

Dr Thomas L Muinzer
Lecturer in Environmental Law and Public Law
Stirling Law School

▲ *An Assessment of the UK's Climate
Change Act 2008 as a Potential
Driver of Innovative Climate
Litigation, in the Framework's 10th
Anniversary Year*

**“ Climate and Energy Governance
for the UK Low Carbon Transition:
The Climate Change Act 2008 ”**

palgrave
macmillan

What do we Mean by: Climate Change (?); Climate Law (?)

“ The science behind the issue runs as follows. A stock of greenhouse gases present in the earth’s atmosphere traps a portion of the sun’s heat and duly contributes to the warming of the planet. Since the inauguration of the modern industrial revolution human activity has been contributing radically to an increase in this atmospheric stock through the sustained burning of fossil fuels. The scientific community has identified a correlation between this anthropogenic (i.e., human-induced) increase in the stock and an associated increase in global warming. It is this global warming that in turn produces the anthropogenic climate change with which climate law is chiefly concerned. ”

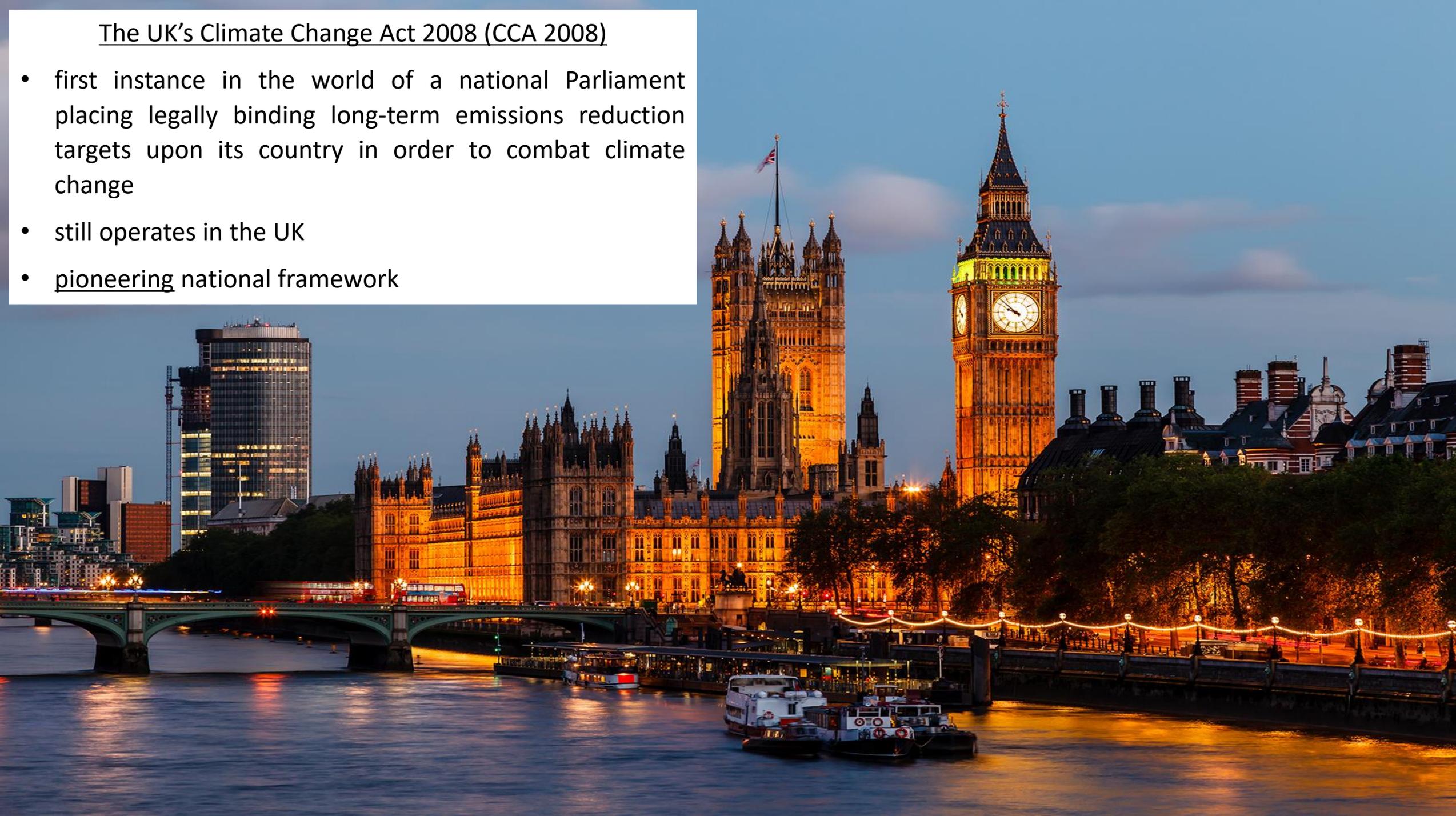
Thomas L Muinzer, ‘Observations on Ireland’s approach to Climate Law’ (2014)

