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Article

It's Time to Get Serious—Why Legislation Is Needed to Make Sustainable Development a Reality in the UK

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Abstract: On paper, the United Kingdom (UK) has the architecture in place to actually start delivering sustainable development. The current UK-wide framework for sustainable development and the individual strategies made under it are all relatively modern and progressive in considering environmental limits and long-term effects. This framework, however, lacks a legislative foundation in the UK. Moreover, these strategies are not delivering in the three areas considered vital for the proper implementation of sustainable development—improving understanding, providing a comprehensive framework to integrate potentially conflicting priorities and providing an operational toolkit. This article argues that over and above its symbolic and educational value, specific legislation setting out the state's approach to sustainable development should impose mandatory obligations on policy and decision makers, with meaningful consequences both inside and outside the courtroom. Using examples from Wales, Canada and Scotland, it explores three legislative models to support the implementation of sustainable development that would be suitable in the UK and its devolved administrations, and the legislative provisions necessary for their delivery. This article emphasises the benefits of procedural obligations, both by themselves and in support of more substantive obligations, along with the possibility that certain appropriately worded substantive duties be treated as legal rules that govern decision-making. It explores the benefits and drawbacks of including a definition of 'sustainable development' and of referring to specific underlying principles such as the precautionary principle, concluding that these elements may not be necessary or suitable in the UK. The article also contends that sustainable development ought to be the central organising principle of government in the UK, and that even if a weaker and less ambitious formulation is adopted, legislative backing for the production, use and review of sustainability strategies would still improve understanding, provide a framework for decision-making and clarify the use and importance of other implementation devices.

Keywords: sustainable development; strategy; framework; legislation; statute

1. Introduction

Humanity's demand on the planet's living resources—its ecological footprint—exceeded the earth's ecological limits by the 1980s and has continued to rise. It now exceeds the planet's regenerative capacity by about 30% [1]. The effects of this failure to protect and maintain the Earth's resources are numerous. They include climate change [2], loss of biodiversity, and failure to meet basic human needs in many places around the world [3]. In 1987 the World Commission on sustainable development produced a report, *Our Common Future*, which offered an alternative paradigm for humanity which would address the challenges of environmental degradation and world poverty at the same time. 'Sustainable development' or 'development that meets the needs of the present without compromising the ability of future generations to meet their own needs' [4] (the Brundtland definition) was supposed to sort all this out. Largely due to its malleability, this notion has proved popular and resilient. Over the past 20 years sustainable development has evolved into a key policy objective for governments, international bodies, businesses and individuals [5]. It is generally recognised that the UK's current national sustainable development framework and the related strategies for each of the administrations are some of the best in the world [6]. Yet it also apparent that decision-making in the UK is not driven by this same vision of sustainable development (see below). In November, 2009, the former Chairman of the Sustainable Development Commission ('SDC') in the UK, Jonathon Porritt, concluded that 'the reality, as I see it, is that the mainstreaming of sustainable development in the UK, from the margins to the centre of government, is indeed underway, but is still moving too slowly in most respects' [6].

The UK is not alone in being at an impasse in its implementation of sustainable development. Other countries and regions are also struggling to make the big changes necessary to actually move from rhetoric to full sustainability, and the mechanisms so far developed have potential but are not being fully used. This article offers a way over the hurdles that states face. It explores the value of using legislation to educate and promote change, and it contends that the time has come to use law to force the hand of decision makers and compel them into action.

The article addresses a key gap in sustainability research. As observed by Dernbach: 'While it is difficult to envision how sustainable development can occur without a legal foundation, the issue of an appropriate legal foundation for sustainable development at the national level has received less attention than it deserves' [7]. Very few nations have actually used legislation to drive their sustainable development programme forward and provide the foundation referred to above. In the UK, sustainable development regularly appears in statutes as a legal objective, a procedural obligation, and arguably as a legal rule providing a framework for decision-making [8]. However, these provisions are specific to particular regimes and to individual or groups of public authorities such as the Environment Agency or planning authorities. Despite calls for a general sustainable development duty which extends to all government actors or activities, there remains no such obligation [9]. Moreover, in the UK, Scotland

and Northern Ireland there is no statutory obligation to produce a national sustainable development strategy nor are there any substantive or procedural obligations in place to regulate how it is produced, to secure its use and to ensure it is regularly reviewed [10]. Thus, while they are generally accepted, sustainable development strategies in the UK—along with their indicators and other implementation mechanisms—lack the legitimacy, and authority that comes with legal recognition.

The main argument presented here is that the UK is now at a stage where specific legislation is required to drive the implementation of sustainable development further forward. Legislation directed at the implementation of sustainable development could potentially address many of the current shortcomings by increasing the priority, support and protection afforded sustainable development across government(s) as a long term policy objective. Legislation could have a significant symbolic and educational impact in making people understand what is at stake. Moreover, it could crystallise the policy framework already in place and thus, turn what is now, at best, good practice into meaningful legal obligations, supported by monitoring and review mechanisms which impose significant consequences for failure. Finally, legislation could set out how tools such as environmental assessment, procurement practice, research funding and public consultation relate to sustainable development and their role in the overall framework for implementation.

The article begins by setting out the basic premise that any programme for sustainable development must include a clear understanding or vision, a framework for decision-making, and a strong operational toolkit (or armoury of mechanisms).It notes that the UK has been only partially successful at meeting these requirements, and that the various criticisms levelled at the UK approach to sustainable development can all be attributed to inconsistencies in the application of the relevant strategy, its objectives and procedures. The article argues that, over and above its symbolic and educational value, legislation in relation to sustainable development—and specifically, in relation to the production, use and review of the national or sub-national sustainable development strategy—would have meaningful consequences both inside and outside the courtroom. It explores three alternative legislative models that would be suitable for the UK and its devolved administrations to support the implementation of sustainable development using examples from Wales and Canada. The first possible model would be purely procedural. Another possible model would aim to make the strategy the central reference point or framework for all policy and decision making. (This approach could be weakened by limiting its application to policy and decision making relating to sustainable development). The final possible model used for this analysis is the most ambitious—to make sustainable development the central operating principle of government.

The article emphasises the practical benefits of procedural obligations, both operating alone and as back up for more substantive obligations, and the possibility of certain well worded substantive duties of being treated as actual legal rules which govern decision making. The article explores the benefits and drawbacks of including a definition of 'sustainable development', and of referring to specific underlying principles such as the precautionary principle; it surmises that while perhaps very useful in other jurisdictions, these definitions and references may not be necessary or suitable in the UK.

This article contends that sustainable development ought to be the central organising principle of government in the UK. However, it argues that even if a weaker and less ambitious formulation is preferred, providing some legislative backing for the production, use and review of the strategies would still be valuable. If this is the case, then the article recommends that legislation for sustainable

development be enacted in a staged fashion, focusing initially on the most important procedural obligations and then later supplementing these with the more substantive obligations, as awareness and acceptance of sustainable development develops.

The article restricts its evaluation to those legislative provisions relating to the production, use and review of a sustainable development strategy, and to the need for other mechanisms, such as environmental assessments and procurement practices, to reflect its aims and priorities. It does so for good reason. The strategy initiates a process and, as Dernbach explains, this 'involves the development of an overall sustainability vision and objectives based on an iterative and open process; identification of the institutions and policies that will be used to achieve those objectives; adoption and implementation of the needed laws and policies; and a monitoring, learning and adaptation process that informs and perhaps changes objectives, policies, and implementation' [7]. Moreover, many of the difficulties and criticisms levelled at the other mechanisms would be resolved if the criticisms directed at the development, use and review of the strategy itself are addressed.

The various recommendations made for the UK, Wales, and Scotland, are in many cases adapted from those developed elsewhere, and they can readily be transposed to other jurisdictions.That said, each jurisdiction needs to tailor its legislation to its own circumstances, keeping in mind its own constitutional and administrative arrangements and political and legal culture [11-13].

2. Implementing Sustainable Development

This section reviews the research on the essentials for the effective delivery of sustainable development as summed up by the criteria used by the SDC—a clear understanding or vision; a framework for decision-making and a strong operational toolkit. It then reviews the history of the UK approach to sustainable development and agrees with Porritt that the necessary infrastructure for delivery exists in the UK so there must be other reasons for the UK's limited progress.

2.1. The Essentials

As early as 1998, the UK's former Deputy Prime Minister, John Prescott observed that the pursuit of sustainable development requires a complete change in culture and behaviour within government [14]. Indeed, governments at all levels have had to develop an understanding of sustainable development and to consider how it should be integrated into everyday decisions and actions in their respective regions, countries and municipalities. A great deal of research and experience now exists into the optimal requirements for delivering sustainable development, and the essentials are now pretty much settled. The OECD has stated that: 'Good governance and sound public management are preconditions for the implementation of sustainable development policies' [15]. The SDC fleshes out this vision by explaining that to be meaningful, sustainable development needs to operate at three different levels. First, people must be helped to understand the 'big picture' or what is actually at stake [6,16]. As described by the OECD, what is needed is a common understanding of sustainable development. Obviously, strong leadership is a key factor for actually achieving this [15]. Leadership, however, is a double edged sword. When it is present, policies flourish, when it disappears, policies like sustainable development flounder [17]. While law can have little influence on ensuring

leadership, it can provide symbolic evidence of the importance of sustainable development, as well as suitable and lasting protection against a lack of leadership in the short term by protecting certain values, and imposing certain substantive and procedural obligations.

