A COMPARATIVE STUDY OF THE ENVIRONMENTAL LAWS OF INDIA AND THE UK WITH SPECIAL REFERENCE TO THEIR ENFORCEMENT

By

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ABSTRACT

This dissertation is a comparative study of environmental law and policy in India and the UK. The study uses research methodology based on comparative law method, concepts of lesson drawing and policy transfer from political science, and socio-legal approaches.

This study concludes that India should take measures to improve enforcement of various environmental laws, including adopting a revised policy on pollution prevention, developing an integrated approach to pollution abatement, developing a policy on prosecution and enforcement, restructuring various environmental laws to meet treaty obligations, introducing incentive based instruments for pollution abatement and adopting a cooperative approach to enforcement of the environmental laws. India may positively draw lessons from the UK in these areas. The UK may draw inspiration from the novel environmental jurisprudence developed by the Indian Supreme Court. This study also favours establishment of an environmental court in each jurisdiction.

This dissertation is dedicated to:

Mr Mukut Mithi, Former Chief Minister,
Arunachal Pradesh, India, and
People of Arunachal Pradesh.

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1 INTRODUCTION

1.1 Aims

This project aims to examine the scope for lesson learning and policy transfer between India and the UK in the field of environmental law.

1.2 Objectives

This project also sets the following objectives:

- To find out the comparative advantages of the environmental policy and law of the UK and India,
- To consider how to redress the problem of poor enforcement of the environmental law in India, and
- To make suggestions for strengthening the environmental policies and laws of India.

1.3 Why compare India and the UK

India is facing problem of resource degradation and pollution of the environment despite employing a range of regulatory instruments. "But the law works badly, when it works at all. The judiciary, a spectator to environmental despoliation for more than two decades, has

recently assumed a pro-active role of public educator, policy maker, super-administrator, and more generally, *amicus* environment."[1]

The Indian Supreme Court has said:

> " If the mere enactment of laws relating to the protection of the environment was to ensure a clean and pollution free environment, then India would, perhaps, be the least polluted country in the world. But, this is not so. There are stated to be over 200 Central and State statutes, which have at least some concern with environmental protection, either directly or indirectly. The plethora of such enactments has, unfortunately, not resulted in preventing environmental degradation which, on the contrary, has increased over the years."[2]

Likewise, the "Approach Paper to the Tenth Indian Five Year Plan" (2002-2007) says that 'pollution of air, water and soil is emerging as a serious threat to human health, biodiversity, climate change, ecology and economy of the area.'[3] The approach has recommended review of existing policy, laws, rules, regulations and executive orders and their better enforcement.

Increasing pollution problem in India may be ascribed to development and industrialization of the country, which was started in the early 1960s. In fact, the UK was also struggling with pollution problems in the early 1960s. The infamous London smog of 1954 is still fresh in peoples' memory. Having gained experience in pollution control dating back to the days of the Alkali Act 1863 and the Alkali Inspectorate established in the same year, the UK has put in place progressive environmental policy and laws in the late 1980s and in the

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1 See generally Divan, Shyam. and Rosencranz, Armin. (2001) *Environmental Law and Policy in India*: C*ases*, *Materials and Statutes*, Second Edition, New Delhi: Oxford University Press, p.1.

[2] *Indian Council for Enviro-Legal Action v Union of India* 1996 (5) SCC 293.

[3] Government of India (2002) *Draft Approach Paper to the Tenth Five Year Plan*, New Delhi: Planning Commission, p.7, available on line at http://www.planningcommission.nic.in (visited 10 March 2002).

early 1990s. The UK's White Paper on the environment, *This Common Inheritance*[4], was the beginning of reforms in the environmental policy and law to be followed by equally impressive policy and legislative measures in other aspects of the environment in an integrated manner. Among the Member States of the European Community, the UK has emerged as a leader in abating pollution and improving the environment. It is worth quoting the words of a German commentator:

> "In the last decade, Great Britain has taken the lead in European environmental law, not least because it has ensured that core concepts of the Environment (Protection) Acts 1990/95 were taken up in the EC Directive 96/61 of 24 September 1996 concerning integrated pollution prevention and control. Now, within the new framework provided for by the Pollution Prevention and Control Act 1999, Britain can adjust the key elements of the integrated system already established by the Environment (Protection) Act 1990/95 to additional European regulatory techniques. Essentially, Britain can relax as it watches other member states struggle to assess and restructure the basis of their environmental law".[5]

Literature review shows that no noticeable work has been done on comparing environmental laws of India and the UK aimed at India benefiting from the success story of the latter. "Detailed comparative study has, however, been done on the environmental policy approaches of India and the Netherlands."[6] Most of the literature reviews in India indicate a role for the judiciary in environmental matters and growth of social action litigation in pollution abatement. In contrast, literature reviews in the UK indicates a role of various environmental laws relating to air, water, waste and town and country planning for better environmental management in conformity with the environmental policies of the Government.

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[4] UK Government (1990) *This Common Inheritance, Britain's Environmental Strategy*, Cmnd 1200, London: HMSO.

[5] Zottl, Johannes. (2000) 'Towards the Integrated Protection of the Environment in Germany ?', *Journal of Environmental Law* ,12: 3, p.281.

[6] Kuik, O.J. et al. (1997) *Pollution Control in the South and the North: A Comparative Assessment of Environmental Policy Approaches in India and the Netherlands*, New Delhi: Sage Publications.

This comparative study is therefore worth undertaking, as India requires knowing how to improve compliance with the environmental laws rather than depending solely on the efforts of some public-spirited citizens to invoke the writ jurisdictions of the Indian Supreme Court and the High Courts for judicial intervention to redress environmental problems. In addition to this 'environmental laws is, perhaps *par excellence*, an area where national law makers can learn from each other's mistakes and successes.'[7]

1.4 Scope

This study is, in general, confined to India and England. Reference will be made to the UK when the extent of the application of policy and law is the entire country e.g. *This Common Inheritance* 1990. At many places the UK has also been used interchangeably with England, particularly in the context of the environmental law. This study is thus confined to a comparative examination of the environmental policy and law of India and England in main aspects of the environment namely air, water, land, waste, and forests.

1.4.1 Environment, environmental law and environmental policy

Einstein once remarked, 'the environment is everything that isn't me'. In this sense, the environment may mean virtually everything in the surrounding. However, for the purpose of this study a limited definition of the environment as contained in the statutes will be adopted. Section 1 of the UK Environmental Protection Act 1990 defines the environment as consisting of ' all, or any, of the following media, namely, the air, water and land; and the medium of air includes the air within buildings and the air within other natural or man-made structures above or below ground'. This definition is closer to the scope of this study

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[7] Tromans, Stephen. (1994) ' Some Comparative Reflections', in Markesinis, B.S. (ed), *The Gradual Convergence: Foreign Ideas, Foreign Influences, and English Law on the Eve of the 21st Century*, Oxford: Clarendon Press, p.252.

than section 2 of the Indian Environment (Protection) Act 1986 which states that ' environment includes water, air and land and the inter-relationship which exists among and between water, air and land, and human beings, other living creatures, plants, micro-organisms and property.

Despite the development of environmental law as a branch of law, it does not comprise a single, distinct set of rules. Rather it is made up of law drawn from a variety of sources including environmental legislation, the tort of nuisance, negligence, trespass, the rule in *Rylands v Fletcher*, town and country planning legislation, land law, consumer protection, and public health legislation etc. But this study will mainly deal with environmental legislation; and tort law and town and country planning law will be discussed in outline.

The main aim of the environmental policy is to state the objects or goals of a desired environment. Constitutional provisions relating to the environment, guidance notes, and policy documents on the environment and pollution have been treated as different contours of environmental policy in this study. However, there are some areas where the precise difference between environmental law and policy is blurred.

Other dimensions of this study are understanding the impacts of EC law and international law on the UK and international law on India's environmental law regime. The 'EC law is domestic law in the sense that it cannot be ignored even though it does not always give rise to enforceable obligations and remedies'.[8] International law has influenced and shaped the environmental law in India and the UK, particularly after the Stockholm Conference 1972. This aspect will therefore find mention in this study.

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[8] Bell, Stuart. and McGillivray, Donald. (2000) *Ball and Bell on Environmental Law: The Law and Policy Relating to the Protection of the Environment,* Fifth Edition, London: Blackstone Press Limited, p.6.

1.5 Research methodology

This study uses four methods or general strategies to undertake the study of the environmental laws of India and the UK. These are comparative law method, policy transfer and lesson drawing approach, a socio-legal approach, and the aid of interviews with officials involved with formulation of environmental policies and enforcement of the environmental laws.

1.5.1 *Comparative law method*

It is often quoted that Aristotle collected more than 150 city state constitutions in the 4th century BC for devising a model constitution for Greece. Therefore, the method of comparative law for understanding and improving law dates back to the ancient times. Zweigert and Kotz (1987) have defined the subject of comparative law as ' an intellectual activity with law as its object and comparison as its process'.[9] Most comparative law books have assumed three main legal families in the world namely civil law, common law and socialist legal order. However, with the collapse of the erstwhile Soviet Union only two parent legal families remain, that is civil law and common law.

Civil law countries, such as France and Germany, have been influenced by the Roman tradition of law making while India and the USA have made their law following the common law tradition of England. Before independence, Indian courts have followed the English common law to adjudicate suits for damages in torts. Article 372 (1) of the Indian constitution applied its seal on the continuance of the common law in India:

> "Not withstanding the repeal by this constitution of the enactments referred to in article 395 but subject to the other provisions of this constitution, all the laws in

[9] See generally Zweigert, Konrad. and Kotz, Hein. (1987) *Introduction to Comparative Law: Volume I-The Framework*, Oxford: Clarendon Press, p.2.

> force in the territory of India immediately before the commencement of this constitution shall continue in force therein until altered or repealed or amended by a competent legislature or other competent authority. This expression includes not only statutory law, but also custom or usage having the force of law and as such, it must be interpreted as including the common law of England which was adopted as the law of this country before the constitution came in force."[10]

This comparative study therefore qualifies the test that like should be compared with like as India has followed the common law tradition of England. "It was Montesquieu who first realised that a rule of law should not be treated as an abstraction, but must be regarded against a background of its history and the environment in which it is called upon to function."[11] Montesquieu's environmental criteria cautions against transplantation of legal ideas from one country to another where there is no contextual similarity. However, greater mobility of people in the world has reduced the problem of context to some extent and people have borrowed ideas in the matter of law and institutions. This has been formally recognised by India and the UK. " The UK Law Commission Act 1965 imposes upon the Law Commission and the Scottish Law Commission the obligation to obtain such information as to the legal systems of other countries as appears to the commissioners likely to facilitate the performance of any of their functions."[12]

Kahn-Freund (1974) observes that lawmakers (in UK) look abroad for new ideas and for new techniques. He further says that comparative law has far greater utility in substantive law than in the law of procedure.

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[10] Singh, Mahendra P. (1998) *VN Shukla's Constitution of India*, Ninth Edition, Lucknow: Eastern Law Book Company, pp.921-23.
[11] Cruz, Peter de. (1999) *Comparative Law in a Changing World*, London: Cavendish Publishing Limited, pp.12-13.
[12] See generally Kahn-Freund, O. (1974) ' On Uses and Misuses of Comparative Law', *Modern Law Review*, 37:1, p.1.

The British rulers introduced in India and in many other colonies the English law of contract,[13] the criminal law,[14] the law of civil procedure and evidence[15] etc. These laws are both substantive and procedural and are still working without much change. This in fact goes against the environmental criteria of Montesquieu to some extent and proves the point that legal transplant from the UK to India is a working proposition. Numerous other laws of India including the Indian constitution, which has borrowed heavily from British traditions, customs, and common law principles, provide further evidence to this.

Zweigert and Kotz (1987) argue that the basic methodological principle of all comparative law is that of *functionality*. " From this basic principle stem all other rules which determine the choice of laws to compare, the scope of the undertaking, the creation of a system of comparative law, and so on. Incomparable cannot usually be compared, and in law the only things which are comparable are those which fulfil the same function."[16] They further argue that the legal system of every society faces essentially the same problems, and solves these problems by quite different means, though very often with similar results. This helps the comparatist by telling him or her where to look in the law of a foreign system in order to discover similarities and at the end of the study also acts as a means of verifying the results.

In addition to Zweigert and Kotz, Kamba (1974) suggests that 'there are three main stages involved in the process of comparison which are the descriptive phase, the identification phase, and the explanatory phase.'[17] The descriptive phase includes description of norms,

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[13] Indian Contract Act 1972.
[14] Indian Penal Code 1860.
[15] Code of Civil Procedure 1908 and Evidence Act 1882.
[16] See note 9, p.31.
[17] Kamba. (1974) ' Comparative Law: A Theoretical Framework', 23 *ICLQ* 485 as quoted in note at 11, p.233.

concepts, and institutions, the identification phase includes identification of differences and similarities of the systems and the explanatory phase identifies probable transplantation of ideas, law and institution. This approach seems quite useful in the present study.

Peter de Cruz (1999) has identified eight steps[18] involved in the process of comparative law method. These steps are identification of problem, identifying parent legal family of the laws, deciding primary sources of the law, assembling material relevant to the jurisdiction, organising materials with headings, mapping out possible answers to the problems, analysing legal principles in terms of their intrinsic meaning and setting out conclusions within a comparative framework.

Kahn-Freund (1974) rightly observes that the criteria for legal transplants have changed since Montesquieu's day but comparative law method would need knowledge of not only foreign law but also of its social and above all its political context. This would be addressed later in this chapter.

This study will use a blend of the techniques of the comparative law method as discussed above.

1.5.2 *Policy transfer and lesson drawing*

Political science and public policy literatures use the methodology of 'policy transfer' and 'lesson drawing' aimed at understanding intrinsic aspects of a policy in operation and to find out ways to improve them. Many social policies in the field of health, education, law and welfare in both developed and developing countries have been shaped based on

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[18] See note 11, pp.235-39.

'foreign' experiences in the last two decades. In this era of global communication policy transfer and lesson drawing will obviously be on larger scale. Because of increasing globalisation and change in the modes of production the world over, nations are bound to restructure their policies drawing lessons from abroad.

Rose (1991) in his seminal paper points out that stimulus for drawing lesson is driven by dissatisfaction. " Policy makers are driven by the need to dissipate dissatisfaction. Instead of new knowledge, policy makers prefer the assurance of doing what has worked before, or been effective elsewhere."[19] Literature on this methodology has used different terms namely policy transfer, lesson drawing, policy convergence and policy diffusion. Despite different nomenclature, aim of all such studies is to understand the process of examining a policy in operation and making suggestion for their improvement.

Although constraints exist, the basic assumption involved in drawing lessons across national boundaries is that: 'Similarities are greater within a given program across national boundaries than among different programs within a country'.[20]

Dolowitz (2000) however sums up a definition of the process, and more specifically policy transfer as:

> "The occurrence of, and processes involved in, the development of programmes, policies, institutions, etc. within one political and/or social system which are based upon the ideas, institutions, programmes and policies emanating from other political and/or social systems."[21]

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[19] Rose, Richard. (1991) 'What is Lesson Drawing', *Journal of Public Policy*, 11:1, p.10.
[20] Rose, Richard. (1988) as quoted in Dolowitz, David. (1998) *Learning from America: Policy Transfer and the Development of the British Workfare State*, Sussex: Academic Press, pp.24-25.
[21] Dolowitz, David P. et al. (2000) *Policy Transfer and British Social Policy: Learning from the USA*, Buckingham: Open University Press, p.3.

Policy transfer is in fact occurring globally and on a regular basis. American policies are fast finding their ways into the whole world including India and the UK. Likewise many foreign countries particularly in the field of education and environmental management are also adapting the UK's policies.

Lesson drawing is only possible if another country is doing well with an identified problem. If on evaluation, the position is found to be bad then the only lesson that can be drawn is what not to do while a policy is in operation. Rose (1991) has identified five alternative ways of lesson drawing, which are *copying*, *emulation*, *hybridisation*, *synthesis* and *inspiration*.

The simplest type of lesson drawing is based upon *copying* a programme in effect in another state or country. Within a nation, copying is often possible as contextual variables remain constant. *Emulation* accepts that a particular programme elsewhere provides the best standard for designing legislation at home, albeit requiring adaptation to take different national circumstances into account. A *hybrid* proposal combines recognisable elements from programmes in two different places. A *synthesis* is created by combining elements familiar in several different programmes into whole that is distinctive. Programmes elsewhere can be used for *inspiration* instead of analysis. This is particularly likely to happen when a policy maker unfamiliar with foreign countries travels abroad.[22]

Form of lesson drawing will depend upon the similarities and dissimilarities in public policy in actual operation, institutions and socio-economic context of the exporter and importer jurisdictions. Page (2000) while summing up the works of Rose (1991) and Dolowitz and Marsh (1996) says that 'the variables covered in the literature (on policy

[22] See note 19, pp.21-23.

transfer) are related to the very basic questions of who, what, why, where and how policy transfer takes place'.[23]

Thus before engaging in the work of policy transfer and lesson drawing, variables as mentioned above have to be adequately answered for efficient transfer of a public policy from one to other jurisdiction. Equally important is the knowledge of social, political, economic and cultural conditions of the exporter jurisdiction, which in fact govern the working of a policy and how these contextual factors will actually be overcome in the importer jurisdiction.

Rose (2001) has in fact devised ten steps in learning lessons from abroad. These include ' diagnosing your problem, deciding where to look for a lesson, investigating how a programme works there, abstracting a cause-and-effect model for export, designing a lesson, deciding whether to import, dealing with resource requirements and constraints, handling the problem of context, bounding speculation through prospective evaluation and finally using foreign countries as positive or negative symbols'.[24] Environmental policy and law, a fast emerging branch of public policy and law, is a fertile ground for lesson drawing and policy transfer. In the present study, use of this methodology is both apt and relevant.

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[23] Page, Edward C. (2000) *Future Governance and the Literature on Policy Transfer and Lesson Drawing*, Introduction prepared for the ESRC Future Governance Programme Workshop on Policy Transfer, January 28, Britannia House, London, available on line at www.futuregovernance.ac.uk/papers/ed (visited 18 June 2001).

[24] Rose, Richard. (2001) *Ten Steps on Learning Lessons from Abroad,* Future Governance Paper 1, pp.1-20, available online at http://www.futuregovernance.ac.uk (visited 10 February 2002).

1.5.3 Socio-legal method

Sociology of law aims to discover the causal relationships between law and society. It seeks to discover patterns from which one can infer whether and under what circumstances law affects human behaviour and conversely how law is affected by social change.[25] Therefore there is a great deal of similarity and overlap between the sociology of law and comparative law. However, the field of socio-legal study is much wider because here, through field observations and empirical observations, functioning of law and institutions are studied while comparative law confines to a study of rules of two systems in relation to each other.

In this method a range of data collected from field is used to determine the efficacy of a law. This method is important in the context of India and the UK as both employ a wide variety of regulatory instruments to protect the environment. With the help of data about violations of law, prosecutions and informal methods used by a department it is possible to use this method to show how effective the law has actually been on the ground. Thus the prime mover in a socio-legal method is the interest to see the worth of a law in actual operation than for the sake of law alone. This approach will be useful in studying enforcement patterns of the environmental laws in India and the UK.

1.5.4 Interviews

In addition to data collection from documents and drawing upon the personal experience of enforcing environmental law and policy in India for more than 15 years, interviews have been conducted with government officials in England. This was done in two phases. Firstly, a senior official of the Environment Agency in charge of actually enforcing the

[25] See note 9, p.10.

environmental law in England was interviewed for verification of the data collected and for developing an insight into the English enforcement style. Secondly, the Chief Economist of the Environment Agency responsible for refining the environmental policy in England was interviewed to know the policy alternatives.

1.6 Context

To recommend that one country emulate or catch up with another's success simply by copying or transferring a programme wholesale is naive, because it ignores the way in which national context influences how a programme can operate, and whether it may be effective.[26] This was in fact the caution given by Kahn-Freund (1974) on possible misuses of comparative law. It is, therefore, of interest briefly to state some background information about India and the UK.

1.6.1 India

The people of India have had a continuous civilization since 2500 BC, when the inhabitants of the Indus Valley thrived on urban culture based on commerce and agriculture. India witnessed many kingdoms in the entire span of her history. She faced many invasions from Turks, Afghans and others. In 16th century AD Moghul dynasty was established. The establishment of the East India Company in 1600 preceded British rule in India.

The Republic of India has an area of 3.3 million sq. km with a population of more than 1 billion as in March 2001. Total literacy rate was 65.38% during 2001. Terrain varies from Himalayas to flat river valleys and climate ranges from temperate to sub tropical monsoon.

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[26] See note 24, p.16.

India shares international borders with China, Pakistan, Myanmar, and Bhutan. In addition to Hindi and English there are 16 other official languages. India achieved independence from Britain on 15 August 1947 and the constitution came into being on 26 January 1950. The type of the government is a federal republic. India has 29 states and 7 directly administered union territories. The President is the head of the republic while the Prime Minister is the head of the government. India's Parliament is bicameral. Chief Ministers head state governments.

Gross Domestic Product (GDP) is $ 390 billion and the real growth rate (1998-99) is 6.8%. Per capita GDP is $420. India has vast natural resources. India's economic growth is constrained by inadequate infrastructure and cumbersome bureaucratic procedures. Despite this, India, following economic reforms started in 1991, has emerged as an important economic and industrial power in world.

According to its constitution, India is a 'sovereign, socialist, secular, democratic republic'. The Indian constitution guarantees fundamental rights of life and liberty to the people of India. The Indian Supreme Court has interpreted right to life under Article 21 to include a right to a wholesome environment. The Supreme Court has also entertained many public interest cases on the environment and has earned comments from jurists of indulging in judicial activism. Some have even criticised this approach of the Supreme Court. But in India polarisation in terms of wealth, power and position is very sharp which has produced judicial activism by the Indian courts. This is not the case in the UK where judicial activism has not developed, as the society is not highly polarised giving less chance to the judges to become activist. India has a federal form of government but its central government is patterned after the British parliamentary system. India's bicameral

legislature consists of the Rajya Sabha (Council of States) having strength of 245 and the Lok Sabha (House of the People) having strength of 545. India's independent judicial system began under the British, and its concepts and procedures resemble those of common law countries.

Prime Minister Atal Behari Vajpayee took office in October 1999 after a general election in which a Bhartiya Janata Party (BJP) led coalition of 13 parties called the National Democratic Alliance emerged with an absolute majority. India's achievement as the world's biggest democracy bears ample testimony to the democratic traditions of people and leaders of India. India remains leader of the Non-Aligned Movement (NAM) and is an active member of the South Asia Association for Regional Cooperation (SAARC).

The British enacted most of the Indian law presently in force. The Indian constitution was deeply influenced by the common law of England. The Indian judiciary is independent and follows British judiciary in manners of style and approach. In fact Indian Supreme Court judges quote frequently from British law and judgments.

The Ministry of Environment and Forest of the Government of India is responsible for evolving policies relating to protection of the environment and forest. States Forest Departments are charged with the responsibility of forest management while States Pollution Control Boards, autonomous bodies under state governments, are responsible for enforcing various environmental laws of air, water etc. The Central Pollution Control Board, an autonomous body under the Ministry of Environment and Forest, helps State Pollution Control Boards and advises the Government of India on environmental matters.

1.6.2 UK

The United Kingdom of Great Britain and Northern Ireland has an area of 244,820 sq. km. GDP (Nominal GDP, 2000) is $1.44 trillion, annual growth rate is 3.0% and per capita GDP (1999) is $24,300. The population is over 59 million, the third largest in Europe and the 18th largest in the world. The form of the government is a constitutional monarchy. Parliament is bicameral comprising House of Commons and House of Lords. After the devolution in 1988, Scotland has a Parliament. Wales and Ireland have Assemblies.

The constitution is unwritten comprising partly statutes, partly common law and practice. The common law of England is the greatest export to the nations of the world.

The UK's constitution and laws guarantee freedoms on the people relating to life and liberty which include rights to human dignity, equality and personal integrity and human rights etc. Three important milestones in the British constitutional history namely Magna Carta, the Bill of Rights and the Human Rights Act 1998 are of profound importance.

Changes may come formally through Acts of Parliament, acceptance of new practices and usages or by judicial precedent. But in actual practice the weight of 700 years of tradition restrains arbitrary actions. The judiciary is independent of the legislative and executive branches but cannot review the constitutionality of legislation.

The European Convention on Human Rights and Fundamental Freedoms (ECHR) was created under the auspices of the Council of Europe. The body of the Convention outlines the main traditional political and civil rights: right to life, freedom from torture and inhuman or degrading treatment, freedom from slavery, freedom of the person and right to privacy etc. All these rights are to be secured without discrimination on grounds of sex,

race etc. The European Court of Human Rights has interpreted some civil and political rights to protect against environmental harms.

The UK has been a party to the ECHR since it entered into force in 1953. The Convention, therefore, is an important constitutional dimension in respect of the UK as far as an express provision relating to human rights is concerned. The UK accepted the compulsory jurisdiction of the European Court of Human Rights, which meant an individual, may petition to this institution in the event of the breach of a Convention right. The Human Rights Act 1998 (HRA) incorporates most Convention rights into the laws of the UK. Section 3 of the HRA places the following duty on all courts and tribunals in all types of legal proceedings:

> " So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention right."

If the High Court finds that, it is impossible to ' read and give effect' to an Act of Parliament or statutory instrument so that it is compatible with the ECHR, it may make a formal 'declaration of incompatibility' under section 4 of the HRA 1998.

> "Section 10 of the HRA 1998 empowers a government minister to introduce a statutory instrument to amend or repeal the provision, which a British Court has declared to be incompatible with the ECHR."[27]

Thus, the HRA 1998 and the ECHR would have greater roles in influencing environmental laws in modern times as the environment and the human rights have been found to have definite connections.

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[27] Le Sueur, Andrew. (1999) *Principles of Public Law*, Second Edition, London, Sydney: Cavendish Publishing Limited, p.1.

> "Recent jurisprudence before the European Court of Human Rights has confirmed that the ECHR may prove to be a valuable source of environmental law."[28]

At the level of the central government, the erstwhile Department of Environment, Transport and Regions has been reorganised into the Department of Environment, Food and Rural Affairs.

On 8th July 1991 the then Prime Minister John Major announced the Government's intention to create a new and unified authority with overall responsibility for the protection of the environment. The Environment Act 1995 established the Environment Agency for England and Wales. This became operational in April 1996. This is a corporate body, which looks after the key regulatory pollution control functions affecting air, land and water. Prior to this, pollution control was divided between the Her Majesty's Inspectorate of Pollution (HMIP), the National Rivers Authority (NRA), the Waste Regulation Authorities (WRA) and the local authorities. Nature Conservancy Council for England (known as English Nature) and the Forestry Commission look after conservation and forest management aspects of the environment respectively. The Royal Commission on Environmental Pollution (RCEP) advises the government on pollution.

Britain is culturally and economically a highly developed nation and commands respect in the community of nations. Her voice is respected internationally and she also plays key roles with the USA in times of difficulty in any part of the world. India and Britain have very strong ties and have collaboration in many fields.

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[28] Sunkin, Maurice et al. (1998) *Sourcebook on Environmental Law*, London, Sydney: Cavendish Publishing Limited, p.21.

2 APPRAISAL OF ENVIRONMENTAL POLICIES

2.1 General

Environmental degradation affects national welfare by damaging human health, economic activities and ecosystems. Because environmental problems represent a *classic externality*,[1] some government regulation is generally warranted. From an economist's perspective, desirable regulation should weigh two factors: the benefits associated with reduced environmental damage, and the opportunity cost of mitigation. In reality, the extent and focus of government intervention will also reflect national political and institutional considerations.[2]

It is therefore in this context that evolving a sound environmental policy is a condition precedent to having a sustainable environmental management. Policy is concerned with identifying problems, setting out aims and objectives and designing strategies and action plans. Law acts as one of the vehicles to achieve the aims and objectives set by policy.

The success of any environmental policy depends on changes in the behavior of producers and consumers. Environmental policy can try to bring about these changes by means of various instruments. We do not have any generally accepted, standardized and

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[1] Some production processes and uses of certain materials can result in discharges of effluents and emissions. These effluents and emissions are called negaive externalities. Activities like tree plantations would lead to production of oxygen and trees also act as sink for greenhouse gases. This is a case of a positive externality.

[2] Dasgupta et al. (2001) ' Environmental Regulation and Development: Cross Country Empirical Analysis', *Oxford Development Studies,* 29:2, p.176.

unequivocal classification of environmental policy instruments.[3] However, there is some agreement that three broad categories of instruments can be distinguished.[4]

- Instruments aimed at voluntary adaptations of individual and group behaviour in a more environmental friendly direction. This category, called communicative instruments includes the provision of knowledge and information in all possible forms, moral suasion and voluntary commitments by trade and industry or agreements between them.

- Instruments, which affect the market condition under which people and firms make their decisions. This category is commonly referred to as economic instruments. This includes charges and taxes, subsidies and other types of financial support (such as tax reductions), tradable rights (to emit a certain amount of pollutants, or to produce or use a certain amount of polluting goods or substances), deposit –refund systems, in which a deposit for a potential polluting product is being paid by the purchaser, who can claim a refund after returning the product showing that the pollution did not take place and liability legislation requiring the polluter to compensate the environmental damage he caused , and thus providing a financial incentive for pollution prevention.

- Instruments, which influence the range of alternatives by means of prohibitions, restrictions or obligations. This category is often called direct regulation or 'command and control' (CAC) regulation. This can be done by introducing

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[3] Kuik et al. (1997) *Pollution Control on the South and North: A Comprehensive Assessment of Environmental Policy Approaches in India and the Netherlands* ,New Delhi: Sage Publications, p.17.
[4] Opschoor, J.B. and Turner, R.K. (eds) (1994) *Economic Incentives and Environmental Policies: Principles and Practice,* Dordrecht: Kluwer Academic Publishers.

product, process or emission standards. Outright bans on certain activities, products or substances also belong to this category.[5]

The emphasis of environmental policy should be to mitigate environmental hazards without compromising development. National environmental policy instruments should also meet the internationally recognized basic principles such as ' the polluters pays', 'prevention is better than cure', the 'precautionary principle', etc.

2.2 Criteria for evaluating environmental policies

A centralized environmental policy requires that some central administrative agency will determine what is to be done and in what manner. A decentralized policy is executed by many individual decision makers, each of whom makes her own assessment of the situation. In this context, the specific criteria for evaluating environmental policies are efficiency, fairness, incentive for improvement and enforceability.[6]

For a policy to be efficient, it must be cost effective. A policy is cost effective if it produces the maximum environmental improvement possible for the resources being expended. For a policy to be socially efficient, it must also balance costs with benefits. This is important in the context of less developed economies where people have fewer resources to put in environmental programmes and can ill afford policies that are not cost effective and efficient.

Fairness, or equity, is another important criterion for evaluating environmental policy. Environmental problems can be approached by different environmental policies. But the impact of each policy will be different on society in terms of the income groups, ethnic

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[5] See note 3, pp. 18-19.
[6] Field, Barry C. (1994) *Environmental Economics: An Introduction,* London: Mc Graw Hill, pp.181-89.

and racial groups. Equity is thus a matter of morality and the regard that relatively well off people have for the underprivileged. Equity considerations become very important in designing an international environmental policy. Because less developed countries feel that economic consequences of a particular policy should be borne by developed countries as they have contributed more towards increasing environmental hazards and problems.

A critically important criterion to evaluate any environmental policy is whether the policy provided a strong incentive for individuals and groups to find new and innovative ways of reducing their impacts on the environment. The greater the incentive, the better would be policy in its application.

The objective of enforcement is to get people to comply with an applicable law. There are two main components of enforcement, which are monitoring and sanctioning. Polluters, who stand to lose money, may try to frustrate monitoring of the applicable laws. And the more sophisticated and complicated the process of applicable law, the easier it is for polluters to find ways of evading it. Functioning of the Union Carbide plant in Bhopal, and the subsequent disaster and efforts of their corporate office in the USA bear ample testimony to this.

The other component of enforcement is sanctioning polluters who are in violation of law. This appears simple but it is not the case. Polluters may use their vast resources to see that the court cases become a long drawn affair so that no penalty is imposed immediately. This may also discourage the prosecuting agencies. So the sanctioning process can become much more complicated than the simple model of policy suggests.