- We are stepping into the heart of the sphere of law concerned to redress climate change → we are **engaging with one of the most important issues of our times**;
- Every major institute of science in the world agrees that anthropogenic climate-driven environmental disaster poses **one of the greatest threats to the life of the human species as we know it**;
- high levels of public and political concern;
- **Moral duty** to safeguard our planet at present, but also for **future generations**;
- This means law's role in attempting to engage with and resolve these problems, and **our role** as a legal community, is **important**

CUTTING-EDGE LEGAL PROBLEM

The UK's Climate Change Act 2008 (CCA 2008)

- first instance in the world of a national Parliament placing legally binding long-term emissions reduction targets upon its country in order to combat climate change
- still operates in the UK
- pioneering national framework

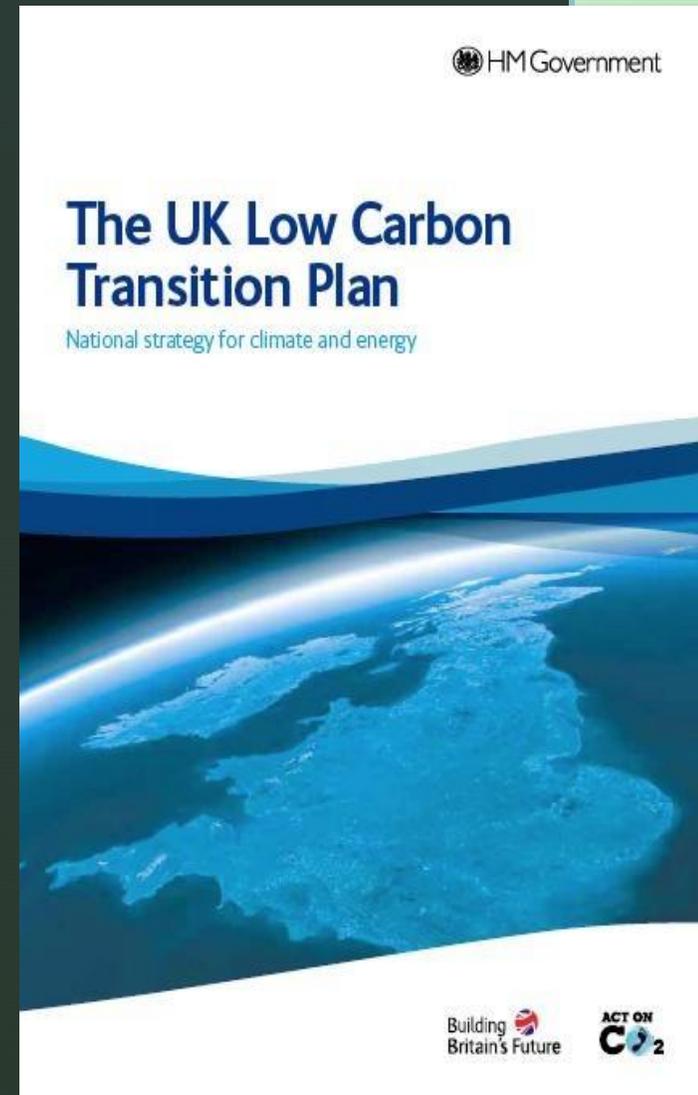


Climate Change Bill, significantly galvanized by:

