A good example of the latter is the US where, due to successful command-and-control, regulatory policy has evolved in a different direction. Instead of treating reflexive law as a legal base, US regulatory policy evolves by incremental and thorough expansion of command-and-control regulation.¹²⁵ In my view, these different approaches to reflexive harmonisation shows that regulatory thought has not yet reached a point of maturity.

8. From regulation to governance

Apart from the changing role of the state, the nature of regulation and the role of business, over the last two decades, the UK has also experienced significant changes in society, which have triggered innovations in regulatory policy. Rawcliffe wrote about "a transition in the environmental politics of the main socio-economic and political institutions, and by a transformation in the political *gravitas* given to environmental issues within this polity."¹²⁶ The most significant change is probably the loss of governmental power to NGOs and other social groups.¹²⁷ During these years, we can

¹²² OECD (PUMA 1997) cited in Neil Gunningham and Darren Sinclair, 'Regulatory Pluralism: Designing Policy Mixes for Environmental Protection' (1999) 21(1) *Law and Policy* 49, 51.

¹²³ Neil Gunningham and Darren Sinclair, 'Regulatory Pluralism: Designing Policy Mixes for Environmental Protection' (1999) 21(1) *Law and Policy* 49.

¹²⁴ Micheal C Dorf, 'The domain of reflexive law: Regulating Intimacy: A New Legal Paradigm (by Jean L. Cohen). Review Essay' (2003) 103(2) *Columbia Law Review* 384; Richard Stewart, 'A New Generation of Environmental Regulation?' (2003) 29 *Capital University Law Review* 21; Gunther Teubner, *Law as an autopoietic system*, (Blackwell 1993); Gunther Teubner, 'Substantive and reflexive elements in modern law' (1983) 17(2) *Law and Society Review* 239.

¹²⁵ Orts (n 96) 1340.

¹²⁶ Peter Rawcliffe, 'The role of the green movement in ecological modernisation: A British perspective' in Stephen C Young (eds), *The Emergence of Ecological Modernisation: Integrating the Environment and the Economy?* (Routledge 2000) 65

¹²⁷ Gunningham (n 38)196.

observe “the growth in movements’ combined membership and resources.”¹²⁸ Interestingly, instead of becoming more radical, the national groups, after their initial success in mobilising and influencing polity, remained unchanged.¹²⁹ In order to fill the gap, there is an apparent shift from regulation to governance. This novel regulatory policy requires dialogue and cooperation between different public, private and non-governmental stakeholders. Therefore, values such as “uniformity, inclusiveness, transparency and institutionalised consensus-building practices”¹³⁰ are inevitably replaced by participation, devolution and flexibility. This has had serious implications for ecological modernisation, especially in its democratic as opposed to technocratic meaning.¹³¹ In the UK, these changes were largely designed by the EU, which over the last two decades has shown greater flexibility in the designing of regulatory policies. Commentators call it a ‘proceduralisation’ of EC law.¹³²

The shift towards governance is also apparent in the adoption of civil regulation, such as corporate social responsibility (CSR) or meta-regulation. From the late 1990s and onwards, we can see a great institutionalisation of CSR. For instance, “[i]n 2001, 73 per cent of the United Kingdom’s FTSE 100 companies had codes of conduct or statements of business principles.”¹³³ This percentage rose to 91 in 2004.¹³⁴ The UK’s regulatory policy proved to be quite responsive to these changes. This is evidenced in the UK government’s major review of company law that produced a report in 2001 in which it stressed the necessity of retaining the voluntary character of CSR and opposed turning it into a direct legal obligation.¹³⁵ This position has been upheld since this report, with Stephan Timms, Energy and Corporate Minister, claiming that CSR is ‘going beyond legal requirements’.¹³⁶ Also the Department of Trade and Industry ‘see CSR as the voluntary actions that businesses can take over

¹²⁸ Rawcliffe (n 126) 66.

¹²⁹ *Ibid* 81.

¹³⁰ *Ibid* 203.

¹³¹ Christoff (n 63) 220.

¹³² *Ibid*.