2.3 Environmental policy in India

Respect for nature is part of the Indian psyche. Arthashastra written in 321 – 300 B.C. contains references to environmental management. The author of this treatise, Kautilya, was the Prime Minister of the Magadh Empire during the reign of Chandragupta Maurya.

After the advent of British rule in India, the environmental and forest policies were shaped as per the directions of the British administration in India. In fact, policy on the general aspects of the environment was not laid down in British India, as environmental problems were not serious enough to warrant a policy of this nature. Therefore policy was confined to forests only.

The British navy has been instrumental in the expansion of empire of the monarchy in 19th century. Britain's Oak Forests having gone, Indian trees were found favourites by the ship building industry of Britain. As a result, Indian forests witnessed large scale felling of trees to cater to the needs of British Navy.

It was thought by the British Government that Indian forests should be properly managed for a sustained supply of timber. It was against this background that the Imperial Forest Department was formed in 1864 with Dr. Dietrich Brandis as the first Inspector General of Forests heading the establishment. The colonial rulers recognized the importance of forests late. Before that they had a policy that village communities would be the owners of forests falling within their boundaries. This was thought to be reversed through legislation of 1865, 1878 and finally in 1927.

B.H. Bade Powell, a senior civil servant asserted that 'the right of the state to dispose of or retain for public use the waste and forest area is among the most ancient and

undisputed of features in oriental sovereignty....the Government is by ancient law.....the general owner of all unoccupied and wastelands'.[7]

The Forest Policy of 1894 upheld the right of the state to exclusive control over forests. This policy also accorded primacy to agriculture. Post-independence India witnessed a forest policy in 1952. The principal aim of this policy was to subordinate industrial use to environmental conservation. It also professed that a third of the geographical area of the country should be brought under forests. This was followed by forest policy of 1988, the principal aim of which is 'to ensure environmental stability and maintenance of ecological balance including atmospheric equilibrium which are vital for sustenance of all life forms, human, animal and plant. The derivation of direct economic benefit must be subordinated to this principal aim'.[8]

The Forest Policy of 1988, however, does not have a matching forest act. The Indian Forest Act of 1927 is still the ruling forest legislation in the country concerned more with regulating the harvesting of forest produce and matters related thereto. The Government of India has issued detailed guidelines in 1990 directing all State governments to implement joint forest management with peoples' participation. This experiment is working satisfactorily in many states. This measure has overcome some of the limitations of the Indian Forest Act 1927, which did not have such provision.

The Stockholm Conference in 1972 on Human Environment increased environmental activities in India. As on today, India has following detailed policy guidelines:

- On Forestry

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[7] Guha, Ramchandra. (1990) 'An Early Environment Debate: The Making of the 1978 Forest Act', *Wasteland News,* May-July, p.4.

- On Abatement of Pollution, February 1992.
- On National Conservation Strategy and Policy Statement on Environment and Development, June 1992.

2.3.1 Constitutional provisions and the environment

The Indian constitution is amongst the few in the world that contains specific provisions on environmental protection. The directive principles of state policy and the fundamental duties chapters explicitly enunciate the national commitment to protect and improve the environment. Judicial interpretation has strengthened this constitutional mandate. In the case of *Tarun Bharat Sangh Alwar v Union of India*[9], the Supreme Court had ruled that 'the issues of environment must and shall receive the highest attention from this court'. In the same case the Supreme Court said:

> "This litigation concerns environment. A great American Judge emphasizing the imperative issue of environment said that he placed government above big business, individual liberty above government and environment above all"[10].

The Supreme Court has adapted and developed some fundamental norms in the process of adjudicating environmental cases. These norms have come to stay in India as part of the environmental policy and law. These norms include right to a wholesome environment, polluter pays principle, precautionary principle, sustainable development principle, intergenerational equity etc.

The Supreme Court has held that the enforcement agencies are under a duty to enforce the environmental laws and they may not plead problems of funds. The Court further

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[8] Singh, Chhatrapati. (2000) *India's Forest Policy and Forest Laws,* Dehradun: Natraj Publishers, p.325.
[9] 1992 AIR (SC), WP(C) No. 509.

clarified that the natural resources are meant for the enjoyment of the general public and cannot be converted into private ownership.

India is a federation of states. Therefore, law-making power is shared between the union government and 29 states. Article 246 of the constitution divides the subject matter of laws made by parliament and by the legislatures of the states. "This provides three lists namely the union list, the concurrent list and the state list appended in the seventh schedule to the constitution."[11] The concurrent list, among others, includes forests, the protection of wild life, mines and mineral development etc. Under this list, both parliament and the state legislatures have overlapping and shared jurisdiction. Parliament is also empowered to legislate in the national interest on matters enumerated in the state list under article 249. In addition, parliament may enact laws on state subjects, for states whose legislatures have consented to central legislation. The Water Act 1947 is an example under this.

Environmental protection and improvement were explicitly incorporated into the constitution by the Constitution (42nd Amendment) Act of 1976. Article 48 A was added to the directive principle of state policy which are the commands of the constitution to the governments to run the affairs of the State. Article 48A says 'the State shall endeavor to protect and improve the environment and to safeguard the forests and wild life of the country.' Article 51 A (g) in a new chapter entitled 'Fundamental Duties', imposes a similar responsibility on every citizen to protect and improve the natural environment including forests, lakes, rivers and wild life and to have compassion for living creatures.

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[10] See generally Divan, Shyam. and Rosencranz, Armin. (2000) *Environmental Law and Policy in India :Cases, Materials and Statutes*, Second Edition, New Delhi: Oxford University Press, p.41.

Although non-enforceable by a court, the directive principles are increasingly being cited by judges as complementary to the fundamental rights. In several environmental cases, the courts have been guided by the language of the article 48 A. An instance is the case of *M.C.Mehta v Union of India.*[12]

Article 253 of the constitution empowers Parliament to make laws implementing India's international obligations as well as any decision made at an international conference, association or other body. Entry 13 of the union list covers 'participation in international conferences, associations and other bodies and implementing of decisions made there at.' Parliament has used its power under article 253 read with entry 13 of the union list to enact the Air (Prevention and Control of Pollution) Act 1981 and the Environment (Protection) Act 1986. The preamble of both these Acts state that these acts were passed to implement the decisions reached at the UN Conference on Human Environment held at Stockholm in 1972.

Fundamental rights under the constitution have served a quick means of relief to people in cases of the environment. Right to life and personal liberty guaranteed under article 21 has been interpreted by the Supreme Court to also include right to a wholesome environment. The Supreme Court and the High Courts under articles 32 and 226 of the constitution have expanded the scope of providing relief in cases relating to environmental pollution and resource degradation. This aspect will be covered more in chapter 5.

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[11] Singh, Mahendra P. (1998) *VN Shukla's Constitution of India*, Ninth Edition, Lucknow: Eastern Law Book Company, p.650.
[12] 1988 AIR (SC) 1037, 1038.

2.3.2 Indian planned development and the environment

India has followed planned development since the early fifties. Earlier plans laid more emphasis on rapid economic development through industrialization. Environmental considerations were not given serious thought while conceiving the objectives and the strategies of earlier plans.

The year 1972 was a watershed in the history of environmental management in India. Following the announcement by the twenty fourth UN General Assembly to convene a conference on the Human Environmental in 1972 a committee on the Human Environment was set up to prepare India's report. This committee prepared three reports by May 1971. These were 'Some Aspects of Environmental Degradation and its Control in India', 'Some Aspects of Problems of Human Settlement in India', and 'Some Aspects of Rational Management of Natural Resources'. With the help of these reports, the impact of the population explosion on the natural environment and the existing state of environmental problems were examined. In April 1992, a National Committee on Environmental Planning and Coordination (NCEPC) was established.

The 5th Plan (1974-79) stressed that NCEPC should be involved in all major industrial decisions so that environmental goals would be taken into account. The 6^{th} Plan (1980-85) devoted a great deal on 'Environment and Development' and emphasized sound environmental and ecological principles in sectoral planning approaches and strategies.

The 7^{th} Plan (1985-90) emphasized sustainable development in harmony with the environment. It also realized the negative impact of developmental programmes on the

environment and called upon the voluntary organizations to work in tandem with the government to create environmental awareness.

The 8th Plan (1992-97) gave an important place to the environment. The planning commission set up an expert committee to formulate long- term sectoral policies in the sectors of environment and forests. It also noted that many environmental problems were continuing to cause serious concern for example the loss of top soil and vegetative cover, the degradation of forests, continuing pollution by toxic substances, careless industrial and agricultural practices and unplanned urban growth. It noted that the environmental degradation was seriously threatening the economic and social progress of the country.[13]

The 9th Plan (1997-2002) gave primacy to environmental considerations while evolving specific objectives. One of the objectives of the 9th Plan was ensuring the environmental sustainability of the development process through social mobilization and participation of people at all levels. The 9th Plan also says that the Indian Government's policy towards the environment is guided by the principles of Agenda 21.[14]

The Approach Paper to the 10th Plan (2002-2007) recognizes India's environmental problems and has advised the Union Government to review the policies for removing the constraints as mentioned in the previous chapter.

2.3.3 Policy Statement for Abatement of Pollution

The Government of India issued a 'Policy Statement for Abatement of Pollution' on 26 February 1992. The objective of this policy statement is to integrate environmental considerations into decision making at all levels. To achieve this, steps need to be taken

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[13] See note 10, p.35.

to prevent pollution at source, encourage, develop and apply the best available practicable technical solutions, and ensuring that the polluter pays for the pollution and control arrangements. The focus was on protection of heavily polluted areas and river stretches and involving public in decision- making process.

Other features of the policy are that mining operations will not ordinarily be taken up in ecologically fragile areas, small scale industries will be assisted for setting up facilities for treatment of effluents and solid wastes, norms of standards will be revised to lay down mass based standards which will not set specific limits to encourage the minimization of waste, promote recycling and reuse of materials. New units will have to conform to stricter standards. They will need to select technologies that produce no or low quantities of wastes and recycle or reuse waste products. More strict vehicle emission standards will be evolved.[15] The policy also had the following highlights:

- Economic instruments will be investigated to encourage the shift from curative to preventive measures.
- To deal with the range of pollution problems a mix of regulatory and economic measures will be adopted.
- All organs of government will be required to integrate environmental concerns more effectively in all policy areas.

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[14] Government of India (1997) *Ninth Five Year Plan*, Volume II, New Delhi: Planning Commission, available on line at http://www.planningcommission.nic.in (visited 15 August 2001).
[15] Government of India (1992) *Policy Statement for Abatement of Pollution: No.H.11013(2)/90-CPW,* New Delhi: Ministry of Environment and Forests, pp.1-14.

- An integrated overview and organizational structure for decentralized environmental impact assessments and environmental law enforcement based on cooperation with local authorities will be sought.
- Environmental audit of industries and local bodies will be done.
- The responsibility for abatement of pollution is not a duty of the Government alone; it is an obligation on all.

2.3.4 National Conservation Strategy and Policy Statement on Environment and Development

The Government of India issued this policy statement in June 1992, which recognized that the survival and well being of a nation depends on sustainable development. It is a process of social and economic betterment that satisfies the needs and values of all interest groups without foreclosing future options. This policy stated that environmental problems in India are on account of the negative effects of development and due to poverty. The policy proposed an action plan to achieve the goals. The action plan would include measures for prevention and control of pollution due to indiscriminate disposal of solid wastes, effluents and hazardous substances in land and water courses, use of clean fuels and clean technologies, air and noise pollution control systems, conservation of bio diversity and improvement in mass transport system to reduce increasing consumption of fuel, traffic congestion and pollution etc.[16]

2.3.5 International obligations and India

India has signed as many as 17 agreements/treaties having a direct bearing on the environment. These include the Protocol of 1978 relating to Pollution from Ships, the Convention for the Protection of Ozone Layer, the Montreal Protocol, the Basel Convention 1992, the Convention on Climate Change 1992, the Convention on Biodiversity 1992, the International Tropical Timber Agreement etc. The leading norms in the field of international environmental law in the context of India are[17]:

- Principle 21 of the 1972 Stockholm Declaration on the Human Environment. This says that 'States have.....the sovereign right to exploit their own resources pursuant to their own environmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other states or of areas beyond the limits of national jurisdictions'.

- Duty of a state to notify and consult other states if it plans to undertake an activity likely to harm the environment of other country.

- To monitor and assess specific environmental conditions domestically and publish it.

- Guarantee in the constitution that all citizens have a right to a decent and healthful environment.

- Polluter pays principle.

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[16] Government of India (1992) *National Conservation Strategy and Policy Statement on Environment and Development,* New Delhi: Ministry of Environment and Forests, pp.1-36.
[17] See note 10, p.583-585.

- Precautionary principle.
- Environmental impact assessment.
- To invite the input of non-government organizations.
- Principle of sustainable development
- Inter generational equity.

In the case of *Ganesh Wood Products*[18], the Supreme Court held the following:

> "A Government Department's approval to establish forest based industry to be invalid because it is contrary to public interest involved in preserving forest wealth, maintenance of environment and ecology and considerations of sustainable growth and inter generational equity. After all, the present generation has no right to deplete all the existing forests and leave nothing for the next and future generations."

Similarly in the *Vellore's citizens Forum* case[19],the concept of sustainable development was ruled by the Supreme Court:

> "The traditional concept that development and ecology are opposed to each other is no longer acceptable. " Sustainable development is the answer."

The Supreme Court has held in the Bichhricase[20] that 'the polluter pays principle' is a sound principle.

Indian environmental policy and laws have thus to be in tune with the international commitments. This may require structural changes in environmental policies and Laws of India.

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[18] *State of Himachal Pradesh v Ganesh Wood Products* 1996 AIR (SC) 149, 163.
[19] *Vellore Citizens' Forum v Union of India* 1996 AIR (SC) 2715.
[20] *Indian Council for Enviro-legal Action v Union of India* 1996 AIR (SC) 1446.

2.4 Environmental policy in the UK

The first recorded environmental regulation in the British Isles dates from the thirteenth century. Edward I, who in 1273 issued a decree prohibiting the burning of coal in order to protect the health of his subjects, promulgated it. Britain industrialized in the later half of 18th century which also led to particulate smoke in urban habitation areas. In 1853, the Home Secretary, Lord Palmerston, persuaded Parliament to enact the Smoke Nuisance Abatement Act, which declared smoke to be a nuisance, and prescribed penalties for non-compliance. The first explicit pollution control standard adopted by Britain was brought into existence in the form of the Alkali Act in 1863. In 1906, Parliament approved the Alkali and Works Regulation Act, which listed thirteen offensive gases whose emissions the Inspectorate was responsible for either reducing or dispersing.[21] This law remained the legal basis of control of industrial emissions until 1974.

Britain was also the first nation to recognize problems of water pollution. In 1357 King Edward III had noticed fumes and other abominable stenches coming from river Thames. In 1885, Michael Faraday wrote that 'the whole of the river (the Thames) was an opaque pale brown fluid'. In 1876, the Parliament approved the Rivers Pollution Prevention Act, which was to be enforced by the local authorities. British environmental movement is also fairly old. In 1889 a group of residents of Manchester established a Fur and Feather Group to protest against the use of birds' feather in the making of hats. British people were also upset by threat to open spaces due to industrial and urban expansion. They formed a trust to control it. "In 1907 the Trust was reconstituted as a statutory body by an act of Parliament and charged with the permanent preservation of property for the

[21] Ashby, Eric. and Anderson, Mary. (1981) The Politics of Clean Air, Oxford: Clarendon p.82.

benefit of the nation."[22] Britain enacted the Town and Country Planning Act in 1947 and the National Parks and Access to the countryside Act in 1949. Parliament also enacted the Rural Water Supply Act 1955, the Litter Act 1958, the Radioactive Substances Act 1960, the Rivers (Prevention of pollution) Act 1961 etc.

The single most important charge in British environmental policy in 1950s was the control of air pollution. The cause of air pollution was burning of coal in homes and industrial units. The black smoke caused severe health hazard and reduced visibility. There were protests in cities of Sheffield and Manchester against the smoke. Though black smoke was declared as nuisance under the Act of 1875, local authorities made little effort to enforce this statute. "On Dec 5, 1952, an unusually nasty fog descended over London, virtually eliminating visibility for nearly four days".[23] Total number of deaths primarily attributed to this was estimated at 4000. Following the public protest, the government agreed to establish a committee of enquiry. The *Beaver Committee's* final report had said that 'air pollution on the scale with which we are familiar in this country today is a social and economic evil which should no longer be tolerated'.

This led to many actions by the government namely establishment of smokeless zones in cities and enactment of the Clean Air Act 1956. A large number of industries were also brought under the control of the Alkali Inspectorate so Central Government became responsible for abatement of air pollution rather than the local government. "Thus before

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[22] Lowe, Philip. and Goyder, Jane. (1983) *Environmental Groups in Politics*, Allen & Unwin, pp.18-21.

[23] See note 22, p.104.

the upsurge of public interest in environmental regulation in the mid 1960s Britain already had in place a fairly extensive system of environmental controls."[24]

In 1970 the Standing Royal Commission on Environmental Pollution was established ' to advise on matters, both national and international, concerning the pollution of environment; on the adequacy of research in this field; and the future possibilities of danger to the environment'.

2.4.1 Planning, development and the environment in the UK

England was the first country to industrialise. This also brought unprecedented problems of pollution and population explosion. Growth in population was marked by its mobility in search of employment and other working opportunities. Between 1801 and 1901, the population of England and Wales grew from 8.9 million to 32.5 million.

The towns and cities grew at an unprecedented rate as people moved from rural to urban areas. Between 1821 and 1851 alone some 4 million people migrated to the towns and by 1851 some 50 percent of the population was urbane in residence. The resultant urban squalor is well documented most vividly in Engels's *Conditions of the English Working Class* in 1845. Conditions for the average family were cramped, damp and unsanitary. Alongwith an inadequate diet, this resulted in high mortality rates and a weak and unhealthy working class population.[25]

British government was alive to the problems of society as it prevailed in the mid of the 19th century. Main concerns were housing problem of the working population and public

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[24] Vogel , David. (1986) National Styles of Regulation: Environmental Policy in Great Britain and the United States, Ithaca and NY: Cornell University Press, p.31.
[25] *Rydin, Yvonne. (1998) Urban and Environmental Planning in the UK*, London: Macmillan, p. 13.

health aspect. This led to the Public Health Act 1848. Rapid industrialization brought pollution in the cities causing health hazards for the people. This was addressed by enactment of Alkali Act 1863 which can be said to be precursor of today's pollution abatement mechanism.

The Housing and Town Planning Act of 1909 created permissive powers for local authorities or landowners to prepare schemes regulating suburban growth. The rural despoliation resulting from tree felling during the First World War was addressed by the establishment of the Forestry Commission in 1919. "These acts went through many changes with the passage of time and Town and Country Planning Act 1947 heavily influenced future planning for development."[26]

The Planning system regulates the development and use of land in the public interest. The system as a whole, and the preparation of development plans in particular, is the most effective way of reconciling the demand for development and the protection of the environment. Thus it has a key role to play in contributing to the government's strategy for sustainable development.

Attempt in the UK is to integrate all sectors of development in terms of policy as well as directions of the administration. Efforts like '*Greening the Government*' initiative are setting the tone of integration of the environmental policies at the level of the government.

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[26] Selman, Paul. (2000) *Environmental Planning*, London: Sage, p.11.

The White Paper '*This Common Inheritance*[27] spelled out the government's environmental strategy over a comprehensive range of policy areas. An update is published each year reporting progress and consolidating policy advances.

Planning with environmental considerations has taken giant strides in Britain. Planning documents are available in almost all areas. Planning Policy Guidance (PPG) notes set out the government's policies on different aspects of planning. Local planning authorities are obliged to consider the PPG while preparing their development plans. The PPG12 states that 'development plan should be drawn in such a way as to take environment considerations comprehensively and consistently into account'. These include, among others, global climate change, air quality and pollution, noise and light pollution, enhancement of biodiversity, environmental effects of unsustainable or poorly controlled waste management and environmental appraisal of development plans etc.

The government is committed to sustainable development and has set out its approach in '*A Better Quality of Life*'.[28] The strategy is based on four broad objectives:

- Maintenance of high and stable levels of economic growth and employment.
- Social progress which recognizes the needs of everyone.
- Effective protection of the environment.
- Prudent use of natural resources.

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[27] UK Government (1990) *This Common Inheritance: Britain's Environmental Strategy,* Cmnd 1200, London: HMSO.

[28] UK Government (1999) *A Better Quality of Life: A Strategy for the Sustainable Development of the UK*, Cm 4345, London: HMSO.

British planning for development model incorporates the environmental imperatives expressed internationally as well as the requirements of people of country. It is a good case study for a country undergoing rapid industrialization and at the same time having an agenda of sustainable development.

2.4.2 The Environmental policy before joining EC

The European Union (EU) has been influencing environmental policies of all member states much more significantly than domestic pressures. However, in the initial years the relations of Britain with EU were not comfortable. "Britain's relations with the EU have been variously portrayed as reluctant, skeptical and awkward."[29]

Government of the day was preoccupied with acts to prevent powers moving to Brussels. Not much enthusiasm was shown. Despite all this, integration has taken place in later years. Before joining the EC, the British system of policy making has been viewed as one of competitive sectorisation. The general style has been described as one of consultative and negotiated consensus, with a desire by officials to impose policy solutions. The outcome of such a style is generally one of incremental change or even policy stasis.[30]

Environmental concerns in this era were not considered to be an issue of national mainstream. There was much devolution of responsibility for enforcing the environmental policy. Britain had developed the different aspects of environmental

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[29] See generally Lowe, Philip. and Ward, Stephen. (eds) (1998) *British Environmental Policy and Europe : Politics and Policy in Transition* , London and New York: Routledge, p.4.

[30] Richardson, J.J. and Jordon, A.G. (1979) *Governing under Pressure: The Policy Process in a Post Parliamentary Democracy*, Oxford: Blackwell.

policy case by case, thus it was more of a reactive response to the emerging problems of the environment.

An American Commentator, David Vogel Writing in early 1980s remarked that the British approach to controlling both air and water pollution makes almost no use of either legally defined standards or statutory deadlines. He concluded 'if there is any one governing principle it is that the British government should make every effort to avoid coercing its own citizenry.' Having close consultation with the affected interests is also a feature of the British policy in the field of the environment.

2.4.3 Environmental policy direction after joining EC

Britain's joining EC in 1973 coincided with the Community's first environmental programme. Britain by this time had adequate rules, regulations and institutions in place capable of guiding the evolution of EC's environmental policy. But on the contrary, barriers and oppositions were created in that process. Three phases of adaptations are visible in the Europeanisation of British environmental policy.[31]

- 1973-83, Lack of Interest and Insularity: It was felt by Britain that the community policy on the environment was basically an offshoot of their trade and economic policies. The principle of 'selectivity' contained in the memorandum of 1972 also guided member states to depend on their existing and well-tried methods of working as far as implementation part is concerned. Britain had an elaborate system of pollution control built over a long period of time. And following the direction of EC for setting limit would have amounted to negating the lessons Britain had learnt in 160 years of controlling pollution.

Thus there was a general sense of superiority in Britain. Intervention by EC was seen more as a matter of international affairs than a measure to change the practice at home. A Department of Environment (DoE) guide published in 1976 stated that ' Great Britain has a long history of concern about the protection of the environment... In consequence we are now at a comparatively advanced stage in the development and adoption of environmental protection policies.'

- 1983-92, Defensiveness and Isolation: Britain the lag state? New directives from EC on environmental policy increasingly challenged the British approach. Examples may be cited of bathing and drinking water directives. Forms of pollution also changed like sulphur and nitrous emissions and decline in river quality. This undermined the superiority of Britain in dealing with environmental problem gradually as done over more than 160 years. The perception of Britain being a lead nation reversed so much so that her own environmental movement branded Britain as 'the Dirty Man of Europe'.[32]

Even the Royal Commission on Environmental Pollution criticized the British Government for acting in a dogmatic manner. At the level of EC commission, many clashes took place over several environmental directives. But as the pace of Europeanisation increased, Britain was obliged to accept EC environmental policy because of her strong interest in the single European market. After 1991 there was only one direction for British and EC environmental relation to go. Both the sides recognized

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[31] See note 29, p.16.
[32] Rose, C. (1990) *The Dirty Man of Europe: The Great British Pollution Scandal* , London: Simon& Schuster.

that environmental issues should not be allowed to disturb their efforts of achieving economic and monetary unification.

Britain's initiative in setting environmental policies on a systematic and more sound footing was appreciated both domestically and internationally. Mention may be made of *This Common Inheritance*: the Environmental White Paper in 1990, *Sustainable Development*: the UK Strategy 1994, *Biodiversity*: The UK Action Plan 1994, *Sustainable Forestry*: The UK Programme 1994, and *Climate Change*: The UK Programme, 1994 etc. British approach to control pollution and style of enforcement of regulations achieved widespread acclaim by the members of EU. Britain was also able to limit the influence of EU in environmental matters in the late 1990s. However, it became abundantly clear that British environmental policy had undergone Europeanisation in the late 1990s.

2.4.4 Impact of Europeanisation on British environmental policy

It is estimated that 80% of UK environmental legislation has its origins in Brussels and Strasbourg.[33] The overall impact may be examined with reference to policy style, policy relations and policy substance.[34]

- Policy Style, Flexibility to Formality: Britain's fragmented, incremental, pragmatic and case-by-case approach has been challenged by European policy which often has its basis in general principles such as the precautionary approach or the polluter pays. Administrative style of British government has been

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[33] Gummer, J. (1994) *Europe, What Next? Environment, Policy and the Community*, A Speech to the ERM Environmental Forum organized by the Green Alliance hosted by the Royal Society of Arts, 20 December, Green Alliance.
[34] See note 29, p.25.

flexible, negotiation oriented and based on departmental circulars. This gave way to more formal and explicit approach to regulation and compliance.

- Policy Relations: The Position of certain groups and institutions has been enhanced while some have been marginalized. The EC Commission does not have elaborate institution to do monitoring of their policies. They depended on environmental groups who received a large volume of codified information about the environment from the EU. This in turn enhanced their status while they reported on compliance of EC directives.

- Policy Substance: It is a hypothetical matter to judge what would have happened to the policy substance if Britain was outside EU. But the common viewpoint is that EU membership has brought higher standards to the UK.[35] However, others feel that Britain would have otherwise brought about environmental policy changes on her own if she was outside the EU.

It would be worthwhile to briefly see some features of the British environmental policies.

2.4.5 This Common Inheritance

This White Paper is Britain's first comprehensive survey of all aspects of environmental concern from the street corner to the stratosphere, from human health to endangered species. Notable features of the policy include the principles of stewardship, polluter pays, precautionary action and international cooperation etc. The policy has identified the global environmental problems to include tropical rain forest destruction, stratospheric

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[35] Osborn, D.(1992) The Impact of EC Environmental Policies on the UK Public Administration, *Environmental Policy and Practice,* 2, pp.199-209.

ozone depletion, loss of plant and animal species (biodiversity), drought, desertification, population growth and global warming. Local environmental problems identified by the policy are acid rain, vehicle pollution, industrial pollution, water pollution and waste disposal.

There are two broad approaches of controlling pollution and tackling environmental problems. Regulation, in which standards or actions are applied by law, and market signals, including taxes and prices which can be used to influence producers and consumers. Those who cause environmental pollution should face the full cost of control (the polluter pays principle).[36] The policy also lays down aims and objectives of programmes relating to air pollution, water pollution, waste disposal and protection of forests etc. The government will aim to preserve and enhance Britain's natural and cultural inheritance, to encourage the more prudent and efficient use of energy, to make sure that Britain's air and water are clean and to take up environmental research. The policy also attaches particular importance to the environmental policy of EC because joint action is often required to tackle pollution effectively.

2.4.6 Sustainable Development

Most societies want to achieve economic development to secure higher standards of living, now and for future generations. They also seek to protect and enhance their environment, now and for their children. 'Sustainable development' tries to reconcile these two objectives. A widely quoted definition of this concept is 'development that meets the needs of the present without compromising the ability of future generations to

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[36] UK Government (1990) *This Common Inheritance: Britain's Environmental Strategy,* Cmnd 1200, London: HMSO.

meet their own needs'. This document is the UK strategy for sustainable development, building directly upon the UK's environmental strategy, *This Common Inheritance*.This strategy looks at the UK economy and the UK environment as a whole. This document reiterates application of the precautionary principle and the polluter pays principle. The document lays detailed prescription on sustainable management of fresh water, global atmosphere, land use, the sea, wild life and habitats. Economic development and sustainability are explored in various sectors having a bearing on the environment namely agriculture, forestry, fisheries, mineral extraction, energy, manufacturing and services, waste, transport, leisure and development and construction.[37]

2.4.7 Climate Change

The climate change programme is the UK's first report under Article 12 of the Framework Convention on Climate Change, which the UK ratified in December 1993. The UK's programme reflects the commitment to adopt a precautionary approach. In other words, the threat of climate change is sufficiently great to require action now, even though scientific uncertainties remain. The programme includes inventories of emissions and scenarios of possible future trends, and sets out measures aimed at returning emissions of each of the main greenhouse gases to 1990 levels by 2000. The programme has its commitment on enhancing carbon sinks in soils and vegetation.The UK provides substantial assistance to developing countries to combat climate change through bilateral aids, particularly for energy efficiency and forestry projects. The programme includes a

[37] UK Government (1994b) *Sustainable Development: The UK Strategy,* Cmnd 2426, London: HMSO.

wide range of publicity and educational campaigns to improve awareness of climate change.The UK's research effort places it at the forefront of climate change research.[38]

2.4.8 Bio diversity Conservation

Article 6 A of the Convention on Biological Diversity required each contracting party to develop national strategies, plans or programmes for the conservation and sustainable use of biological diversity. This Action Plan published in 1994 is in response to the requirement of the Convention. Overall goal of the plan is to conserve and enhance biological diversity within the UK and to contribute to the conservation of global biodiversity through all appropriate mechanisms. Underlying principles include sustainable and precautionary action in conserving bio-diversity. Conservation and where possible enhancement of the bio-diversity are envisaged in the plan at the European and global scale.[39]

2.4.9 Sustainable Forestry

The UK programme is a response to the Rio Principles and the Helsinki Guidelines by providing a tangible account of the Government policies and of the actions that are being pursued. The first comprehensive forestry policy for the UK was laid down in 1919. The emphasis was on replacing the losses of previous centuries in order to reduce dependence on imported timber. The effect of this and successive policies has been a doubling of forest cover to about 10% of the UK's land area. Since 1919, forestry policy has been reviewed several times. The main aims of the present policy on forestry set out by the government in September 1991 are the sustainable management of existing woods and

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[38] UK Government (1994) *Climate Change: The UK Programme*, Cmnd 2427, London: HMSO.

forests and a steady expansion of tree cover to increase the many diverse benefits that forests provide. The programme also supports forestry programmes in countries namely Cameroon, Ghana, Kenya, Malawi, India, Indonesia land Nepal etc. by way of bilateral aids.[40]

2.4.10 Planning Policy Guidance

Planning Policy guidance (PPG) notes set out the Government policies on different aspects of planning. They must be taken into account by local planning authorities as they prepare their development plans. PPG 23 gives guidance for the first time on the relevance of pollution controls to the exercise of planning functions. It fulfills a commitment given in the environment White Paper, *This Common Inheritance*.

Besides these, various environmental policies are backed up by many consultation papers and other documents published by the RCEP, The Environment Agency, Standing Committees of the House of Lords and the House of Commons. Mention may be made of the Air Quality Strategy 2000 and the Waste Strategy 2000 etc.

2.5 EC environmental laws and the UK

UK's unwritten constitution does not provide any express reference to the environmental protection though common law rule for the same has been in existence for long. But the EC law has filled up the constitutional gap.