- **targeted campaigning from Friends of the Earth** (and some others)
- **the coming together of 3 MPs from each of UK Parliament's (then) main three parties** –
John Gummer (Conservative); Michael Meacher (Labour); Norman Baker (Liberal Democrats)
- **Presented a model Climate Bill in House of Commons** → April 2005
- **The Stern Report** → appears shortly prior to the publication of the government's draft Bill for public consultation; sets out strong economic case for national decarbonisation. Bill published in March 2007.
Nicholas Stern, *The Stern Review: The Economics of Climate Change* (H.M. Treasury 2006)
- **Business lobby cumulatively less obstructive than might have been anticipated**
see e.g., Neil Carter, 'Combatting Climate Change in the UK' *Political Quarterly* (2008) p.200, on Corporate Leaders Group on Climate Change and (then) Prime Minister Tony Blair

Climate Change Act 2008

- Extends to UK as a whole
- Transposes essential aspects of the UK's decarbonisation programme into legally binding duties
 - see *UK Low Carbon Transition Plan* (HM Government 2009), presented to Parliament pursuant to CCA 2008 ss.12-14
 - *The Carbon Plan* (HM Government 2011).
- Commits the nation to major long-term legally binding greenhouse gas ('GHG') emissions reduction targets
- 34% national binding reduction target to be achieved by 2020 (measured on 1990 emissions levels) → CCA 2008, s.5(1)(a)
- 80% emissions reduction target on 1990 levels for 2050 → CCA 2008, s.1(1)



▸ Substance of the CCA 2008

- **Part 1: Targets and budgeting**
Carbon budget system is created to introduce finite emissions units, which are to be steadily reduced over five-year budgeting periods thus serving to drive down emissions
- **Part 2: The Committee on Climate Change (CCC)**
Non-departmental public body; scrutinizes the emissions reduction programme; provides expert advice to key governance actors, including UK Government & Devolved Administrations
- **Part 3: Emissions trading**
- **Part 4: Impact of / adaptation to climate change**
- **Part 5: Other policy measures**
- **Part 6: concerns relatively minor legal technicalities**



Climate Change Act 2008

CHAPTER 27

What 'Level' OF GOVERNANCE is the CCA 2008 embedded at?

CCA 2008 = NATIONAL-LEVEL ACT, with multi-level dimensions



EU-level/UK-level infusion:

“the partial implementation answer to substantial targets and legislative goals that have been developing in this area at the EU/supranational level.”

Muinzer, ‘Does the Climate Change Act 2008 Adequately Account for the UK’s Devolved Jurisdictions?’ (2016)

Also impacted explicitly & implicitly by devolved level:

- Colin Reid, ‘Scotland: Constraints and Opportunities in a Devolved System’, in *Climate Law in EU Member States* (2012);
 - Sharon Turner, ‘Committing to Effective Climate Governance in Northern Ireland: A Defining Test of Devolution’ *Journal of Environmental Law* (2013)
 - Thomas Muinzer & Geraint Ellis, ‘Subnational Governance for the Low Carbon Energy Transition’ *Environment and Planning* (2017)
- Note that these types of issues are in some sense ‘constitutional’ matters of sorts (the UK-EU relationship; UK devolution); they speak to the complex constitutional environment in which the CCA 2008 is located.

Quick summary of the UK Climate Experience under the EU Regime



Under the Emission Trading Scheme Directive* carbon emissions are to be cut from the UK's regulated industry by 21% from a 2005 baseline level by 2020. Focuses on energy generation and heavy industry.

** Directive 2009/29/EC of the European Parliament and of the Council of 23 April 2009 amending Directive 2003/87/EC so as to improve and extend the greenhouse gas emission allowance trading scheme of the Community.*

Under the Effort Sharing Decision** extending to areas outside the ETS remit (e.g., housing, transport) the UK is to reduce emissions by 16% from a 2005 baseline by 2020.

*** Decision No 406/2009/EC of the European Parliament and of the Council of 23 April 2009 on the effort of Member States to reduce their greenhouse gas emissions to meet the Community's greenhouse gas emission reduction commitments up to 2020.*

A Carbon Capture and Storage (CCS) Directive*** has also been issued in order to facilitate investment in CCS technology and its deployment.