¹³³ UK Institute of Business ethics survey, 2005 in Doreen McBarnet, ‘Corporate social responsibility beyond law, through law, for law: the new corporate accountability’ in Doreen McBarnet, Aurora Voiculescu and T. Campbell (eds), *The New Corporate Accountability: Corporate Social Responsibility and the Law* (Cambridge University Press 2007) 10.

¹³⁴ *Ibid* 10.

¹³⁵ Department of Trade and Industry, *Company Law Review Report, 2001*, Doreen McBarnet, ‘Corporate social responsibility beyond law, through law, for law: the new corporate accountability’ in Doreen McBarnet, Aurora Voiculescu and Tom Campbell (eds), *The New Corporate Accountability: Corporate Social Responsibility and the Law* (Cambridge University Press 2007) 11.

¹³⁶ *Ethical Corporation*, September 2004, 13, Doreen McBarnet, ‘Corporate social responsibility beyond law, through law, for law: the new corporate accountability’ in Doreen McBarnet, Aurora Voiculescu and Tom Campbell (eds), *The New Corporate Accountability: Corporate Social Responsibility and the Law* (Cambridge University Press 2007) 11.

and above compliance with legal requirements'.¹³⁷ This voluntary approach towards CSR is consistent with the position of the European Commission in its Green Paper on CSR.¹³⁸

Nevertheless, the insistence on a voluntary character for CSR did not prevent the UK's corporate regulatory policy from designing indirect legislative measures that have encouraged and in certain situations even necessitated the adoption of CSR policies by major corporations. A good example of such regulatory mechanisms is a wider adoption of disclosure requirements. In 2000, a disclosure requirement was implemented for pension funds, which from then on were required to provide information about the inclusion of social, environmental and ethical considerations. The practical outcome of this legislative measure was that an increasing number of pension funds have chosen to adopt CSR.¹³⁹ Further examples of this pro-CSR measure are disclosure requirements anticipated in the Companies Act 2006. Although some of the disclosure requirements in the 2006 Act did not differ significantly from the voluntary approach taken in pension regulation, e.g. the requirement for a business review, the 2006 Act appears to be more progressive than the pure voluntarism, adopted in pension legislation. Some parts of the 2006 Act appeared to adopt a new regulatory strategy - tit-for-tat. This strategy is evidenced in further pressure via disclosure apparent in a reserve power that enables the government to request a disclosure of information about voting by institutional directors at annual meetings. The tit-for-tat strategy is also apparent in the flexible use of enforcement policies. A good example of this approach is a recommendation made in the 'Hampton Review' to lessen regulatory inspection for companies that have demonstrated themselves to be 'responsible'. The revolutionary effect of the 2006 Act is nonetheless apparent in the duty imposed on these directors to consider factors other than the profit-making considerations, such as the environment, employees, customers and suppliers. This duty is very important as it gave rise to a legal foundation to the concept of CSR and enabled the shift towards the 'triple bottom line'. This provision showed the commitment in the UK's corporate regulatory policy to the concept of CSR.¹⁴⁰ In addition, this legal incorporation of factors other than profit-maximisation into the motives of corporations reflects also the modern theories of CSR, advocated by authors such as Carroll¹⁴¹ and Parkinson.¹⁴² It can also be reconciled with Friedman's narrow vision of social responsibility of corporations, as this definition anticipates certain benevolent actions of corporations, as long as they are strategic measures to increase profits and efficiency.¹⁴³

¹³⁷ www.csr.gov.uk/whatiscsr.shtml, Doreen McBarnet, 'Corporate social responsibility beyond law, through law, for law: the new corporate accountability' in Doreen McBarnet, Aurora Voiculescu and Tom Campbell (eds), *The New Corporate Accountability: Corporate Social Responsibility and the Law* (Cambridge University Press 2007) 11.

¹³⁸ Doreen McBarnet, 'Corporate social responsibility beyond law, through law, for law: the new corporate accountability' in Doreen McBarnet, Aurora Voiculescu and Tom Campbell (eds), *The New Corporate Accountability: Corporate Social Responsibility and the Law* (Cambridge University Press 2007) 11-12.

¹³⁹ *Ibid* 32.