The SDC's second requirement is that sustainable development must provide a comprehensive framework within which to integrate potentially conflicting priorities [6]. Like many other countries, the various UK administrations have opted to use their national sustainable development strategies as the framework for the implementation of sustainable development. Approaches which use the national strategy combined with themes around economy, environment and society tend to be well regarded in the literature as 'whole systems approaches' which capture multiple aspects of a system [18,19]. As a 'whole systems' concept, sustainable development must not be too closely linked to one particular concern including environmental protection, human rights or climate change. Consequently, sustainable development cannot be an effective champion for any of its component parts on their own. These concerns need their own champions [20]. Instead, sustainable development is most appropriately viewed as providing the forum 'or table' to which important and more concrete objectives and values can be brought [21]. Used in this way, sustainable development can offer a framework for decision-making which ensures these objectives and values have influence in the decision making process [20,21]. Legislation can be used to support this role by requiring certain procedures—such as the production of reports and consultation opportunities—or by imposing substantive duties requiring decisions to be made in a particular way by taking into account certain factors, and importantly, introducing certain priorities.

Finally, the SDC maintain that sustainable development must also provide an operational tool kit—in terms of policy making, performance appraisal, management systems, procurement and so on [6]. The OECD similarly expects states to develop specific institutional mechanisms to steer integration (including enforcement and monitoring) along with effective stakeholder involvement and efficient knowledge management [15]. There are many different tools in the armoury for implementing sustainable development. These include government employment and procurement practices, dealing with the government estate, the allocation of resources through public service agreements and spending reviews, and the use of various assessment tools.

2.2. History of Sustainable Development Strategies in the UK

The UK has consistently used to its strategy to underpin and set out its sustainable development programme. The emphasis on strategy has benefits. Swanson *et al.* describe the sustainable development strategy as 'a navigational tool for identifying priority sustainability issues, prioritizing objectives, and co-ordinating the development and use of a mix of policy initiatives to meet national goals [22]. Dernbach adds that 'it is directed at the achievement of specified goals or objectives; it is a process, not merely a document. It reflects the priorities and circumstances of the country that produces it' [23]. The UK, however, has employed this strategic process without any legislative guidance or direction.

In the UK, these goals, priorities and policy tools have evolved over time along with the UK's interpretation of the term sustainable development itself. The UK's first sustainable development strategy published in 1994, described sustainable development as a trade-off between the environment

and economic development [24]. This strategy was criticised for ignoring many of the social justice issues raised in the Brundtland report. It was also criticised for lack of concrete targets, action plan and review processes [25]. Five years later, in its strategy for sustainable development, *A Better Quality of Life*, the Labour Government expanded the definition to include social concerns while still pursuing high economic growth as an objective [26]. The government produced annual reports on progress for this strategy and these were reviewed by the newly establish House of Commons Environmental Audit Committee. Target setting improved but was still far from satisfactory. The strategy was criticised for watering down the environmental side of sustainable development and for being geographically inconsistent due to its failure to take into account devolution [14,27-29]. Moreover, both of these strategies, like those of many other governments, institutions and businesses at the time, were clearly based upon what is commonly referred to as 'weak sustainability', due to their explicit attachment to the pursuit of high economic growth [30]. Weaker interpretations of sustainable development focus more on development and are indifferent to the form in which capital stock is passed on [31].Pearce notes that 'on the weak sustainability interpretation of sustainable development there is no special place for the environment' [31,32]. In contrast, stronger interpretations of sustainability limit the extent that environmental capital may be substituted by man-made capital and define certain environmental assets which are critical to our well-being and survival as critical natural capital [30].

By 2004, it had become evident to policy makers in the UK that the ecological changes being experienced were, or would soon be, creating unacceptable consequences and the weak version of sustainability popular among governments and business was not working. As Bosselmann later observes, the attempt to roll three types of sustainability (ecological, economic and social) into one overarching concept of sustainability left it pointing in multiple directions without any central meaning [33].

The SDC and academics around the world were calling for sustainable development to be 'the central organising principle of government' [33-35]. These concerns did have an impact on the next UK strategy as did devolution. *One future—different paths: UK Framework for Sustainable Development* was published in 2005 jointly by all the administrations in the UK and sets out a new approach to sustainable development based on five principles: living within environmental limits, ensuring a healthy and just society, achieving a sustainable economy, promoting good governance, and using sound science responsibly [36]. The reference to high economic growth is gone. This change combined with the explicit acknowledgement to the Earth's environmental limits, demonstrates a deeper commitment to ecological or strong sustainability. Moreover, the Framework sets out a shared understanding of sustainable development; a common purpose outlining what the UK is trying to achieve; the guiding principles needed to achieve it; sustainable development priorities for UK action, at home and internationally; and indicators to monitor the key issues on a UK basis. At the same time, the UK administration produced a UK Strategy for Sustainable Development entitled *Securing our Future* which deals with reserved (or UK-wide) issues and those issues following devolution, which only pertain to (mainly) England [37].

The devolved administrations then produced their own strategies for sustainable development, largely using the framework as a template and adding detail in relation to their own priorities and competences [38-40]. In Northern Ireland a *Sustainable Development Strategy for Northern Ireland—First Steps towards Sustainability* was produced in 2006 while devolution was still

suspended. The office of the First Minister and Deputy First Minister has produced a plan of implementation for the strategy and have been consulting on a new strategy [41]. After the Scottish National Party's success in the Scottish Parliament's election in May 2007, it replaced the previous government's sustainable development strategy with its own Economic Strategy and National Performance Indicators [42,43], along with the single objective of 'increasing sustainable economic growth'. While initially appearing at odds with the framework, recent planning policy more fully explains how the Scottish Government's vision fits in with that set out in the UK shared framework: 'Sustainable economic growth means building a dynamic and growing economy that will provide prosperity and opportunities for all, while respecting the limits of our environment in order to ensure that future generations can enjoy a better quality of life too' [44]. It is questionable whether this is truly consistent with the UK's 'sustainable economy'. Uniquely, Wales has a statutory duty to produce a sustainable development scheme s. 79 of the Government of Wales Act 2006 (and previously s. 121 of the 1998 Act). The scheme that followed the UK framework was *Starting to Live Differently—The Sustainable Development Scheme of the National Assembly for Wales*. The Welsh Assembly Government has recently replaced its strategy with one which explicitly states that 'Within the lifetime of a generation we want to see Wales using only its fair share of the earth's resources' [45].

Thus, as noted by Porritt much of the architecture is in place. Unfortunately, as discussed below, this by itself is an insufficient condition for success.

3. Criticisms of the Current UK Framework and Strategies

One future—different paths provides a unifying, UK-wide framework, and the individual strategies are all relatively modern and progressive in considering environmental limits and long-term effects. These should be capable of delivering change. However, research shows that the strategies lack influence and their use in practice is sporadic at best. The problems listed below can all be traced back to inconsistency in the application of the strategy, its objectives and procedures. The reasons for inconsistency vary. They include varying priorities between decision makers and misunderstandings about the meaning of sustainable development, its role and its applicability. Hence, at the moment, despite enviable strategic documentation, the approach is not delivering. Decisions continue to be made with little regard to the principles in the framework and strategies.

For instance, the day after the new Secretary of State for Climate Change Ed Miliband MP announced a legally-binding pledge to cut Britain's greenhouse gas emissions by 80 per cent by 2050 covering all sectors of the economy, including shipping and aviation [46], Prime Minister Gordon Brown was threatening petrol companies with an inquiry under competition laws if they refused to pass on lower oil prices to motorists [47]. The previous week the Government backed plans to allow the expansion of Stansted Airport to handle an extra 10 million passengers a year and increase the number of flights from 241,000 to 264,000 [48]. In Scotland, a newly elected Scottish National Party sought electoral favour by removing the tolls on the Tay and Forth Road Bridges despite high maintenance costs and traffic congestion concerns [49]. Essentially, it is an easy matter for governments to ignore their sustainable development commitments when they prove inconvenient or contrary to short term vote-winning decision making.

Moreover, the process for the development, use, and review of the strategies is best described as *ad hoc* and inconsistent. Even in Wales, the process set out in the statute is vague (see below). The acceptability and usefulness of any strategy is dependent on its legitimacy. While the content is very important, the procedures used for its development, use and review are equally important. As Oliver notes 'participation, in the sense of consultation and being listened to on the part of those affected by possible policy changes, may result in better-prepared and thought out proposals being implemented' [50]. Legitimacy, according to Freeman is when the public accepts decisions without having to be coerced [51]. Thus, a strategy whose development process makes sense to the public and stakeholders will be widely accepted as legitimate, and this will improve its policy relevance and usability. These problems with development, review, and implementation undermine the achievement of the SDC's first criterion for sustainable development—promoting a public understanding of what is at stake.

Each of the UK strategies for sustainable development has been subject to significant review by the House of Commons Environmental Audit Committee, which is a specialist cross cutting Parliamentary Committee; the Sustainable Development Commission, which is a non-governmental public advisory body; and academics and non-governmental organisations such as the World Wildlife Fund [16,28,52,53]. The most recent strategies were also widely consulted upon before adoption and review, and those consultations led to significant improvement in these strategies [44,45]. However, several drawbacks remain.