**** Directive 2009/31 of the European Parliament and of the Council of 23 April 2009 on the geological storage of carbon dioxide and amending Council Directive 85/337/EEC, European Parliament and Council Directives 2000/60/EC, 2001/80/EC, 2004/35/EC, 2006/12/EC, 2008/1/EC and Regulation (EC) No 1013/2006.*



Quick summary of the UK Climate Experience under the EU Regime (CONT.)



Under the **Renewables Directive*** the UK is to achieve a total renewable energy share of 20% by 2020 (per Article 3). A particular target is applied to Member States within this bubble; in the UK's case it is to lift its renewables share from 1.3% (measured at a 2005 baseline) to 15% by 2020.

** Directive 2009/28/EC of the European Parliament and of the Council of 23 April 2009 on the promotion of the use of energy from renewable sources and amending and subsequently repealing Directives 2001/77/EC and 2003/30/EC.*

The 20-20-20 objectives relating to **ENERGY EFFICIENCY** are a little more complex in legal terms. Instead of creating an overarching Directive supranational law continued to rely on the Energy Performance of Buildings Directive, a follow-up buildings Directive enacted in 2010, and the 2006 Energy End-Use Efficiency and Energy Services Directive.**

*** Directive 2002/91/EC of the European Parliament and of the Council of 16 December 2002 on the energy performance of buildings; Directive 2010/31/EU of the European Parliament and of the Council of 19 May 2010 on the energy performance of buildings; Directive 2006/32/EC of the European Parliament and of the Council of 5 April 2006 on energy end-use efficiency and energy services and repealing Council Directive 93/76/EEC.*

It was not until 2012 that a more explicit form of Directive arrived with the **Energy Efficiency Directive*****

**** Directive 2012/27/EU of the European Parliament and of the Council of 25 October 2012 on energy efficiency, amending Directives 2009/125/EC and 2010/30/EU and repealing Directives 2004/8/EC and 2006/32/EC*



CC(S)A → BASED ON CCA 2008

▾ APPROACH

- Legally binding target of 42% reduction of GHG emissions for 2020 based on 1990 levels
- Equivalent long-term target of 80% below 1990 levels for 2050
- The '2050 target' is stated at section 1, with the 'interim target' – namely the 2020 target – stated at section 2. CC(S)A s.1(1), s.2(1)
- The Scottish Ministers must ensure that the net Scottish emissions account for the year 2020 is at least 42% lower than the baseline; CC(S)A s.2(1).



The Substance of the CC(S)A 2009 is Framed as Follows:



Climate Change (Scotland) Act 2009

Part 1: imposition of emissions reduction targets

Part 2: advisory functions

Part 3: reporting duties

Part 4: duties of public bodies relating to climate change

Part 5: 'other climate change provisions'



Muinzer, Thomas L., 'An Evaluation of the Implications of EU Climate and Energy Governance for the UK in light of Brexit', *European Journal of Current Legal Issues* 23(2) (2017).

Not just interested in 'Brexit' in general - employs multilevel governance analysis to distinguish the most important EU-driven climate and energy laws in the UK, tacking them to analysis of the EU's constitutional development (changes to the EU Treaties) to better understand where powers are located, etc.

Muinzer, 'Does the Climate Change Act 2008 Adequately Account for the UK's Devolved Jurisdictions?' *European Energy & Environmental Law Review* (2016)

Some multilevel governance theorising, but with classic doctrinal legal analysis to the fore / 'black letter law', where the Climate Change Act is critiqued in order to interrogate how the legislation itself accounts for the UK devolved jurisdictions, and knowingly or unknowingly structures and impacts aspects of national-devolved power relationships.