The Community's environmental policy began with recognition at the Paris Summit in 1972 of the fact that economic expansion is not an end in itself but a means to obtaining an improvement in the quality of life. However, no Treaty provision provided expressly

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[39] UK Government (1994) *Biodiversity: The UK Action Plan*, Cmnd 2428, London: HMSO.

for the adoption of legislation to protect the environment .The gap was filled by the general powers to legislate contained in EC Article 94 (ex Article 100) and EC article 308 (ex Article 235) until the adoption of the SEA, which inserted a new title into the EC Treaty concerned with the environment. Finally, the Amsterdam Treaty amended EC Article 2 so as to include the promotion of a high level of protection and improvement of the quality of the environment as one of the tasks of the Community.[41]

There are many ways in which EC can play role in shaping the British environmental law and policy. Some pieces of EC legislation lay down rules and standards that are directly enforceable in Member States without any need for further implementation. In these cases, EC law is British Law. Other pieces of EC legislation are addressed to Member States and require changes in British law or administrative practice. This is normally the situation in relation to environmental legislation. The EC has its own environmental policy in addition to having environmental laws. This exerts influence on British attitude to policy, laws and enforcement. And economic policies of EC have a profound effect on the direction of both EC and domestic environmental law.[42]

The EC is also signatory to a number of international treaties. Therefore, all Member States are duty bound to implement such agreements in their respective countries.

The EC has following principles on the environment:

- To preserve, protect and improve the quality of environment.

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[40] UK Government (1994) *Sustainable Forestry: The UK Programme*, Cmnd 2429, London: HMSO.
[41] Lasok, KPE. and Lasok,D. (2001) *Law and Institutions of the European Union*, Seventh Edition, London : Butterworths, pp.782-783.
[42] See generally Ball, Simon. and Bell, Stuart. (1996) *Environmental Law: The Law and Policy Relating to the Protection of the Environment*, Delhi: Universal Law Publishing Co. Pvt. Ltd.

- To contribute to the protection of the health of individuals.
- To ensure a prudent and rational utilization of natural resources.
- To promote at international level, measures to deal with regional or world wide environmental problems.

The EC lays emphasis on attending to problem of pollution in air, water, land and issues relating to natural resource conservation and access to information etc. The European Environment Agency came into being in 1993 as a legal entity.

> "The European court of Justice held in *the Von Colson case* in 1986 that domestic legislation must be interpreted so as to comply with EC law if the domestic law was passed to implement it, and the House of Lords accepted and approved this view in *Litster* v *Forth Dry Dock & Engineering Co. Ltd.* in 1989. Since then, the European court of Justice has decided in *the Mar Leasing case* in that national courts should interpret national legal provisions in accordance with EC laws, irrespective of whether they pre-date or post-date it."[43]

2.5.1 International law and the environment in the UK

The 1972 Stockholm Declaration on Human Environment contains principle 21 of general application and represents custom. Principle 21 provides that states have "the responsibility to ensure activities within their jurisdiction or control do not cause damage to the environment of other states or of areas beyond the limits of national jurisdiction"[44]

The U.K. has signed many treaties and conventions at the international level. This brings a lot of responsibility on Britain with regard to their enforcement. Important international instruments to which Britain is a signatory include the Vienna Convention, the Basel

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[43] See note 42, p.49.
[44] See generally McEldowney et al. (1996) *Environment and the Law: An Introduction for Environmental Scientists and Lawyers,* London: Longman, p.37.

Convention, the Montreal Protocol, the Conventions on Bio-diversity and Climate charge, the Agenda 21 etc.

International environmental law has been influencing British environmental policies to a great extent. So much so that Britain has its own Local Agenda 21, the Biodiversity Action Plan, Sustainable Forestry Programme and Sustainable Development Programme etc.

However, the international environmental law will become increasingly more important and relevant to the domestic laws in so far as they relate to:

- The right of access to environmental information
- That the precautionary principle should be widely applied and recognized.
- That national authorities should endeavour to adopt the principle of 'the polluter pays'.

From the large body of international agreements and other acts it is possible to discern general rules and principles, which have broad, if not necessarily universal, support and are frequently endorsed in practices. These are:[45]

- The obligation reflected in principle 21 of the Stockholm Declaration and Principle 2 of the Rio declaration, namely that states have sovereignty over their natural resources and responsibility not to cause environmental damage,
- The principle of preventive action,
- The principle of good neighborliness and international cooperation,

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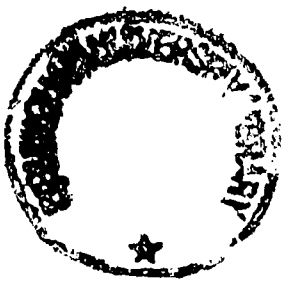
[45] Sands, Philippe. (1995) *Principles of International Environmental law I: Frameworks, Standards and Implementation*, Manchester and New York: Manchester University Press, pp. 183, 218-219.



- The precautionary principle,
- The polluter pays principle, and
- The principle of common but differentiated responsibility describes the shared obligations of two or more states towards the protection of a particular environmental resource and differentiated responsibility implies differentiated environmental standards set on the basis of a range of factors.

2.6 Discussion

India has in general reached to the level of economic and technological development in which the UK was in the late 1960s facing the problems of environmental pollution. This situation brings India and the UK to a point of comparison.

Publication of the White Paper, *This Common Inheritance* in 1990 marked the beginning of a new dawn in the field of policy making. This was followed by policy documents on climate change, biodiversity, sustainable development and forestry. This change did not occur overnight. This was the culmination of developments during the 1980s resulting from growing pressures from EC Directives, from a greening public opinion and vociferous environmental lobby. Pragmatism has been displayed in bringing out report each year on *This Common Inheritance* 1990 and resolve of the Government to correct the policy annually.

The White Paper 1990 takes a precautionary approach in controlling pollution. " This basic principle is said to be guided by a number of additional aims: to prevent pollution at source, to minimize the risk to human health and the environment, to encourage and apply the most advanced technical solutions while recognizing the integrated nature of

the environment and the need to achieve the best practicable environmental option and to ensure that the polluter pays for the necessary controls. The White Paper states that these principles are united in the new system of 'integrated pollution control' (IPC)". This has formed the basis of major legislative reform now enacted in Part I of the Environmental Protection Act 1990 under which certain industrial processes that discharge harmful substances to air, water or land would require prior approval of the Environment Agency or the relevant local authority. This aspect will be covered in more detail in the next chapter.

The IPC is now the most important feature of the EPA 1990 and places the UK in a better position in EC in controlling pollution even after the introduction of the IPPC in EC since 1999.

The Air Quality Strategy for England and Wales 2000 sets out policies for managing ambient air quality.[46] This strategy addresses eight pollutants namely benzene, lead, ozone, carbon monoxide, 1,3-butadiene, nitrogen dioxide, particles (PM10) and sulphur dioxide. It sets health- based standards for these pollutants and objectives for achieving them. The strategy also takes account of European legislation and international agreements since these have impact on all aspects of national air quality policy.

Directive 96/62/EC on ambient air quality assessment and management, the Air Quality Framework Directives, establishes a framework under which the EU will set limit values

[46] UK Government (2000) *The Air Quality Strategy for England, Scotland, Wales and Northern Ireland,* Cm 4546, London: HMSO.

for specified pollutants. The Directive identifies twelve pollutants for which limit or target values will be set in subsequent Daughter Directives.[47]

Industry, commerce and households in England and Wales produce around 106 million tones of waste each year, and most of this waste is landfilled. The Waste Strategy 2000 for England and Wales lays down the decision-making framework for integrated waste management. The Strategy proposes to recognize each step in the waste management process as part of a whole, involvement of all key players, a mixture of waste management options and formal and informal partnership in an effort to reduce waste production. It also takes into account the best practicable environmental option, the proximity principle, and duty of care etc.[48] Further, landfill tax imposed by the Government in 2000 is also acting as an incentive to reduce production of waste.

Following the Earth Summit meeting in 1992, it was recommended that all countries should produce sustainable development strategies. The UK was one of the first to do so in early 1994. In May 1999, the UK Government published *A Better Quality of Life*, A Strategy for Sustainable Development for the UK. This meant meeting four objectives at the same time, in the UK and the world as whole:[49]

- Social progress which recognizes the needs of everyone,
- Effective protection of the environment,
- Prudent use of natural resources, and

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[47] See note 46, p.23.
[48] UK Government (2000) *Waste Strategy for England and Wales Part 1&2*, available online at http://www.defra.gov.uk/environment/waste/strategy (visited 20 February 2002).
[49] UK Government (1999) *A Better Quality of Life: A Strategy for Sustainable Development for the UK*, Cm 4345, London: HMSO, available online at http://www.sustainable-development.gov.uk (visited 19 February 2002).

- Maintenance of high and stable levels of economic growth and employment.

The concept of sustainable development is very important environmental law principle. Future development of environmental law shall have to build upon this principle. Though the term 'sustainable development' has not been defined elaborately. However, this principle has come to stay as a central feature of the growth of environmental law and policy.

The Department of Environment, Food and Rural Affairs (DEFRA) has issued a press release under the title 'UK Quality of Life Barometer Rises' on 13 March 2002 about the positive progress since the launch of sustainable development strategy in 1999. The press release notes the following:

> "On the environmental side, the percentage of greenhouse gases in the atmosphere emanating from the UK has been falling, the quality of rivers and air have shown significant signs of improvement with urban air quality the clearest since 1993. Ten of the fifteen headline indicators, which are considered a barometer of quality of life in the UK, showed progress in the right direction."[50]

The UK government is putting sustainable development at the heart of every department's work. It has created a powerful Cabinet Committee on the Environment which co-ordinates policy on sustainable development. It has revitalized the system of 'Green Ministers'.

In recent years the '*Greening Government Initiative*' has expanded to cover issues related to policy making. Activities of all departments have a direct bearing on the environment and sustainable development. Considerable progress has been made in the UK in all

[50] These details have been received from Mr Ronan Palmer, Chief Economist, the Environment Agency whom I interviewed on 11 March 2002.

departments through development of awareness raising strategies and related training and communication activities, many of which have been led by Green Ministers.[51]

For sustainable development to be achieved, economic, social and environmental impacts have to be considered together when policies are being devised or revised. White Paper the *Modernising Government* commits the government to produce and deliver an integrated system of impact assessment and appraisal tools in support of sustainable development, covering impacts on business, the environment, health and the needs of particular groups in society.[52] Let us now turn to the Indian policy position.

The Policy Statement for Abatement of Pollution 1992 in India focuses on using a mix of instruments in the form of legislation, fiscal incentives, voluntary agreements etc. But economic instruments are not in vogue as the regulatory mechanism is very weak as admitted by the Annual Report 1999 of the Ministry of Environment and Forests. Likewise, the Policy on Environment and Development 1992 begins with the concept of sustainable development and ends with establishing a correlation between 'the environmental concerns and development pursuits that have a direct bearing on the very fabric of our society and life styles'.[53]

Most of the documents issued by the Ministry of Environment and Forests following the policies of 1992 are in the nature of delegated legislation and action plan to control pollution in different parts of the country. Increasing pollution has led the Indian Supreme Court to intervene in a number of cases ordering relocation of polluting

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[51] Greening Government 2001, *Memorandum of Evidence to the House of Commons Environmental Audit Select Committee Inquiry,* February 2001, available online at http://www.britarch.ac.uk (visited 19 February 2002).
[52] UK Government (1999) *Modernising Government,* Cm 4370, London: HMSO.
[53] See note 16, p.36.

industries. This is happening because the Indian Government does not have practicable policy on pollution abatement and protection of forests. This is coupled with the bureaucratic inertia of the related Government departments. Even the policies of 1992 do not appear to be efficient as no incentive for enforcing various environmental laws have been provided to those who are regulated.[54] The Indian policy on pollution issued in 1992 uses the term 'best practicable technical solution' without actually defining it. Equivalent terms in the British policies have not only been defined but they have also been the subject matter of much discussion and advice by the Department of Environment. Mention may be made of 'best practicable means'[55] 'best practicable environmental option'[56] and 'best available techniques not entailing excessive cost'[57]. In addition to this Indian policies on pollution and sustainable development have also remained static and there has not been any stock taking on the policies announced many years back.

Public law regime creates a set of rights and duties. But environmental law regime in both the countries does not strictly conform to this. There are instances of creation of environmental duties without corresponding rights. Even when statutes create rights, they

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[54] See note 6.

[55] The usage of this term dates back to 1842 when it was applied to smoke control. It was also used in the PHA 1936 and the Alkali Acts (1863, 1874 and 1906) and COPA 1974. This acted as a defense in some proceedings in pollution cases. This has now been largely superseded by BATNEEC as an environmental standard.

[56] This was introduced under the EPA 1990 as a part of the integrated pollution control (IPC). The Royal commission on Environmental Pollution in its 11th report had considered the concept of BPEO. "A BPEO is the outcome of a systematic consultative and decision making procedure and conservation of the environment across land, air and water. The BPEO procedure establishes, for a given set of objectives the option that provides the most benefit or the least damage to the environment as a whole, at acceptable cost in the long term as well as in the short term".

[57] Its concept is found in the EPA 1990. This is the cornerstone of the system of IPC. The EPA 1990 requires that BATNEEC is used by all prescribed processes in order to: prevent the release of substances prescribed for any environmental medium into that medium or, where that is not practicable by such means for reducing the release of such substances to a minimum and for rendering harmless any such substances

are not justiciable. The Indian constitution under article 51-A of the Fundamental Duties enjoins upon every citizen of India to protect and improve the natural environment including forests, lakes, rivers and wildlife, and to have compassion for living creatures. While article 48-A says that the State shall endeavour to protect and improve the environment and to safeguard the forests and wildlife of the country. But despite all this, these constitutional commands are not justiciable. This notion of rights and duties in the matter of the environment has also been called as environmental citizenship. This has not progressed in India and the UK beyond some rhetoric.

2.6.1 Scope for lesson learning and policy transfer

The Indian Parliament and the Supreme Court have shown great encouragement for the cause of the environmental protection. The Indian constitution, as indicated above, affords a unique opportunity in providing a mandate to the Government to protect the environment not only through legislation but also by internalizing international treaties. The flurry of activities started in India after the Earth Summit 1992 appears to have stopped. Nothing substantial has really happened on the front of pollution abatement and sustainable development in terms of policy since 1992. On the contrary, environmental policies in the UK have entered into the stage of real implementation. This calls for lesson learning and policy transfer suggested by Rose[58] (2000). "The stimulus to search for lessons comes from being dissatisfied."[59] This is because in an age of global

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which are so released, and for rendering harmless any other substances which might cause harm if released into any other environmental medium.

[58] See para 1.5.2.

[59] Rose, Richard. (1991) 'What is Lesson Drawing', *Journal of Public Policy*, 11:1, p.10.

communication, there is constant exposure to information about the countries, which are held up as examples of how one's own should act.[60]

Before drawing lessons, it is very important to study if a particular public policy has worked well in the exporter jurisdiction. Policy on pollution has been successful in the UK, as has been evaluated. Air people breathe now in the UK is lot more cleanly than the last decade. This has influenced EC to adapt the IPC from the UK in developing the IPPC now covering all the member states. Even the establishment of the European Environment Agency was inspired by the Environment Agency which was created in the UK following the Environment Act 1995. Such policy transfers in the field of the environment have been common, for example the precautionary principle is a German concept and the Bathing water policy of the EU is French in origin.[61]

Drawing a lesson in evolving a policy on pollution abatement would involve designing a lesson. This process should be at two stages, namely developing a policy on pollution in India and strengthening the organizational structure of the pollution control boards. There is not much difference in the context in which both the pollution control agencies are working. Therefore the lesson may be in the form of adaptation in respect of the contents of the policy and inspiration in respect of changing the structure of the pollution control boards in India. This should be on the lines as suggested by Rose[62](2000) and discussed in the first chapter.

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[60] Rose, Richard. (2000) ' What Can We Learn from Abroad?', *Parliamentary Affairs,*53:4, p.628.
[61] Jordan, Andrew, Wurzel, Rudi. and Zito, Tony. (2001) *The Transfer of Environmental Policies and Policy Instruments in the EU,* available online at http://www.futuregovernance.ac.uk (visited 19 February 2002).
[62] See para 1.5.2.

The Policy Statement for Pollution Abatement 1992 in India does not have a follow up strategy on air quality and waste management as mentioned in the context of the UK. The Air Quality Strategy 2000 and the Waste Strategy 2000 clearly demonstrate concrete actions to be taken by the enforcement agencies. These strategies have been produced after thorough consultation with all the stakeholders, which indicates their implementation without much hindrance. It would be wiser to adapt these strategies in India with minor adjustments in respect of the institutions as the enforcement agencies in the UK have more independence. This may be done by the Indian Ministry of Environment and Forest.

Another area of lesson learning and policy transfer is in respect of implementing programme of sustainable development and forestry.

The term sustainable development has been defined by the Brundtland report[63], as 'development which meets the needs of the present without compromising the ability of future generations to meet their own needs'. The UK government has adopted this definition and interpreted it as meeting four objectives as mentioned in *A Better Quality of Life.*[64] This emphasizes the government's commitment of sustainable development to be at the heart of every department's work. The *Greening Government Initiative* recognizes that protection of the environment cannot be the sole responsibility of just one department. The Green Ministers are responsible to oversee that environmental considerations and sustainability are incorporated in the policies of all departments. This makes a strong case for India to undertake a detailed examination and evaluation of the

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[63] The Brundtland Report (1987) *Our Common Future: Report of the 1987 World Commission on Environment and Development*, Oxford: Oxford University Press.
[64] See note 49.

British policies aimed at drawing lessons for changing domestic policies for better integration of policies, strategies and action plans in the domain of environmental protection and sustainable development.

The UK's policy on forests makes it mandatory for the Forestry Commission to manage the forests of the country in a sustainable manner. Similar is the thrust in respect of the conservation of bio-diversity in the UK. These measures should act as *inspiration* for India to develop her own policies in tune with vast potentials of development of forests and biodiversity. State Forest Departments should issue vision statements for sustainable management of forests and appropriate strategies to this effect should be put in place. Due to contextual differences in both the countries in respect of these resources, the methodology of lesson learning in the form of *inspiration* would work well.

3 COMPARING THE ENVIRONMENTAL LEGISLATION OF INDIA AND THE UK

This chapter proposes to take stock of the main legislative provisions in India and the UK relating to the environmental protection in areas of air, water, wastes, forests and land. India did not have separate legislation on various aspects of the environment, except forests, until the Stockholm Conference of 1972. In contrast, the environmental laws in the UK have been in existence since the enactment of the Alkali Act 1963. Now India and the UK have in place appropriate legislative measures to protect the environment. After describing the main provisions of the environmental laws and cases, points for comparative study and improvements will be made.

3.1 Environmental laws of India

The Stockholm Conference on Human Environment in 1972 inspired a number of measures relating to the enactment of laws in the domain of air, water and other aspects of the environment. "In December 1984, the Bhopal disaster occurred claiming thousands of lives and inflicting permanent disability upon hundreds of thousands of hapless residents in Bhopal. The inadequacy of Indian environmental law was laid painfully bare. India's environmental law regime before Bhopal was inadequate, unimaginative and so ineffectual as to be virtually non-existent".[1]

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[1] Dias, Ayesha. (1994) 'Judicial Activism in the Development and Enforcement of Environmental Law: Some Comparative Insight from the Indian Experience', *Journal of Environmental Law*, 6:2, pp. 243-244.

A flurry of policy and law reform measures were catalysed by the Bhopal tragedy and in this effort, an already activist judiciary was unwilling to play the role of a passive spectator. It was uniquely placed to extend its judicial activism to environmental issues and concerns and in fact did not hesitate to do so.[2]

Parliament has enacted three major anti-pollution laws dealing with various aspects of environmental pollution. These laws are: the Water (Prevention and Control of Pollution) Act 1974, the Air (Pollution and Control of Pollution) Act 1981, and the Environment (Protection) Act 1986. "It is significant to note that the term 'prevention' appearing in the titles of the Water and Air Acts, refers to new sources of pollution whereas the term 'control' refers to the existing sources of pollution."[3]

The Government of India had constituted a Commission on 'Review of Administrative Law' in 1998. Following the recommendations, all departments have to propose necessary amendments, repeal etc in respects of the Acts pertaining to them. Accordingly, the Forest Policy and Law Division of the Ministry of Environment and Forest has initiated necessary action in a phased manner for the amendment of the Water (Prevention and Control of Pollution) Act 1974, the Air (Prevention and control of Pollution) Act 1981 and the Environment (Protection) Act 1986.[4]

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[2] See note 1, p.244.
[3] Vibhute, K.I. (1995) ' Environment, Development and the Law: The Indian Perspective', *Journal of Environmental Law,* 7:2, pp. 137-148.
[4] Government of India (2000) 'Legislation and Institutional Support: Review of Administrative Laws', *MOEF Annual Report 1999-2000,* available on line at <http://www.envfor.nic.in/report/ (Visited 14 Aug. 2001).

3.1.1 Water pollution control laws

The Indian legal system provides four major sources of law for addressing water pollution problems:

- A comprehensive scheme of administrative regulation through a system of permits for effluent discharge under the Water (Prevention and Control of Pollution) Act 1974,
- Provisions of the Environment (Protection) Act 1986 relating to water quality,
- Public nuisance action against polluters, including municipalities charged with controlling water pollution, and
- The common law right of riparian owners to unpolluted water.[5]

3.1.2 *Framework of the Water Act*

The Water (Prevention and Control of Pollution) Act 1974 (hereinafter the Water Act) was amended in 1978 and revised in 1988. Water is a state subject under the Constitution. Therefore, this central act was enacted after twelve states consented under article 252(1) of the Constitution to the effect that law should be enacted on this subject by the Central Government.

This Act establishes Central and State Pollution Control Boards to advise the respective governments on water pollution issues, sponsor investigation and research relating to water pollution and develop a comprehensive plan for the control and prevention of

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[5] See generally Divan, Shyam. and Rosencranz, Armin. (2001) *Environmental Law and Policy in India: Cases, Materials and Statutes*, Second Edition, New Delhi: Oxford University Press, p.167.

water pollution.[6] The Water Act applies to streams, inland waters, subterranean waters and sea or tidal waters. Standards for the discharge of effluent or the quality of the receiving waters are not specified in the Act. Instead, the Act enables state boards to prescribe these standards. The Act provides for a permit system or 'consent' procedure to prevent and control water pollution. It prohibits disposal of polluting matter in streams, wells and sewers or on land in excess of the standards established by the state boards.[7]

By the amendment made in 1988, the state boards may issue a direction to any person, officer or authority, including orders to close, prohibit or regulate any industry, operation or process and to stop or regulate the supply of water, electricity or any other service. Amendments in 1988 also enabled citizens to bring legal action under the Act. The state boards can also apply to courts for injunctions to prevent water pollution under section 33 of the Act. Failure to comply with a court order is punishable by fines of Rs. 10,000/- (£ 143.00) or three months imprisonment or both.

Composition of the state water boards has state government nominees and representatives of the companies. There is hardly an independent voice on the board representing the affected citizen or environmentalist. The penalties are too low to deter defaulters.[8] Municipal bodies are also under obligation to obtain consent of the state boards before discharging sewage from new outlets. But generally they are not complying with it as enjoined under sec. 25 of the Act. In the case of *Almitra Patel*,[9] the

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[6] Section 16, the Water Act 1974.
[7] Section 24, the Water Act 1974.
[8] See note 5, p.179.
[9] *Almitra Patel v Union of India* 1997 (6) SCALE 12 (SP).

Supreme Court had to direct the central and the state board to ensure compliance by municipalities.

Section 21 of the Act provides detailed procedures for sampling effluents. In *Delhi Bottling case*,[10] the High court had set aside the injunction order of the magistrate court against the company, as samples were not taken as per the Act.

The Government of Gujarat had closed *Narula Dyeing and Printing Works*[11] as conditions stipulated in the consent order of the state board were not complied with namely installation of treatment plant within 6 months. In this case, the High Court ruled ".....mere fact that consent orders were obtained by the petitioners can not insulate them against the requirement of putting up the effluent treatment plants and complying with the standards of tolerance limits prescribed". Thus the Water Act mainly functions on the principle of 'Command and Control'. However, Parliament has enacted the Water (Prevention and Control of Pollution) Cess Act 1977, under which a rebate of 25% of the cess[12] is given for installation of water treatment plant to certain industries and local authorities. The Central government has also issued the Water (Prevention and Control of Pollution) Rules, 1975 and the Water (Prevention and Control of Pollution) Cess Rules, 1978.

3.1.3 Judicial relief under the Water Act

Under section 33 of the Act, the State board may make an application to a court of a metropolitan magistrate or a judicial magistrate of first class for seeking order to stop

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[10] *Delhi Bottling Co. Pvt. Ltd. v Central Board for the Prevention and Control of Pollution* 1986 AIR (DEL) 152.
[11] *Narula Dyeing & Printing Works v Union of India* 1995 AIR (Guj) 185, 191.

pollution. Judicial opinion about the scope of section 33 is divided as seen in the *Delhi Bottling Case*. However, in *Pondicherry Papers Limited Case*,[13] the Court held: 'the Water Act is a social welfare legislation, enacted for the purpose of prevention of pollution of water and for maintaining wholesomeness of water. Therefore the Act should be strictly enforced. It has been settled that the Water Act does not impose unreasonable restrictions on the right of petitioners to carry on their trade or business as guaranteed under the Constitution of India. Section 47 of the Water Act extends liability for violations committed by companies to certain corporate employees and officials.

Most state pollution control boards have achieved little success in bringing to book violators under the Water Act. The Haryana state board successfully prosecuted the polluters in the case of *Jai Bharat Woollen Finishing Works*.[14] In this case, the court imposed a nominal fine of Rs. 3000/- (£43) on the firm and Rs. 2500 (£36) on its manager. The nominal fine imposed by the court will not act as deterrence to corporate violators.

3.1.4 *Water pollution and common Law*

In the *Ratlam Municipality case*,[15] the Supreme Court held that the Water Act does not affect injunctive relief under sec. 133 of the *Code of Criminal Procedure 1973*. A private party who suffers an unreasonable interference with the enjoyment of his property may bring a common law action to restrain the polluter. The Indian legal system also

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[12] Cess: It means a tax or tariff and is generally used when the levy is for some special administrative or other expense which the name signifies (health cess, education cess, road cess).
[13] *Pondichery Papers Ltd. v Central Board for Prevention and Control of Pollution* 1980 Madras High Court CMPNO. 4662 and 4663 of 1978 (Unreported).
[14] *Haryana State Board v Jai Bharat Woollen Finishing Works* 1993 FOR. L.T. 101.
[15] *Municipal Council, Ratlam v Vardhichand* 1980 AIR (SC) 1622.

recognises a common law right of a riparian owner to unpolluted water. This is rarely invoked in water pollution cases. However, the Supreme Court revived this doctrine in the *M.C.Mehta vUnion of India* [16](Municipalities) case, and held 'in common law the municipal corporation can be restrained by an injunction in an action brought by a riparian owner who has suffered on account of the pollution of water in a river caused by the corporation by discharging into the river insufficiently treated sewage from discharging such sewage into river'.

3.1.5 *Air pollution control laws*

Problems of air pollution in Indian cities are particularly important from the view of public health hazards. Suspended particulate matter (SPM) levels in Indian cities are three to five times higher than the acceptable limit set by the World Health Organisation (WHO). Under the Air (Prevention and Control of Pollution) Act 1981, state pollution control boards carry out the executive function as per the delegation under article 258(3) of the Constitution. The Act was amended in 1987. Under section 19, State government may designate certain areas as 'air pollution control areas'. All industrial units in these areas have to obtain a permit or consent order from the state board. Under the Act, magistrates have power to deal with pollution cases and the boards may even close down industrial units if their directions are not complied with. Under sec 43, citizens can seek emissions data from the boards to build up a citizens' case. Consent orders under the Act are monitored and enforcement is done through fines and criminal prosecutions.

The Air Act operates in tandem with the Environment (Protection) Act 1986 (EPA). Emission standards notified under the Environment (Protection) Rules 1986 (EPR) are

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[16] *M.C. Mehta v Union of India* (Municipalities) 1988 AIR (SC) 1115.

re-notified by the state boards under the Air Act. Under the EPR, National Ambient Air Quality Standards (NAAQS)[17] are notified for industrial, residential, rural and sensitive areas. In addition to this, ambient air quality standards in respect of noise and emission standards for motor vehicles have also been issued under the EPR.

3.1.6 *Judicial relief under the Air Act*

In the case of *Dwarka Cement Works Limited*,[18] the magistrate had issued process against the chairman and other officials of the company for alleged offences under sections 21(4), 21(5), 31-A, 39 and 40 of the Air Act. Company officials moved the High Court under section 482 of the *Code of Criminal Procedure* (CrPC) for quashing and setting aside the impugned order issuing process against them. The Gujarat High Court held that under the Air Act, an accused company and its directors are obliged to disclose the identity of the managers who could be held liable. Further, invoking the inherent powers of the court under section 482 of CrPC would amount to prejudging the issue as held in the case of *Narayan Sing* by the Supreme Court in 1999 and would also lead to abuse of the process of court. The petition thus failed and the High Court directed the accused company to appear before the magistrate and take appropriate date for further proceeding.

In the case of *Mathew Lukose v Kerala State Pollution Control Board*,[19] the Kerala High Court has discussed the dangers of pollution. Justice Sankaran Nair held that article 21 of the Constitution includes right to a healthy environment ordered the board to close

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[17] NAAQS may be defined as levels of air quality intended to protect public health, vegetation and property with an adequate margin of safety.

[18] *Dwarka Cement Works Ltd v State of Gujarat* 1992 (1) GUJ. Law Herald 9.

down the factory after 3 months if the company failed to achieve the norms prescribed by it. This judgment also introduced the system of taking assistance from an *amicus curiae* and the concept of inter-generational equity. The judge also urged the Government to prescribe ambient air quality standards, ambient noise levels and environment impact assessment regulation. These things are now part of the Indian environmental law.

Indian mountains and hill resorts have been under pressure of deforestation and quarrying for limestone. Among the earliest judicial efforts to deal with the problem was the *Dehradun Valley* case.[20] Other cases to preserve ecology of the hilly areas include *M.C Mehta v Kamal Nath*,[21] *Ajay singh Rawat v Union of India*,[22] *Bombay Environmental Action Group v State of Maharastra*[23] and *Bandhua Mukti Morcha v Union of India*.[24]

One of the important cases of air pollution is the famous *Taj Mahal case*.[25] The Taj Mahal, at Agra city, is a national monument of marble built during the Mughal period. It is one of the wonders of the world. The monument has turned yellow with black and brown spots in its interior. Industrial/refinery emissions, brick kilns, vehicular traffic and generator sets are primarily responsible for polluting the ambient air around the Taj Trapezium Zone (TTZ).

The breadth of judicial activity in the *Taj Trapezium case* is unmatched. The Supreme Court supervised the installation of pollution abatement equipment, shut down violators,

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[19] 1990 (2) KER.L.T. 686.
[20] *Rural Litigation and Entitlement Kendra, Dehra Dun v State of Uttar Pradesh* 1985 AIR (SC) 652.

[21] 1997 (1) SCC 388,415.
[22] 1995 (3) SCC 266.
[23] 1997 W.P.No. 2754, Bombay High Court, 18 November 1998.
[24] 1991 (4) SCC 177, 193, 195.

cajoled the Gas Authority of India Limited (GAIL) to pipe gas to the industries, urged development of a green belt around the monument, relocated industries, fashioned a labour compensation and entitlement scheme, expedited the construction of a high way to divert traffic away from Agra, prodded the government to speed up work on barrages that would revive the flow in the river Yamuna and generally monitored development activity in the Trapezium.[26]

The *Vehicular Pollution case*[27] is presently going on in the Supreme Court. In the meantime, the court has pressed the Central Government to convert its vehicles to operate on a cleaner fuel, compressed natural gas (CNG), and also sought technical solutions to reduce harmful emissions from two and three wheelers and diesel trucks and buses. The Supreme Court has ordered that all private vehicles registered after 1.6.1999 to conform to Euro I norms and those registered after 1.4.2000 to conform to Euro II norms.

The EPA recognises noise as an environmental pollutant. Under this Act, the Central Government has framed the Noise Pollution (Regulation and Control) Rules 2000. Under these rules, ambient air quality standards in respect of noise, emission limits for machinery and appliances and firecrackers are prescribed.