First, some administrations appear more committed to the values, objectives, priorities and approach set out in shared framework than others. While the UK published its strategy on the same day as the framework, and Wales (due to its statutory obligation) already had a very similar scheme in place, it took the Scottish Executive seven months and the Northern Ireland Office over a year to publish their respective strategies.

Furthermore, the change in government in Scotland led to a substantial shift in the Scottish approach, whereby the strategy was completely replaced by a new Economic Strategy and a single objective of 'sustainable economic growth'. The approach in many respects is very modern. However, it did little to improve the public's understanding of sustainable development, especially since it took two years for the Scottish Government to even attempt to realign itself with the rest of the UK by explaining how its unique approach fit within the UK Framework [44].

The Scottish experience also demonstrates the vulnerability of policy based approaches to electoral short termism. As noted by Porritt 'so far, rather than there being a sense of collective endeavour for SD alongside the diversity of approaches, there is a strong impression that they [the devolved administrations] are energetically pursuing their own agendas without much reference to Whitehall, and vice versa' [6]. Some flexibility is necessary and desirable. Nonetheless, there needs to be some consistency and a resistance to the pressure of short-termism imposed by the electoral system. The UK is not alone. In the United States, Presidential Executive Orders intended to foster sustainable development have suffered the same fate since such Orders have no authority outside the executive agencies to which they apply and they lack the durability or effect of a statute [7].

A separate problem is that the strategies remain unconnected to many of the supposed tools available for their delivery. Thus, there is a failure to provide a truly 'operational toolkit' aimed at delivering sustainable development. There is an abundance of research on methods which can deliver

more transparent, inclusive, responsive and holistic indicators and the various strategies place emphasis on these methods. Nevertheless, when it actually comes down to selecting indicators, these methods are not used. The strategy is supposed to provide an infrastructure or framework for indicator selection. However the criteria used do not reflect the principles contained in the strategy itself [36,54], and the actual indicators seem to depend more on historic use and availability than on any link to policy in the strategy [20]. The UK is not alone in this failing. A recent UN report explained that 'indicators can increase rigour and credibility of the NSDS [national sustainable development strategy] and the NSDS can provide an institutional framework for indicators to gain policy relevance'. Yet the report concluded that 'most countries have not yet fully harnessed the mutually supportive and strengthening relationship between sustainable development indicators and the NSDS' [18].

Even when the links are present and explicit in the strategy quite often there are discrepancies within an administration in actual delivery of sustainable development objectives or compliance with procedures. Varying levels of priority for the sustainable development objectives have a knock effect on mechanisms such as the sustainable development action plans, indicators, public service agreement targets and the use of the various appraisal tools. For example, the UK government's strategy requires all UK Government departments to produce sustainable development action plans (SDAPs). The SDC in January 2008 reported that 'it appeared that many departments did not have adequate and effective systems to monitor and report progress on their SDAPs, or on how sustainable development is approached more generally' [55].

The danger, as explained by Blair and Evans, is that 'for sustainability to be mainstreamed, the frameworks of corporate management, the processes and specific tools (targets and indicators), audit, review and inspection procedures all need to be appropriately aligned and geared to a common sustainability set of criteria. Currently this is not the case' [56].

Finally, and most importantly, there seems to be very little understanding or coherent thought about what exactly sustainable development means and its role in governance. Confusion remains as to whether sustainable development is simply a matter for environmental policy makers, whether it is the same as climate change, and to what extent it is compatible with the pursuit of economic growth. Moreover, uncertainty exists as to the role of sustainable development in all forms of decision-making. It regularly takes the form of a procedural obligation in both law and policy. The Welsh obligation to produce a sustainable development scheme is such a requirement. It can also appear as a weak substantive duty whereby a body is to have regard to it as a material consideration [57,58]. Finally, it has also appeared in statute as a stronger substantive duty whereby the body is to 'contribute to the achievement of sustainable development' [59,60]. Such a formulation could be interpreted as creating a legal rule which sets out how decision making is to take place and thus, providing a framework for decision-making [8]. At present, sustainable development takes on all three roles depending on the context [8]. It is also regularly ignored altogether for example in many of the pre-legislative memoranda which are required by the Scottish Parliament (see below). Although this may be appropriate for individual agencies in their specific contexts, there needs to be much more clarity as to the overall role of sustainable development in government. This requires mechanisms to support that role. While some critics maintain that real progress demands that sustainable development be given the status of 'the central organising principle of government', other models are also possible which would still assist in moving the UK closer to that objective. These are described below.

In sum, the current UK shared Framework and its related strategies lack legal and political clout and their use in practice is sporadic at best. Moreover, they are not delivering in the three areas the SDC notes as vital for the proper implementation of sustainable development—improving understanding; providing a comprehensive framework to integrate potentially conflicting priorities and providing an operational toolkit.

Arguably, these problems can all be traced back to inconsistency in the application of the strategy, its objectives and its procedures—wholly apart from whether there is any underlying legislation. The reasons for the inconsistency include: varying priorities between decision makers, misunderstandings about the meaning of sustainable development, its role and its applicability and these are magnified by other influential factors such as path dependency and resource constraints [6]. My contention here is that legislation can make a significant and beneficial difference in the way in which sustainable development strategies are developed, implemented, and reviewed. Over and above its symbolic and educational value, legislation can turn good practice and policy into binding obligations, with meaningful consequences both inside and outside the courtroom, and it can make a significant difference to delivering on all three levels set out by the SDC.

4. Possible Legislative Options for Sustainable Development

Any legislative solution to the difficulties described above needs to take into account the legislative options actually available to a given state or administration, its institutional framework, and legal culture. For the UK, devolution, a preference towards legislating sparingly, avoiding unenforceable substantive provisions and where possible leaving decision-makers ample discretion to ensure flexibility, all figure prominently in this regard. Keeping this in mind, and building on experiences in Wales and in Canada, three possible legislative models and the provisions needed by each are explored below. The models start from different political and cultural perspectives, yet they are not mutually exclusive. Indeed, it may be preferable to introduce the legislation in a staged fashion, initially setting out more detailed procedural obligations and then over time supporting these with more powerful substantive duties as public and political opinion becomes more accustomed to using sustainable development as the central organising principle of government.

As Rubin explains, in a modern state contemporary legislation serves a range of purposes.These includecreating direct prohibitions, regulatory controls and administrative agencies; conferring benefits on groups or individuals; issuing guidance; conferring grants of jurisdiction and statutory duties; imposing enforcement and implementation procedures and facilitating private arrangements [61]. Some legislation is simply symbolic expressing the political authorities' awareness of an issue and that something needs to be done about it [62].

Different states will use legislation for big policy issues (like sustainable development) in different ways and for different purposes. Different states will also have different legislative options available to them, and any suggested legislative approach must take account of the constitutional and administrative arrangements in a particular state. In many countries if one wanted to truly embed sustainable development into government the answer would be to seek a constitutional amendment and, in fact, sustainable development appears in the Constitutions of South Africa, Poland and the European Union [63-65]. While the UK can pass legislation which impacts on its Constitution (the devolution

Acts [10,66,67], the European Communities Act 1972) there is no individual or identifiable collection of documents which are 'the UK Constitution', so a constitutional approach is not available for the UK.

4.1. The Importance of Legal Culture and Institutions on the UK Approach to Sustainable Development

Before discussing any legislative options, it is essential to review the legal culture and institutions of the UK. The UK's initial approach to the sustainable development agenda was largely non-legislative [68]. Indeed, in 2000, the Government dismissed the need for legislation, stating that sustainable development could be placed at the heart of an organisation by policy directions from the executive or by the inclusion of non-statutory aims and objectives [69]. There is also a view that the needs of sustainable development are better served by specific provisions, such as targets to improve water quality or reduce hospital waiting lists, rather than any general overarching duty or objective [70]. That said, references to sustainable development have become much more commonplace in statutes of both the UK and Scottish Parliaments [8]. One possible reason is that, over the last decade, sustainable development has proven its acceptability and resilience as a policy tool and crystallising it in statute has become more palatable. For example, sustainable development has been a key policy objective of the planning systems both north and south of the border for many years [71,72] but it was only included in a relevant English statute in 2004 and in the Scottish equivalent in late 2006 [73,74]. Also, while it is not one of the European Union's core environmental principles [75,76], sustainable development has been elevated in status to one of the Union's general aims. This is reflected in the EU's legislation [65], which has influenced the content of legislation at both UK and devolved levels [77].

In light of the above, as well as the Welsh experience discussed below, legislation specifically directed at an administration's approach to sustainable development would seem not be out of step with modern UK gal culture. However, any legislation also would need to take into account the institutional structures that exist in the UK. The key challenge in this regard is devolution, and the fact that legislative and administrative competence often does not lie with the UK Government, but instead, with the devolved institutions. Enacting legislation that binds the UK and devolved governments to certain policy goals would not be easy since it largely counteracts the purpose of devolution [78,79]. Therefore, any legal formalisation in relation to the production, review, and use of the UK shared framework for sustainable development and its indicators is not a realistic possibility. Instead such formalisation needs to remain as a joint policy initiative among the administrations. The current informal approach works well at this level because successful co-operation is often underpinned by its non-binding nature. Indeed much of the actual workings of the devolution settlement are set down in a Memorandum of Understanding and various other Concordats rather than in the devolution legislation itself [80,81]. The SDC plays an important role here, keeping Scotland and Wales and Whitehall in touch with one another over sustainable development strategies and policy experience, and in maintaining a sense of common cause in the spirit of *One future, different paths* [6].