Muinzer, TL and Geraint Ellis, 'Subnational Governance for the Low Carbon Energy Transition: Mapping the UK's "Energy Constitution"', (2017) 35(7) *Environment and Planning C*, 1176-1197

*" The UK has a 'national' strategy to decarbonise its energy sector, yet the transfer of key responsibilities to its Devolved Administrations has meant that they control many of the powers that determine the rate and extent of the decarbonisation process. This reflects an asymmetrical distribution of legal responsibilities that has cast a complex range of powers 'downward' from the national sphere to subnational scales and which plays a crucial role in shaping the agency at different levels of the UK's energy governance. **This paper provides a detailed exploration of the UK's 'Energy Constitution' as a means of examining the way in which the complex legal framework of devolution shapes the spatial organisation of the UK's low carbon transition.** "*

Muinzer, 'TL. Muinzer, '**Is the Climate Change Act 2008 a "Constitutional Statute"?**', *European Public Law* (2018, forthcoming).

Develops technical legal arguments around the issue of constitutional rights and human rights

THERE ARE CERTAIN PROBLEMS OR COMPLEX ISSUES RAISED BY THE CCA FRAMEWORK...

Extent of enforceability of duties = Currently a Hard Legal Problem

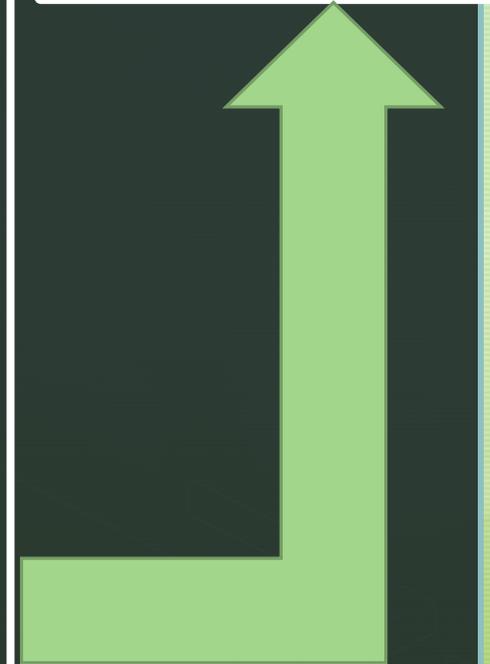
- CCA 2008 expressly **establishes a range of complex duties**,
- Where duties not complied with, legal recourse = judicial review, but
- CCA **does not incorporate sanctions for the breach of those duties**
...including for breach of **major reduction targets or carbon budget levels**
- Further, Colin Reid stresses that:

“[although JR] is the only realistic route for seeking a sanction or remedy... [t]he likelihood of any individual being able to claim compensation is ruled out by **the combination of the unlimited class to whom the duty is owed** and the **difficulty of attributing any loss to the failure to achieve the targets.**”**

**Prof Colin Reid,

“A New Sort of Duty? The Significance of ‘Outcome’ Duties in the Climate Change and Child Poverty Acts”

P.L. 749 (2012)



Our Default Assumptions Are...

- These sorts of JR challenges may (perhaps) prove fruitful where courts are appealed to as a means of securing compliance with ‘softer’ sorts of CAA 2008 duties (reporting, consultation)
- Where ‘hard’ reduction targets or carbon budget thresholds are missed, much greater difficulty arises
- In these ‘hard’ obligations cases, courts might award **declaratory relief** (possibly at the most)

Friends of the Earth v. Secretary of State for Business, Enterprise and Regulatory Reform [2009]

E.W.C.A. Civ 810 →

a rare Secretary of State ‘target’ case that emerged (concerning fuel poverty & Warm Homes and Energy Conservation Act 2000, s.2(1)); **nothing in it mitigates the assumptions sketched out above**

See also *Catherine Callaghan, ‘What is a ‘Target Duty’?’ Judicial Review (2000)*

Colin Reid, 'A New Sort of Duty? The Significance of 'Outcome' Duties in the Climate Change and Child Poverty Acts'

“The **unqualified nature of the duty neutralises the factors militating against judicial intervention** but at the same time they may **leave the court with little scope to provide a meaningful remedy** in the event of impending or actual non-compliance. The formulation of the duty may **render the issue justiciable**, by removing the discretion and room for manoeuvre that other types of duty leave for Ministers, but may **also constrain the ability of the courts to offer more by way of sanction** than a self-evident declaration of non-compliance.”