3.2 Forest and conservation laws

The Indian Forest Act 1927 was enacted to consolidate the law relating to forests, the transit of forest produce and the duty leviable on timber and other forest produce. Following the announcement of the National Forest Policy 1988, it was felt that the

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[25] *M. C. Mehta v Union of India* (Taj Trapezium case) 1997 AIR (SC) 734.

Indian Forest Act 1927 was not able to achieve the ends laid out in the Government policy resolution dated 7th December 1988. The Govt. of India therefore prepared a draft forest bill in 1990 namely 'The conservation of Forests and Natural Ecosystems Act'. Copies of the draft bill were widely circulated. Four prominent NGOs have prepared their own 'Amended Draft Forest Bill 1995'. The NGOs' bill lays more emphasis on rights of communities, seeking to transfer power to committees at the levels of village, district, state and center, whilst the government bill is directed towards achieving conservation.[28] The controversy is still going on.

The Forest (conservation) Act 1980 was enacted to protect forestlands. Section 2 says that no authority, except with the prior approval of the Central Government, may make an order de-reserving a forestland for non-forestry purpose. The Forest (conservation) Rules, 1981 have also been issued. This Act has brought more teeth to the Indian forestry legislation.

3.2.1 *Forest protection and judicial perspectives*

The *Dehradun valley* litigation[29] was the first case in which the Supreme Court balanced the environmental and ecological integrity against industrial demands on forest resources. This case was an outcome of the haphazard and dangerous limestone quarrying in the Mussoorie hill ranges of the Himalayas. In this case, the Supreme Court played an activist role. The following are the major rulings in the case:

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[26] See note 5, pp.267-68.
[27] *MC Mehta V Union of India* WP (C) No. 13029 of 1985.
[28] Sinha, G. N. (1997) 'Comparison between Government & NGOs Draft Forest Bills: An Appraisal', in *Indian Forest Act along with Forest Conservation Act 1980*, DehraDun: Natraj Publishers, p. xxviii.
[29] See note 20.

- The court in 1983 prohibited blasting operations pending a review under the Mines Act 1952. An expert committee was appointed to assess the mines.

- In 1987, based on the ecological considerations alone, mining in the valley was stopped.

- Mining in reserved forests in the valley violated the Forest (conservation) Act 1980.

In addition to ecological integrity and national interests, the Supreme Court was also concerned with the welfare of mine operators and labourers left unemployed by closure of the valley operations. Following directions were issued to mitigate the effects:

- Orders that mine lessees whose operations were terminated by the court be given priority for leases in new areas open to limestone mining, and

- Orders that the Eco-Task Force of the Central Department of Environment reclaim and reforest the area damaged by mining and that workers displaced by mine closure be given priority for jobs with the Eco-Task Force operations in the region.

The other important case in recent times to protect forests from denudation is the on going *Forest conservation case*[30] in the Supreme Court of India. In this case, the court considered the questions of National Forest Policy 1988, definition of the term 'forests', working of forests as per working plans and illegalities committed in forests etc. This case has affected extraction of timber and other non-timber forest produce from forests.

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[30] *T. N. Godavarman Thirumulkpad v Union of India* 1997 AIR (SC) 1228.

The orders passed in December 1996 had imposed complete ban on all forestry operations. The court appointed an *amicus curiae* who is still playing an important role in the case. The court also appointed a High Power Committee for the northeastern region of the country in particular. This committee collected all relevant statistics about forests and forest based industries in the region. The committee even imposed fines on those industries, which were found to have collected illicit timber. The Supreme Court of India in this case also suggested a definition of the term 'forest' as this term has not been defined in the forest act. It said that the term 'forest' must be understood according to its dictionary meaning. This description covers all statutorily recognised forests as well as any area recorded as forest in Government record irrespective of their classification or ownership. Mining in all such areas was stopped where prior permission of the Central Government was not obtained as per the Forest (Conservation) Act 1980. The Supreme Court has passed many orders in the case of *T.N.Godavarman Thirumulkpad v Union of India*. A copy of the first order dated 12 December 1996 passed in this case is placed as Appendix 1.

3.3 The Environment (Protection) Act 1986

This Act is umbrella legislation.[31]The Act authorises the central government to establish standards for the quality of the environment and for emission or discharge of environmental pollutants from any source. The Ministry of Environment and Forests has published Environment (Protection) Rules establishing general standards and industry based standards for certain types of effluent discharge. The Act also includes a citizen's

initiative provision, section 19(b), and a provision authorising the Central Government to issue direct orders to protect the environment.

This Act is also an enabling law 'laying down legislative policy on environmental protection giving scope to issue delegated legislation'. Under section 23 the Centre may delegate its powers and functions to any officer, state government or other authority. Section 24 says that provisions of this Act and rules or orders would override any other law. Under sections 6 and 25, broad rule making power is conferred on the Central Government. The Act imposes severe punishments namely a prison term upto five years or fine of Rs 100000/-(£1428) or both.

3.3.1 *Delegated legislation under the Environment Act*

The Government of India has made a large body of delegated legislation under the Environment Act (EPA). These may be broadly classified under following four groups:

- Pollution Control: Section 7 of the EPA prohibits the discharge of environmental pollutants in excess of the prescribed standards. The government has made the Environment (Protection) Rules 1986 to implement this mandate. Standards are appended in the schedule to the EPR. These are of three types namely source standard, product standards and ambient standards. Schedule I contains industry wise standards for effluent discharge. Pollution control boards are empowered to specify stricter standards than those published in respect of

[31] Umbrella legislation means consolidating act. This is aimed at providing a framework for central government coordination of the Activities of various central and state and state authorities established under previous laws, such as the Water Act and the Air Act.

any industry, operation or process, where necessary. The Noise Pollution (Regulation and Control) Rules 2000 supplement the EPR.

- Hazardous Substance Regulation: The Hazardous Wastes (Management and Handling) Rules 1989 were issued under the EPA. This introduced a permit system to regulate the handling and disposal of hazardous waste. The Manufacture, Storage and Import of Hazardous Chemical Rules 1989 spell out the responsibilities of those handling hazardous substances. In 1996, the Central Government made the Chemical Accidents (Emergency, Planning, Preparedness and Response) Rules. Under this, crisis management groups at Centre, State and District are to be set up.

- Environment Impact Assessment: The Ministry of Environment and Forests issued a comprehensive and statutory Environment Impact Assessment Notification in January 1994 (EIA) bringing 29 designated projects/industries under its domain. Before 1994, obtaining EIA was an administrative matter. The notification requires project authorities to submit an EIA report, an environment management plan, details of the public hearing, a project report to the impact assessment agency for clearance. There is also a provision of further review by a committee of experts.

- Coastal Regulations and Protection of Specified Areas: In addition to the EIA, the Coastal Zone Regulations have also been issued in February 1991 to control development activity within a strip of 500 meters from the sea shore along the entire coast of India.

In 1991, the Ministry of Environment and Forests announced a scheme for labelling environment friendly products. The label known as 'Ecomark' may be used by the manufacturers of the consumer goods who meet the environment criteria notified by the Central Government under the scheme.

3.3.2 *Environment Act and protection of the environment*

In the *Bichhri case*,[32] the Supreme Court was examining the possibility of invoking writ jurisdiction notwithstanding the fact that the Central Government was supposed to take all measures to control the industrial pollution. The court held that it can certainly give directions under article 32 if such directions are warranted.

In *Vellore Citizens' Welfare Forum case v Union of India*,[33] the Supreme Court dealt with damage caused by untreated effluent discharged by tanneries in Tamil Nadu. The court commenting on section 3(3) of the EPA said:"The main purpose of the Act is to create an authority or authorities under sec. 3(3) of the Act with adequate powers to control pollution and protect the environment. It is a pity that till date no authority has been constituted by the Central Government. The work, which is required to be done by the authority in terms of section 3(3) read with other provisions of the Act, is being done by this court and other courts in the country. It is high time that the Central Government realises its responsibility and statutory duty to protect the degrading environment in the country."

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[32] *Indian Council for Enviro-Legal Action v Union of India* 1996 AIR (SC) 1446.
[33] 1996 5 SCC 647.

In *CRZ Notification case*,[34] the Supreme Court has noted the poor enforcement of the environmental law and recognised the administrative burden on the pollution control boards, which prevented them from effectively implementing the coastal regulations. The Court requested the Central Government to set up coastal authorities, which were established in 1998.

3.3.3 The National Environment Appellate Authority Act 1997

This Act (NEAAA) requires the Union Government to establish a body known as the National Environment Appellate Authority to hear appeal against orders granting environmental clearance in designated areas where industrial activity is prohibited or restricted by regulations made under the EPA. The Appellate Authority is chaired by a retired judge of the Supreme Court or a Chief Justice of a High Court and has its head office at Delhi.

In *A.P.Pollution Control Board v Prof M V Nayudu*,[35] the Supreme Court held that in addition to its statutory jurisdiction, the Appellate Authority also had an advisory role to play in complicated environmental matters that were referred to it by the Supreme Court or the High Courts.

3.3.4 The Public Liability Insurance Act 1991

This Act (PLIA) was aimed at providing immediate relief to the victims of accidents involving hazardous substances. This imposes 'no fault' liability upon the owner of the hazardous substances and requires them to compensate the victims irrespective of any neglect or default on their part. Maximum compensation in case of injury or death is Rs.

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[34] See note 32.

25000/- (£ 357.00) and Rs. 6000/- (£86.00) in case of damage to private property. This Act was amended in 1992, which introduced a relief fund. Rules under PLIA were framed in 1991 which lay down the procedure for inviting and processing compensation applications and also cap the potential liability of an insurer at Rs. 450 million (£ 6.42 million).

3.3.5 The National Environment Tribunal Act 1995

This Act (NETA) builds on the foundation laid in the PLIA and substantially alters the law of torts relating to toxic substances in India. The NETA extends the principle of 'no fault' liability. The NETA authorises the Central Government to establish a national tribunal at New Delhi to entertain applications for compensation in the event of an accident.

3.4 India's international obligations

India has obligations under a large number of treaties and agreements having a bearing on the environment. Mention may be made of the Convention on International Trade in Endangered Species of Wild Fauna and Flora 1973, the Convention for the Protection of the Ozone Layer 1985, the Protocol on Substances that Deplete the Ozone Layer 1987, the Convention on the Control of the Transboundary Movements of Hazardous Wastes and their Disposal 1989, the UN Framework Convention on Climate Change1992 and the Convention on Biological Diversity 1992 etc. Established norms of international environmental law have been mentioned under the second chapter (see above 2.3.5). The Supreme Court has given explicit recognition to those norms through a variety of rulings.

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[35] 1999 AIR (SC) 812.

3.5 The environmental laws of the U K

Contrary to popular belief, environmental law is not a new subject in the United Kingdom. For centuries the common law torts of nuisance, negligence, the rule in *Rylands v Fletcher* and trespass have been used by injured parties seeking remedies for pollution incidents. In terms of statute law the Environmental Protection Act 1990 is looked upon as a current landmark. Large sections of this were, however, lifted substantially from the Public Health Act 1875. Local enactments and byelaws regulating offensive trades can be traced back to the 15th century.[36] The body of environmental laws in the UK includes primary legislation, secondary legislation, tertiary legislation, guidance and other rules.[37]

- Primary legislation: The Environmental Protection Act 1990 deals with the controls over emissions from industrial processes, waste management, statutory nuisance, litter and genetically modified organisms. The Water Resources Act 1991 deals with controls over water pollution, water quality regulation, water resource uses and other water related matters namely fisheries and navigation. The Water Industry Act 1991 and the Water Industry Act 1999 cover the control of the supply of water and the provision of sewerage services by the water and sewerage undertakers. The Environment Act 1995 sets out the duties and powers of the Environment Agency. The Pollution Prevention and Control Act 1999 sets out the basic framework for the implementation of the

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[36] Campbell, Gordon. (1998) *Environmental Liability: Issues for Corporate and Property Professionals*, Second Edition, Birmingham: CLT Professional Publishing, p. 1.

[37] See generally Bell, Stuart. and McGillivray, Donald. (2000) *Ball & Bell on Environmental Law: The Law and Policy relating to the Protection of the Environment*, Fifth Edition. London: Blackstone Press Limited, pp. 64-70.

Integrated Pollution Prevention and Control Directive. The Town and Country Planning Act 1990 controls land use planning and sets out procedures for strategic development planning. The European Communities Act 1972 confers powers on the member states to pass secondary legislation so as to comply with the EC law.

- Secondary Legislation: Typically secondary legislation is commonly made by the appropriate Secretary of State under the enabling clauses in primary legislation. There is little parliamentary scrutiny of these regulations mostly because the subject matter is too technical. These regulations are placed in both the Houses of Parliament for a definite period before they become law. These regulations are designed to actually translate the mandate contained in primary legislation and may include matters which are procedural and standards for different industries. Environmental Protection (Prescribed Processes and Substances) Regulations 1991, Air Quality Regulations 2000 etc fall in this category. Certain European Community Directives have also been transposed directly into secondary legislation e.g. Environmental Information Regulations 1992 and Waste Management Licensing Regulations etc.

- Tertiary Legislation, Guidance Notes and other rules: Primary and secondary legislation may not be user friendly at times. Therefore, many documents in the nature of guidance notes, statement of policy and setting out a detailed procedure in non-legalistic language are generally brought out by many agencies. These are called tertiary legislation or quasi-legislation, which may not have force of law in strict terms but are generally persuasive. These serve many

purposes namely as an aid to the interpretation of statutory provisions, as a more flexible form of informal guidance and as statements of regulatory agency policy etc. An example is the definition of waste, which is explained in simpler terms in the Department of Environment Circular 11/94.

3.5.1 Planning and pollution control

Environmental law and planning law are closely related. Any plan to undertake development will invariably have impact on the environment. Therefore, planning authorities have to take environmental considerations of a plan into account before according planning permission. This has also led to a great deal of overlap between these two regimes. In addition, the environmental assessment Directive 85/337/EEC is enforced as an aspect of planning law.

3.5.2 Town and country planning law

The Town and Country Planning Act 1947 nationalised the rights of landowners to develop their land as they wished. The main Act now is the Town and country Planning Act 1990 (TCPA).[38]

Planning authorities are responsible for determining whether development can take place and assessing what would be its impact on the environment. Therefore, all prospective developers must obtain planning permission from the relevant planning authority. In England, this is usually the local authority. On getting all the information about a development plan, the planning authority issues planning permission and may also attach

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[38] See generally Woolley, David. et al. (eds) (2000) *Environmental Law*, New York: Oxford University Press, p. 637.

conditions. In case of major development projects, the promoters may be required to carry out an environmental impact assessment (EIA).

The development plans have also to be drawn up taking environmental considerations into account. Development plans are often composed of a number of plans. In July 1994, the Government issued the 'Policy Planning Guidance (PPG) Notes 23',which make following specific comments:

- The planning system should not be operated so as to duplicate controls which are the statutory responsibility of other bodies,
- Planning controls and pollution controls are separate but complementary,
- Planning authorities should consult relevant pollution control authorities and should have confidence in the effectiveness of pollution control legislation, and
- Planning system should focus on development plan rather than on the control of processes or substances.

The Government has issued the PPG 23 to clarify some of the problems relating to the overlap of functions between planning and pollution control authorities.[39] The PPG 23 was issued following the rulings in the case of *Gateshead Metropolitan Borough Council*[40] in which the Court of Appeal agreed with the Secretary of State for the Environment that the planning system should not duplicate controls under the Environmental Protection Act 1990. In this case, the local borough council had refused

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[39] See generally Wolf, Susan. and White, Anna. (1997) *Principles of Environmental Law*, London: Cavendish Publishing Limited, p. 375.

planning permission to the applicant to set up a clinical waste incinerator, as it would cause nuisance and pollution in the area. The Secretary of State for Environment had, however, granted the planning permission.

In respect of large development projects, environmental impact assessment must be carried out in order to determine their impacts on the environment. The 1985 Environmental Assessment Directive 85/337/EEC required Member States to take measures to comply with the Directive by 3rd July 1988. In the UK, this was implemented by the Town and Country Planning (Assessment of Environmental Effects) Regulations 1988. This was amended in 1994. Following the receipt of the 1997 Environmental Assessment Directive from EC, necessary changes were made through the Town and Country Planning (Environmental Impact Assessment) (England and Wales) Regulations 1999.

3.6 Integrated Pollution Control (IPC) in the UK

Pollution control legislation in the UK had until 1990 mostly followed the single medium approach. In other words, legislation was developed to control pollutions in different media namely air, water or land. The RCEP in its fifth report (1976) had said:

> "The reduction of emissions to the atmosphere can lead to an increase in wastes to be disposed of on land or discharged to water. If the optimum environmental solutions are to be found, the controlling authority must be able to look comprehensively to all forms of pollution arising from industrial processes where different control problems exist."[41]

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[40] *Gateshead MBC v Secretary of State for the Environmental and Northumbrian Water Company Plc* (1993) as given in note at 39, p.379.
[41] See note 39, p.235.

Thus the single medium approach failed to appreciate the inter-relationship between different environmental media.

The Royal commission Report (1976) also spoke of the 'transferability of pollution':

> "the three principal forms of pollution, air, water and land, are often very closely linked. In order to reduce atmospheric pollution, gases or dusts may be trapped in a spray of water or washed out of filters. This leaves polluted water, if not discharged to a sewer or direct to a river or the sea can be piped into a lagoon to settle and dry out, leaving a solid waste disposal problem. The pollutant may even go full circle by blowing off the lagoon as dust."[42]

The RECP (1976) therefore recommended a cross media approach so that pollutants were not simply transferred from one medium to another. Following the recommendations from the RECP (1976), the Environment Agency was created by the Environment Act 1995. The Integrated Pollution Control (IPC) also came into being following the enactment of the Environmental Protection Act 1990 (Part I). The IPC is now controlled by the Environment Agency. The IPC covers only the most seriously polluting industrial processes, which produce noxious emissions. This is regulated by means of prior approval in which the process is required to obtain an authorisation from the Agency. In granting the approval, the Agency must consider the impact of the process on all three environmental media, air, water and land, and determine the means of operation that would give the 'best practicable environmental option.'

The industrial processes which are not so seriously polluting come under the ambit of the local authority and the system of control is known as Local Authority Air Pollution Control (LAAPC).

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[42] See note 41.

Section 6 of the EPA 1990 requires that certain prescribed processes[43] must not be carried on or certain prescribed substances[44] must not be released into any environmental medium without prior authorisation from either the Environment Agency or the relevant local authority. Any person carrying on a prescribed process has to use the 'best available technique not entailing excessive cost' (BATNEEC) to Control pollution.

3.6.1 The new regime under the Integrated Pollution Prevention Control (IPPC)

The Pollution Prevention and Control Act 1999 (PPCA 1999) has been developed and enacted following the European Directive 96/61. The framework Act of 1999 has been followed by the draft regulation known as the Pollution Prevention and Control (England and Wales) Regulations 2000. This effectively means that there will be some degree of overlap between IPC and the PPCA (referred to as IPPC). When IPPC becomes operational, it will revoke part I of the EPA 1990. The Environment Agency will implement the provisions of the IPPC. The system of IPPC is mostly based on the principle of IPC. The UK is therefore in somewhat advantageous position in implementing the IPPC. Under the IPPC, no person shall operate an installation except to the extent that they are authorised to do so by the regulator. The installation is basically the building in which the particular activity is carried out. The domain of control under IPPC is more than IPC. The IPPC shall also be dealing with waste disposal, noise and energy efficiency etc. which are not part of IPC.

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[43] Section 1 Part I of the EPA 1990 defines the term 'process' which means any activities carried on in Great Britain, whether on premises or by means of mobile plant, which are capable of causing pollution of the environment. Thus even storage (keeping a substance) capable of causing pollution would amount to a process as ruled in the case of *HMIP v Safety Kleen UK Ltd* (1994).

[44] By virtue of section 2 (5) of the EPA 1990, the Secretary of State can also prescribe certain substances for control and accordingly the release of the prescribed substances requires authorisations under section 6.

The term 'installation' under the IPPC has been defined as any stationary technical unit (thus excluding mobile plant) where a prescribed activity is carried out and any other directly associated activities carried out on the same site which have a technical connection with the prescribed activities and which could have an effect on pollution. Thus the crucial test appears to be whether or not the activity in question is directly associated with, or has a technical connection with, or could have an effect on emission and pollution from the installation.[45]

Under the new regime of IPPC, the EA will control pollution emanating from the seriously polluting installations while local authorities will continue to control less serious polluting processes. However, the systems of control under the IPC will be slowly phased out to IPPC over a period of eight years.

The general approach of the IPPC legislation (PPCA 1999) is to prevent, reduce and if possible eliminate pollution and environmental impact as a whole. Under IPPC 'pollution is defined as including emissions as a result of human activity which may be harmful to human health, or the quality of the environment, cause offence to any human senses, result in damage to any material property, or impair or interfere with amenities and other legitimate uses of the environment and pollution means any substance, vibration, heat or noise released as a result of such emissions which may have an effect'.[46]Therefore IPPC through its permit system is supposed to enforce pollution control more efficiently than those under IPC.

3.6.2 Atmospheric and air pollution laws

The principal UK legislative schemes concerned with air pollution may be summarised as follows:[47]

- Integrated Pollution control (IPC): regulation of the most complex industrial processes is the responsibility of the Environment Agency under the IPC provisions contained in part I of the EPA 1990.

- Local authority Air Pollution Control (LAAPC): less complex processes generating air pollution are regulated by local authorities (London boroughs and district councils) also under part I of the EPA 1990.

- Local authorities also have powers regarding smoke pollution under the Clean Air Act 1993. They may also be concerned with air pollution where activities constitute a statutory nuisance.

- National bodies and local authorities have powers and responsibilities in relation to the National Air Quality Strategy established by part IV of the Environment Act 1995.

Local authorities have various powers of enforcement, which the EA has under part I of the EPA. Prescribed processes in this category should use the 'Best Available Technique Not Entailing Excessive cost' (BATNEEC).

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[45] See note 37, pp.387-88.
[46] See note 38, p.386-87.
[47] See generally Sunkin, Maurice. et al. (1998) *Sourcebook on Environmental Law*, London: Cavendish Publishing Limited, pp. 136-137.

3.6.3 The Clean Air Act 1993

Provisions of the Clean Air Act 1956 amended in 1968 have now been consolidated under the Clean Air Act (CAA) 1993. The provisions of Parts I to III of the CAA 1993 do not apply to any process regulated under part I of the EPA 1990.The CAA 1993 controls emissions of smoke, dust and grit by means of criminal offences which include emission of dark smoke, from a chimney or from industrial premises other than from a chimney, emission of dust and grit from non-domestic furnaces, emission of smoke from a chimney in a smoke control area and various offences relating to the installation of furnaces. Violators are normally prosecuted in magistrate's court by the local authorities.

In the case of *Sheffield City Council*,[48] it was held that premises could include a demolition site and that there was no requirement for the land to be covered by a building. The Clean Air Act 1956 and then in 1993 were enacted in response to air pollution caused by smoke due to burning of coal. The CAA 1993 provides some exceptions and defences also. For example, lighting the furnaces from cold or breakdown of machinery or non-availability of appropriate fuel are common defences available to the occupier of a premise. But burden of proof will fall on him. Anyone seeking to install a furnace or a chimney must obtain prior permission from the local authority. Presumption is that a high chimney will disperse and dilute the emissions. The CAA also envisages declaration of smoke control areas. Smoke, fumes or gas emitted from premises (non-domestic) so as to be prejudicial to health will constitute statutory nuisance under the CAA 1993.

3.6.4 Pollution from motor vehicles

Pollution from vehicles has also become significant in recent times. The government has developed following strategy to combat pollution:

- Secure necessary reduction in polluting emissions by improvements in vehicle technology and fuels,
- Encourage the use of less polluting alternative fuels,
- In the longer term, to reduce the need to use and rely on the car and to look for more tighter controls of standards.

3.6.5 National Air Quality Strategy

Under section 80 of the Environment Act 1995, the Secretary of State is under a duty to publish a national air quality strategy which should include standards relating to the quality of air, objectives for the restriction of levels at which particular substances are present in air, and measures which are to be taken by local authorities and other persons for the purpose of achieving those objectives. The strategy should also contain policies for implementing any obligations under EC law or international agreements. The Environment Agency is required to have regard to the strategy while performing its duty under various Acts. 'The Air Quality Strategy 2000 has all these features'.[49]

3.6.6 Statutory nuisance

The legislation governing statutory nuisance is contained in Part III of the Environmental Protection Act 1990. This replaces and updates the statutory nuisance provisions of the

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[48] *Sheffield City Council v ADH Demolition* (1983) LGR 177.

Public Health Act 1936, the Public Health (Recurring Nuisances) Act 1969 and the noise nuisance provisions of the Control of Pollution Act 1974. Local authorities are under a duty to inspect their areas from time to time to detect statutory nuisances and to investigate complaints made by residents. The nature of this duty was examined in the case of *R v Carrick District Council*,[50] when the court ordered that the council was under a duty to serve an abatement notice. The meaning of the word nuisance is the same as under the common law. Section 79 (1) of the Act sets out the matters, which would constitute a statutory nuisance if 'prejudicial to health or a nuisance'. This would include smoke, fumes, gases, dust, steam, noise etc.

3.6.7 Noise control

Provisions for the control of noise are contained in part III of the Control of Pollution Act 1974, and provisions relating to statutory nuisance are to be found in the Environmental Protection Act 1990. The Control of Pollution Act 1974 (COPA) provisions relate primarily to construction sits, noise-abatement zones, new buildings and plant and machinery.[51]

Local Authorities have power under section 60 of COPA to serve a notice imposing requirements as to how work is to be carried out on construction sites. Section 63 empowers a local authority to designate all or any part of its area a noise- abatement zone. In addition to the Environmental Protection Act 1990 and COPA 1974, there are other statutory provisions, which relate to noise. These are the Land Compensation Act

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[49] UK Government (2000) *The Air Quality Strategy for England, Scotland, Wales and Northern Ireland*, Cm 4548, London: HMSO.
[50] [1996] Env LR 273.

1973, the Health and Safety at Work Act 1974, the Civil Aviation Act 1982, the Noise and Statutory Nuisance Act 1993, the Town and Country Planning Act 1990 and the Noise Act 1996. The Noise Act 1996 provides for a new summary procedure in relation to nighttime noise.

3.6.8 Regulation of waste on land

The COPA 1974 had dealt with this problem. Now part II of the Environmental Protection Act (EPA) 1990 has introduced a new regulatory regime in relation to waste management and waste disposal replacing the earlier inadequate system under the COPA. In the UK over 85% of waste is disposed of by way of landfill. This has serious environmental repercussions.

The provisions of the EPA have created a much stricter licensing system, and coupled with the statutory duty of care have resulted in a framework which endeavours to regulate waste throughout its life cycle. Thus focus under COPA has shifted from waste disposal to waste management. In other words, the EPA envisages a ' cradle to grave' approach in relation to waste. Section 75(2) of the EPA defines waste as:

- any substance which constitutes a scrap material or an effluent or other unwanted surplus substance arising from the application of any process, and
- any substance or article which requires to be disposed of as being broken, worn out, contaminated or otherwise spoiled, but does not include .....an explosive.

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[51] Mumma, Albert. (1995) *Environmental Law: Meeting UK and EC Requirement*, London: McGraw Hill Book Company, p. 164.

In the case of *Long v Brooke*[52], it was held that on its true construction the statutory definition of waste (then under the COPA) defines waste from the point of view of the person discarding it. If a person discards an unwanted material and other person finds use for it, then also the same would come within the meaning of waste. This was the approach in cases *Kent CC v Queens Borough Rolling Mill*[53] and *R v Rotherham Metropolitan Borough council ex parte Rankin.*[54]

However, the EPA 1990 after amendment states that waste means any substance or object in the categories laid down in schedule 2B to the EPA (schedule 4 in the Waste Management Licensing Regulation 1994) which the holder discards or intends to discard or is required to discard.

Sections 75(4) to (7) of the EPA define those types of waste that are controlled waste. This includes household waste, industrial waste and commercial waste. The special waste Regulation 1996 expanded the list of special wastes to include more hazardous wastes following the EC Directive.

3.6.9 Waste management licensing system

The system of waste management licenses came into force in May 1994 by means of the Waste Management Licensing Regulations 1994. Section 35 of the EPA 1990 defines it as a: 'license granted by the Environment Agency authorising the treatment, keeping or disposal of any specified description of controlled waste in or on specified land or the treatment or disposal of any specified description of controlled waste by means of a specified mobile plant.'

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[52] [1980] Crim LR 109.

Section 33(1)(a) of the EPA 1990 prohibits the deposit of waste on land without a waste management license. The meaning of the term deposit was considered in the case of *Leigh Land Reclamation Ltd v Walsall Metropolitan Borough council*[55] where it was held that waste was deposited at landfill sites only when there was no realistic prospect of further examination or inspection and it had reached its final resting place. However, in the case of *R v Metropolitan Stipendiary Magistrate* [56] it was held that the term 'deposit' applies to temporary deposits as well as permanent deposits.

3.6.10 A national strategy for waste

Section 44A of the EPA 1990 (inserted by section 92 of the Environment Act 1995) obliges the Secretary of State to prepare a statement containing his policies for the recovery and disposal of waste in England and Wales as soon as possible. Change in approach to waste management in the UK was influenced by the EC Directive 75/442/EEC. "Waste Strategy 2000 has now been issued by the Government".[57]

3.6.11 Waste: The Duty of Care

The RCEP in its 11th report on Managing Waste: The Duty of Care (1985) had argued that such a duty of care be put on a statutory footing. "The producer (of Waste) incurs a duty of care which is owed to society, and we would like to see this duty reflected in public attitudes and enshrined in legislation and codes of practice." This statutory duty of care was introduced by the EPA 1990 which became effective from 1st April 1992. This

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[53] [1990] Crim LR 813.
[54] (1990) 1 PLR 93.
[55] [1991] Crim LR 298.
[56] [1993] 3 All ER 113.
[57] UK Government (2000) *Waste Strategy for England and Wales Part 1&2*, available online at http://www.defra.gov.uk/environment/waste/strategy (visited 19 February 2002).

is supplemented by Regulations made in 1991 and a code of practice. Breach of the duty of care as enjoined under section 34 would amount to a criminal offence.

3.6.12 Contaminated land

Section 78 A of the EPA introduces a new definition of contaminated land as 'land which appears to the local authority in whose area it is situated to be in such a condition , by reason of substances in, on, or under the land that significant harm is being caused or there is a significant possibility of such harm being caused or pollution of controlled waters is being, or is likely to be caused.' A general approach is that contaminated land contains potentially hazardous substances that do not naturally exist on the land. The provisions of Sec 78A- YC of the EPA 1990 have been enacted to provide a new regulatory regime for contaminated land. The provisions provide for identification, registration, remediation and monitoring. The legislation addresses the problems of liability and the apportionment of financial responsibility for remediation. [58]

The common law torts of nuisance, negligence and the rule in *Rylands v Fletcher* can also be used to provide redress for damage caused by contaminated land as was shown in the case of *Cambridge Water Company v Eastern Counties Leather Plc* in 1994.

3.6.13 Water pollution control

Water pollution in England increased with the advent of industrial revolution. Industrial units and urban population both used water from watercourses and released effluents and domestic waste into them.

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[58] See note 39, p.371-372.

The first Act of Parliament to combat water pollution appeared in the Rivers (pollution prevention) Act 1876. This operated mainly as a device for protecting the private rights of landowners rather than as protector of community rights. Despite that, the original common law remedies remain unaffected by statutory developments and are available today, although statutory authority is a defence to a common law action is nuisance.[59]

Water pollution control regime in England is governed by the Water Resources Act (WRA) 1991 and the Environment Act 1995. The former act has succeeded the erstwhile Water Act of 1989. Under the WRA, the Environment Agency grants discharge consents. Section 6 of the EA 1995 and section 19 of the WRA 1991 impose two duties upon the Environment Agency when managing water resources. These are i) to conserve, redistribute, augment and secure the proper use of water resources in England and Wales and ii) to promote the conservation and enhancement of the natural beauty and amenity of inland and coastal waters, the conservation of flora and fauna, which are dependent on the aquatic environment. Section 20 of the WRA 1991 imposes a duty upon the Agency to make water resources management scheme with water undertakers.