¹⁴⁰ Doreen McBarnet and Patrick Schmidt, 'Corporate accountability through creative enforcement: human rights, the Alien Tort Claims Act and the limits of legal impunity' in Doreen McBarnet, Aurora Voiculescu and Tom Campbell (eds), *The New Corporate Accountability: Corporate Social Responsibility and the Law* (Cambridge University Press 2007) 33-37.

¹⁴¹ Archie B Carroll, 'A Three-Dimensional Conceptual Model of Corporate Performance' (1979) 4(4) *Academy of Management Review* 497.

¹⁴² John E Parkinson, *Corporate Power and Responsibility* (Clarendon Press 1996) 261.

¹⁴³ Milton Friedman, *Capitalism and Freedom* (University of Chicago Press 1982) 133.

Subsequent to the institutionalisation of the concept of CSR and the incorporation of legal justifications for it, the UK's regulatory policy evolved further via the internalisation of self-regulation, in the form of meta-regulation. This is a significant shift from the previous voluntary approaches towards the regulation of CSR, as it has a mandatory character. A good example of this technique is the adoption of the Corporate Manslaughter and Corporate Homicide Act 2007. This legislation, although criticised by many academics, shows the deepening of the concept of meta-regulation. The UK also developed more advanced modes of meta-regulation. This is apparent in the adoption of settlements of "potential regulatory enforcement actions with businesses only on condition that they implement internal changes to identify, correct and prevent future wrongdoings."¹⁴⁴ Meta-regulation is encountered in other regulatory systems. For instance, the Australian government adopted a counterpart of the UK's corporate manslaughter legislation. The aforementioned forms of settlements are common in most Commonwealth jurisdictions, with a particularly developed form in Australia. The tit-for-tat approach adopted in 2006 to some extent reflected the pyramid strategies of responsive regulation advocated by Ayres and Braithwaite.¹⁴⁵ Nevertheless, the measures implemented in the 2006 Act are not as complex and sophisticated as the solutions advocated by Ayres and Braithwaite. This difference might stem from the ambivalent treatment of legal certainty by Ayres and Braithwaite.

Unfortunately, positive attitudes towards CSR seem to benefit only big firms, which are more visible and have greater resources to adopt CSR. Therefore, a pro-active policy in the case of CSR can easily be contrasted with the reluctance of the UK's corporate regulatory policy in catering for small firms, which due to their small visibility and modest resources are not capable of incorporating CSR into their constitutions.¹⁴⁶ It appears that small firms have been neglected in current regulatory policies. Although, the regulator has acknowledged the contribution of SMEs to growth,¹⁴⁷ the current regulatory policy appears to neglect their special position. For instance, only one in 100 RIAs has considered the additional burden of regulation on SMEs.¹⁴⁸

The other type of meta-regulation adopted by the UK government is "the setting of minimum requirements for particular types of standards set by individual firms or organisations, as with attempts to set minimum terms for manufacturers' guarantees."¹⁴⁹ An example of this form of meta-regulation is the UK Enterprise Act 2002, which required the OFT to set minimum standards and grant approval marks to schemes being approved. This mode of meta-regulation is similar to the US's 'enforced self-regulation', which incentivises and at the same time requires firms to set their own rules.

As already mentioned, all of these instances of meta-regulation to some extent reflect the concept of responsive law. Nevertheless, they do not incorporate all the tenets proposed by responsive law theorists. Meta-regulation is also consistent with the percepts of the proceduralised

¹⁴⁴ Christine Parker, 'Meta-regulation: legal accountability for corporate social responsibility' in Doreen McBarnet, Aurora Voiculescu and Tom Campbell (eds), *The New Corporate Accountability: Corporate Social Responsibility and the Law* (Cambridge University Press 2007) 219.

¹⁴⁵ Environment Agency (n 98) 35-53.

¹⁴⁶ Robert Bayliss, Lianne Connell and Andrew Flynn, 'Company Size, Environmental Regulation and Ecological Modernization: Further Analysis at the Level of the Firm' (1998) 7(5) *Business Strategy and the Environment* 285.

¹⁴⁷ *Framework for National Statistics*, Office for National Statistics, 2000, available from www.statistics.gov.uk/about/national_statistics.gov.uk/about/national_statistics/documentation.asp.