- IN SUM: we have a **doctrinal legal 'paradox'** insofar as sharply drawn duties are imposed on the Secretary of State in a fashion that simultaneously constrains judicial enforcement of remedies

Nonetheless...

- Perhaps the novel / 'new' form of law embodied by the CCA 2008 will lead to similarly novel/new approaches by the courts, perhaps even radical judicial thinking...
- See developments in **Holland** and **New Zealand** →

These Dutch & New Zealand cases (below) cannot extrapolate to UK CCA 2008 law - but may **demonstrate and emphasise how space for novel capacities for action can arise contiguously in the face of novel legal climate obligations.**

** ***Urgenda Foundation v Netherlands*** (24 June 2015) ECLI:NL:RBDHA:2015:7196.

Dutch legal doctrine of 'hazardous state negligence' developed by Dutch courts, re., climate change

*** ***Taralga Landscape Guardians v Minister for Planning*** [2007] NSWLEC 59.

New South Wales 'principle of intergenerational equity' developed by New Zealand courts re., climate change

See further Fisher,
Scotford and
Barritt,

"The Legally
Disruptive Nature
of Climate Change"

MLR (2017) at
pp.190-191.



BUT THERE MAY BE MORE SCOPE FOR ACTION IN OUR OWN LAW THAN WE REALISE

- Muinzer, TL. “Is the Climate Change Act 2008 a ‘Constitutional Statute?’”, forthcoming in *European Public Law*
 - Acknowledges that it is hard to make a case that the 2020 and 2050 target dates are meaningfully legally enforceable
 - Also, if for argument’s sake one accepts that they ARE enforceable, it is hard to know what meaningful REMEDIES courts may apply where the targets are breached
 - Points out that there is some uncertainty over whether CCA 2008 climate governance is part of the UK’s ‘constitution’ or not
 - Argues that its novel nature could permit it to be construed as a ‘constitutional statute’, which could conceivably strengthen courts’ approach to enforceability and remedies; see *Thoburn v Sunderland City Council* [2003] Q.B. 151



Litigation: All (Fairly) Quiet on the Western Front

The Queen on the Application of London Borough of Hillingdon & Ors v Secretary of State for Transport v Transport for London

High Court of Justice Queens Bench Division Administrative Court [2010] EWHC 626 (Admin)

The Secretary of State had indicated in a White Paper strategy that the UK Government's support for a third runway at Heathrow Airport was dependant on certain climate change (and other) conditions being satisfactory, and then subsequently indicated that those conditions could be met. However, the court found the Secretary of State had erred, insofar as the CCA had since been passed since that strategy was set out and thus the position would need to be reviewed in light of how those developments would impact the conditions. Thus, **Lord Justice Carnwath noted that "common sense demanded that a policy established in 2003, before the important developments in climate change policy, symbolised by the Climate Change Act 2008, should be subject to review in the light of those developments."** Para [52]

PLAN B + 11 CITIZENS (aged 9 to 79)

**DEMAND A FUTURE FROM THEIR
GOVERNMENT**

20 March 2018, Royal Courts of Justice, Strand,
London WC2A, 09:00hrs to 10:00hrs



The Government knows its carbon target for 2050 is inconsistent with the Paris Agreement and is targeting only climate chaos. It turns out it's based on a simple mistake.

WE DEMAND a future for ourselves and our children
WE DEMAND inter-generational equity
WE DEMAND to be heard

Join us outside Court in solidarity with our legal action, and in celebration of C & C, the model for the Climate Change Act 2008, with music from Aubrey Meyer and ClimateKeys.

HOWEVER:

Plan B litigation is in pipeline right now

- December 8, 2017 → Claimants file their grounds for JR at the High Court
- Claimants note that the CCA 2008 set a carbon emissions reduction target for the year 2050 that is at least 80% lower than the aggregate total of the UK's greenhouse gas emissions in 1990 (the 2050 target).
- Claimants argue that the 2050 target is consistent with limiting average warming to 2 degrees C above pre-industrial levels, but in post-2008 period and particularly since the Paris Agreement the scientific consensus suggests limiting average warming to 1.5 degrees C above pre-industrial levels is appropriate.
- Under CCA 2008 s.2, the Sec of State has facility to revise the 2050 80% reduction target in light of scientific developments and international law. Thus Sec of State has a duty to amend the 2050 figure, and Claimants seek to JR the failure to do so.