Chapter II, Part II of the WRA deals with licences to abstract water. Without a licence, water may not be abstracted from a source. Water companies are responsible for the supply and quality control of water as well as for sewage collection and control. These companies are under the administrative control of the Water Industry Act 1991.

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[59] See note 47, p.217.

3.6.14 Regulation of pollution

Section 85 of the WRA defines offences committed by polluting 'controlled waters'. The term controlled-waters has been defined under section 104 of the WRA to include almost all-inland and coastal water and all territorial waters. A person contravenes section 85 of the WRA if he causes or knowingly permits any poisonous, noxious, or polluting matter or any solid waste matter to enter any controlled waters.

The term 'causes' has been the subject of extensive judicial interpretation. In *Alphacel v Woodward*,[60] polluted water had flowed into controlled waters from the factory because of blocking of the pump. In this case, the judge stated that 'cause' should be given a common sense meaning and *mens rea* was not required. The appellants were held liable. Similar approach has been held in later cases including *Southern Water Authority v Pegrum*,[61] where a blocked storm drain caused water to flow into a lagoon containing effluent from a pig farm.

However, the chain of causation can be broken when a third party interferes with plant or equipment, at least where the intervention was not reasonably foreseeable. This became the basis to acquit the defendants in the case of *National Rivers Authority v Wright Engineering Co Ltd.*[62] In the case of *National Rivers Authority v Welsh Development Agency*,[63] the landlord would not 'cause an entry into controlled waters which was the consequence of activities engaged in by a tenant. Leading case for judicial interpretation

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[60] [1972] AC 824 at 834.
[61] [1989] Crim LR 442.
[62] [1994] Crim LR 453.
[63] [1993] Env LR 407.

of the term 'knowingly permits' is *Schulmans Inc v National Rivers Authority*,[64] in which appellants were acquitted of knowingly permitting fuel oil from a tank to enter controlled water on account of absence of knowledge.

The Environment Agency is responsible for issue of discharge consents as per the provision of the WRA 1991. In the case of *R v National Rivers Authority ex parte Moreton*,[65] a swimmer brought an action to cancel the consent order and an injunction because the NRA had not required ultraviolet disinfection as a condition of the consent. The application was dismissed, the court stated that it was a proper exercise of the NRA's discretion to take into account Welsh Water's financial limitations when considering the benefits of ultra violet disinfection.

3.7 Protection of trees and woodlands

British approach to conservation is fairly old dating back to 1869 when the Sea Birds Protection Act was passed. Currently, the Wild Life and Countryside Act 1981 is the major piece of legislation in this area. Following the Huxley and Ritchie Reports in 1949, the Nature Conservancy was established by Royal Charter. Under the Nature Conservancy Act 1973 this body became the Nature conservancy Council (NCC). After enactment of the EPA 1990, the NCC was split into three national bodies one each for England, Wales and Scotland. In respect of England the NCC is called English Nature. In Northern Ireland, nature conservation is looked after by the Environment and Heritage Service of the Department of Environment.[66]

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[64] [1992] Env LR 130.
[65] [1996] Env LR 234.
[66] See note 37, p.621-22.

English Nature is charged with the responsibility to notify sites of special scientific interest so that existing diversity of wild animals and plants may be maintained. Section 28 of the 1981 Act states that where the English Nature is of the opinion that any area of land is of special interest by reason of any of its flora, fauna or geographical or physiographical features, it shall be the duty of the Council to notify that fact to the local planning authority, every owner and occupier of any of that land and to the Secretary of the State. The nature of the duty was examined in the case of *R v Nature Conservancy Council ex parte London Brick Co Ltd* [67], and it was held that duty must be complied with and it is not discretion.

Use of tree preservation orders (TPOs) has existed under the Town and Country Planning law since 1932. Trees are now protected through recourse to the Town and Country Planning Act 1990. Section 197 of the Act imposes a general duty on local planning authorities to make adequate provisions for trees when planning permission is granted. A TPO is a means by which individual tree, groups of trees or woodlands may be protected against damage.

Any person who in contravention of a TPO cuts down, uproots or willfully destroys a tree, or willfully damages, tops or lops a tree in such a manner as to be likely to destroy it commits an offence unless consent has been obtained from the local planning authority. On summary conviction, the fine is £ 20,000, which is the maximum limit. These are offences of strict liability. In the case of *Maidstone Borough Council v Mortimer*,[68] the contractor on felling trees was held liable though the owner had stated that the consent

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[67] [1996] Env LR 1.
[68] [1980] 3 All ER 552.

was available. The court ruled that TPO is a public document so any one can check before carrying out works. The case of *Barnet London Borough Council v Eastern Electricity Board*,[69] illustrates that damaging trees by negligence will also lead to liability.

The local planning authority has the responsibility of making TPOs under the Town and Country Planning (Trees) Regulations 1999. There has been attempt to define a tree. In the case of *Kent Country Council v Batchelor*,[70] Lord Denning MR had arbitrarily suggested that a diameter of 7 to 8 inches was needed before something could be called a tree. But *Phillips J. in Bullock v Secretary of State for the Environment* [71], that anything ordinarily called a tree could be covered by a TPO. This expressly included a coppice also. Defences are available to the TPO offences. Areas being operated by the Forestry Commission will also come outside the overview of offences.

Under Section 9 (2) of the Forestry Act, a felling license is required from the Forestry Commission for the felling of trees over 8 cm in diameter (15 cm in coppices) measured 1.3 m from the ground. The Forestry Commission is under a duty to endeavor to achieve a balance between the management of forests and the conservation of landscape and nature.

3.8 European Community and the environmental policy and law

The original Treaty of Rome did not mention any thing on the environment. This was primarily because the main purpose of the EEC was to augment economic development and integration of the member states. However, in the early 1970s it was recognized in a

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[69] [1973] 1 WLR 430.

meeting of the heads of states at Paris that economic expansion is not an end in itself but a means to obtaining an improvement in the quality of life. It was also realized by the heads of the states that economic growth and environmental degradation were inter related. This led to the environmental action programmes.

However, no treaty provision provided expressly for the adoption of legislation to protect the environment. The gap was filed by the general powers to legislate contained in EC article 94 (ex Article 100) and EC Article 308 (ex Article 235) until the adoption of the Single European Act (SEA) which inserted a new title into the EC Treaty concerned with the environment (see above 2.5). By then the ECJ had proclaimed that environmental protection was one of the Community's essential objectives and that it could justify restrictions on the freedom of trade and competition. Finally, the Amsterdam Treaty amended EC Article 2 so as to include the promotion of a high level of protection and improvement of the quality of the environment as one of the tasks of the Community.[72]

The principles of the EC policy is based on the precautionary principle, the principle that preventive action should be taken, the principle that environmental damage should as a priority be rectified at source and the principle that polluters should pay. The policy must take account of available scientific and technical data, environmental conditions in the various regions of the Community, the potential benefits and costs of action or lack of action, the economic and social development of the Community as a whole and the balanced development of the regions.

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[70] (1976) 33 P&CR 185.
[71] (1980) 40 P&CR 246.
[72] Lasok, KPE. and Lasok, K. (2001) *Law and Institutions of the European Union*, Seventh Edition, London: Butterworths, pp. 782-783.

3.8.1 EC environmental policy

This is contained in the various environmental action programmes the Community launched since meeting of the heads of state at Paris in 1972. The first programme (1973-77) singled out the main objectives to include:[73]

- The protection of the aquatic environment by controlling pollution through discharge of certain dangerous substances into the environment and establishing a common procedure for the exchange of information on the quality of surface freshwater,
- Measures to combat atmospheric pollution by controlling in particular air quality standards for sulphur dioxide and use of fuel oils,
- Control of noise pollution by laying down maximum permitted noise levels for different motor vehicles, construction equipment and domestic appliances,
- Control of chemical in the environment, and
- Promotion of scientific research, information and various international environment oriented agreements.

The second programme (1977-1983) had emphasis on protection of marine environment and environmental impact assessment of big developmental projects.

The third programme (1983-1987) envisaged control of pollution and nuisances. This started to concentrate on the prevention of pollution through the integration of

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[73] See note 72, pp.784 –785.

environmental requirements into the planning and execution of action.[74] The fourth programme (1987-1992) recognized the necessity of pursuing environmental objectives in concert with the social and economic policies. This programme also introduced the concept of economic instruments, freedom of environmental information act, integrated pollution prevention and control (IPPC) etc.

The fifth programme (1993-2000) makes a departure from the sectoral approach to the principle of sustainable development. This programme identifies five sectors, which have maximum bearing on the environment. These are industry energy, transport, agriculture and tourism.

Policy making within the EU is characterized by incrementalism, with policy undertaken in a step-by-step movement. Environmental policy is no exception.[75] The fifth programme adopted sustainable development, which was based on the experiences of running previous programmes, as well as the general direction in which the international community was moving as far as the environment is concerned.

In 2001, the Commission proposed a sixth programme (2001-2010) focusing on four priority areas namely climate change, nature and biodiversity, environmental and health and natural resources and waste. It is also designed to achieve improvements in the four areas by the following means: 'ensuring the implementation of existing environmental legislation, integrating environmental concerns into all relevant policy areas, working closely with business and consumers to identify solutions, ensuring better and more

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[74] O' Callaghan, Paul W. (1996) *Integrated Environmental Management Handbook,* West Sussex: John Wily & Sons, p.35-36.

accessible information on the environment for citizens and developing a more environmentally conscious attitude towards land use.'[76]

3.8.2 EC environmental law

The volume of legislation implementing the environmental programmes enumerated above is elaborate and impressive. These are mostly in the form of regulations and Directives. This is an ever-increasing area, which mostly cover aquatic and air pollution, noise abatement, chemical pollution and the protection of natural environment.

- Water Pollution: The framework Directive on pollution by certain dangerous substances discharged into the aquatic environment of the Community,[77] in part requires the Members States to take measures to eliminate water pollution. The Ground Water Directive[78] deals with the prevention or restriction of the discharge into ground water of certain substances. The Bathing Water Directive[79] lays down an obligation on the Member States to ensure that the quality of bathing water attains certain quality. Directives 80/778[80] and 98/83 have been issued on the quality of water intended for human consumption.

- Air Pollution: Many Directives have been issued to deal with air pollution, industrial pollution, protection of ozone layer and protection of forests from atmospheric pollution. Some of these are Dir. 80/779, Dir. 82/884, Dir. 85/203, and Dir. 85/210 etc.

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[75] Baker, Susan. et al. (ed) (1997) *The Politics of Sustainable Development: Theory, Policy and Practice within the European Union* , London: Routledge, p.101.
[76] See note 72, p.785-886.
[77] Directive 76/464.
[78] Dir. 80/68 amended by Dir. 91/692 Case 291/84 *Commission v Netherlands* [1987] ECR 3483.

- Noise Pollution: Some of the Directives are 78/1015 amended by 87/56 and 89/235 on motorcycles, 70/157 for motor vehicles, 79/113 on construction plant land equipment etc.

- Chemical and Industrial Pollution: These include Directives 67/548 on dangerous substances, 96/82 on control of major accident hazards and 88/320 on good laboratory practice.

- Waste Management: Separate Directives have been issued on ordinary waste management and dangerous waste. The former comprises Directives 75/439[81] on the disposal of waste oil, 94/62 on packaging waste and 1999/31 on landfill waste. Those in the latter category include Regulation 259/93 on trans-frontier transhipment of hazardous waste, Directive 91/1578 on disposal of batteries, 78/116 on waste from titanium dioxide industry and 96/59 on the disposal of PCBs and PCTs.

There are numerous other Directives, which are designed to protect forests from atmospheric pollution and fires. Directives 90/313 provides for free access to environmental information, and regulation 880/92 establishes the scheme for Eco-labels, by means of a market based instrument, which relies on the voluntary participation of manufacturers.[82]

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[79] Dir. 76/160 amended by Dir. 91/692 Case C - 56/90 *Commission v UK* [1993] ECR I – 4109.
[80] Case C-42/89 *Commission v Belgium* [1990] ECR I-2821.
[81] Case C -102/97 *Commission v Germany* [1999] ECR – 5051.
[82] Gormley, Laurence W. (ed) (1998) *Introduction to the Law of the European Communities: From Maastricht to Amsterdam*, Third Edition, London: Kluwer Law International, pp. 1102-1103.

3.8.3 EC laws in action

The mandate of the Community has made a major shift from growth to sustainable development. Environmental considerations are thus bound to infringe the concept of free trade. The ruling of the ECJ is pertinent in the *Dannish Bottles case*.[83] In this case the court said that the protection of the environment is one of the EC's mandatory requirements. Therefore it can justify interference with the common market provided the method adopted is proportionate to the aim, which is being protected. Similar approach was followed in the *Wallonian Waste case*[84] in which the court ruled that wastes constituted goods under the Treaty.

In the case of the Drinking Water,[85] the court ruled that non-compliance in fact amounts to non-compliance in law. Therefore, the UK government is in breach of Directive 80/778 on drinking water. This is an instance of the EC law having direct effect. EC laws may also have indirect effect as ruled in the case of *Von Colson*[86] and *Marleasing SA* [87]in 1984 and 1990 respectively.

3.8.4 External dimension and the Community

The EC is party to a large number of international agreements in its own right or concurrently with the member states. Some of them are the Helsinki Convention on the Protection of Marine environment in the Baltic Sea Area (1983), the Convention on Long Range Transboundary Air Pollution (1986), the Berne Convention for the protection of

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[83] Case 302/86 *Commission v Denmark* [1988] ECR 4607.
[84] Case C –2/90 *Commission v Belgium* [1992] ECR I – 4431.

[85] Case C –337/89 *Commission v UK* [1992] ECR I – 6103.
[86] Case 14/83 *Von Colson v Land Nordrhein Westfalen* [1984] ECR 1891.

the River Rhine against Chemical Pollution (2000), the Paris Convention for the Prevention of Marine Pollution from Land based Sources (1985), the Vienna Convention for the Protection of Ozone Layer (1988), the Montreal Protocal (1988), and the Barcelona Convention for the Protection of Mediterranean Sea against Pollution (1977) etc. The member states are thus having obligations towards the conventions as well as the Community.

3.8.5 The ECHR

The European Court of Human Rights has interpreted some civil and political rights to protect against environmental harms. For example, the court has creatively relatively interpreted the right to respect for home life (in article 8) to provide a remedy against extreme pollution. The court in the case of *Fredin v Sweden* [88] said that (it) recognizes for its part that in today's society the protection of the environment is an increasingly important consideration. This will have important bearing in the UK in view of the incorporation of the Convention into UK law by the Human rights Act 1998.

3.9 International law and the UK

International law is of great relevance to the UK in the sense that many environmental problems are trans boundary and global in nature. As such they need to be tackled at the international level. The UK is party, therefore, to a host of international environmental laws. This association has two dimensions. Firstly, it affects rights and obligations and policy making at national level and secondly it enables the UK to contribute towards the development of international environmental policy and law.

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[87] Case C-106/89 *Marleasing SA v La Commercial Internacional de Alimentacion' SA* [1990] ECR I –

Under section 156 of the Environmental Protection Act 1990, the Secretary of State has been conferred specific power to make regulations to comply with the obligations arising from the EC or international laws.[89] In this way measures, which have in fact their origin in international initiatives are disguised as national laws. International obligations may also influence the interpretation of a domestic law if this has been an outcome of the former.

Therefore, when the law on a matter such as the transportation of hazardous waste is considered, it is not enough to look only at the relevant regulations, namely the Transfrontier Shipment of Waste Regulations 1994. This statutory instrument, together with the complementary EC Waste Shipment Regulations (EC/259/93) should be read in the light of the Basel Convention on the Control of Transboundary Movement of Hazardous Wastes and their Disposal (1989).[90]

From the large body of international agreements and other acts it is possible to discern general rules and principles, which have broad, if not necessarily universal, support and are frequently endorsed in practices.[91]

3.9.1 International environmental agreements

The Stockholm Conference in 1972 marked the beginning of the formal discipline of international environmental law. The Conference adopted an action plan of 109

4135.
[88] (1990) 13 EHRR 784.
[89] Duxbury, RMC. and Morton, SGC. (eds) (2000) *Blackstone's Statutes on Environmental law*, Third Edition , London :Blackstone Press Limited, p .163.
[90] See note 38, p.92.
[91] See text at 2.5.1.

recommendations and a declaration of 26 principles. First two principles stated above are the outcome of the declaration.

It is believed that the EC environmental law is the Conference's most tangible outcome. This was followed by the report of the World Commission on Environment and Development (Our Common Future, the Brundtland Report) in 1987 which, though non binding legally, established a close connection between increasing global crises and environmental degradation. This report also coined the usage of the term sustainable development, which has come to stay locally, regionally and nationally in all fields of activity. The Earth Summit was held at Rio de Janeiro in 1992 known formally as the UN Conference on Environment and Development. Only two treaties were agreed namely the 1992 Biodiversity Convention and the UN Framework Convention on Climate Change 1992. Three other instruments agreed were the Rio Declaration on Environment and Development, the Statement of Principle for a Global Consensus on the Management, Conservation and Sustainable Development of all types of Forest (the Forest Principles), and Agenda 21.

3.9.2 International obligations of the UK

On the subject of trans boundary air pollution, the *Trail Smelter* case is perhaps the only international adjudication. In this case, noxious fumes emanating from a Canadian smelting company were carried to the United States and caused considerable damage to land and other interests in the state of Washington. The tribunal held that 'no state has the right to use or permit the use of its territory in such a manner as to cause injury by

fumes in or to the territory of another.[92] This became the precursor to the Principle 21 of the Stockholm Conference and the preventive principle.

The 1979 Geneva Convention for the Control of Long range Trans boundary Air Pollution (LRTAP) entering into force in 1983 recognized the adverse effects of air pollution over the short and long term. The LRTAP has been based on the principles as laid down in the *Trail Smelter case* as well as Principle 21 of the Stockholm Declaration. This instrument is supplemented by four protocols which are the 1984 Geneva Protocol on Air Pollution Monitoring, the 1985 Helsinki Protocol on the Reduction of Sulphur Emission, the 1988 Sofia Protocol on Control of Emission of Nitrogen oxide and the 1991 Geneva Protocol on Emissions of Volatile Organic Compounds. The second protocol on the further reduction of sulphur emission was adopted in Oslo in 1994. The 1992 Framework Convention on Climate Change is really forward looking in the sense that it addressed the global climatic change due to build up of the green house gases such as carbon dioxide.

The 1982 UN Convention on the Law of the Sea is of paramount importance in respect of controlling pollution of the marine environment. It entered into force in 1994. This Convention attempts for the first time to provide a global framework for the rational exploitation and conservation of the sea's resources and the protection of the environment, which can also be seen as a system for sustainable development.

The most comprehensive and important of all the conventions and the first one to provide comprehensive and exhaustive guidelines for ship builders and ship owners to follow in order to actively prevent marine oil pollution is the 1973 International Convention on the

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[92] See note 47, p.72.

Prevention of Marine pollution from Ships, as modified by the 1978 Protocol relating to it (MARPOL 73/78). The MARPOL Convention and its Annexes also provide the main source for the international rules and standards for pollution from ships.[93]

The Convention for the Prevention of Marine Pollution by Dumping of Waste and other Matter 1972 obliges all states parties to take all practicable steps to prevent the pollution of the sea by the dumping of waste and other matter that is liable to retreat hazard to human health, to harm living resources and marine life, to damage amenities or to interfere with other legitimate uses of the sea.

The 1989 Convention on the Control of Trans boundary Movement of Hazardous Wastes and their Disposal, also known as Basel Convention, requires all parties to ensure that the trans boundary movements of hazardous wastes are reduced to the minimum consistent with environmentally sound and efficient management. It also implies an approach that wastes should be disposed of where it actually originated. This is known as the *proximity principle*.

The convention on International Trade in Endangered species (CITES) 1973 regulated international trade in wild plant and animal species through a permit system, which is based on whether the species concerned is listed in either of three Appendices to the Treaty. This has been incorporated into the UK law by the Endangered Species (Import and Export) Act 1976. Appendix I species include all species threatened with extinction. The Convention on Biological Diversity 1992 addresses all aspects of biodiversity from conservation to sustainable use. This Convention presumes conservation of biodiversity for present as well as future generations based on the premise of sustainability. The

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[93] See note 47, pp. 169-170.

Convention on the Conservation of European Wildlife and Natural Habitats 1979, also known as Berne Convention, was negotiated by the Council of Europe. The Convention has been implemented among member states through EC Directives on the conservation of natural habitats of wild Fauna and Flora.

The Convention on early Notification of a Nuclear Accident 1986 was adopted within three months of the Chernobyl nuclear disaster in the former USSR.

The Convention on Environmental Impact Assessment in a Trans boundary context 1991 (ESPOO) is the first multilateral agreement to lay down detailed rules, procedures, and practices for trans boundary environmental impact assessment. This has been signed by the EC in addition to many other member states.

3.10 Discussion

The main points emerging from the comparative account of the environmental laws are: integrated approach to pollution prevention, efficacy, sanctions, and different impact of international law.

Britain was the first country to industrialize so it was also the first country to address the environmental problems both at the level of legislation and institutions. Delhi is now known as the fourth most polluted city in the world. The UK was in this stage in the early 1950s when the infamous London Smog is supposed to have led to thousands of deaths.

The UK has been prudent in quickly reversing the trend of environmental degradations by systematic efforts both at the level of evolving policies and legislation. In this context, comparative law method as a tool of understanding and improving the environmental

laws of India would be very apt as India has reached the similar stage of economic development as the UK was in the early 1950.[94]

3.10.1 Efficacy of the environmental laws

India is now facing environmental problems and resource degradation on a massive scale. Indian environmental laws are not proving effective and on a number of occasions enforcement has been induced by the higher Judiciary namely the Supreme Court and the High Courts. It is high time that India learns from the experience of the UK in redesigning the environmental laws for effective control of the environmental problems. In fact, a start has already been made namely in the field of controlling vehicular pollution.

Public-spirited citizens under article 32 of Indian Constitution filed most of the leading cases in India on air and water pollution. Legislative frameworks on air and water have not been invoked by regulating agencies to the desired extent. In an affidavit, the CPCB even went to the extent of saying that it is mostly busy with administrative matters so the Central Government should notify authority under the EPA 1986 to deal with pollution problems. As a result, more imaginative and interpretative case law under the Air Act and Water Act have not grown in India.

On the other hand the UK has benefited from case law and legislation dating back to 1860s when the Salmon Fisheries Act 1861 was enacted. Later enactments like the Rivers Pollution Act 1876, the Public Health Act 1875, the Rivers Pollution Prevention Act 1961, the Control of pollution Act 1974, and the legislation enacted after 1990 have

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[94] According to Zweigert and Kotz (1987), similar stage of economic development favours use of

only added to that. Environmental laws in India need to be used more by the enforcement agencies than public-spirited citizens performing that function.

3.10.2 Need for integrated approach to environmental problems

Britain has tried to view the environment in a holistic perspective. Development invariably has an adverse effect on the environment. The UK is addressing these problems through the regime of planning law namely the Town and Country Planning Act 1990 and the EIA regulations 1999 issued under the Act. Planning and development in the UK is thus integrated to a great deal. In contrast, development planning in India does not come under any formal legislation. Therefore most of the development plans evolved and implemented at the State and District levels often do not have regard to environmental pollution and other ill effects of development plans.

Legislation aimed at controlling pollution in India is contained in the Air Act 1981, the Water Act 1974 and the Environmental (Protection) Act 1986. This approach to controlling pollution is clearly fragmented. This is because in this approach pollutants if not allowed to be released into air would most certainly find their way into water. If water pollution is to be controlled then the pollutants may find their way onto land. However, the Environment (Protection) Act 1986 made a good beginning to integrate the problems by defining environment as ' environment includes water, air and land and the inter relation ship which exists among and between water, air and land, and human beings, other living creatures, plants, micro organisms and property'. But the Act could not reach to its logical culmination by providing a statutory mechanism to address

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comparative law method.

problems of pollution from the environment as per the definition of the environment as contained in the Act.

On the other hand, Part I of the [UK] Environmental (Protection) Act 1990 introduced 'Integrated Pollution Control', which is based on a multimedia approach. This was following the recommendations of the RCEP, which argued for viewing environment as a whole. Further improvement in the integrated approach is being made following enactment of the Pollution Prevention and Control Act 1999 based on the EC Directive 96/61/EC. Following this system IPC is to be phased out by IPPC.

One of the most detailed definitions of the broad concept of IPPC is to be found in a recommendation adopted by the OECD in 1991. The Recommendation advised OECD member countries to 'practice integrated pollution prevention and control, taking into account the effects of activities and substances on the environment as a whole and the whole commercial and environmental life cycles of substances when assessing the risks they pose and when developing and implementing controls to limit their release'.[95]

Under IPC, the BATNEEC included not only the technical means and the technology of pollution abatement, but also the number qualifications, training and supervision of persons employed in the process in addition to the design, construction, layout and maintenance of the buildings in which the process was carried on. BAT under IPPC includes both the technology used and the way in which the installation is designed, built,

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[95] Haigh, Nigel. and Emmott, Neil. (1996) *Journal of Environmental Law*, 8: 2 pp. 301-302.

maintained and decommissioned. This distinction could take on a greater importance in practice.[96]

The range of environmental impacts suggested by Directive 96/61 is wider than the relatively narrower focus of the IPC regime concerning only the emissions of polluting substances into the environment. The Directive extends to a significantly greater number of installations than the existing IPC system. The best estimate is that it will apply to some 6,000 installations compared with the 2,000 covered by IPC. The extra 4,000 installations includes about 1,000 landfill sites, around 1000 intensive pig and poultry forms and some 500 food and drink factories.[97]

The principal requirement for an authorization under the UK law is BATNEEC, which should have regard to BPEO. Under the transposed EC legislation, the requirement under IPPC has become BAT. Thus PPCA 1999 provides a clear direction to the regulatory agency the manner in which problems of overall environmental pollution should be addressed. Indian environmental (protection) Act 1986 does not contain any feature of this sort.

3.10.3 Nature of the Indian environmental laws

A perusal of the [Indian] Air Act 1981 reveals that it is mostly concerned with the administrative details of composition of the State Pollution Control Boards, their powers and functions while the Clean Air Act 1993 in the UK actually concentrates on operational aspects of pollution and the mechanisms of control. It even addresses issues,

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[96] See note 37, p.396.
[97] Hawkins, Richard. (2000) 'Review Article: Pollution Prevention and Control in the UK and EC', *Journal of Environmental Law*, 12: 1, p. 110.

which are related to other Acts namely the EPA 1990 insofar as air pollution control is concerned. Indian environmental regime relies excessively on delegated legislation and the Government does not issue guidance notes for the help of the staff and the related public. In the absence of such notes the enforcement officials are mostly in dark about the course of action to be taken in many events. In the UK, such guidance notes in fact supplement the statutes and add to the efficacy of the related laws.

3.10.4 Air pollution laws

The [Indian] Air Act 1981 draws its inspiration from the Stockholm Conference. While the [UK] CAA 1993 is the culmination of a large number of legislation starting from the Public Health Act of 1875 and 1936 and the Public Health (Smoke Abatement) Act 1926. This Act successfully improved the air environment of the UK as borne out by the White Paper on the Environment ' *This Common Inheritance* 1990'. The situation in India is that most of the leading cases of air pollution, for example the *Taj Mahal* case, was on article 32 of the constitution rather than the Air Act.

3.10.5 Problem of waste

India does not have a separate legislation to tackle the environmental effects of indiscriminate waste disposal. However, the Central Government has made the Hazardous Wastes (Management and Handling) Rules 1989 under section 6 of the Environment (Protection) Act 1986, which is an umbrella legislation. However, there is no legislation to deal with non-hazardous wastes.

The Environmental Protection Act 1990 in the UK formally established a waste management regime and a statutory duty of care. But after the enactment of the

Environment Act 1995, a shift from waste disposal to waste management has taken place. The Environment Agency has the necessary power to issue waste management licenses. The Agency can revoke a license where it appears to it that the holder of the license has ceased to be fit and proper person or the continuation of the activity would cause harm to the environment or human health. Under the provision of the Special Waste Regulations 1996 in England the movement of 'special waste' from the waste producer's premises has to be pre notified to the Agency. This provides an opportunity for the Environment Agency to check if the suggested disposal plant is suitable under its site license conditions to take in the waste load and to avoid consignments of special wastes from disappearing into unlicensed sites.[98]

The EPA 1990 also establishes a regime of duty of care. This is very much a forward-looking feature in the legislation for the simple reason that impact of waste on environment is significant.

Under sections 3,6 and 25 of the [Indian] Environmental (Protection) Act 1986, the Government of India has issued much delegated legislation. Mention may be made of the Municipal Solid Wastes Rules 2000, the Batteries Rules 2000, the Bio-Medical Wastes Rules 1998, the Recycled Plastics Usage Rules 1998, the Noise Pollution Rules 1999, the Recycled Plastics Manufacture and Usage Rules 1999, and many other such notifications on other areas of human activity having a bearing on the environment.[99]In the UK waste management is being addressed through primary legislation, secondary legislation and tertiary legislation and in the form of PPG notes.

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[98] See generally Lange, Bettina. (1999) 'National Environmental Regulation?: A Case Study of Waste Management in England and Germany', *Journal of Environmental Law*, 11: 1, p. 69.

3.10.6 Problems of water pollution

Control of pollution of water in the UK is addressed under the provisions of the Water Resources Act 1991 (WRA). There is no overall statutory national strategy as found in the air quality and waste management sector. However, the Department of the Environment in England has started the process.

Offences under the Water (Prevention and Control of Pollution) Act 1974 in India have been given under section 24. This relates to causing pollution in any stream, or well or sewer or on land. The term stream has been defined to include river, watercourse, inland water, sub-terrain water or sea or tidal waters. On comparison of the section 104 of the WRA 1991 (defining controlled waters) with section 2(j) of the Indian Water Act 1974, it is found that the former is more comprehensive to address incidents of pollution.

3.10.7 Forestry laws

Government of India has still not succeeded in bringing a modern forestry Act despite having announced a progressive forest policy in 1988. Many sections of the Indian Forest Act 1927 are in contradictions with some acts namely the Forest (conservation) Act 1980. The forest act of 1927 does not reflect principles of sustainable forest management even by amendments.

The position in the UK is a lot more progressive. The Forestry Act 1967 is supposed to promote sustainable forestry. The Forestry Commission was brought under a duty in 1985 to endeavour to achieve a reasonable balance between the development of afforestation, the management of forests and the production of timber and the

conservation and enhancement of natural beauty and conservation of flora, fauna and geological and physiographical features of special interest. Further, the UK's Biodiversity Action Plan takes conservation aspects much ahead of India.[100] There is an urgent need to restructure the Indian Forest Act 1927 in tune with the Forest Policy of 1988.

3.10.8 Different impact of the international law

There have been two major periods of concern and activity about the environment in the last twenty-five years, the early seventies and the early nineties. Internationally these surges of interest and concern were given focus by the great world environmental conferences of Stockholm in 1972 and Rio in 1992. Nationally they were associated in the UK with major legislation, the Control of Pollution Act 1974, the Environmental Protection Act 1990 and the Environment Act 1995.[101]

India also responded to the Stockholm Conference by enacting legislation, namely the Air (Prevention and control of Pollution) Act 1981, the Water (Prevention and Control of Pollution) Act 1974 and the Environment (Protection) Act 1986. These laws however require major structural overhaul in view of the changes having taken place in the modes of production after the economic liberalization initiated in 1991 in India.

Indian environmental laws have not been restructured to comply with the international treaties and conventions in general. However, the Indian Supreme Court has filled up the vacuum by interpreting Indian environmental laws in the light of internationally well-

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[99] These notifications are available online at http://envfor.nic.in (visited 14 August 2001).
[100] See generally Reid, Colin T. (1997) 'The Changing Pattern of Environmental Regulation: British Forestry and the Environmental Agenda' , *Journal of Environmental Law*, 9:1,p.23-42.

settled environmental principles namely precautionary principle, preventive principle and sustainable development etc. Case law in the Indian Supreme Court and the High Court abound in directly importing these well-settled international environmental principles.[102] This will be covered more in chapter 5. It would be in the fitness of things to slowly restructure Indian environmental laws in conformity with the international perceptions as the UK does following changes at international levels and those at the level of EC.