¹⁴⁸ Amber, Chittenden and Iancich (n 52) 21.

¹⁴⁹ Scott (n 24) 163.

law envisaged by the legal theory of autopoiesis (LTA).¹⁵⁰ Such instances contribute to the institutionalisation of the post-regulatory state, but as noted by Scott, this is “more [of an] exception than the rule”.¹⁵¹

Although, as indicated in the case of the institutionalisation of CSR, the impact of groups in wider society has had a positive impact on the UK's regulatory policy, there have been few instances when social pressures led to certain injustices. For instance, in the case of pollution abatement, lobbying power can cause disparities between regions, as regions with certain characteristics have greater lobbying power than others. Cole, Elliott and Shimamoto gave examples of such variables: population density, unemployment rate, proportion of professional workers, the share of a region's population under the age of 44.¹⁵² There is much empirical evidence that these variables have affected the UK's regional regulatory policies. Cole, Elliott and Shimamoto named certain examples of regional activism meeting the aforementioned characteristics. One of the examples concerned 'direct' informal regulation after a chemical waste disposal firm from Lancashire applied for a license to process highly toxic waste in 1988. As the firm was located in a densely populated residential area, with a school nearby, the matter attracted much attention. Locals began a leafleting campaign and there were many press releases. As a result of these actions, the chemical firm was forced to withdraw its application.¹⁵³

9. Conclusions

Over the last two decades, the UK's corporate regulatory policy evolved in new directions. From a basic analysis of deregulatory and regulatory trends, it might appear that the most common trend in the UK's regulatory policy is deregulation. However, after careful consideration, we can observe that over the last two decades, deregulation has had a different character. Even if it cannot be described as a *sensu strictu ex ante* deregulation, it differs from a populist policy adopted by the Conservative government in the 1980s, as it is more thoughtful. This is primarily emphasised by regulatory reviews conducted by regulators. Furthermore, we can also observe a heavier regulatory touch in certain areas, such as the environment. Nevertheless, in general, a departure from state regulation has resulted in a slow adoption of new forms of regulation. The state has endeavoured to facilitate this process by the adoption of meta-regulation and certain voluntary codes. These changes may not appear significant, but they give rise to revolutionary shifts in corporate governance and CSR which, to a certain extent, have overtaken the role of a state. Unfortunately, considering the fact that only large firms are responsive to CSR, it appears that the greatest deficiency of the current regulatory policy is its neglect of small firms. The regulator has made certain endeavours to cater for small firms, but these actions have not proven very effective. The great theme during these years was the environment and the novel concept of ecological modernisation. Although we can talk in this context about a certain evolution, there are certain path dependence elements to this process, which are evident not so much in the governmental shifts, but in the traditional British regulatory style, which has only been moderated in very few areas. A tendency to secrecy and the avoidance of broad principles are the best examples. The UK's regulatory policy, over the last two decades, has to a great

¹⁵⁰ *Ibid.*

¹⁵¹ *Ibid* 167.

¹⁵² Matthew A Cole, Robert JR Elliott and Kenichi Shimamoto, 'Industrial characteristics, environmental regulation and air pollution: an analysis of the UK manufacturing sector' (2005) 50 *Journal of Environmental Economics and Management* 121, 129-130.

¹⁵³ *Ibid* 127.

extent reflected regulatory thought more widely. This is particularly apparent in the case of more developed countries. The UK has nevertheless maintained many features of its traditional policy-making, such as its cooperative character and this distinguishes it from regulatory policies in other countries. As far as general trends are concerned, it is difficult to say whether British regulatory policy over this period has reached a point of maturity. In my opinion, it has not, as there are different approaches towards regulation such as reflexive harmonisation that can be expanded further. It is difficult to speculate whether or not, over the last two decades, the UK's regulatory policy has been consistent with a wider academic way of thinking, as there are many differences between commentators. For instance, economists propose different solutions than do reflexive law practitioners. It appears that the UK's regulatory policy has adopted some ideas that were easy to implement, but I think that it is wrong to say that it follows the evolutionary concepts proposed by Teubner or Selznick. There is much that could be done.

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