Legislation directed at a single administration is possible, as shown in Canada, where there is a federal Sustainable Development Act that covers areas of competence of the federal government [82]. Additionally, three of the ten Canadian provinces have opted to pass their own Sustainable

Development Acts [83-85]. A similar approach would be suitable in the UK. Ideally, the individual statutes will include a reference to a shared framework or some other co-ordinated UK-wide effort.

At this stage, it is important to emphasise the value of legislating at the sub-national level. Porritt hypothesises that sustainable development may be an easier concept to operationalise at the sub-national level. In his review of the standing of sustainable development in government in the UK, he notes that the new devolved system has opened up political space for innovation in Scotland and Wales, and that there has been a potentially helpful break with 'path dependence' [86]. This is supported by the new Welsh strategy and by Ross' finding that Scottish Parliament has shown a greater willingness to legislate on sustainable development than its UK counterpart [8]. Moreover, from the review below, the Canadian provinces also appear more proactive in their legislation than the federal government. Porritt suggests that particular regions or states can be laboratories for policy changes and Scotland and Wales could enlarge policymakers' sense of the politically possible in relation to sustainable development [6].

4.2. Three Legislative Models

So what is the best approach for the UK? The answer is that it depends on what the particular UK administration wants the legislation to do. Since a framework approach to sustainable development is supposed to be iterative, and capable of review and change, crystallizing the content of any existing strategy itself into law is not desirable. Instead, law reform is needed to support the selection, development, use, and review of national sustainable development strategy and, arguably, the overall approach to implementing sustainable development. It is imperative for any legislation on sustainable development to be very clear as to its overall purpose. This section explores three possible models and the legislative approaches that each model requires, drawing on examples from Wales, Canada, and the Canadian provinces of Manitoba and Quebec.

4.3. Procedural Model

The first model is purely procedural. Its objective is to ensure that certain events happen at certain times in a certain way. This approach introduces procedural obligations in relation to the production, use and review of the sustainable development strategy, and it employs other tools such as indicators and action plans. These procedural obligations could, in turn, implicitly embody the substance of certain principles [8]. For example, procedural obligations could require the production of the strategy, provide consultation opportunities, or require regular reports on progress. There is already a strong UK example of this approach in Wales. When the UK Parliament established the National Assembly for Wales ('Assembly') under the Government of Wales Act 1998 it included a requirement to produce a scheme of sustainable development [10]. Similar duties were not included in the Scottish and Northern Ireland settlements as these created parliaments with legislative power and it was thought that imposing such a duty would be contrary to the spirit of devolution. Importantly, the Welsh provisions need to be distinguished as they were, at least formally, imposed on the Assembly and later the Welsh Assembly Government ('WAG') rather than being introduced by the institutions themselves. That said, the WAG is proud that sustainable development is a core principle within its founding statute [45].

Section 79 of the Government of Wales Act 2006 requires the Welsh Ministers to produce a scheme setting out how they propose in the exercise of their functions to promote sustainable development and to report annually on how all functions were carried out. Every four years, the Assembly is to report on the effectiveness of the proposals [87].The provisions are confined to these procedural obligations. There is no definition of sustainable development, nor does the Act impose a substantive duty on the key Welsh institutions [88]. Moreover, the procedures are very vague. For example, under s. 79(3) the Welsh Ministers must consult such persons as 'they consider appropriate'. These minimal procedures have led to the Welsh institutions to be quicker to incorporate sustainable development into their policies and the exercise of their functions, to review their progress regularly and to respond accordingly. The Assembly, and subsequently, the Welsh Ministers have produced the required effectiveness reports on its first two sustainable development schemes. Both reports, produced by independent consultants, strongly commended the commitments to sustainable development made by the Assembly, but pointed to difficulties in driving those commitments through to delivery [89,90]. Nevertheless, the SDC in 2005 criticised the Welsh institutions for starting well but having unambitious commitments, failing to join up the delivery of commitments and failing to embed sustainable development across the Welsh public sector [91]. Munday and Roberts add that 'Although the commitment to sustainable development has become a legal duty, there has been very little elucidation of precisely what sustainable development means, in economic, environmental, social and cultural terms, and, as importantly, how to identify whether or not the region is becoming more sustainable' [92].

One of the unique challenges for Wales is that often it does not have the legislative competence to introduce the necessary changes. Nonetheless, the most recent scheme, entitled *One Wales—One Planet 2009*, is arguably the most ambitious of the UK strategies to date. Specifically, it sets a vision which uses sustainable development as the overarching strategic aim of all WAG policies and programmes across all ministerial portfolios and confirms that sustainable development will be the central organising principle of the WAG, as well as the steps to be taken to embed this approach. Uniquely, it sets an explicit long term aim for Wales to use only its fair share of the earth's resources [45].

Thus, for Wales, the UK government opted for a purely procedural approach relying on a minimum number of procedural duties. From the experience in Wales, it is safe to argue that introducing these types of legal procedures elsewhere in the UK would make a significant difference to the embedding of sustainable development into government activities. That said, the evidence also suggests that the Welsh provisions could benefit from some additional detail—for example, on the consultation process and the role of the SDC.

The statutes of Canada and the Canadian provinces of Quebec and Manitoba offer examples of more detailed procedural regimes. As a federal state, Canada divides legislative competences between the federal and provincial governments. The sustainability acts noted below all focus on the activities of a single administration. All three acts also impose obligations on the government to produce a sustainable development strategy as well as component strategies for individual departments [93-95], All three allocate specific responsibilities to the relevant Environment department in relation to the strategies [96-98]. In addition, these three acts have increased the powers of the relevant Auditor General's office to include review of the implementation of sustainable development across

departments and public bodies [99-101]. Both provincial governments establish special funds to encourage sustainable development research and innovation [102,103] and include procedures for the development of indicators [104,105]. The Canadian and Manitoba Acts also create advisory bodies or roundtables [106,107].

Thus, in the UK, legislatively adopted procedures could explicitly require the production of the departmental sustainable development action plans and clarify the roles of the National Audit Office, SDC and, for the UK administration, the role of the House of Commons Environmental Audit Committee in reviewing and monitoring the various strategies. It would be simple enough to put their policy remits into statute. The process for the selection, development, use and review of national or sub-national indicators could incorporate—and require compliance with—the principles and objectives set forth in the relevant sustainable development strategy.

These procedures would bring several benefits to the UK. First, a failure to comply with a statutory procedure is much easier to enforce and monitor than noncompliance with some vague substantive duty—not only under judicial review but also, importantly, by central government, interest groups and the public [8]. Moreover, the procedures can be introduced without having to address politically sensitive issues, such as clarifying the substantive meaning of sustainable development and any principles underpinning it, or delineating its specific status within UK governance. Arguably, the appropriate procedural provisions may reduce the need to include substantive provisions; by complying with the procedures the public body will still need to direct its mind to the substance behind the procedure. The Welsh Assembly's obligation to produce a scheme of sustainable development and report on it regularly is a good example.

Unfortunately, less successful examples also exist. The Scottish Parliament requires most Bills to be accompanied by a pre-legislative memorandum that includes a statement of the Bill's impact on sustainable development. Studies show that the quality of these statements has always varied and continues to be variable, often reflecting a significant lack of understanding among policy makers and draftsmen and their conflicting priorities [108,109]. These point to the need for a substantive provision to clarify the role and meaning of the term.

Thus, while providing support for a strong operational toolkit for sustainable development, an exclusively procedural approach fails to address the SDC's remaining objectives: promoting a common understanding and creating a framework for decision making. Exclusive reliance on procedural mechanisms will create a danger that any symbolic statement on sustainable development will be lost, and the required procedures will be reduced to mere 'box-ticking exercises'.

4.4. Establishing the Strategy as the Framework for Sustainable Development

The second model explicitly establishes the national sustainable development strategy as the framework for the implementation of sustainable development in the UK. Ideally, this approach explicitly sets out the sustainable development strategy as the primary reference point for all decision making across an administration. A weaker version would do this only in relation to environmental decisions, which would include the duties imposed on various public bodies to 'exercise [their] powers in the way best calculated to contribute to the achievement sustainable development' [110,111] At present, the different statutes refer to all sorts of different guidance to assist in the interpretation of

sustainable development. While allowing contextualisation and flexibility, arguably this also creates confusion and inconsistency [8]. Even the weaker version of this approach ensures a more consistent interpretation of sustainable development across an administration. This appears to be the approach taken in section 3 of the Canadian Act which provides that 'the purpose of this Act is to provide the legal framework for developing and implementing a Federal Sustainable Development Strategy that will make environmental decision-making more transparent and accountable to Parliament'. Regrettably, the purpose is (in this author's opinion) unnecessarily limited to environmental decision-making rather than extending to all government decision making.