3.10.9 Sanction

Most of the environmental laws except the EPA 1986 in India prescribe only small fines while in the UK it is up to £20,000 in cases of serious violations. "In the words of a senior official of the Environment Agency, this is a draconian punishment. On being asked if there is a need to revise the fine upwardly the official stated that the trying magistrate may commit the case to Crown Court for higher punishment if the case demands so."[103]

3.10.10 Proposal for legal transplantation and policy transfer

Indian environmental laws need substantial restructuring, as they have not been able to mitigate environmental problems, which on the contrary are increasing. The 'descriptive phase'[104] of the environmental laws discussed in the preceding pages indicate that the UK has restructured her environmental laws so much so that a German commentator observed that 'now the UK has emerged as a leader in controlling pollution and Germany

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[101] Osborn, Derek. (1997) 'Some Reflections on UK Environmental Policy: 1970-1995', *Journal of Environmental Law*, 9: 1, p. 3.
[102] This aspect will be covered more in chapter 5.
[103] Interview with Mr Philip Burns, Local Area Manager, The Environment Agency, Lichfield, held on 7/2/02.

is trying to restructure her environmental laws on British lines'.[105] Even among EC nations the position of the UK is pre-eminent in respect of implementation of the new regime of the IPPC. This calls for legal transplantation of ideas, laws and institutions in respect of the environmental management from the UK to India. This is in tune with the policy transfer approach as the environmental laws are in operation in the UK satisfactorily, which has also been found to be so on evaluation as Rose (2001) stresses.[106]

Comparative law method has served as a good tool for comparative research and as an aid to legislation and laws reform for long. Examples of Greeks and Romans visiting cities, which they felt could provide them with models of laws that were worth enacting in their own country, are too famous. In modern times, Yntema (1956) says that the purpose of comparative law is 'the constant refinement and extension of our knowledge of law'.[107] Contemporary time is full of instances of legal transplantation from one country to another. Therefore legal transplantation in respect of some aspects of the environmental laws from the UK to India would increase the efficacy of the relevant laws in India.

Both Indian and the UK environmental laws are aimed at the same object of mitigating and controlling environmental problems. This meets the test of functionality as stressed

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[104] Kamba (1974) identifies descriptive phase as one of the stages of comparative law method. See text at 1.5.1.
[105] Zottl, Johannes. (2000) 'Towards the Integrated Protection of the Environment in Germany ?', *Journal of Environmental Law* ,12: 3, Abstract.
[106] See text at 1.5.2.
[107] Yntema, Hessel E. (1956) 'Comparative Legal Research: Some Remarks on "looking out of the cave"', *Michigan Law Review*, 54, p.901.

by Zweigert and Kotz (1987).[108] According to Kamba (1974), the explanatory phase as discussed in the preceding pages identifies probable transplantation of ideas, law and institutions.[109] It is therefore worth making some suggestions for improving the environmental laws of India.

This study has found strong justification for India to adapt an integrated approach to pollution prevention in the manner of the [UK] Environmental (Protection) Act 1990 along with the regime of the IPPC. This legal transplantation should not be static and one time but should be dynamic with changed situations. In this transplantation India would be indirectly benefiting from the EC laws as they get internalized in the UK laws.

India should enhance the penal provisions in the environmental laws so that they may act as deterrence to willful violators. Indian Forest Act should be restructured to meet the aims of the National Forest Policy 1988 and principles of sustainable development of forests as enjoined under the [UK] Forestry Act 1967. India is making preparations to enact a law on biodiversity. The Indian Law Commission while commenting on the draft Biodiversity Bill 2000 has drawn lessons from abroad.

"While recommending the proposed legislation, we have kept in view the research work done in this behalf in several countries including Australia, Brazil, South Africa and Columbia. We found the Columbian law very helpful in this behalf. The work done in Australia is particularly useful."[110] It is heartening to note that the Indian Law

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[108] See text at 1.5.1.
[109] See text at 1.5.1.
[110] Law Commission of India (2000) *One Hundred Seventy First Report on Biodiversity Bill 2000*, available online at http://www.nic.in/lawcom/biod.htm (visited 10 February 2002).

Commission is drawing upon the comparative law method and lesson drawing from abroad, while sending their comments to the Government of India.

Most of the other Indian environmental laws would require restructuring in view of the fact that India is party to many international environmental treaties.

The organizational structure of the pollution control boards in India would also require considerable re-thinking. As of now the State Pollution Control Boards are functional in the state capitals only and the Central Pollution Control Board in the national capital at Delhi. They do not have local and regional branches. Therefore they are not equipped to tackle the environmental problems in such a vast country. They should either be restructured on the lines of the Environment Agency of England or officials of the forest department in India may be charged with the power and responsibility of pollution control at the local level. And finally the Government of India may think of creating a think tank on environmental pollution at the national level on the lines of the Royal Commission on Environmental Pollution.

4 APPROACH TO THE ENFORCEMENT OF THE ENVIRONMENTAL LAW

4.1 Types of enforcement mechanism

Environmental law regimes comprise elaborate frameworks of environmental law in both the countries. In an ideal situation, they should have been able to achieve the objects of legislation. But actual compliance on the ground reveals a different story in India. Examples abound in India of how businesses evade environmental law. Therefore environmental laws without proper enforcement do not serve any purpose. This is an area where more probing of the interface of the environmental laws and society is required. A socio-legal approach appraises this relationship based on field and empirical observations about the functioning of the law and the institutions.[1]

It is therefore of interest to understand how a particular law works on the ground rather than the same being contained in books. The socio-legal approach considers the practical expression of legislative mandates.[2] An examination of the enforcement of environmental law reveals the inherent weaknesses of many a legislation and procedures enabling an opportunity to put forward suggestions for remedial measures. This aspect is a special focus under this study as efficacy of the environmental governance rests on efficient enforcement of the relevant laws. This chapter therefore discusses forms of regulation and enforcement and explores the possibility of lesson drawing in these areas.

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[1] See text at 1.5.3.

[2] See generally Hutter, Bridget M. (ed) (1999) *A Reader in Environmental Law*, Oxford: Oxford University Press p.4.

Until the 1970s 'Command and Control' (see below 4.1.1) strategies have been used in enforcing the environmental regulations in most countries including the United Kingdom and India. By the 1980s, however, this strategy was under scrutiny and attack. The regulatory agencies charged with enforcement were identified too closely with the regulated leading to enforcement becoming too lax. In other words, they were captured by the regulated groups. The agencies were also found to be at times unreasonable, legalistic and a burden on industries. Other charges leveled against the command and control regime were that it leads to inefficiency, as it cannot harness the vast potential of markets to design pollution abatement measures.

Consequently governments and socio-legal scholars turned their attention to alternative methods of regulation and the term regulation became construed broadly to include a wide range of policy instruments.[3] This alternative model of regulation is also called a 'cooperative model' of enforcement or incentive based strategy of achieving the goals of the environmental policy. It is therefore worthwhile perusing various forms of the regulation.

4.1.1 Command-and-control strategy

In the case of environmental policy, the Command and Control (CAC) approach consists of relying on standards of various types to bring about improvements in environmental quality. In general, a standard is simply a mandated level of performance that is enforced in law. A speed limit is a classic type of standard, it sets maximum rates that drivers may

[3] See note 2, p. 20.

legally travel.[4] The spirit of a standard entails passing a law prescribing sanctions in case of violations.

The term command and control has been borrowed from military vocabulary. It first appeared in the literature on American environmental policy. Royston in 1979 distinguished between American and European versions of 'Command-and-Control', but environmental policy literature has continued to use the term for policies relying on traditional administrative policy instruments. General understanding of the term is that CAC regulations tend to force all businesses to adopt the same measures and practices of pollution control and thus accept identical shares of the pollution control burden regardless of their relative impacts.[5]

Standards in environmental matters may be of three types namely ambient, emission, and technology. Ambient environmental quality refers to the qualitative dimensions of the surrounding environment. Therefore, ambient standard denotes to a never-exceed level for some pollutants in the ambient environment, which may be water, air or land. This cannot be enforced directly. What can be enforced is the various emissions that lead to ambient quality levels. Emission standards are never exceed levels applied directly to the quantities of emissions coming from pollution sources. This is normally expressed in terms of quantity of material per some unit of time i.e., grams per minute or tons per week. Thus emission standards are a type of performance standard because they refer to end results that are meant to be achieved by the polluters who are regulated.

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[4] Field, Barry C. (1994) *Environmental Economics: An Introduction*, Singapore: McGraw Hill, p.206.

[5] Anderson, Mikael Skon. (1994) *Governance by Green Taxes: Making Pollution Prevention Pay*, Manchester: Manchester University Press, pp 20-21.

There are numerous standards that do not actually specify some end result, but rather the technologies, techniques, or practices that potential polluters must adopt. These are called technology standards. The requirement that cars be equipped with catalytic converters, or seat belts, is a technology standard. This type of standard also includes what are often called 'design standards' or 'engineering standards'. There are also a variety of product standards specifying characteristics that goods must have, and input standards that require potential polluters to use inputs meeting specific conditions.[6]

4.1.2 Incentive-based strategies

Apart from CAC regulation through public law backed by criminal sanctions, governments may enact civil law remedies. Alternatively they may opt for economic incentives such as effluent charges or taxation policies, administrative measures, such as licensing, or self-regulation or self audit, where government seeks to establish the principle that businesses and industries regulate themselves. In addition there may be non-governmental influences upon environmental regulation.[7]

4.1.3 Economic Incentives

Important economic incentives to reduce pollution are emission charges and marketable permits both being based on the 'polluter pays' principle. Emission charges charge dischargers either a fixed price per unit of pollution or a variable rate according to the level of compliance. Charges may be used to fund environmental improvements or may go to government's finances. Marketable permits are a form of emissions charge. Essentially they are permits to pollute, which may be traded. Thus over-compliance in

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[6] See note 4, page. 209.
[7] See note 2, p. 20.

one area may be traded for under compliance in another area, either within one site, one company, or between companies. This enables polluters to either opt out of burdensome regulation or to develop pollution control technology.

Thus economic incentives give opportunity to the regulated to innovate with pollution abatement while at the same time enabling governments to set apart the revenue generated by emissions charges for further research on evolving cleaner technologies.

4.1.4 Commercial environmentalism

This means using the commercial incentives existing in the market for pollution prevention. Environmental concerns may create new markets such as the demand for recycling, and waste management industries. Consumer pressure for buying environment friendly goods and boycotting unfriendly products may be used as potential sources of pollution abatement.

Symbolic incentives such as environmental rewards and praise may also be used to improve environmental quality. In recent times third party enforcement has increased in pollution abatement activities. Governments also find it convenient at times to make use of data, interpretations and perspectives on pollution drawn from NGOs as these valuable information are not always forthcoming from government agencies. NGOs like Greenpeace, Friends of the Earth and Sierra Club through their interventions often serve to the cause of a better environmental quality.

Self-regulation by industries themselves is also gaining currency in present times in pollution abatement. It may be in the interest of industries to lay down ground rules of pollution control and strictly enforce them upon themselves. This measure certainly

improves their image and at the same time reduces imposition of stricter controls by government.

4.2 The Indian institutional set-up

The Union Ministry of Environment and Forests (MoEF), constituted in 1985, is headed by a Union Minister who is assisted by a Secretary to the Government of India and a Director General of Forests. The MoEF is the nodal agency at the central level for planning, promoting and coordinating environmental programmes in addition to policy formulation for the environment, forestry and wildlife sectors. The MoEF is responsible for formulating legislation in the above areas for sound environmental management and pollution abatement. The MoEF is assisted by six regional offices located in the country. Among many autonomous institutions under the MoEF, the Central Pollution Control Board (CPCB) is important. This discharges executive and advisory functions.

The States' Department of Environment and Forests perform similar executive functions at the state level as MoEF does at the Centre. The State Pollution Control Boards (SPCB) in various states likewise perform executive and advisory functions.[8]

4.2.1 Main regulatory regime

The main environmental regime in India for environmental protection and pollution abatement is based on CAC strategy. Under various environmental and forestry legislation, delegated legislation (comprising rules, regulations, notification and guidelines etc.) is issued for implementation. This is normally done by prescribing standards and issuance of consents by the CPCB and the SPCB. "The Environmental

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[8] See generally Centre for Enviromental Law (1999) *Strengthening Environmental Legislation in India*, New Delhi: WWF- India, p.183-187.

(Protection) Act 1986 provides an umbrella for a plethora of activities generated through the mechanics of delegated legislation and delegation of powers. The Environment Act did not repeal any prior law on environment or pollution control. It acts as a veritable supplement."[9] Delegated legislation has to deal with environmental audit, environmental impact assessment, hazardous industries and substances, ecomark, coastal zone regulations, bio-medicinal waste, ozone depleting substances, and recycled plastic manufacture and usage rules etc.

In India, standards have generally been criticised for being too lax, too stringent, or simply irrelevant. Given the enormous capital investment by firms and municipalities trying to comply with such standards, it is appropriate that standards face periodic review and updating. This process is ongoing in India.[10]

The standards are applied more often for specific industries and are generally stricter for new ones in the hope that they comply with cleaner technologies. The standards are legally enforceable. The MoEF has issued industry specific standards for water effluents as well as for air emissions. These are generally known as Minimal National Standards (MINAS).

The CPCB has also specified the National Ambient Air Quality Standards (NAAQS) for residential, commercial, industrial and sensitive zones for the country as a whole. Respective State governments through SPCB have to ensure that the water quality criteria and ambient air quality objectives are met as per these specifications. This is primarily achieved by making the effluent and emission standards stricter than those

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[9] Leelakrishnan, P. (1995) ' Delegated Legislation and Delegation of Powers: New Horizons of Environmental Protection', *Cochin University Law Review,* p.73.

prescribed by the Central Government. "National Ambient Air Quality Standards means the level of air quality necessary with an adequate margin of safety, to protect the public health, vegetation and property."[11] The National Ambient Air Quality Monitoring Programme (NAAQMP) was started in 1984. This is operated through SPCB, CPCB, and the National Environmental Engineering Research Institute (NEERI).

The frequency of inspection of industrial units depends on their level of severity of pollution. Industries are categorised as 'Red', 'Orange' and 'Green' according to the descending order of the severity of pollution. Amendments to the Air Act and the Water Act have empowered the Boards to take direct administrative action i.e., to close down polluting facilities and to stop their supply of electricity and water.[12]

4.2.2 Uniform Consent Procedure

The MoEF has issued a draft notification under the Environmental (Protection) Act 1986 on the uniform consent procedure to be adopted by the SPCBs and the Pollution Control Committees (PCCs) of the Union Territories. The new proposals provide for combined application form for obtaining consent, which includes aspects of water pollution, air pollution and hazardous wastes management and handling. This will bring in uniformity in the process of grant and renewal of the consent by the SPCBs and the PCCs and will also provide a level playing field to the industries so as to regulate investment for sustainable development.

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[10] See note 8, p. 205.

[11] CPCB, *National Ambient Air Quality Standards*, available on line at http://envfor.nin.in/cpcb/aaq/intro.html (visited 9 Aug 2001)

[12] Kuik, O.J. et al. (1997) *Pollution Control in the South and North: A Comparative Assessment of Environmental Policy Approaches in India and the Netherlands*, New Delhi: Sage Publications, p. 214.

The SPCBs and the PCCs are now required to issue the consent order valid for a period against each category of industries, which have been classified into red, orange and green categories for the purpose of consent management. Validity of consent orders would be two years, three years and five years for industries in red, orange and green categories respectively. In case of non-polluting industries, consent order would be ten years. Draft notification also envisages frequency of visits to the industries by the officers of SPCB and PCCs for inspection of treatment plants and sampling of effluents etc.

4.2.3 Problems of enforcement

The Indian Supreme Court had made following observation in the case of *Indian council for Enviro-legal action*,[13]:

> "If the mere enactment of laws relating to the protection of environment was to ensure a clean and pollution free environment, then India would, perhaps be the least polluted country in the World. But this is not so. There are stated to be over 200 central and state statutes, which have at least some concern with environmental protection, either directly or indirectly. The plethora of such enactments has, unfortunately, not resulted in preventing environment degradation which, on the contrary, has increased over the years." (See above 1.3).
>
> "India employs a range of regulatory instruments to preserve and protect its natural resources. As a system for doing so, the law works badly, when it works at all. The legislature is quick to enact laws regulating most aspects of industrial and development activity, but chary to sanction enforcement budgets or require effective implementation. Across the country, government agencies wield vast power to regulate industry, mines and other polluters but are reluctant to use their power to discipline violators".[14] (See above 1.3).

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[13] *Indian Council for Enviro-legal Action v Union of India* 1996 AIR (SC) p.293.

[14] See Divan, Shyam. and Rosencranz, Armin.(2001) *Environmental Law and Policy in India: Cases, Material and Statutes*, Second Edition, New Delhi: Oxford University Press, p.1.

4.2.4 Absence of policy on enforcement and prosecution

The CPCB and the SPCBs are charged with a statutory duty to take cognizance of the offences under various environmental laws and move to courts for prosecution. But these boards do not have any laid down policy to determine relative culpability of the offences. This gives vast discretion to the boards, which mostly leads to inaction. Forest officials of the States Forest Departments are under a statutory duty to enforce the provisions of the Indian Forest Act 1927 or the State Forest Acts with regard to the offences. Forest officials have to file complaint cases in the courts of magistrates in cases involving illegal felling of trees and damage to forests. Officials exercise vast discretion in mattes of prosecuting offenders. Most forest departments have manual containing departmental procedures and guidelines. But departments do not have any laid down prosecution policy for attending to the cases of violations.

4.2.5 Incentive based regime in India

CAC regime based on regulations has been found to be inefficient, as it does not harness the potentials of the markets in pollution abatement. The same ambient standards could in principle be achieved through a system of economic incentives, which internalize the externalities of pollution. "Pigou in his pioneering work in 1920 had recommended taxes on activities generating negative externalities and subsidies on activities generating positive externalities as a means of internalizing externalities and bringing the choice of the firm in line with what it would have been had it faced the true social cost (benefit) of production."[15] But this has not fully arrived in India so far.

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[15] See generally Mehta, Shekhar. et al. (1997) *Controlling Pollution: Incentives and Regulations*, New Delhi: Sage Publications, pp. 60-61.

The Policy Statement for Abatement of Pollution 1992 however brought a welcome change in approach to enforcement from pollution control to pollution prevention. This policy says that steps like prevent pollution at source, encourage, develop and apply the best available practicable technical solutions, ensure that the polluter pays for pollution etc. have to be taken for achieving the objectives. "The policy further says that economic instruments will be investigated to encourage the shift from curative to preventive measures."[16] "However, economic instruments are not yet in vogue because the regulatory mechanism is quite weak and ineffective."[17]

The Ministry of Environment and Forests should commission a study to explore the possibilities of introducing economic instruments for pollution prevention as stated in the policy statement 1992. This will require an inter-disciplinary approach to pollution prevention, which the Government of India should consider.

However, few economic incentives are available for purchase of pollution control equipment under the Income Tax Act 1961, tax deductions of contributions made by tax payers to any institution engaged in the conservation of natural resources, rebate on customs and excise duty on pollution control equipment and imposition of cess on water consumption under provisions of the Water (Prevention and Control of Pollution) Cess Act 1977.

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[16] Govt. of India (1992) *Policy Statement for Abatement of Pollution*, New Delhi: Ministry of Environment and Forests, pp. 4-8.

4.2.6 Statutory remedies

The Public Liability Insurance Act 1991 and the National Environmental Tribunal Act 1995 provide a summary remedy to the victims of a hazardous industrial accident. Both laws adopt a 'no-fault' liability standard.

Under section 19 of the EPA 1986, a citizen can also prosecute a pollution offender after giving a notice of 60 days to the government. The CAC regime also enables filing a 'representative' or class suit under order 1 Rule 8 of the *Code of Civil Procedure* 1908. In the wake of the Bhopal disaster, the Indian Government had filed a class action suit on behalf of all the victims in accordance with the terms of the Bhopal Gas Leak Disaster (Processing of claims) Act 1985.[18]

4.3 The Administrative set-up in the United Kingdom

Power to lay down policy and rules in environmental matters lies with the central government through the Department of the Environment, Food and Rural Affairs (DEFRA). However, other departments of the Government also play an important part in laying down policy in environmental matters. Government departments such as the Department of Trade and Industry (in relation to energy) and the Treasury (in relation to economic instruments) play a significant role in environmental matters. In addition to the above, there are bodies in existence as part of the '*Greening Government*' initiative. Mention may be made of the House of Commons Environmental Audit Committee, the Cabinet Committee on the Environment, the Green Ministers Committee etc. Besides

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[17] Govt. of India (1999) *State of the Environment Report: India*, New Delhi: Ministry of Environment and Forests, available online at http://envfor.nic.in/soer/chap6.html (visited 14 Aug 2001).

[18] See note 14, pp. 132, 153, 155.

these, the Parliamentary Select Committee and the Royal Commission on Environmental Pollution (RCEP) play significant part in shaping environmental law and policy in the country.

'*Modernising Government*'[19] lays more emphasis on designing policies around shared goals, making sure that policies are inclusive, avoiding imposing unnecessary burdens, involving others in policy making and learning from experience. This initiative is expected to lead to more integration of various inter and intra sectoral linkages of all such organizations having interface with environmental management. This will lead to the concept of having a '*joined up*' government.

Because of the framework nature of much environmental legislation, the Secretary of State has wide legislative and quasi-legislative powers. This power has been conferred on the Secretary of State for not only updating the law but also to comply with the EC requirements. However, day-to-day control of the environmental matters in England and Wales lies with the Environment Agency (EA).

4.3.1 The Environment Agency

The Environment Act 1995 brought the Environment Agency into being. The Environment Agency is an independent corporate body and does not have Crown immunity. However, partial immunity can be granted where the Agency performs a ministerial function under an agreement. The Environment Agency has the pre-existing functions of the erstwhile bodies namely the National Rivers Authority, the Her Majesty's Inspectorate of Pollution and the Waste Regulation Authority. Thus EA

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[19] UK Government (1999) *Modernising Government*, Cm 4310, London: HMSO, available online at http://www.archive.official-ducuments.co.uk (visited 19 February 2002).

discharges functions which include control of water pollution, management of water resources, licensing waste management facilities, control of all emissions under the IPC and the IPPC etc. The EA is also a statutory consultee in relation to the National Air Quality Strategy and the National Waste Strategy.

Section 4 of the Environment Act 1995 defines the principal aim of the EA as in discharging its functions the Agency is required so as to protect or enhance the environment, taken as a whole, as to attain the objective of achieving sustainable development. Under section 5 of the EA 1995, the Agency is under a duty to exercise its functions for the purpose of preventing or minimising, or mitigating the effects of pollution of the environment. The Agency has general environmental duties relating to water under section 7 of the Act. Under section 39 the Agency is under a duty to take into account the costs and benefits of exercising its powers. The Agency has broad powers of inspection and enforcement of environmental policy and laws. In addition to the EA, local authorities also exercise vast environmental functions.

4.3.2 Regulatory regime in the United Kingdom

Despite a proliferation suggested economic or fiscal mechanisms for combating environmental problems, the system of regulation by public bodies remains the prime tool for environmental protection in the UK.[20] Regulation in the context of environmental pollution is enforced by the setting of standards by the regulatory bodies, details of which are discussed in the beginning of this chapter.

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[20] See generally Bell, Stuart. and McGillivray, Donald. (2000) *Ball & Bell on Environmental Law: The Law and Policy Relating to the Protection of the Environment*, Fifth Edition, London: Blackstone Press limited, p.177.

Traditionally the British system of regulation has been pragmatic, flexible, and reveals an absence of statutory standards, minimal use of prosecution and a flexible enforcement strategy.[21] The United Kingdom has been in conflict with EC on broad dimensions of environmental law as the latter has emphasized a centralized issue of standards and enforcement mechanisms. However, with the passage of time in last 10 years or so, the British approach to regulation has become more centralized. Therefore the analysis by Vogel about British regulation is now somewhat outdated.

4.3.3 The British approach to regulation

The first feature of the regulatory system in the UK is decentralisation of decision-making. This operates through use of delegation, geographical decentralization and conferment of powers on a large number of bodies. Mention may be made of the Nature Conservancy Council, the Health and Safety Executive and the Countryside Agency. Local authorities also have environmental protection powers in respect of air pollution, contaminated land, noise control and town and country planning matters. Even within DEFRA, many important matters like appeals against refusal of planning permission etc. are delegated.

Secondly, discretion has been given to the regulatory bodies in substantial measure. Mention may be made of standard setting and consent setting by the Environment Agency. Likewise, local planning authorities have been given wide powers in grant of planning permission for new developmental projects. In matters of enforcement also, discretion plays a vital part in deciding whether the EA will go in for prosecution or not. However, this discretion is based on a meticulously drawn policy.

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[21] As noted by David Vogel, an American commentator in his *National Styles of Regulation* in 1986.

Judicial intervention in environmental matters is also limited until it is of pressing urgency. For example in the case of *London Residuary Body v Lambeth London Borough Council,*[22] the Secretary of State's decision to grant planning permission for office development in London County Hall was held to be unchallengeable by the House of Lords.

Thirdly, the British approach to regulation is marked by gradualism and reliance on scientific evidence. This allows the regulated to adjust with the new regime of pollution control.

However, things on the environmental front are now changing. There is now an increased tendency for standards to be set centrally and a further tendency for them to be set out more explicitly in legislative instruments or formal policy documents.

4.3.4 The British approach to enforcement

Generally speaking, enforcement may have three styles namely (i) compliance approach (or conciliatory or cooperative); (ii) deterrence approach; and (iii) responsive approach which comprises verbal warning, notices and revocation of consents etc. Traditionally, the British approach to enforcement has been marked by flexibility in setting standards, wide definitions found in key statutes, informal guidance on interpretation of statutes, reliance on self-regulation and voluntary compliance and the use of discretionary powers rather than mandatory duties. A number of empirical studies have been conducted in 1990s about the enforcement styles of environmental law. Mention may be made of Hawkin's *Environment and Enforcement 1984*, Richardson's and others *Policing Pollution 1982* and Hutter's *The Reasonable Arm of the Law 1988*. Each of these studies

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[22] [1990] 1 WLR 744.

has confirmed that regulatory agencies depend more on a cooperative approach in enforcing environmental law than on resorting to prosecutions in the first place.

Richardson (1982) has also put a question mark on the regulatory lapses to be acts, which may be called criminal. Most officers interviewed have believed that non-observance of consent conditions are not criminal acts but are in fact immoral acts. This should not lead to prosecution of the operators and alternative remedies to secure compliance should be explored and pursued. They believed that the criminal sanction should be used only as a last resort and only if it served as general or special deterrence. This raises doubt about extension of the criminal law into the regulatory field in general and use of the principle of strict liability in particular. However, no officer actually abandoned the principle of strict liability though they did so with reservations.

In nature conservation offences, a cooperative approach is even more visible. However, the last 10 years has seen a large body of environmental law falling in place with a move towards a more formal and standards, consents based regime, regulatory agencies have also moved more towards deterrence style of enforcement. Though the number of cases charged for offences has been low, the percentage of prosecutions has risen in 1990s including exemplary fine imposed in the case of *Sea Empress* pollution disaster. The amount of fine imposed by the court of Appeal was £750,000.

4.3.5 The Environment Agency Enforcement and Prosecution Policy

Empirical studies done in the 1980s have revealed that offences booked for prosecutions have varied from region to region. Enforcement officials have used their discretionary powers in this regard. This has resulted into a lack of uniformity in prosecuting offenders. There has been demand to lay down a policy on prosecution in order to have

transparency and uniformity in approach. The Environment Agency (EA) has published 'Enforcement and Prosecution Policy' in 1998. A copy of this policy is placed as Appendix 2.

This policy regards prevention as better than cure. The purpose of enforcement is to ensure that preventive or remedial action is taken to protect the environment or to secure compliance with regulatory system. The EA expects full voluntary compliance with relevant legislation, but it will not hesitate to use its enforcement powers where necessary.[23] The policy describes powers of the EA, which include enforcement notices (where contravention can be prevented or needs to be remedied), prohibition notices (where there is risk of environmental damage), and suspension and revocation of licences etc. Where a criminal offence has been committed, in addition to any other enforcement action the EA will consider instituting a prosecution, administering a caution or issuing a warning, the policy says. The policy operates on four principles:

- *Proportionality* in the application of law and in securing compliance,
- *Consistency* of approach,
- *Transparency* about how the Agency operates and what those regulated may expect from the Agency, and
- *Targeting* of enforcement action, and action against law-breakers.

The purpose of the prosecution is to punish wrongdoing, to avoid a recurrence and to act as deterrence to others, the policy says. Prosecution will be adopted in serious cases, those operating without license or consent or those indulging in persistent breaches and

obstructing the EA officials to gather information. This has brought a measure of uniformity in approach to enforcement. Courts have also made it clear that decision to prosecute is not amenable to judicial review.

4.3.6 Guidance for the enforcement and prosecution policy

The prosecution policy is backed up by guidance note for the staff explaining how the policy will be put into practice and how to achieve a consistent approach. This is called as ' functional guidelines'.[24] This covers all areas of the activities of the EA in the fields of environmental protection, water resources, fisheries, flood defence and navigation. The guidance details the purpose of enforcement and other operational matters for actual use by the EA officials. For example it describes different forms of enforcement actions. "A formal caution is a written acceptance by the offender that they have committed the offence and may only be used where a prosecution could properly be brought. Where a formal caution is refused, a prosecution will normally be pursued."[25] This guidance contains the enforcement and common incident classification scheme (CICS), which helps in determining the impact of an event causing environmental damage. This also helps in deciding the course of action to be adopted by the EA between enforcement and prosecution. If no environmental impact is caused by an event, normally preventive and remedial action is taken and not the prosecution.

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[23] UK Government (1998) *Enforcement and Prosecution Policy*, the Environment Agency for England, available online at http://www.environment-agency.gov.uk (visited 24 December 2001).
[24] UK Government (2001) *Guidance for the Enforcement and Prosecution Policy*, the Environment Agency for England, available online at http://www.environment-agency.gov.uk (visited 24 December 2001).

[25] See note 24.

4.3.7 The use of economic instruments in the UK

Economic instruments constitute one category amongst others of environmental policy instruments designed to achieve environmental objectives. They can be used as a substitute or as a complement to other policy instruments such as regulations and co-operative agreements with industry.[26]

Economic instruments affect costs and benefits of alternative actions open to economic agents, with the effect of influencing behaviour in a way that is favourable to the environment. This could be done for example by encouraging pricing systems that signal the true environmental costs of products to consumers thereby making environment friendly products cheaper than those which cause pollution.

Annexure A to the White Paper, *This Common Inheritance* discusses a range of different ways in which economic instruments may be used to further environmental protection. These build on five general categories identified by the Organization for Economic Cooperation and Development (OECD), namely: charges, subsidies, deposit or refund schemes, the creation of a market in pollution credits and enforcement incentives. It is accepted in the White Paper that charges and subsidies have constituted the main uses of economic instruments so far although there is an increasing adoption of more complex and sophisticated measures. A selection of economic tools or instruments is considered below.[27]

- ***Charges for the administrative cost of operating the regulatory system***: The idea is to recover the regulatory costs that are incurred in granting applications or

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[26] OECD (1991) *Environmental Policy: How to Apply Economic Instruments*, Paris: OECD p. 10.
[27] See note 20, pp.201-211.

consents, or in such things as inspecting, monitoring or policing those consents. In relation to water pollution, a scheme of charging for applications for consent was introduced in October 1990. Similar schemes were introduced for operating process under the IPC and for the Local Authority Air Pollution Control in 1991. Thus higher charges would be there on those schemes, which cost more to monitor and these are often those, which cause more pollution. This therefore gives an incentive to reduce pollution.

- ***Charges reflecting the full environmental cost of an activity***: Such systems may be seen as the true environmental or pollution tax.[28] The most controversial example is the so-called 'carbon energy tax'. The idea is to raise the price of fossil fuel to reflect their true environmental effect, thus curtailing their use and reducing the green house effect. But nothing significant has happened in this regard beyond some consultations.