Plan B litigation **continued...**

- **Section 3 of the JR Claim Form reads:**

“Details of the decision to be judicially reviewed[:].... The ongoing failure of the Secretary of State for Business, Energy and Industrial Strategy not to exercise his power under section 2 of the Climate Change Act 2008 to amend the percentage figure set out in section 1(1) of that Act.”

It is also claimed that Arts 2 (‘Right to Life’), 8 (‘Right to Respect for Private and Family Life’), and Art 1 of Protocol 1 (‘A1P1’; ‘Protection of Property’) of the HRA 1998 have been breached. “The Claimants rely upon these both individually and read in conjunction with Article 14.” → Art 14 is “Prohibition of Discrimination”

Claimants present **five grounds for seeking judicial review** of the Secretary of State's failure to revise the 2050 target:

- (1) it is **ultra vires**, because it frustrates the legislative purpose of the 2008 Act;
- (2) it is **based on an error of law** regarding the objective of the Paris Agreement;
- (3) it is **irrational**, because it fails to take into account and / or inappropriately weighs considerations including the risks of global climate change and predictions of future technical innovation;
- (4) it **violates the Human Rights Act 1998**; and
- (5) it **breaches** the public sector equality duty set out in **Section 149 of the Equality Act 2010**.

What are the Claimants seeking?

Claimants seek declaratory relief that the Secretary of State acted unlawfully in violation of his responsibilities under the 2008 Act and a **"mandatory order that the Secretary of State revise the 2050 target"** (quoting JR Claim Form, Section 7). They also seek what other relief the court deems appropriate and costs.

Other Cases Raised in my Book Research...

- ***In the Matter of an Application By JR 47 for Judicial Review [2013] NIQB 7*** → CCA evoked with reference to statutory duties centring on appropriate residential accommodation being made available by pertinent authorities to a hospital patient suffering from a learning disability
- ***Preston New Road Action Group v Secretary of State for Communities and Local Government [2018] EWCA Civ 9*** → appeal against planning permission granted for exploration works to test the feasibility of developing hydraulic fracturing / 'fracking' at two sites in Lancashire, England
- ***The Queen on the Application of London Borough of Hillingdon & Ors v Secretary of State for Transport v Transport for London [2010] EWHC 626 (Admin)*** → CCA drawn upon in order to challenge UK Government's favourable disposition towards the development of a controversial third runway at Heathrow Airport
- ***R (on the application of Drax Power Ltd) v HM Treasury [2016] EWHC 228 (Admin)*** → treatment of an unsuccessful challenge to UK Government's rather sudden removal of important financial exemptions for renewable source electricity
- ***R (on the application of Griffin) v Newham LBC Divisional Court [2011] EWHC 53 (Admin)*** → involved a local authority's decision to vary a planning permission so as to enable a greater number of flights per year at London City Airport

Litigation
and the
Climate
Change
Act
2008



Other Cases Raised in my Book Research...



Climate Change Act 2008

R (on the application of People & Planet) v HM Treasury [2009] EWHC 3020 (Admin) → a 'hopeless' endeavour by claimants to persuade the courts that the CCA created a particular legitimate expectation in the context of UK Treasury's handling of investment in the Royal Bank of Scotland.

Climate Change (Scotland) Act 2009

Has not yet been the subject of significant litigation in the Scottish courts.

Has exhibited tendency to arise as a background feature over the course of court argument or reasoning in certain instances, in particular where disputes over wind farm planning permissions are concerned, see e.g., ***Lord Boyd of Duncansby, para [1], Wildland Ltd and the Welbeck Estates v Scottish Ministers*** (wind farm planning dispute)

Bova v Highland Council [2013] SC 510, para [54] → planning permission for housebuilding and risk of flooding

Packard, Petitioner [2011] CSOH 93, para [19] → concerning an obligation to transition to renewable energy

Litigation
& Climate
Change Act
2008
+
Climate
Change
(Scotland) Act
2009





**THANK
YOU FOR
LISTENING**