This model also has the advantage of creating additional substantive obligations in relation to the indicative content and structure of the strategy and its use. For example, in Canada, the federal statute requires the strategy to be based on a specific definition of the precautionary principle. The federal and Quebec Acts require the inclusion of certain substantive content: goals, targets, an implementation strategy for each target and an allocation of responsibility to individual Ministers [112,113]. In contrast, the Manitoba statute creates no explicit substantive requirements for the strategy's content. Instead it sets out that the strategy is intended for the purpose of but not limited to establishing provincial sustainable development goals; establishing a framework for sustainable development policy development and guiding the preparation of specific economic, environmental, resource, human health and social policy component strategies [114]. Arguably, this description implicitly sets out certain substantive content.

In the UK, this type of approach would increase the status of the strategy in decision-making, both generally and in relation to those existing obligations that require particular agencies to 'contribute to sustainable development' It would add value by making the strategy the mandatory point of reference for these bodies, rather than leaving it to guidance and their own guidance. To be truly effective, this type of provision needs be accompanied by the procedural obligations set out above. This approach still falls short of delivering any significant cultural change however, since it says nothing about the role of sustainable development itself in the workings of government.

4.5. Establishing Sustainable Development as the Central Organising Principle of Governance

Finally, an Act could establish sustainable development as the central organising principle of governance in the UK or one of the devolved administrations. In Jonathon Porritt's final blog as Chairman of the SDC he notes: The 'mainstreaming' imperative that drives all our work ('to make sustainable development the central organising principle of everything Government does') may not as yet have got as far as we would have liked, but it has got a lot further than many may once have thought possible [116]. Jackson concludes that 'The idea of an economy whose task is to provide capabilities for flourishing within ecological limits offers the most credible vision to put in its place. But this can only happen through changes that support social behaviours and reduce the structural incentives to unproductive status competition' [117].

Such legislation would cause a massive cultural shift for governance in the UK, encouraging and driving sustainable development forward, rewarding compliance, penalising non-compliance. The legislation would also need to include an explicit statement of purpose. The most forceful example is that used in the Quebec statute; 'the object of this Act is to establish a new management framework

within the Administration to ensure that powers and responsibilities are exercised in the pursuit of sustainable development' [118]. The aim in Manitoba is less forceful—to 'create a framework through which sustainable development will be implemented in the provincial public sector and promoted in private industry and in society generally' [119]. An even weaker declaration is in the Canadian Federal Act: 'the Government... acknowledges the need to integrate…the making of all decisions of government' [120]. This declaration is clearly insufficient to make any impact. A provision based on the commitment in new Welsh strategy would work very well as a legal declaration: 'sustainable development (the process that leads to [the UK, Wales, Scotland, Northern Ireland] becoming a sustainable nation) will be the central organising principle of Government, and we will encourage and enable others to embrace sustainable development as their central organising principle and a general duty imposed on all public bodies' [45].

If a statute is going make such a commitment to sustainable development then some argue that it should be accompanied by a definition of sustainable development. All three of the Canadian administrations in their Sustainable Development Acts have chosen to define sustainable development using the Brundtland definition—'development that meets the needs of the present without compromising the ability of future generations to meet their own needs' [121-123] and, where considered necessary, adding to it. There are strong arguments in favour of providing some definition of sustainable development. First, without a clear definition, the imprecise nature of sustainable development introduces a lack of consistency, both internally within a regime or public body and externally between regimes or public bodies. Second, there may be a lack of continuity in the meaning of the term over time. This may result in confusion as to meaning and expectations, both for those implementing the legislation and those subject to it. Finally, imprecision may give the executive (a public body) too much discretion while needlessly taking power away from the judiciary and the legislature [8]. That said, as noted earlier using the Brundtland definition does little to alleviate these concerns since it can be interpreted an endless number of ways.

These arguments have all been raised in the UK relating to the specific provisions for public bodies in various acts [8]. While the number of UK statutes that refer to sustainable development is on the increase, to date the UK has resisted defining sustainable development in its legislation. Experience with such terms as 'planning' and, increasingly 'sustainable development' itself, has shown that it is better that the legislation allow the precise meaning and interpretation to evolve over time and be contextualised to suit a wide range of circumstances [124]. The non-binding nature of guidance is attractive to policy makers as it allows them to take greater risks and introduce more ambitious approaches than they would attempt with legislation. This approach has proven very effective in the UK and there is no reason why it should not continue to be. So, for instance, any definition or interpretation set out in legislation produced in 1994 on sustainable development would be out of step with more ecologically focused interpretation of sustainable development in the UK shared Framework [121]. Adding a statutory obligation to produce a strategy that offers such guidance will provide some continuity and consistency for the definition, while establishing where the relevant interpretation is to be found (in the strategy).

A related question is whether certain component principles of sustainable development, such as acting within the earth's ecological limits and seeking fair and just society, should be defined in statute or receive other statutory protection. Such provisions could set out certain principles, objectives or

rules that must be taken into account and thus explicitly incorporate certain established values or principles into decision-making processes. Both Quebec and Manitoba have adopted this arrangement. The list of substantive principles in Quebec's Sustainable Development Act must be taken into account by the Administration when framing its actions. The principles also influence the production of the sustainable development strategy [125]. However, this prescriptive approach may restrict opportunities for the principles to evolve over time and be contextualised for certain circumstances. It could also potentially limit the discretion of future administrations, and increase the chances that the provisions will be watered down to the lowest acceptable level. The Manitoba statute contains both substantive principles and guidelines for sustainable development. However, the Manitoba government only needs to 'have regard' to sustainable development and the listed principles and guidelines [126].

In order for sustainable development to actually become the central organising principle of government, a substantive duty would need to be imposed on all public bodies. This is not an easy task. The UK tends not to legislate on substantive principles, and even dominant policy changes have tended not to be explicitly legislated. Thus, for example, until recently very few statutes expressly mention equality, democracy, freedom of speech.

Moreover, some of the duties that already exist in relation to sustainable development for specific public bodies are next to meaningless [127]. For example, the duty imposed on Scottish Natural Heritage in the Natural Heritage Scotland Act 1991—'to have regard to the desirability of securing that anything done whether by SNH or any other person, in relation to the natural heritage of Scotland is undertaken in a manner which is sustainable'—is so diluted that it can only be interpreted as a rather vague objective. On the other hand, the strongest possible phrasing would impose a duty to achieve sustainable development. Given the definitional issues surrounding the term this would be a tall order and none of the UK statutes go that far [128]. Instead, they are couched in phrases which add layers of discretion. The more recent formulations use 'contribute to the achievement of' or 'contribute to' sustainable development. So long as these are not further watered down with qualifications such as 'reasonableness' or 'as costs allow', they could form the basis of a strong general obligation to be imposed on all public bodies. Arguably, this formulation is sufficient to create a legal rule and to allow sustainable development to provide the framework for decision-making [8]. At present, similar case law indicates that the courts are likely to interpret these provisions objectives rather than as legal rules [129]. That said, any change needs to start in the legislature.

One means of giving greater legitimacy to substantive duties is to phrase them as 'targets'. Targets set clear goals that are capable of being acted upon. Recently there has been an increase in the use of duties and targets in UK statutes, especially in areas such as fuel poverty, climate change and biodiversity [130]. The enforceability of these targets in court is questionable however, and one has to question what might achieved by bringing an action against the government for failing to meet established targets. Moreover, it is hard to see how a target for sustainable development can be set that would attract the same sort of public attention as those for climate change or biodiversity. Sustainable development reflects a holistic view that is difficult to express as a single indicator or target. However, targets do have a role in any legislative approach to sustainable development, both as precise deadlines for producing documentation and as benchmarks for specific sustainable development indicators that are essential to drive forward progress. More indirectly, specific climate change, biodiversity,

fuel, poverty and other targets could be used as evidence to assess progress towards sustainable development.

5. Consequences of Breach and the Case for a Staged Approach

The consequences of a failure to comply must be explored fully to ensure any legislation is effective. In the UK a failure to meet a procedural obligation is much easier to challenge and enforce than a breach of substantive duty. The procedure was either performed correctly and on time or it was not. In contrast, substantive duties are often more subjective, and give the person responsible significant discretion. While procedural obligations on their own can make a difference, the same cannot be said about substantive obligations. Thus, as set out above, the ideal model uses both. Regardless of the model chosen, it is imperative that both substantive and procedural obligations are supported by requirements for reporting, review, publication and audit that have real consequences if breached.

A key question is whether the legislation should be focused on keeping generally willing people in line or rather aimed at forcing changed behaviour among unwilling parties? In the context of the UK, it is likely that any legislation would have to be directed at dealing with both challenges. There will be inadvertent errors of judgement in pursing sustainable development. However, there will also be people who are determined to flout the system by putting their own personal short-term gain ahead of wider long term public benefit. At present, none of the existing specific substantive provisions in UK or Scottish statutes are supported by criminal sanctions and only one provision includes a statutory appeal mechanism [8]. It is difficult to see how criminal sanctions could be introduced into a Sustainable Development Act, however, given the well documented likelihood that certain public bodies will resist change for reasons such as path dependency, resource constraints, and poor leadership [52]. Some deterrence mechanisms, such as naming and shaming and budgetary penalties are likely necessary.