- ***Charges to finance environmental or pollution control measures***: Under section 161 of the WRA 1991, the EA may recover costs incurred in preventing water pollution or in remedying it from the person who caused it. Likewise the EA may also recover the costs in cleaning up unlawful deposits of waste from the concerned person. Fines levied in court for offences may also be seen as a form of environmental charge.

- ***Charges levied on polluting materials or processes***: A charge may also be levied on a process or a product. The best example is the landfill tax introduced in October 1996. It is expected that the amount of tax will be passed back by the

operators of the land fill sites to the originators of the waste, thus increasing the cost of landfill and acting as an incentive to reduce the amount of waste produced. Alternatively, a charge may be reduced on environment friendly activity. The best example is reduced charge on unleaded petrol practiced in the United Kingdom.

- ***Subsidies***: 'Subsidy' is a general term for various forms of financial assistance which must act as an incentive for polluters to alter their behaviour or which are given to firms facing problems in complying with imposed standards. This may be administered through grants, soft loans and tax allowances.[29] Subsidies are available for treatment of agricultural water and silage effluent and grants are available for preserving nature reserves or sites of special scientific interest.

- ***Creation of a market in pollution credits***: Section 3(5) of the EPA 1990 allows the Secretary of State to establish total emissions of any substance either nationally or for a limited area, and to allocate quotas, with power to reduce the total allowed. Firms may then bid for the right to take up a part of the total. This will provide incentive to reduce emissions or to develop alternatives. An emissions trading scheme has also been provided under the PPCA 1999. The first target is to reduce carbon dioxide emissions. This has still to be implemented in the United Kingdom. However, emission trading in sulphur dioxide (SO_2) has been attempted.

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[28] As referred to by Pearce, et al. in *Blue print for a Green Economy* published in 1989.
[29] OECD (1989) *Economic Instruments for Environmental Protection*, Paris: OECD, p.15.

- ***Deposit and refund scheme*:** In deposit and refund systems, a surcharge is laid on the price of potentially polluting products. When pollution is avoided by returning these products or its residuals to a collection system, a refund of the surcharge follows.

4.3.8 Self-regulation by the regulatee

Self-regulatory mechanisms of environmental protection are underpinned by voluntary action rather than compulsion. Thus economic benefits resulting from sale of environment friendly products may act as regulatory controls on companies. It also encourages a sense of environmental responsibility within the regulated companies, which should promote environmental improvement not as a reaction to legislation but as part of corporate development generally. Self- regulation may operate through management standards, information based mechanisms or private agreements. The first environmental management system (EMS) was introduced as a British standard, BS 7750, in 1994. EMSs are simply systems and procedures, which are put in place to measure environmental performance and provide a benchmark for future improvements. Information based mechanism include incorporation of environmental information into annual reports by companies and eco-lebelling of products certifying their impacts on the environment. Private agreements with the regulator are also gaining popularity in the United Kingdom as a mechanism of environmental regulation.

4.4 Discussion

The main points emerging for comparison from the preceding account relate to the poor enforcement of the regulations, policy on enforcement and prosecution and necessity of

also applying incentive based strategies. This suggests definite lesson drawing by India from the UK aimed at improving the compliance with the relevant laws.

In fact, enforcement of environmental law in India is such a field where not much work has been done. This study believes that data from the field, both observations and empirical, should be gathered to understand the real import of the relevant laws and that what difference they make.

4.4.1 Bottlenecks in enforcement

Environmental pollution laws in India are supposed to be enforced by the Central Pollution Control Boards (CPCB), the State Pollution Control Boards (SPCB) and the forestry laws by various States Departments of Environment and Forests.

The Planning Commission had conducted review of the performance of 25 SPCBs in the country for a period of six years i.e., 1992-93 to 1997-98. Some of the excerpts from the report are worth mention.[30]

> " The composition of the State Boards is mostly characterized by dominant presence of non-technical members, differential availability of staff for monitoring a certain number of polluting industrial units, discomforting vacancy position."
>
> "The degree of inventorisation of polluting industrial activities accomplished by the SPCBs is not generally satisfactory. The inventorisation of small polluting units is yet to take off."

The report goes on to state that compliance of industrial units with the stipulated standard is poor in some states. Crucial activities like training to staff, generation of awareness among the public regarding different aspects of pollution and research and development

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[30] Govt. of India (2000) *Evaluation Study on Functioning of State Pollution Control Boards*, New Delhi: Programme Evaluation Organisation, Planning Commission, pp i-xii.

remain low-priority items of expenditure in the budgets of most of the SPCBs. Most of industries releasing noxious emissions and effluents do not have treatment plants. The SPCBs are, sometimes, not able to exercise the powers to force compliance by stopping electricity supply or water because of interference by powerful pressure groups.

Total number of cases filed under the Water Act, in India, was 5436. Out of 2809 cases decided by courts, 587 were in favour of the boards and 1414 were against the boards. Likewise under the Air Act 1403 cases were filed. Out of 622 cases decided, 285 cases were in favour of the boards and 247 cases against it. These figures are as on 31.12.2000.[31]

Following the Environment Act 1995, the Environment Agency as a unified environmental protection agency was created and was charged with the responsibility for water and waste-related functions, industrial process and in respect of contaminated land provisions under the Environmental Protection Act 1990. In addition, it has general functions in relation to the provision of guidance and information, the carrying out of research and in relation to the National Air Quality Strategy and the National Waste Strategy as statutory consultees. One of its most important duties is that of enforcement of environmental laws in the UK. For example, it must enforce section 34 relating to statutory duty of care under the waste management provisions of the EPA.

The Chief Executive, the Environment Agency said in September 1998 that current levels of fines for chemical pollution are imposed at £ 2000 per tonne, believes that such relatively low fines are an inadequate deterrent for multimillion-pound companies. It is obvious that at such levels, companies would have no difficulty absorbing such costs.

The Environment Agency has also been facing criticisms about its enforcement policy. The difficulties of inadequate fines imposed by magistrates' courts, low prosecution rates by the EA and the problems encountered by the European Commission in ensuring compliance with its legislation are unlikely to be solved in near future.

The EA has been critical of the low level of fines imposed by the courts and has impressed upon the judiciary to adopt a more rigorous approach by imposing fines which may reflect the level of environmental damage and also to set a deterrent effect on other potential polluters. The EA has been lobbying the Home Office and the Magistrates' Association towards the same end. This has made some difference in the sense that training for magistrates' has been started though this needs to be done for the entire judiciary. The recent decision to impose a fine of £ 4 million in the case of *the Milford Haven Port Authority* for the oil spillage from the *Sea Empress* may be a good example to cite in future environmental cases. This prosecution was brought for a single offence of causing polluting matter to enter controlled waters in breach of Section 85(1) of the Water Resources Act.

If fines for pollution offences were hypothecated, the environment may benefit potentially. In the case cited above, the Port Authority will only be liable for part of the clean-up costs and the ruling does not follow the polluter pays principle in letter and spirit. It is therefore incumbent upon the UK Government to issue some central guidance to help judges and magistrates decide the most appropriate levels of fines in environmental pollution cases.

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[31] Govt. of India (2001) *Enforcement of Environmental Laws: Lower House Starred Question No .305 to be answered on 13.08.2001*, New Delhi: Ministry of Environment and Forests, p.3.

During 2001 in the UK, offenders prosecuted in relation to water resources, water quality and waste were 10, 227, and 459 respectively. On being asked what is the percentage of successful prosecutions in the UK, a senior official of the Environment Agency stated that it is 99%. He further explained that the EA would not take weak cases of violations. In such cases it is a normal practice to issue formal legal caution to the violators. The formal legal cautions may be cited in courts in subsequent infringements by the offenders. Prosecution figures also show that formal prosecutions have increased in the recent years. Decision to prosecute is fully examined and evaluated according to the prosecution policy before actually starting the cases.[32]

Poor performance of the CPCB and the SPCBs have been attributed to high level of political interference, inadequate institutional infrastructure and lack of expertise in prosecuting offenders. Pollution Control Boards are essentially technical advisory bodies required to lay down standards and give permissions rather than make arguable cases in courts.

Environmental regulations in India do not have bargaining provisions with the regulated and affected groups. There is also absence of non-litigation remedies for affected persons resulting in excessive reliance on litigation. The enforcement regime does not provide any incentive to regulators, regulated and affected public in complying with statutory provisions.

Similar is the situation of the enforcement of the Indian Forest Act 1927. In December 1996, the Indian Supreme Court had to issue orders in a writ petition[33] to ban felling of

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[32] Interview with Mr. Philip Burns, Local Area Manager, the Environment Agency, Lichfield, held on 7.2.2002.

[33] *T.N.Godavarman Thirumulkpad v Union of India* 1997 AIR (SC) 1228.

trees in the entire country. This was because thousands of trees were found to have been felled illegally (see Appendix 1). The forest officials were trapped in a vicious circle of seizure of illegal timber, their disposal, and again to be followed by detection of huge stock of illegal timber.

4.4.2 Enforcement and prosecution policy

One reason may be attributed to this sorry state of enforcement, which is that neither SPCB nor state forest departments have a laid down enforcement and prosecution policy for achieving uniformity and transparency in their actions with regard to enforcement of the environmental laws.

The Environment Agency still does not have requisite funds and manpower to go in vigorously for deterrence style of enforcement. This may be compared with their Indian counterparts who are also in almost similar predicament. But Indian agencies are more reliant on litigation with little success. British approach to enforcement is marked by informal consultation and conciliation with those who are regulated. Administrative enforcement namely notices and warnings have been found to be more efficacious remedies of pollution abatement and nature conservation. British approach to enforcement and prosecution has been shaped by legal, financial and cultural factors accumulating over a very long periods of time.

However, in recent times there is a clear move in the UK to adopt deterrence style in serious environmental offences.

While deciding to go in for prosecution, the Agency will give regard to environmental effect of the offence, foreseeability of the offence, intent of the offender, history of

offending, attitude of the offender, deterrent effect of a prosecution and personal circumstances of the offender (see Appendix 2).[34]

It is perhaps surprising that other regulatory bodies namely local authorities and English Nature are not covered by such guidance. The DEFRA must evolve similar guidelines for these bodies setting out the policy of enforcement and prosecution in black and white.

A characteristic feature of the British approach to enforcement is that dialogue between regulator and regulated does not break, which underpins the compliance approach. This is more vital in those cases where voluntary compliance is relied more as in nature conservation. This is not the situation in India. Forest offenders are charged as thieves under the *Indian Penal Code 1860*. There is absolutely no dialogue between States Forest Departments and violators in cases of forest offences.

It is therefore likely that the future style of enforcement in the UK will be eclectic with different approaches being taken in relation to different offenders. With more reliance on self-monitoring and inspection and voluntary performance indicators there will inevitably be a greater targeting of those who might be lebelled 'free riders' [35]

There is a great deal of similarity between the UK's EA and the Pollution Control Boards in India. Both are autonomous bodies but are answerable to Parliament through the Minister in-charge. The CPCB and the SPCBs do not have an enforcement and prosecution policy. Legislation is in place without operational guidelines. Therefore at times discretion to prosecute is marred by arbitrariness. Most often decisions to prosecute follow judicial verdicts in some public interest litigation filed by environmentally spirited

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[34] See note 23.
[35] See note 20.

individuals. This aspect will be touched upon in detail in the next chapter. Forest departments in India similarly do not have enforcement and prosecution policies. Enforcement and prosecution styles vary considerably in the country from pick and choose to not taking cognizance of forest offences. This approach was severely criticized by the Indian Supreme Court in the case of *T.N. Godavarman* in 1996 (see Appendix 1).

4.4.3 Limitations of the CAC regime

Two decades of experience revealed a number of regulatory failures associated with the traditional command and control approach. These shortcomings fall into three categories: (i) economic inefficiency; (ii) environmental ineffectiveness; and (iii) democratic illegitimacy. CAC instruments effectively exclude the general public and environmental interest groups from the decision making process and allow polluters to 'capture' regulators. This amounts to democratic illegitimacy of the CAC based regulatory mechanism of pollution abatement.[36]

4.4.4 Incentive based regime

The deployment of new environmental policy instruments particularly eco-taxes, voluntary agreements and informational devices has grown substantially in Europe in recent years. Some estimates put the growth in the use of market-based instruments in environmental policy (e.g. taxes and tradable permits) at over 50% between 1987-94 in OECD countries. The trend towards adopting new policy instruments is not new; as long

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[36] See generally Golub, Jonathan. (ed) (1998) *New Instruments for Environment Policy in the EU*, London: Routledge, pp.3-4.

ago as in 1993, Dahl and Lindblom described it as 'perhaps the greatest political revolution of our time'.[37]

Choice of policy instruments can be made against five set of criteria namely (i) environmental effectiveness; (ii) economic efficiency; (iii) equity; (iv) administrative feasibility; and (v) cost and acceptability. These are general requirements for any new environmental policy instrument. Emission charges should be given particular consideration for stationary pollution sources and where marginal abatement costs vary across polluters. Product charges should especially be applied to products that are consumed or used in large quantities and in diffuse patterns. Deposit-refund systems should be considered for products or substances, which can be reused, recycled or which should be returned for destruction. Marketable permit systems offer advantages in situations in which marginal costs of compliance with uniform standards are non-homogenous across the regulated target group; the greater the cost difference; the greater the potential benefits of trading.[38]

The [UK] 2001 Pre-Budget Report reveals that a range of green tax measures were proposed, including further incentive for investing in greener technologies and more incentives for developing cleaner fuels. In addition to this, the EA has submitted a proposal for emissions trading scheme for sulphur dioxide and nitrogen dioxide. The mechanism will work through establishing a market in emission allowances. Numbers of these allowances are limited so that they trade at a price. In this scheme, the best

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[37] Jordan, Andrew, Wurzel, Rudiger, Zito, Anthony R. (2000)' Innovating with 'New' Environmental Policy Instruments: Convergence or Divergence in the European Union?' *Future Governance*, p.2, available on line at http://www.futuregovernance.ac.uk/basicnavigation/basicframe.html (visited 10 March 2002).

[38] See note 26, pp.20-23.

available technique (BAT) requirement under the IPPC Directive is considered to be delivered. This will initially cover thirty large combustion plants following the EC Directive and will be operational by April 2003.[39]

4.4.5 Cooperative approach

Contrary to the popular belief economic instruments cannot supplant regulatory regime based on CAC approach but they can only supplement it. Moreover, economic instruments have not been found to work in isolation. "An excessive reliance on single instrument approach is misguided, because all instruments have strengths and weaknesses. Accordingly, a better strategy will seek to harness the strengths of individual mechanisms while compensating for their weakness by the use of additional instruments. That is, in the large majority of circumstances, a mix of regulatory instruments is required, tailored to specific goals."[40]

Failings and limitations of both the CAC based regulations and market approaches have become increasingly apparent. "The US government has adopted pollution trading to combat domestic air pollution problems. Further more, the US has successfully foisted pollution trading in the rest of the world as a policy tool to combat climate change, despite strong opposition from developing countries and some environmentalists. Pollution trading in Los Angeles has led to concentrated toxic air emissions hot-spots that have shackled low income and minority communities with the region's air pollution."[41]

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[39] Interview with Mr. Roman Palmer, Chief Economist, the Environment Agency held on 11/3/02.
[40] Gunningham, Neil. and Sinclair, Darren. (1999) 'Regulatory Pluralism: Designing Policy Mixes for Environmental Protection', *Law and Policy*, January, pp. 44-60.
[41] Drury, Richard Toshiyuki. et al. (1999) ' Pollution Trading and Environmental Injustice: Los Angeles Failed Experiment in Air Quality Policy', *Duke Environmental Law and Policy Forum*, 9, pp. 234-235.

A policy mix has been suggested involving regulations, economic instruments, self-regulation, voluntarism, and information strategies. Inherently complementary combinations may be information and all other instruments, voluntarism and regulation, self-regulation and regulation, regulation and supply side incentives, regulation and economic instruments, and similar other permutations and combinations aimed at achieving policy goals.[42]

Research being undertaken under the auspices of ESRC's Future Governance Programme describes this policy mix as cooperative environmental governance. "This is the evolution of devolved governance in environmental policy involving discussions, agreements and a blend of formal and informal regulation between industry, citizen groups, and, commonly local state bodies. Cooperative environmental governance has been seen to offer an acceptable middle ground between (draconian) command and control legislation, and voluntary self-regulation (which is criticized for being too lax)."[43]

As mentioned earlier, the future style of enforcement in the UK will be eclectic with different approaches being taken in relation to different offenders. For example, the enforcement of packaging waste legislation has initially concentrated on those companies who have failed to register rather than monitoring those who have already registered. However, this policy style to enforcement is too early for India to adopt, as she has to experiment with a range of policy instruments before coming to adopt regulatory mix as being practiced in the UK.

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[42] See note 40.

[43] Forsyth, Tim (2000) ' Cooperative Environmental Management and Public – Private Partnership in Asia', *Future Governance*, available on line at http://www.futuregovernance.ac.uk/projects/ (visited 16 July 2001).

4.4.6 Proposal for policy transfer and lesson drawing

Increased interdependence between states and the movement of ideas and money across national boundaries has internationalised the context of policy making.[44] India's environmental enforcement is lax beyond doubt. One of the main reasons, this study identifies, is the lack of a policy on enforcement and prosecution. Case law discussed in preceding pages has established that most of the environmental laws in India are obeyed in their breach. This study would recommend *emulation* of the prosecution policy and the functional guidelines by India in the manner as prescribed by Rose[45] (1991). The emulation should be in the nature of adaptation of the policies to fit in the Indian context seeing the size of the country and multitudes of the problems. This should be done by the Indian Central Pollution Control Board. Like wise state forest departments should also issue policy on prosecution and enforcement for efficient enforcement of the forestry laws. Indian Environment and Forest Ministry should expedite introduction of incentive based instruments to supplement the CAC regime. Appointment of a committee by MoEF to explore the possibility of using market-based instrument is too late and too little, while other nations are entering into the phase of a policy mix of instruments. The UK would, obviously, concentrate on regulation and broad based instruments including policy mix as suggested by Gunningham and Sinclair (1999).[46]

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[44] Rose, R. (2000) 'What Can We Learn from Abroad' *Parliamentary Affairs*, 53:4, p.629.
[45] See text at 1.5.2.
[46] See note 40.

Indian and the UK environmental laws have same *functionality* as required by the prescriptions of Zweigert and Kotz (1987).[47] Therefore these lessons drawing by India would be very apt for improving compliance with the relevant environmental laws.

[47] See text at 1.5.1.

5 JUDICIARY AND THE ENVIRONMENT

5.1 General

Modern environmental laws have their roots in the common law particularly the torts of public and private nuisance, negligence and trespass and the rule in *Rylands v Fletcher*.[1] The system of common law was developed to protect the interests of owners in land. During 19th century, following heavy industrialization of Britain, cases of use and abuse of land abounded. In response, the courts through the mechanism of common law made monumental contribution to the protection of interests in land by private owners. Incidentally, it came to be used for environmental protection.

Severe environmental harm was caused by the chemical industry, which came to dominate Lancashire, first in St. Helens and, following litigation, in Widnes and Runcorn.[2]

Public complaint against pollution increased in the course of time. It became incumbent upon the government of the day to appoint a committee under the name of Derby committee in 1862 to enquire into the impact of noxious gases on people.

Nevertheless, the common law has afforded an excellent tool in 19th century towards environmental protection. In 20th century, large number of specific enactments came in the wake of importance of environmental management for human survival. However, the great tradition of the common law developed soon after the Norman conquest has great potentials

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[1] Mc Auslan, Patrick (1991) 'The Role of Courts and Other Judicial Type Bodies in Environmental Management', *Journal of Environmental law*, 3:2, p.198.

[2] Elworthy, Sue. and Holder, Jane. (1997) *Environmental Protection: Texts and Materials*, London: Butterworths, pp.48-49.

of providing an alternative, albeit indirectly, mechanism of protecting the environment in England and India.

Thus we find that the courts have been at the forefront of the evolution of environmental laws in the UK. The case of *St Helen's Smelting Co v Tipping*[3] is a good example of the judges attempting to grapple with the consequences of industrial air pollution on the countryside. Ever since the action in nuisance has remained one of the most important weapons to challenge and if possible prevent pollution[4]. This has obviously influenced courts in India as the latter has inherited the common law tradition.

Therefore, courts have made positive interventions, which include claims in tort e.g. negligence and the rule in *Rylands v Fletcher*, defining the ambit of the criminal law in respect of pollution offences and judicial review of administrative action.

The Indian Supreme Court has ruled in a number of cases that right to life includes right to a healthful environment. In the UK, now the courts are also deciding environmental matters brought before them not only under the specific environmental laws but also the Human Rights Act 1998. Generally it can be said that 'degraded physical environments contribute directly to infringements of the human rights to life, health and the livelihood, acts leading to environmental degradation may constitute an immediate violation of internationally recognised human rights'.[5] "Courts then are institutions already engaged in the task of environmental management; they have a considerable history in so doing."[6]

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[3] (1865) 11 HL Cas 642 as quoted in note at 2, p.57.
[4] See note 1.
[5] Anderson, Michael R. (1998) ' Human Rights Approaches To Environmental Protection: An Overview', in Boyle, Alan. and Anderson, Michael. (eds) *Human Rights Approaches To Environmental Protection*, Oxford: Oxford University Press, p.3.
[6] See note 1, p.199.

Close linkage between human rights and the environment has been recognised internationally with the publication of the final report of the 'UN Sub-Commission on Human Rights and the Environment' in 1994.[7] The European Convention of Human Rights (ECHR) and the Human Rights Act 1998 would therefore increasingly play vital role in environmental cases brought before domestic courts in the UK, while the Indian Supreme Court and the High Courts are already on a chartered path of judicial activism in correlating environmental protection and human rights.

India's higher judiciary has invoked their writ jurisdictions and have expanded the scope of public interest litigation in their attempt to improve compliance with the environmental laws as well as to achieve the constitutional mandate relating to environmental protection and fundamental rights.

This chapter will therefore discuss judicial development of tort remedies and environmental protection through judicial review and fundamental rights principles. India and the UK do not have environmental courts at present though this matter has been debated in both the countries. Therefore, the idea of having environmental court in both the jurisdictions will be examined. Both India and the UK have almost similar judicial systems, laws and procedures what Zweigert and Kotz (1987) calls *functionality*[8]. In comparing two legal systems the laws should perform the same function. This is the broad meaning of *functionality*. The explanatory phase as identified by Kamba[9] (1974) will be used to suggest possibility of legal transplantation and/or lesson drawing in respect of both the countries.

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[7] See note 5, p.1.
[8] See text at 1.5.1.
[9] See text at 1.5.1.

5.2 Common law and civil liability in England

The primary function of the common law is to protect interests in land. Environmental considerations also came to be addressed indirectly by courts while adjudicating suits in damages for torts. The rule evolved in *Rylands* v *Fletcher* has influenced the common law of torts in common law countries. It would be worthwhile to briefly state the various torts and see how they have served the cause of environmental protection.

5.2.1 Private Nuisance

This was defined in *Read* v *Lyons & Co. Ltd.*[10] as 'unlawful interference with a person's use or enjoyment of land or some rights over, or in connection with it'. Here the protection provided is towards protecting proprietary interests.

For a case under private nuisance to succeed, courts have to satisfy themselves of the reasonableness of the claims of the plaintiff. Therefore, courts have to undertake a balancing exercise in cases relating to actions in private nuisance.

Buckley J. stated the importance of reasonableness in a case of private nuisance:

> "The court must consider whether the defendant is using his property reasonably or not. If he is using his property reasonably, there is nothing which at law can be considered a nuisance; but if he is not using it reasonably.....then the (claimant) is entitled to relief."[11]
>
> "In attempting to assess liability in a nuisance claim, a balance is made between the reasonableness of the defendant's activity and its impact upon the claimant's proprietary rights".[12]

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[10] [1947] AC 156.

[11] *Saunders-Clark v Grosvenor Mansions CO Ltd* [1900] 2 Ch 373.

[12] See generally Ball, Stuart. and McGillivray, Donald. (2000) *Ball & Bell on Environmental Law: The Law and Policy Relating to the Protection of the Environment,* Fifth Edition, London: Black Stone Press Limited, p.258.

While granting relief under private nuisance, the courts have to consider many factors namely the locality doctrine, the duration and intensity of nuisance, hypersensitivity of claimant and now famous fault regime heightened after the verdict in *the Cambridge Water case*.[13]

St. Helen was one of the most polluted places in England at the time. Mr Tipping had brought a claim in private nuisance in 1865 for recovering damages for injury to trees, hedges, fruit and cattle and for substantial personal discomfort. The House of Lords in their verdict 'upheld the Exchequer Chamber's ruling that the company was liable for any physical damage it caused, but that it was not liable for deterioration of the plaintiff's comfort'. In deciding this case, locality doctrine had come into play.

Courts have done great service in developing the common law in England, which was borrowed by many common law countries while developing their laws and legal institutions. It is in this context that action in nuisance has remained one of the most potent weapons available to those wishing to challenge and if possible prevent pollution.[14]

However, courts would not grant relief to a hypersensitive plaintiff. "A man who carries on an exceptionally delicate trade cannot complain because it is injured by his neighbour doing something which would not injure anything but an exceptionally delicate trade."[15] In this case thus, a claim under private nuisance was not sustained.

The decision of the House of Lords in *the Cambridge Water case* is of profound importance. Eastern Counties Leather had for several years used particular solvents. This led to spillages until 1976 and found its way in the underground strata and then into an

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[13] *Cambridge Water Company v Eastern Counties Leather* [1994] 2AC 264.
[14] See note 1.
[15] *Robinson v Kilvert* (1889) 41 Ch D 88 as quoted in reference at note 12, p.261.

aquifer from which the plaintiff company used to abstract water. Following new direction on standard of drinking water under Directive 80/778/EEC, the water company started checking the contents of organo-chlorine in the aquifer. It was found to be beyond the permissible limit. The water company brought action against the Leather Works for nuisance, negligence and the rule in *Rylands* v *Fletcher*.

The House of Lords overturned the decision of the Court of Appeal that liability was strict based on *Ballard v Tomlinson*[16] and held that liability depended on the forseeability of the relevant type of damage occurring. The water company's claim in nuisance was, therefore, unsuccessful.[17]

Who can sue or be sued in private nuisance has been bothering the courts for a long time. Now this matter has been settled by the decision of the House of Lords in the case *Hunter* v *Canary Wharf Ltd* [18] under which the right to sue in private nuisance can only be exercised by those with rights to the land affected, usually freehold owners or tenants in possession.

5.2.2 Public nuisance

This was defined in the case of *Attorney General* v *PYA Quarries*[19]:

> "A public nuisance is one which materially affected the reasonable comfort and convenience of a life of a class of Her Majesty's subjects who come within the sphere or neighbourhood of its operation; the question whether the number of persons affected is sufficient to constitute a class is one of fact in every case and it is sufficient to show that a representative cross section of that class has been so affected for an injunction to issue."

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[16] (1885) 29 Ch D 115.
[17] See note 12, p.262.
[18] [1997] 2 WLR 684.
[19] [1957] 2 QB 169.

In the case of *Gillingham Borough Council* v *Medway (Chatham) Dock Co Ltd* [20] Buckley J. refused to grant an injunction in a case of public nuisance. The planning permission was granted to the defendant company by the authorities, which later on sued the company for causing disturbance at night by movement of lorries. This decision has been severely criticized in society that there has to be more reliance on statutory remedies than the common law. Some who bitterly criticized the ruling of Buckley J. in *the Gillingham* case went to the extent of suggesting a special court for trying offences having a bearing on environment.

"The conclusion of Buckley J. that it is a planning problem, not a question for the courts not only will fail to satisfy the residents affected by the planning decision but represents low aspiration for the role of law in environmental matters. It is certainly from that the law of nuisance provides a crude tool insufficient to deal with the problems of complex society, and further statutory controls are needed. But the body should not be thrown with the bath water. Perhaps Buckley J would agree that when the courts operating the existing law of nuisance are not appropriate, a specialized environmental court dealing with both common law and statutory aspects may provide a better forum for the resolution of such disputes."[21]

5.2.3 Negligence

This was defined by Lord Wright in *Lochgelly Iron and Coal Co.* v *Mc Mullen* [22]

> "Negligence means more than headless or careless conduct...it properly connotes the complex concepts of duty, breach and damage thereby suffered by the person to whom the duty was owing."

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[20] [1993] QB 343.
[21] Comments by Colin Crawford (1991) *Journal of Environmental Law,* 4:2.p.271.
[22] [1934] AC 1.

In order to succeed in a case of negligence, the plaintiff must prove that a duty of care is owed to the plaintiff by the defendant, that there is a breach of this duty, that there is damage resulting from this breach of duty, and that the damage was foreseeable. This common law principle is least useful in environmental protection as it is primarily fault based.

5.2.4 Trespass

Its utility in environmental protection is of recent development. The dumping of rubbish on land is a common form of trespass, even if causes very little damage as in the case of *Gregory* v *Piper* [23]or blocking the highway as in case of *Randall* v *Tarrant*.[24]

5.2.5 The rule in Rylands v Fletcher

The rule in *Rylands* v *Flectcher* originates from the development of the tort of nuisance. The principles of the rule were established by Blackburn J. in *Rylands* v *Fletcher* [25]as

'that the person who for his own purposes brings onto his land and collects and keeps there anything likely to do mischief if it escapes, must keep it at his peril, and, if he does not do so, is prima facie answerable for all the damage which is the natural consequence of its escape'. This rule imposes strict liability on defendants. Necessary factors for establishing liability under *Rylands Vs Fletcher* were clarified in *Read* v *Lyons* :

- Dangerous thing likely to do mischief,
- Brought on to land,
- Escape, and

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[23] (1829) 9 B & C 591.
[24] [1955] 1 WLR 255.
[25] (1868) LR 3 HL 330.

- Non-natural user of land.

5.2.6 Future of the tort law in environmental protection

While deciding *the Cambridge water* case the House of Lords had considered the requirement of forseeability in great detail:

> "It by no means follows that the defendant should be held liable for damage of a type which he could not reasonably foresee; and the development of the law of negligence in the past 60 years points strongly towards a requirement that such forseeability should be a pre requisite of liability in damages for nuisance, as it is of liability in negligence."

Therefore, in *the Cambridge Water case*, plaintiff did not succeed in meeting the requirement of forseeability. The House of Lords, thus, is not inclined to favour development of common law as a mechanism for environmental protection. It is worth quoting the following from the judgment:

> "Given that so much well informed and carefully structured legislation is now being put in place for (the escape of hazardous substances), there is less need for the courts to develop a common law principle to achieve the same end, and indeed it may well be undesirable that they do so."[26]

However, common law will continue to address problems of the environment indirectly.

5.3 Application of tort law in environmental protection in India

The remedy of tort as a measure of environmental protection has not developed or been used in India on the scale as used in England. However, India being one of the main common law countries and its judicial and legal system founded on English system, tort has been used to provide a clean and healthful environment.

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[26] See generally Wolf, Susan. and White, Anna. (1997) *Principles of Environmental Law,* Second Edition, London: Cavendish Publishing Limited, p.102.

The inalienable common law right of every person to a clean environment was traced by the Supreme Court in *Vellore Citizens Forum* v *Union of India*[27] by quoting from the Blackstone's Commentaries on English Law of Nuisance published in 1876:

> "...since the Indian legal system was founded on English common law, the right to a pollution free environment was a part of the basic jurisprudence of the land."[28]

Common forms of tort developed in India for environmental protection are nuisance, negligence and strict liability. But the Supreme Court of India has added a new class of tort based on the principle of 'absolute liability' following the Bhopal gas tragedy.[29]

A plaintiff in tort action may sue for damages or injunction or both. The Supreme Court in *Shriram Gas Leak* case[30] has while commenting on damages to act as a deterrence observed the following: "That compensation must have a deterrent effect. The larger and more prosperous the enterprise, the greater must be the amount of compensation payable by it".

Temporary injunction is governed by section 94 and 95 and order 39 of the *Code of Civil Procedure 1908* and may be granted by courts on an interlocutory application. Perpetual injunction is governed by sections 37 to 42 of the *Specific Relief Act 1963*. The test of balance of convenience is normally applied by courts while granting injunction, which has proved more potent a weapon in abatement of pollution than the damages, which are often paltry.