Standing alone, many substantive provisions, such as statements of purpose or declarations, could not realistically be accompanied by any obvious enforcement mechanisms. However, they may still be effective from a more symbolic perspective—acting to educate, inform and heighten awareness. Moreover any breach of these provisions is still likely to attract the attention of the public, interest groups, parliamentary committees, or a higher level of government and result in more informal, *ad hoc* enforcement.

Judicial review only seems appropriate in instances where a body has acted procedurally improperly, or more rarely, where a public body has acted irrationally or illegally. It is also generally reactive, costly, and time-consuming. Courts are very reluctant to intervene in any case where the argument is essentially about the merits of government policy and the allocation of resources. That said, the UK courts have demonstrated a willingness to accept sustainable development as a material consideration in decisions even without any statutory obligations [131,132]. They would likely treat a generally applicable substantive provision in the same way. Ideally, the provision would be so worded to allow the court the possibility of interpreting it as a legal rule. As noted above, however, previous research on similar provisions in other areas has revealed unwillingness to date on the part of the judiciary to treat such vague provisions as legal rules [129,133].

To be most effective then, Reid suggests that 'any legal duty should be phrased in such a way as to be enforceable, and policy targets should be strengthened not by unenforceable statutory duties but through the establishment of specific monitoring, reporting and scrutiny mechanisms that will allow effective political accountability to be achieved' [133-135]. As a result, where possible, the substantive objectives must be accompanied by a meaningful toolkit of procedural duties. These include obligations to produce an annual report, require notice, audit or publicity. A failure to comply with these statutory procedures is much easier to enforce and monitor than non compliance with broad principles, both under judicial review and, importantly, by central government, interest groups, and the public. There is precedent in the UK for supporting a general duty with an obligation to produce a strategy. Section 1 of the Nature Conservation (Scotland) Act 2004, for example, imposes a general duty on all public bodies and office holders to exercise their functions to further the conservation of biodiversity. This duty is supported by an accompanying duty to produce a Scottish Biodiversity Strategy. Procedures such as these can significantly enhance the potential impact of a given provision.

Thus, needed cultural change may have to come in stages—initially in the legislature and then later in the courts. Given the continued public and political indifference to the challenges facing the Earth, it may be that the best immediate approach is to simply introduce the necessary procedures under the first model described above. Even acting alone, the procedures can secure significant progress by compelling action. With public, media and political support, these ideally ought to be used to support explicit (as opposed to implicit) substantive obligations in relation to the sustainable development strategy its development, use, review and link to other governance tools. Ideally, a further substantive obligation that pronounces sustainable development as the organising principle of governance should also be enacted. Depending on the level of public and political support, it may be necessary to use a staged legislative approach whereby these substantive duties are introduced later as political and public understanding improves itself as a consequence of the procedural obligations taking effect. As noted above, to date the courts have been hesitant to interpret substantive obligations as anything more than material considerations to be taken into account or general objectives, and it may take longer to get the courts to fully enforce these obligations, especially those that could be treated as legal rules. That said, without legislation actually in place there is nothing for the courts to interpret. Experience indicates that it may take time to reach the stage where strong substantive obligations are interpreted by the courts as legal rules that actually secure sustainable development as the central organising principle of government supported by strong procedural obligations. It was only in 1991 that the House of Lords finally struck down UK legislation as incompatible with European law despite the supremacy of European Community law being set out in the European Communities Act 1972 [136].

6. Conclusions

The policy approach based on weak sustainability and supported by only minimal legislation is not delivering the cultural change required to meet the UK's aspirations for sustainable development. Legislation is now needed to compel compliance and adherence to best practice and promote consistency in interpretation and use. Arguably, the real challenge for legal drafters in the UK is to design a system that contains legal tools to create a meaningful framework for decision-making based on sustainable development, while ensuring that this frame work is iterative and flexible.

A UK wide statute on sustainable development which binds both central and devolved administrations alike is unfeasible following devolution. Nonetheless, specific legislation on sustainable development for each of the UK administrations would be valuable and not out of step with modern UK legal culture.

A key issue for legislators is which legislative model for sustainable development should be adopted. Three models have been explored in this article. The first model focuses on creating binding legal procedures considered vital to implement sustainable development fully, such as the production of a strategy, reports on progress, and wide consultation in the process. The typical current approaches put a general obligation in the statute and follow this up with either detailed guidelines or regulations. Getting the balance right is key.

The Government of Wales Act 2006 gives too much discretion while the list of principles set out in the Quebec statute provides too much detail and is too prescriptive with unfortunate implications for the legitimacy and enforceability of the legislation. Generally, however, the imposition of obligations to produce a strategy, and to pursue other measures such as action plans, spending reviews, indicators, and targets would be a major step forward in making the 'sustainable development toolkit' operational.

Procedures alone will not necessarily deliver a cultural change within governments, however. The second model examined above aims to enhance the status of the sustainable development strategy by introducing a substantive duty across government to ensure that its activities in implementing sustainable development are consistent with the objectives and principles set out in the sustainable development strategy. This approach gives the strategy legal status, provides a clear point of reference for those bodies with substantive obligations relating to sustainable development and generally improve the understanding of the term. It does not explicitly set out the role of sustainable development in the workings of government, however. This omission misses out on important symbolic benefits, and it fails to address directly any inconsistencies in the interpretation and application of sustainable development.

Increasingly, there have been calls for governments to make sustainable development the central organising principle of governance in the UK and arguably this is the only way to truly secure the cultural change required for genuine sustainability. For this third model to be operational two additional legislative provisions are needed. First there must be a clear declaration of purpose by government about the role of sustainable development in all its activities. The statement in the most recent Welsh strategy works well in that regard. Secondly, the legislation must impose meaningful substantive duties on all government bodies. These duties should do more than simply 'have regard to' or 'take account of' sustainable development. Sustainable development needs to be more than a material consideration, or one objective to be balanced against others. There is precedent for a better approach in previous statutes—for example, 'contribute to the achievement of sustainable development'. This phrasing is strong enough to potentially take on the role of legal rule and hence, truly provide a framework for all decision-making across government.

This author remains unconvinced of the value of legislating to define sustainable development or of referring to certain underlying principles such as good governance or sound science. More research is needed into how best to deliver these more substantive goals while still retaining the flexibility needed to allow sustainable development to be contextualised and to evolve over time.

Due to the asymmetrical nature of devolution, the means of making these changes differs across the UK. The administrations of the UK, Scottish and, arguably, Northern Ireland, could simply enact their own Sustainable Development statutes. The Government of Wales Act 2006 provides an excellent starting place for Wales but does not go far enough even if a minimalist procedural objective is used. More specific procedures are needed about consultation and the role of the SDC in particular. As Wales has only limited legislative power it would be up to the UK government to either devolve this power to Wales under the 2006 Act or to legislate for Wales.

Finally, the implementation of sustainable development to date has been a staged process in the UK and elsewhere. There is no reason to believe it will not continue to be so. Sustainable development has proven itself to be a resilient and valuable policy tool in the UK, and it is time for the UK administrations to give it legislative backing. While legislation which adopts the SDC's vision of sustainable development as the central organising principle of governance in the UK is desperately needed and arguably is the only way forward, it may take the UK administrations a while to be willing to give this legislative backing. It will likely take the UK courts longer still. This article has shown that such legislation can be staged, and even the most basic procedures can significantly improve the implementation of sustainable development. Formalisation would raise the status of the sustainable development strategy and of sustainable development itself. It would also upgrade the framework approach from a nice idea to a legal obligation. Failure to produce the strategy or a failure to observe the legislated procedural requirements would not only be subject to judicial review but it would attract considerable public attention. Most importantly, legal recognition will improve the educational value of the strategy and heighten its status in the public eye.

References and Notes

1. WWF; Zoological Society of London; Global Footprint Network. *Living Planet Report 2008*; p. 2; Available online: http://www.panda.org/about_our_earth/all_publications/living_planet_report/ (accessed on 1 April 2010). The Ecological Footprint measures the amount of biologically productive land and water area required to produce the resources an individual, population or activity consumes and to absorb the waste it generates, given prevailing technology and resource management.
2. Hadley Centre for Climate Prediction and Research. *Met Office Resources*; Available online: http://www.metoffice.gov.uk/climatechange/science/hadleycentre/ (accessed on 1 April 2010).
3. Secretariat of the Convention on Biological Diversity. *Global Biodiversity Outlook (GBO-2)*, 2006; Available online: http://www.cbd.int/gbo2/ (accessed on 1 April 2010).
4. World Commission on Environment and Development. *Our Common Future (The Brundtland Report)*; Oxford University Press: Oxford, UK, 1987.
5. Consolidated Versions of the Treaty on European Union and the Treaty on the Functioning of the European Union. *Official Journal of the European Union*, 9 May 2008, No. C 115; Available online: http://walmartstores.com/FactsNews/NewsRoom/8696.aspx (accessed on 12 April 2010); http://world.honda.com/environment/ecology/2008report/ (accessed on 12 April 2010).

6. Porritt, J. *The Standing of Sustainable Development in Government*, November 2009; p. 10; Available online: http://www.jonathonporritt.com/pages/2009/11/the_standing_of_sustainable_de.html (accessed on 12 April 2010).
7. Dernbach, J. Navigating the U.S. Transition to Sustainability: Matching National Governance Challenges with Appropriate Legal Tools. *Tulsa Law Rev.* **2008**, *44*, 93-120.
8. Ross, A. Why Legislate for Sustainable Development? An Examination of Sustainable Development Provisions in UK and Scottish Statutes. *J. Environ. Law* **2008**, *20*, 35-68.
9. Jenkins, V. Placing Sustainable Development at the Heart of Government in the UK: The Role of Law in the Evolution of Sustainable Development as the Central Organising Principle of Government. *Legal Studies* **2002**, *22*, 578-602.
10. There is such a duty in Wales under the s.79 of the Government of Wales Act 2006.
11. Many of the points raised for Scotland apply equally to Northern Ireland however, progress in Northern Ireland on sustainable development lags well behind the rest of the UK due to, among other things, the suspension of devolution from to 2007 and the power-sharing arrangements for government which often lead to deadlock. See Turner, S. Laying the Foundations of a Sustainable Northern Ireland: The Review of Environmental Governance. *N. Irel. Leg. Quart.* **2007**, *58*, 422-458;
12. Turner, S. Transforming Environmental Governance in Northern Ireland. Part One: The Process of Policy Renewal. *J. Environ. Law* **2008**, *18*, 55-87.
13. Turner, S. Transforming Environmental Governance in Northern Ireland. Part Two: The Case of Environmental Regulation. *J. Environ. Law* **2008**, *18*, 245-275.
14. *The Greening Government Initiative*; Second Report of Session 1997–98, HC 517-II (1997–98) Q2 (answer given in evidence January 28, 1998); House of Commons Environmental Audit Committee: London, UK, 1998.
15. *Improving Policy Coherence and Integration for Sustainable Development: A Checklist*; Organisation for Economic Co-operation and Development (OECD): Paris, France, 2002; Available online: www.oecd.org/dataoecd/60/1/1947305.pdf (accessed on 1 April 2010).
16. *Shows Promise. But Must Try Harder—An Assessment by the Sustainable Development Commission of the Government's Reported Progress on Sustainable Development Over the Past Five Years*; Sustainable Development Commission: London, UK, April 2004.
17. Kavanagh, D.; Richards, D. Departmentalism and Joined-Up Government: Back to the Future? *Parliament Aff.* **2001**, *54*, 1-18.
18. Many different frameworks have been adopted and are being tested. *Global Trends and Status of Indicators of Sustainable Development*; Background Paper No.2DESA/DSD/2006/2; Division for Sustainable Development UN Department of Economic and Social Affairs: New York, NY, USA, 2006.
19. Hodge, R.A.; Hardi, P. The Need for Guidelines: The Rationale Underlying the Bellagio Principles for Assessment—Chapter 2. In *Assessing Sustainable Development: Principles in Practice*; Hardi, P., Zdan, T., Eds.; International Institute for Sustainable Development (IISD): Winnipeg, Canada; 1997; Volume i-iv, pp. 1-164.

20. Ross, A. Sustainable Development Indicators and a Putative Argument for Law: A Case Study of the UK. In *Global Justice and Sustainable Development*; French, D., Ed.; Martinus Nijhoff: Leiden, The Netherlands, 2010; pp. 1-441.
21. Ross, A. Modern Interpretations of Sustainable Development. *J. Law Soc.* **2009**, *36*, 32-54.
22. Swanson, D.L.; Pintér, L.; Bregha, F.; Volkery, A.; Jacob, K. *National Strategies for Sustainable Development: Challenges, Approaches and Innovations in Strategic and Co-ordinated Action*; p. 41. Available online: www.iisd.org/pdf/2004/measure_nat_strategies_sd.pdf (accessed on 8 December 2009).
23. Dernbach, J. National Governance. In *Stumbling toward Sustainability*; Dernbach, J., Ed.; Environmental Law Institute: Washington DC, USA, 2002; pp. 724-727; p. 723 as cited in Dernbach, J. Navigating the U.S. Transition to Sustainability: Matching National Governance Challenges with Appropriate Legal Tools. *Tulsa Law Rev.* **2008**, *44*, 93-120.
24. *Sustainable Development: The UK Strategy*; Cm 2426; Department of Environment Food and Rural Affair : London, UK, 1994.
25. *Opportunities for Change—Consultation Paper on a Revised UK Strategy for Sustainable Development*; Department of Environment, Transport and the Regions (DETR): London, UK, 1998.
26. The 1999 strategy advocates the three prongs—social, economic, environment—whereby high economic growth is still one of four objectives. See *A Better Quality of Life: A Strategy for Sustainable Development for the United Kingdom*; Cm 4345; Department of Environment, Transport and the Regions (DETR): London, UK, 1999.
27. *The Sustainable Development Strategy: Illusion or Reality?* Thirteenth Report of Session 2003–04, Volume I, HC 624-I; House of Commons Environmental Audit Committee: London, UK, 2004.
28. *Sustainable Development—A Review of Progress by the Scottish Government*, Sustainable Development Commission (Scotland): Edinburgh, UK, November 2008.
29. *Taking It On—Developing a UK Sustainable Development Strategy Together—A Consultation Paper*; Department for Environment, Food and Rural Affairs (DEFRA): London, UK, 2004.
30. Blowers, A. Planning a Sustainable Future: Problems, Principles and Prospects. *Town Country Plann.* **1992**, *61*, 132.
31. Pearce, D. *Blue Print 3—Measuring Sustainable Development*; Earthscan: London, UK, 1993.
32. For a slightly stronger view see Bowers, J. *Sustainability and Environmental Economics—An Alternative Text*; Longman: Harlow, UK, 1997.
33. Bosselmann, K. *The Principle of Sustainability—Transforming Law and Governance*; Ashgate: Aldershot, UK, 2008.
34. *Where We Are Now. A Review of Progress on Sustainable Development*; Sustainable Development Commission: London, UK, July 2009.
35. *Agenda for a Sustainable America*; Dernbach, J, Ed.; Environmental Law Institute: Washington DC, USA, 2009.
36. *One Future—Different Paths: The UK's Shared Framework for Sustainable Development*; Department for Environment, Food and Rural Affairs (DEFRA): London, UK, 2005.

37. *The UK Strategy for Sustainable Development—Securing the Future*; Department for Environment, Food and Rural Affairs (DEFRA): London, UK, 2005.
38. *Choosing Our Future Scotland's Sustainable Development Strategy*; Scottish Executive: Edinburgh, UK, 2005.
39. *Starting to Live Differently—The Sustainable Development Scheme of the National Assembly for Wales*; National Assembly for Wales: Cardiff, UK, 2006.
40. *Sustainable Development Strategy for Northern Ireland—First Steps towards Sustainability*; Northern Ireland Office: Belfast, UK, 2006 (produced while devolution was still suspended. The office of the First Minister and Deputy First Minister has produced a plan of implementation for the strategy).
41. *Everyone's Involved: Sustainable Development Strategy*; Office of the First Minister and Deputy First Minister: Belfast, UK, 22 October 2009.
42. *The Government Economic Strategy*; Scottish Government: Edinburgh, UK, 2007.
43. *Scotland Performs*; Scottish Government: Edinburgh, UK, 2007.
44. *Scottish Planning Policy*; Scottish Government: Edinburgh, UK, February 2010.
45. *One Wales: One Planet, a New Sustainable Development Scheme for Wales*; Welsh Assembly Government: Cardiff, UK, 2009.
46. Britain to pledge legally-binding emissions cut. *The Independent*, 16 October 2008.
47. Brown: Petrol firms must lower fuel prices or face OFT inquiry. *The Independent*, 17 October 2008.
48. Government green light for Stansted expansion. *The Independent*, 9 October 2008.
49. Watson, J. Scrapping bridge toll adds half an hour to road misery across the Forth. *Scotland on Sunday*, 24 February 2008; Available online: http://scotlandonsunday.scotsman.com/scotland/Scrapping--bridge-toll-adds.3809986.jp (accessed on 12 April 2010).
50. Oliver, D. *Constitutional Reform in the UK*; Oxford University Press: Oxford, UK, 2003.
51. Freeman, J. Private parties, public function and the real democracy problem in the new administrative law? In *Recrafting the Rule of Law*; Dyzenhous, D., Ed.; Hart: Oxford, UK, 1999; pp. 31-37.
52. Cussons, S. *Review of Statutory Sustainable Development Duties*; IHPC: London, UK, 2006.
53. Birley, T. *Reality Check: A Review of Scottish Executive Activity on Sustainable Development*; Report to WWF Scotland; WWF Scotland: Perthshire, UK, October 2001.
54. *Sustainability Counts—A Consultation Paper on a Set of Headline Indicators of Sustainable Development*; Sustainable Development Unit, DEFRA: London, UK, November 1998.
55. *Sustainable Development Action Plans (SDA) Progress Reports—The Sustainable Development Commission's Key Findings*; Sustainable Development Commission UK (SDC): London, UK, January 2008.
56. Blair, F.; Evans, B. *Seeing the Bigger Picture-Delivering Local Sustainable Development*; Sustainable Development Commission UK (SDC): London, UK, April 2004.
57. Further and Higher Education (Scotland) Act 2005, s. 20.
58. Clean Neighbourhoods and Environment Act 2005, s. 88(9).
59. Transport Act, s. 207(2)(b).
60. Water Industry (Scotland) Act 2002, s. 51.

61. Rubin, E. Law and Legislation in the Administrative State. *Colum. Law Rev.* **1989**, *89*, 369-426.
62. Mader, L. Evaluating Effects: A Contribution to the Quality of Legislation. *Statute Law Rev.* **2001**, *22*, 119-131.
63. The Constitution of the Republic of Poland (1997), Article 5.
64. The Constitution for the Republic of South Africa (1996) Article 24.
65. Treaty of European Union (Lisbon consolidation) OJ C115/13 (9.5.2008) Article 3(3) provides that '[the Union] shall work for the sustainable development of Europe.' Article 3(5) similarly requires the Union to 'contribute to the sustainable development of the Earth'.
66. The Scotland Act 1998.
67. The Northern Ireland Act 1998.
68. Ross, A. The UK approach to delivering sustainable development in government: a case study in joined up working. *J. Environ. Law* **2005**, *17*, 27-49.
69. *Achieving a Better Quality of Life: Review of Progress towards Sustainable Development: Government Annual Report 2000*; Department of Environment, Transport and the Regions (DETR): London, UK, 2000.
70. *Is the Scottish Executive Structured and Positioned to Deliver Sustainable Development?* Environment and Rural Development Committee 10th Report 2004 (Session 2), Volume 2, SP Paper 206; The Scottish Parliament: Edinburgh, UK, 2004; p. 43.
71. *Scottish Planning Policy (SPP) 1: The Planning System*; Scottish Executive: Edinburgh, UK, November 2002.
72. *Planning Policy Guidance (PPG) 1: General Policies and Principles*; Office of the Deputy Prime Minister: London, UK, 1997.
73. Planning and Compulsory Purchase Act 2004.
74. Planning *etc.* (Scotland) Act 2006.
75. Article 11 and 191–193 of the Treaty on the Functioning of the European Union OJ C115/47 (9.5.2008) set out the integration, polluter pays, preventative and precautionary principles.
76. Winter, G. The Legal Nature of Environmental Principles in International, EC and German Law. In *Principles of European Environmental Law*; Macrory, R., Ed.; Europa Law Publishing: Groningen, The Netherlands, 2004.
77. Council Directive (EC) 2000/60 establishing a framework for Community action in the field of water policy, as amended [the Water Framework Directive].
78. Natural Environment and Rural Communities Act 2006 Sch. 4—the Joint Nature Conservancy Council as an example all the UK administrations working together.
79. Reid, C.T. *Nature Conservation Law*, 3rd ed.; W. Green: Edinburgh, UK, 2009.
80. Bulmer, S.; Burch, M.; Hogwood, P.; Scott, A. UK Devolution and the European Union: A Tale of Cooperative Asymmetry. *Publius* **2006**, *36*, 75-85.
81. Ross, A.; Nash, H. European Union Environmental Law—Why Legislates for Whom in a Devolved Great Britain. *Public Law*, July 2009, pp. 564-595.
82. Federal Sustainable Development Act 2008, c. 33.
83. Sustainable Development Act 2006, RSQ cD-8.1.1.
84. Sustainable Development Act 1997, S.M c. 61 as amended.

85. Sustainable Development Act 2007 SNL cS-34. Note that statute for Newfoundland and Labrador is limited to the sustainable development of natural resources in the province and as such is of only limited use in a UK context.
86. Lindblom, C.E. Still Muddling, Not Yet Through. *Pub. Admin. R.* **1979**, *39*, 517-525.
87. *Sustainable Development Annual Report 2007–2008*; Welsh Assembly Government: Cardiff, UK, 2008.
88. There is very weak substantive obligation imposed on the Assembly Commission (which is the contracting arm of the legislature) that 'in the exercise of the functions of the Assembly Commission due regard must be had to the principle of promoting sustainable development. In Schedule 2, clause 8(2).
89. *How Effectively Has the National Assembly for Wales Promoted Sustainable Development? Report to the Welsh Assembly Government*; CAG Consultants: London, UK, October 2003.
90. Flynn, A.; Marsden, T.; Netherwood, A.; Pitts, R. *Final Report, The Sustainable Development Effectiveness Report for the Welsh Assembly*; The Welsh Assembly Government: Cardiff, UK, March 2008.
91. *Sustainable Development in Wales: From Pioneer to Delivery*; Sustainable Development Commission (SDC): London, UK, June 2006.
92. Munday, M.; Roberts, A. Developing approaches to measuring and monitoring sustainable development in Wales. *Reg. Stud.* **2006**, *40*, 535-554.
93. Federal Sustainable Development Act 2008, c.33, ss. 9-11.
94. Sustainable Development Act 2006, RSQ cD-8.1.1, ss. 5-12, 15.
95. Sustainable Development Act 1997, S.M c.61 as amended s. 7.
96. Federal Sustainable Development Act 2008, c.33, s. 7.
97. Sustainable Development Act 2006, RSQ cD-8.1.1, ss. 8,12,13.
98. Sustainable Development Act 1997, S.M c. 61, as amended s. 5.
99. See Auditor General Act 1985, RSC 1985 A-17 as amended s. 7, ss. 21.1-23.
100. Sustainable Development Act 2006, RSQ cD-8.1.1, s. 31.
101. Sustainable Development Act 1997, S.M c. 61 as amended s. 16(1)(b).
102. Sustainable Development Act 2006, RSQ cD-8.1.1, s. 26.
103. Sustainable Development Act 1997, S.M c.61 as amended s. 17.
104. Sustainable Development Act 2006, RSQ cD-8.1.1, ss. 7,13.
105. Sustainable Development Act 1997, S.M c. 61 as amended s. 9.
106. Federal Sustainable Development Act 2008, c. 33, ss. 6,8.
107. Sustainable Development Act 1997, S.M c. 61 as amended s. 4.
108. Ross, A. Sustainable development in Scotland post devolution. *Environ. Law Rev.* **2006**, *8*, 6-32.
109. Reid, C.T. Environment and Sustainable Development. In *Law Making and the Scottish Parliament: The Early Years*; Sutherland, E.E., Goodall, K.E., Little, G.F.M., Davidson F., Eds.; Edinburgh University Press: Edinburgh, UK, 2010.
110. Transport Act 2000, s. 207(2)(b).
111. Water Environment and Water Services (Scotland) Act 2003, s. 2(4).
112. Federal Sustainable Development Act 2008, c. 33, s. 9, 10.
113. Sustainable Development Act 2006, RSQ cD-8.1.1, s. 11.

114. Sustainable Development Act 1997, S.M c. 61 as amended s. 7(2).
115. Climate Change Act 2008, ss. 13(3), 58(2).
116. Porritt, J. *Looking Back on Nine Years at the Sustainable Development Commission*; Available online: http://www.forumforthefuture.org/blog/looking-back-on-nine-years-at-the-SDC (accessed on 12 April 2010).
117. Jackson, T. *Prosperity without Growth—Transition to a Sustainable Economy*; Sustainable Development Commission (SDC): London, UK, 2009.
118. Sustainable Development Act 2006, RSQ cD-8.1.1, s. 1.
119. Sustainable Development Act 1997, S.M c. 61 as amended, s. 2.
120. Federal Sustainable Development Act 2008, c. 33, s. 5.
121. Federal Sustainable Development Act 2008, c. 33, s. 2.
122. Sustainable Development Act 2006, RSQ cD-8.1.1, s. 2.
123. Sustainable Development Act 1997, S.M c. 61 as amended s. 1.
124. Collar, N. *Planning*, 2nd ed.; W. Green: Edinburgh, UK, 1990.
125. Sustainable Development Act 2006, RSQ cD-8.1.1, ss. 6, 7.
126. Sustainable Development Act 1997, S.M c. 61 as amended s. 3.
127. Roberts, I.R.; Reid, C.T. Nature conservation duties: more appearance than substance. *Environ. Law Manage.* **2005**, *17*, 162-168.
128. In contrast see Abu Dhabi Law No. (16) of 2005 Reorganization of the Abu Dhabi Environment Agency, Article 3 which states that 'To fulfill the above objectives, the Agency has the followingresponsibilities: 22—Achieve sustainable development through environmental activities'.
129. Bell, S. Statutory Pollution Prevention Objectives: Are They Rules or Aims? *J. Environ. Law* **2003**, *15*, 78-81.
130. Climate Change Act 2008, s. 1(1) 'It is the duty of the Secretary of State to ensure that the net UK carbon account for the year 2050 is at least 80% lower than the 1990 baseline'.
131. *Horsham D.C. v. First Secretary of State, Devine Homes plc* [2004] EWHC 769.
132. *R(Ludham) v. the First Secretary of State, Derbyshire D.C.* [2004] EWHC 99.
133. *Friends of the Earth v Secretary of State for Energy and Climate Change* [2009] EWCA Civ 810.
134. Reid, C.T. Enforcement of Policy Duties. *Scottish Plan. Environ. Law* **2009**, *132*, 44.
135. Reid, C.T. Enforcement of Policy Duties Part II. *Scottish Plan. Environ. Law* **2010**, *137*, 15.
136. *Factortame v. Sec. of State for Transport (No.1)* [1989] 2 W.L.R. 997 (HL); 1990 *The Times* 20 June (E.C.J.); *(No.2)* [1990] 3 W.L.R. 818 (H.L.); [1991] 3 All E.R. 769.