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[27] 1996, AIR (SC) 2715.
[28] See generally Divan, Shyam. and Rosencranz, Armin. (2000) *Environmental Law and Policy in India: Cases, Materials and Statutes*, Second Edition, New Delhi: Oxford University Press, p.88.
[29] See note 28.
[30] *M.C.Mehta v Union of India* 1987 AIR (SC) 1086.

5.3.1 Nuisance

Public nuisance is an unreasonable interference with a general right of the public, while private nuisance is a substantial and unreasonable interference with the use and enjoyment of land. In a case of private nuisance a plaintiff may seek injunctive relief as well as damages. Courts while granting the relief as prayed have to apply the test of reasonableness.

In the case of *Kuldip Singh* v *Subhas Chandra Jain* [31], the Supreme Court did not grant the relief prayed. In this case, the plaintiff feared that the baking oven and 12 foot chimney built by his neighbour would cause a nuisance when the bakery commences to its operation. The Supreme Court drew a distinction between an existing and future nuisance in this case and concluded that a future nuisance apprehended by the plaintiff cannot be actionable.

In the case of *JC Galstaun v Dunia Lal Seal* [32], which may be one of the earliest pollution cases reported, the court awarded perpetual injunction and damages of Rs. 1000/- (£15) to the plaintiff. In this case the plaintiff had a garden house in the suburbs of Calcutta and the defendant had a shellac factory located near this. The defendant discharged liquid refuse of his factory into the municipality drain near the house of plaintiff. This caused foul smell noxious to the health of plaintiff. The defendant was penalized twice by the municipality. The subordinate court granted perpetual injunction and Rs. 1000/- (£15) as damages to the plaintiff. The appellate court found the decree of the court below convincing and dismissed the appeal of the defendant. The appellate court held that the defendant had no right to release the liquid foul smelling refuse of his factory into the municipal drain. This case

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[31] 2000(2) Scale 582.
[32] (1905) 9 CWN 612.

shows the efficacy of the common law regulatory regime in controlling the environmental pollution in a pre-industrial society.

In the case of *Ram Baj Singh v Babu Lal* [33], the plaintiff successfully restrained the defendant's the brick grinding machine that generated dust and polluted air. Here the court granting relief has gone by the test of reasonableness.

Public nuisance is an unreasonable interference with a general right of the public and therefore it is not tied with the enjoyment and use of property and remedies are available to every citizen.

Section 268 of the *Indian Penal Code 1860* defines the offence of a public nuisance:

> "A person is guilty of public nuisance who does any act or is guilty of an illegal omission which causes any common injury, danger or annoyance to the public or to the people in general who dwell or occupy property in the vicinity or which must necessarily cause injury, obstruction, danger or annoyance to persons who may have occasion to use any public right."

A compliant under section 190 of *Code of Criminal Procedure* (CrPc) has to be made for removing the nuisance. The magistrate on being satisfied may impose a penalty of Rs. 200/-, which makes it pointless.

Sections 133 to 144 of *Code of Criminal Procedure* provide for an independent, speedy and summary remedy in the court of a magistrate for removal of public nuisance. The magistrate may pass a conditional order to remove the nuisance within a stipulated time. This has been held by various courts that the power of magistrate under section 133 to act in a case of a public nuisance is not curtailed by the Air Act 1981 or Water Act 1974.

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[33] 1982 AIR (ALL) 285.

In the *Municipal Council Ratlam v Vardhi chand* [34] case, the Supreme Court affirmed the orders of the magistrate who acted under section 133 of CrPc. The Supreme Court even went beyond the scope of section 133 of CrPc in ordering that the Municipal Council will construct sanitation facilities and abate pollutions.

The court further held that budgetary constraints did not absolve the Municipality from performing its statutory obligation to provide sanitation facilities and also held that section 133 of CrPc imposed a mandatory duty on magistrate to remove a public nuisance whenever that exists.

In *PC Cherian* v *State of Kerala* [35], the Kerala High Court had considered whether carbon block emitted from two rubber factories amounted to public nuisance under section 133 of CrPC. The High Court upheld the orders of the magistrate in directing the defendant company to abate pollution by mixing of carbon in their factories.

The remedy to public nuisance cannot be obtained in private disputes. However, individuals may move if they suffer more harm than the general public. In cases of public nuisance, a civil action may be brought by the Advocate General or two or more members of the public with the permission of the court.

5.3.2 Negligence

In an action for common law action in negligence, the plaintiff must show that defendant was under a duty of care, that there was a breach of this duty and the breach of duty caused the damage.

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[34] 1980 AIR (SC) 1622.
[35] 1981, *Ker. L.T.* 113.

An act of negligence may also cause nuisance if it unlawfully interferes with the right or enjoyment of a person in his land or it may also amount to a breach of rule in *Rylands v Fletcher* if the act complained of allows the escape of anything dangerous, which the defendant has brought on his land.

In *Mukesh Textile Mills case*[36], judgment was given for damages in a pollution case. In this case, appellant had a sugar factory who stored molasses on his premises in tanks. Following the breach, molasses escaped and damaged the agricultural field of the respondent. The court below granted a relief Rs. 14709/ (£210) to the plaintiff. The Appellate Court examined it and found that the plaintiff was under a duty of care and secondly that the activity of the factory amounted to a non-natural use of land as he collected huge quantity of molasses in tanks. Therefore, he is also liable for breach of rule in *Rylands* v *Fletcher*. While finally disposing of the case, Karnataka High Court reduced the damages to Rs. 12,200/- and thus allowed the appeal partly.

In the case of Sushila Devi[37], the Supreme Court upheld a decree against the Delhi Municipal Corporation where a scooterist was killed by a falling tree. The court agreed with the verdict of the court below that the municipal corporation was negligent in discharging its duty of care to road users.

5.3.3 Strict Liability

The rule in *Rylands* v *Fletcher* holds a person strictly liable when he brings or accumulates on his land something likely to cause harm, it if escapes and damage arises as a natural consequence of its escape. Number of exceptions have been recognized to the rule of strict

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[36] *Mukesh Textile Mills (P) Ltd v H. R. Subramaniya Sastri* 1987 AIR (KANT) 87.
[37] *Municipal corporation of Delhi v Sushila Devi* 1999 AIR (SC) 1929, 1933.

liability which are i) an act of God e.g. natural disasters as flood or earthquake ii) act of third party as sabotage iii) fault by plaintiff iv) consent by plaintiff v) natural use of land by defendant and vi) statutory authority.

5.3.4 Absolute Liability

With the increasing industrialization of the country, number of chemical industries and scale of their operation in dealing with hazardous chemicals also increased as these were routinely required in making fertilizers, insecticides and pesticides. Normally, the doctrine of strict liability was sufficient to deal with the cases of their escape. But after the outbreak of Bhopal Gas Tragedy in 1984, the Supreme Court propounded the theory of absolute liability and this principle has also been adopted by Parliament in enactments namely the Public Liability Insurance Act 1991 and the National Environment Tribunal Act 1995.

The doctrine of absolute liability may be attributed to the Supreme Court in the *Shriram Gas Leak* Case[38]. P.N. Bhagwati, J had following to say in the case:

> "...we, therefore, hold that where an enterprise is engaged in a hazardous or inherently dangerous activity and harm results to anyone on account of an accident in the operation of such hazardous or inherently dangerous activity resulting, for example; in the escape of toxic gas the enterprise is strictly and absolutely liable to compensate all those who are affected by the accident and such liability is not subject to any of the exceptions which operate vis-à-vis the tortuous principle of strict liability under the rule in *Rylands* v *Fletcher*".

The absolute liability theory laid down by the Supreme Court in Shriram Gas leak case was first applied by M.P. High Court to support its award of interim compensation to the Bhopal victims[39].

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[38] See note 30.

[39] *Union Carbide Corporation v Union of India*, Civil revision number 26 of 1988, dated 4 April 1988.

The doctrine of absolute liability was further applied by the Supreme Court in *the Bichhri case*.[40] In this case, some of the respondents were providing potentially dangerous and highly toxic chemicals said to be 'H' acid, the manufacture of which is stated to have been banned in western countries. This chemical damaged the soil, water, crops and affected human health of people of Bichhri village in Rajasthan.

5.4 Writ jurisdiction in India

The power to issue writs has been taken in India from England, where the prerogative writs have been issued for centuries.[41] The writ powers of the Indian Supreme Court and the High Courts under Articles 32 and 226 of the Indian constitution derived from English law extend to 'directions or orders or writs in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari.' The term ' writs in the nature of' widens the courts' discretion in granting relief by releasing Indian courts from the procedural technicalities that once governed the issue of these writs under English law.

The relative speed, simplicity and cheapness of the writ remedy have made it immensely popular with litigants. Writs of mandamus, certiorari and prohibition are generally used in cases pertaining to environmental issues. The Supreme Court has interpreted Article 21 of the Indian constitution, which guarantees the fundamental right to life and personal liberty, to include the right to a wholesome environment.[42]

A writ of mandamus can issue against an administrative, quasi-judicial or judicial authority. Mandamus does not lie against a private individual. But mandamus can be issued if it is proved that the individual was colluding with a public authority as held in the case of *Sohan*

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[40] *Indian Council for Enviro-legal Action v Union of India* 1996 AIR (SC) 1446.
[41] See note 28, p.123.
[42] *Subhas Kumar v State of Bihar* 1991 AIR (SC) 420.

Lal v Union of India.[43] A litigant has to show that the duty sought to be enforced is a duty of public nature. The writs of certiorari and prohibition are aimed at restraining public authorities from acting in excess of their powers. Certiorari is an order to an inferior court or quasi-judicial body to transmit the record of pending proceedings to the superior court for review while prohibition prevents a lower court or tribunal from acting in excess of its jurisdiction.

5.4.1 Limitations on the Writ jurisdictions

Limitations on writ jurisdictions are matters of judicial policy. These are *locus standi,* the exhaustion of alternative remedies, the principle of *res judicata* and the time within which a writ may be sought. These act as important safeguards against circumvention of the prescribed statutary procedure for correcting administrative action. However, when questions of fundamental rights are concerned the higher judiciary normally relaxes *locus standi* and *laches*.

The Supreme Court has recognised that where a public wrong or a public injury is caused by the State, any member of the public acting in good faith can maintain an action for redress.[44] This relaxation in standing has caused rapid growth in public interest litigation in India concerning the environment.

5.4.2 Judicial review and the writ jurisdiction

The Supreme Court's jurisdiction under Article 32 can only be invoked if fundamental rights given under Part III of the Constitution is violated. This power cannot be abridged by the Parliament. The High Courts can be moved for enforcement of fundamental rights or

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[43] 1957 AIR (SC) 529, 532.
[44] *People's Union for Democratic Rights v Union of India* 1982 AIR (SC) 1473, 1483.

for any other purpose under Article 226. Thus power of the High Courts is broader than the Supreme Court in respect of issue of writs. Under the writs damages cannot be awarded. In several public interest litigations, the Supreme Court and the high courts have appointed fact-finding commissions to investigate facts contained in the affidavits of the petitioners e.g. *L.K.Koolwal v State of Rajasthan.*[45]

5.4.3 Public interest litigation in India

Since the 1980s, the higher judiciary in India has been asked to deal with public grievances over flagrant human rights violations by the State or to vindicate the public policies embodied in the statutes or the constitution. This new type of judicial business is collectively called ' public interest litigation'.[46] This was developed in India primarily by two Supreme Court judges Justice V.R.Krishna Iyer and Justice P.N.Bhagvati. These judges relaxed the traditional rules of standing for addressing human rights violations in respect of the poor and the under privileged. Most of the environmental cases fall in this category.

This modification of the traditional rules of standing which permits the poor and oppressed to be represented by volunteers is called ' representative standing'.[47] A second modification of the classical rule of standing has come to be known as 'citizen standing' in which a concerned citizen (or voluntary organisation) may sue not as a representative of others but in his or her own right as a member of the citizenry to whom a public duty is owed. Here the citizen suing may not have suffered any personal harm. The courts under this expanded standing have dealt official inaction threatening the environment.

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[45] 1988 AIR (RAJ) 2.
[46] See note 28, p.133.
[47] Cunningham, Clark D. (1987) ' Public Interest Litigation in Indian Supreme Court: A Study in the Light of American Experience', *Journal of Indian Law Institute*, 29, p. 494.

The early environmental cases decided by the Supreme Court, which resulted in the closure of limestone quarries in the Dehradun region[48], the installation of safegaurds at a chlorine plant in Delhi[49] and the closure of polluting tanneries on the river Ganges[50], represent citizen standing cases. In the *Ganga pollution* (Municipalities) case[51], the Supreme Court upheld the standing of a Delhi resident to sue the government agencies whose prolonged neglect had resulted in severe pollution of the river. However for any relaxation to the standing the petitioner must act in the public interest and not for his private or political gain. In the case of *Subhas Kumar v Union of India*[52] the Supreme Court had reprimanded the petitioner for abusing the process of the court. However in really sensitive cases the court may even accept a letter as a petition under Article 32. This is called epistolary jurisdiction. The *Dehradun quarrying* case is an example of this.

5.4.4 Relief in PIL cases

Relief in most of the PIL cases relating to the environment in the Supreme Court is obtained through interim orders. There is a new emphasis in the Supreme Court with compliance with the environmental laws. The government agencies are normally directed to submit periodic reports to the courts of their compliance of the directions. Generally, short interim directions in the nature of a 'continuing mandamus' are passed at frequent intervals. Dismayed at the poor enforcement of the environmental laws the Supreme Court set the national agenda on environmental cases in the public interest in the 1990s. In the ongoing

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[48] *Rural Litigation and Entitlement Kendra v State of Uttar Pradesh* (Dehradun Quarrying case) 1985 AIR (SC) 652.
[49] *M.C.Mehta v Union of India* (Shriram gas leak case) 1987 AIR (SC) 965.
[50] *M.C.Mehta v Union of India* (Ganga pollution[Tanneries] case) 1988 AIR (SC) 1037.

[51] *M.C.Mehta v Union of India* 1988 AIR (SC) 1115.

[52] See note 42.

case of *T.N.Godavarman Thirumulkpad v Union of India*[53] (see Appendix 1) several orders in the nature of continuing mandamus have been passed so far. In this case periodic reports called as Action Taken Reports are still being submitted to the Court by the forest departments, which are respondents in the case. The lead provided by the Supreme Court has been followed by some other High Courts also. Non-compliance with court orders is met with judicial strictures, action in contempt of court or fines, which are quite common due to bureaucratic inertia.

5.4.5 Judicial activism

Another characteristic of many PIL cases is the courts' ingress into fields traditionally reserved for the executive. Finding the executive response to be absent or deficient, the Supreme Court has used its interim directions to influence the quality of administration, making it more responsive than before to the constitutional ethic and law. Professor Baxi describes this gradual judicial takeover of the direction of administration in a particular arena from the executive as '*creeping jurisdiction*'. An example of this is the *Dehradun Quarrying* case in which the Supreme Court, balanced and resolved competing policies-including the need for development, environmental conservation, protecting jobs, and protecting substantial business investments-in deciding to close a number of limestone quarries in the Mussoorie hills and to allow others to continue operating under detailed conditions. In rendering this judgment the court reviewed the highly technical reports of various geological experts and gave varying weight to the expert opinions.[54]

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[53] 1997 AIR (SC) 1228.
[54] See note 28, p.147.

5.4.6 Judicial recognition of the right to know

The Supreme Court judges have derived the right to know from the constitution- the fundamental right to freedom of speech and expression guaranteed in Article 19(1) (a) and the fundamental right to life and personal liberty enshrined in Article 21. In the absence of any national law on right to information in India this is yet another contribution of the Indian judiciary having a direct bearing in the environmental cases.

Justice Mathew in the State of *Uttar Pradesh v Raj Narain*[55], was the first to recognise the citizen's right to know. Justice Bhagvati in the *judges' transfer case* [56] held that the right to know is implicit in the right to free speech and expression. The strong link between Article 21 and the right to know is important in environmental matters where secret government decisions may affect health, life and livelihood of people. The Supreme Court in the case of *Bombay Environmental Action Group v Pune Cantonement Board*[57], held as follows:

> 'we would direct that any person residing within the area of a local authority or any social action group or interest group or pressure group shall be entitled to take inspection of any sanction granted or plan approved...alongwith related papers and documents...except in cases where in the interests of security such inspection can not be permitted'.[58]

5.5 Judiciary and the environment in the UK

Environmental enforcement authorities are public bodies exercising public powers. These powers are exercised under existing statutes and delegated legislation. The Administrative Court oversees the exercise of these powers by means of judicial review on the grounds of illegality, irrationality and procedural impropriety. Lord Woolf has commented:

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[55] 1975 AIR (SC) 865, 884.
[56] *S.P.Gupta v Union of India* (Judges Transfer Case) 1982 AIR(SC) 149, 234.
[57] SC SLP (c) No. 11291 of 1986.
[58] See note 28, p.165.

> 'The Environmental Protection Act 1990 depends upon judicial review for its control of the activities of environmental enforcement bodies...it is not difficult to identify provisions which will be a fruitful source of...litigation on judicial review.[59]

The High Court has several remedies available to it to overturn a decision made unlawfully. These include the following:[60]

- quashing order, to quash the public authority's decision,
- mandatory order, or a mandatory injunction, requiring the public authority to carry out its duties,
- prohibiting order,or a prohibitory injunction, restraining a public authority from continuing to act unlawfully,
- a declaration, stating what the law is.

Although an injunction is available as a remedy under the judicial review procedure, it is the least used remedy as the court normally requires a cross undertaking in damages.

5.5.1 Procedure of judicial review

Under the Civil Procedure Rules 1998 (CPR) the main features of the claim for judicial review procedure are the need to have standing, the need to commence proceedings without delay and the need to have an arguable case in order to obtain permission to proceed. Procedure of judicial review is guided by the Supreme Court Act 1981, section 31, CPR Part 54 and practice directions. A claim has to be made promptly and in any event within three months from the date when the grounds of the claim first arose, unless the Court considers that there is a good reason for extending the period. The applicant must also show

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[59]Woolf, Harry. (1992) ' Are the Judiciary Environmentally Myopic', *Journal of Environmental Law,* 4, pp.6-8.

[60] Le Sueur, Andrew. et al. (1999) *Principles of Public Law,* Second Edition, London: Cavendish Publishing Limited, p.332.

'sufficient interest' in the case. This becomes difficult in environmental matters, as environmental rights of public at large are generally not recognised.[61] However, case law has shown that this has been relaxed by the judiciary in many cases involving questions having a bearing on the environment.

5.5.2 Public interest litigation in the UK

English law does not have provision enabling citizens to bring suits in public interest but it has received some judicial support. Lord Diplock in *R v Inland Revenue Commissioners ex parte National Federation of Self Employed and Small Business Limited* [62] asserted that: " It would, in my view, be a grave lacuna in our system of public law if a pressure group, like the federation, or even a single public spirited taxpayer, were prevented by outdated technical rules of *locus standi* from bringing the matter to the attention to the court to vindicate the rule of law and get the unlawful stopped."

5.5.3 Standing in environmental cases

The standing (sufficient interest) under the Supreme Court Act 1981, section 31 had to be considered with the known merits of a case. Local interest groups have been granted standing on environmental matters. But position of general environmental groups is problematic.

English public law does not recognise standing by environmental pressure groups. However, the judiciary has recognised that question of standing may be relaxed if such groups are acting in public interest. This attitude is borne out in two cases namely *R v*

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[61] See note 12, pp.75-76.
[62] [1982] AC 617.

Inspectorate of Pollution,ex parte Greenpeace Limited (No.2)[63] and *R v Secretary of State for Foreign and Commonwealth Affairs, ex parte World Development Movement Limited* (Pergau Dam Case).[64] This liberalisation of the law of standing is following the recommendations of the Law Commission as contained in the report 'Administrative Law: Judicial Review and Administrative Appeals'.[65] However, an applicant without 'sufficient interest' may approach the Attorney General for a relator action. It is important to note that section 7 of the HRA limits the 'sufficient interest' provision to a victim of the unlawful act.

Despite the above, there is always an uncertainty about grant of the standing as seen in the case of *R v N. Somerset District Council, ex parte Garnett*[66], where the court required a special interest in the matter of challenge. But with similar facts in the case of *R vSomerset county council, ex parte Dixon,*[67] the decision in the *Pergau dam case* was reaffirmed and the law on standing was liberalised. In both cases of Garnett and Dixon the facts were similar but judicial verdict was different. The trend now is that standing to an environmental group is granted unless the applicant is a busybody or troublemaker.

Most concern in the environmental field in public interest has focused on the decision in the *Rose Theatre Trust case*[68], in which Schiemann J. decided that the Trust did not have sufficient interest to challenge the refusal of the Secretary of State for the Environment to schedule the remains of the theatre as an ancient monument. In that case he raised the possibility that there might be decisions, which affected everyone equally and no one in

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[63] [1994] 4 All ER 329.
[64] [1995] 1 WLR 386 (Pergau Dam case).
[65] 1994, Law Com. No. 226.
[66] [1998] Env LR 91.
[67] [1998] Env LR 111.
[68] *R v Secretary of State for the Environment, ex parte Rose Theatre Co* [1990] 1QB 504.

particular, which were effectively immune from challenge by judicial review. Thus, this case put a restrictive approach in public interest litigations.

In the case of *R v Poole Borough Council, ex parte Beebee*[69] the grant of planning permission to build houses on Canford Heath in Dorset was challenged by the WWF and the BHS (British Herpetological Society). The judge held that the BHS had *locus standi* as it had a continuing and genuine interest but the WWF lacks standing though it makes grants to the BHS for conservation.

In July 1987 Friend of the Earth (FoE) had sought leave to challenge the decision of the Energy Secretary to give consent for the construction of the sizewell B nuclear power station. The Court of Appeal refused leave, as there was no arguable point of law though the matter of *locus standi* was tacitly conceded because the FoE had taken part in the enquiry, which had preceded the grant of consent. In *R v Swale BC ex parte Royal Society for the Protection of Birds,*[70] the RSPB challenged the grant of planning permission for land reclamation of mud flats, known as Lappel Bank, which were used as feeding grounds by a significant proportion of the wintering population of various species of birds. The judge granting *locus standi* to the RSPB observed "once one postulates a promise of consultation in advance of a decision in which the promisee has a sufficient interest, that of itself founds a legitimate expectation."

Likewise in the case of *R v Inspectorate of Pollution, ex parte Greenpeace Limited*[71] Otton J. conceded that Greenpeace did have standing. Thus the general trend in the UK is that an applicant with a sound point of law is normally granted standing in public interest matters

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[69] [1991] 2 PLR 27.
[70] [1991] 1 PLR 6.
[71] See note 63.

as they pass the test of ' sufficient interest'. Cases where standing have been denied have also failed on substantive grounds. It can be said that English judges have made significant contribution in *locus standi* matters when environmental organisations are involved. This can be contrasted with the narrow view taken by the ECJ in the case of *Stichting Greenpeace Council and others v European Commission*[72]. This case involved the construction of two power plants on financial assistance received from the Commission. The environmental groups and Greenpeace contested that the EIA was not done. The ECJ held that applicants were not directly and individually concerned with the project. This is a conservative view of the *locus standi* taken by the European Court of Justice.

5.5.4 Delay factor in environmental cases

The Supreme Court Act 1981 enjoins a period of three months within which an application for judicial review should be made. A large body of case law has shown that it is a matter of discretion and facts of the case, which lead to the condonation of delay by the court. For example in the case of *R v Secretary of State for Trade and Industry, ex parte Greenpeace Limited*,[73]the court dismissed the application of Greenpeace which sought to challenge the grant of licence in 1997 to explore for North Sea oil as that was contrary to the habitat Directive. The areas contained the coral *Laphelia pertusa*, a species that was claimed to be protected under Annexure I of the Habitats Directive. The court held that application should have been made before the grant of licences i.e. before November 1995. Availability of any other remedy under any statute will also preclude grant of permission for judicial review. However, the question of delay is considered in the context of the facts of the case. Judicial attitudes to delay may vary, as seen in the case of *Dixon* and *Garnett* discussed above.

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[72] [1998] ECR I-1651.
[73] See note 12, p.78.

5.5.5 Human rights as a ground of review

The Human Rights Act 1998 (HRA) came into force in October 2000. It unquestionably has the potential for being one of the most fundamental constitutional enactments since the Bill of Rights over 300 years ago.[74] The HRA incorporates most of the rights protected by the European Convention on Human Rights and Fundamental Freedoms into the laws of the UK. The UK has been party to this Convention since it entered into force in 1953, but non-compliance with Convention rights did not form a ground of challenge until the HRA came into being.

Section 6 of the HRA states that it is unlawful for a public authority to act in a way, which is incompatible with a Convention right. All 'UK legislation must be interpreted so far as it is possible to do so in accordance with the Convention'.[75] "It is intended that the new Act will leave the individual to assert his or her rights through the existing powers and procedures of the courts. He or she will be able to do this either by an application for judicial review or by way of defence in any action in which a public authority attempts to use a law which is inconsistent with the European Convention against a citizen."[76]

5.5.6 The European Convention of Human Rights

The main body of the Convention outlines the traditional political and civil rights: right to life, freedom from torture and inhuman or degrading treatment, freedom from slavery or forced labour, freedom of the person, right to a fair trial, prohibition on a retrospective criminal legislation, right to respect for privacy, freedom of conscience, freedom of

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[74] Young, James. and Clements, Luke. (1999) ' Human Rights: Changing the Culture,' *Journal of Law and Society*, 26-1, p.1.

[75] Section 3 of the HRA 1998.

[76] Wooley, David. et al. (eds) (2000) *Environmental Law,* New York: Oxford University Press, p. 930.

expression etc. All these rights are to be secured without discrimination on grounds of sex, race, colour, language etc. However, not all of these rights are absolute and some are subject to certain restrictions.

There are no 'environmental rights' under the Convention. It is most likely that cases relevant to the environment will come within Article 8 (the right to respect for private and family life, home and correspondence) or Article 1 of the First Protocol (right to property). The considerable jurisprudence that exists regarding Article 10, which covers the right to freedom of expression, and the right to send and receive information and ideas, would also cover access to environmental information. Article 14 protects individuals against discrimination in the way in which the other rights under the Convention are applied.[77]

Public authorities in the course of implementation of environmental regulations may violate Article 6(1) of the Convention, which confers the right to a fair and independent hearing. In a planning case *Bryan v UK* [78], the point in issue was whether the system of appeals to a government appointed inspector provided a fair and independent hearing. This applies to all inquiries under the environmental Acts. The European Court held that the right of appeal to the Secretary of State was not in itself sufficient. The House of Lords' judgment in the *Alconbury* [79]case also opens up opportunities of judicial intervention in planning cases.

5.5.7 Article 8 of the ECHR

The ECHR in the case of *Lopez Ostria* [80] held that there was a violation of the Convention as the applicant and her family had to live in difficult conditions next to a waste treatment

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[77] See note 76.
[78] [1996] *Journal of Planning Law ,p.* 386.
[79] *Alconbury v DETR* (House of Lords) (2001) *Journal of Environmental Law,* 13:3, p.390.
[80] (1995) 20 EHRR 277.

plant, which the authorities allowed to operate without a licence. Thus severe environmental pollution may affect an individual's well being and prevent them from enjoying their homes and affect their private and family life. The court ruled that the authorities must balance the interests of the individual and the communities as a whole.

The ECHR applied the above ruling in the case of *Guerra v Italy* [81] in which the state did not inform local inhabitants of the risks from a chemical factory. It was held that Article 8 was violated. The court ordered payment of compensation also. Finding that the UK government has balanced various factors, the ECHR in cases *Buckley v UK*[82] and *Powell& Rayner v UK,* [83] concerning Heathrow Airport held that Article 8 is not violated. The subsequent ruling in the case of *Hatton v UK* [84]did not however agree with this approach.

5.5.8 Article 1 of Protocol 1 of the ECHR

General principle of this article is that individuals have right to a peaceful enjoyment of their property. But it may cause problems to those who seek to protect the environment. Thus some particular environmental legislation may be found to be in violation of the Convention in times to come.

5.6 Discussion

Probably more than any other jurisdiction on Earth, the Republic of India has fostered an extensive and innovative jurisprudence on environmental rights. [85] This has led to the growth of public interest litigation in India sometimes also called 'social action' litigation. The Indian Supreme Court and the High Courts have been at the forefront of evolving this

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[81] (1998) 4 BHRC 63.
[82] [1996] *Journal of Planning Law*, p. 1018.
[83] See note 76. p.932
[84] *Hatton v UK* , Westlaw (visited on 21 January 2002).
[85] See note 5, p.198.

rights based approach to the environmental protection. The courts in the UK have favoured compliance with relevant environmental laws rather than developing social action litigation. The UK judiciary also does not favour judicial activism, as the social divide in the UK is not as wide as in India giving less scope to judges to favour public interest cases.

From an international perspective, the evolution of public interest law is an American contribution. Many trace its beginning to the landmark desegregation decisions of the 1950s when the US Supreme Court required schools in southern American states to end racial segregation.[86] PIL is therefore primarily judiciary led and even to some extent judiciary induced and a product of juristic and judicial activism in the Supreme Court. [87]Articles 14-32 of the Indian Constitution guarantee fundamental rights to all its citizens. These include right to equality, right to freedom, right against exploitation, right to freedom of religion, cultural and educational rights, and right to constitutional remedies. When cases on environmental issues started coming before the Supreme Court, it was found that environmental rights are intricately linked with human rights. It was in this background that the Supreme Court in a large number of PIL cases has held that the right to life, being one of the fundamental rights, includes right to a healthful environment.

Thus the Supreme Court has emerged as a defender of constitutional rights and obligations, even if it meant making inroads into the domain traditionally reserved for the legislature and the executive.

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[86] See note 27 p.134.
[87] See generally Singh, Rajkumar Deepak. (1999) ' Response of Indian Judiciary to Environmental Protection: Some Reflections', *Indian Journal of International Law*, 39, p.447.

The ruling in the *Maneka Gandhi v Union of India*[88] of the Supreme Court clearly authenticated the view that the judiciary not only declares a law or applies it, but it also creates it in the interest of protection of fundamental rights pertaining to life and liberty. In the words of former chief justice of India, P.N.Bhagvati, who was at the forefront in evolving PIL:

> Law making is an inherent and inevitable part of the judicial process. Even when a judge is concerned with the interpretation of a statute, there is ample scope for him to develop and mould the law. It is he who infuses life and blood into the dry skeleton provided by the legislature and creates a living organism appropriate and adequate to meet the needs of society, and by thus making and moulding the law, he takes part in the work of creation. Judge is not a mimic. The greatness of the Bench lies in its creativity.[89]

It was this constructive/creative attitude of the judiciary that led to new and wider interpretations of Article 14[90] and 21[91] of the constitution, relaxation of the rule of standing, dispensing traditional procedures, expanding the scope of Article 32 to include compensatory relief, admitting letter petitions, *suo moto* interventions and using internationally recognised principles namely polluter pays principle and precautionary principle in the judgments.

Enforcement of the environmental laws in India has been very lax. This defeats the very purpose of having policy on the environment and forests. The Indian Supreme Court through some path breaking decisions has opened new grounds in judicial intervention to

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[88] 1978 AIR (SC) 597.

[89] See generally Centre for Environmental Law (1999) *Strengthening Environmental Legislation in India* , New Delhi: WWF India, p.149.

[90] Article 14 says that "The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India."

[91] Article 2 says that " No person shall be deprived of his life or personal liberty except according to procedure established by law."

improve compliance with the laws. Damage to the forests in the north-east India continued unabated and large volume of timber was extracted without complying various policy guidelines on the subject issued by the government. On a writ petition in the case of *T.N.Godavarman Thirumulkpad v Union of India* [92] the Supreme Court stopped felling of trees in forests and issued wide ranging directions to comply with the policy of the government on tree felling first and then approach the Court for permission to restart fresh timber extraction. A High Power Committee for the north-east India and an *amicus curae* were also appointed by the Court for processing the details of the case and advice (see Appendix 1).

Industrial and vehicular pollution were defacing the Taj Mahal in India for years. Pluution laws were only enforced in their breach by the CPCB and the SPCB. On a writ petition in the case of *M.C.Mehta v Union of India*[93], the Supreme Court gave directions that no coal based industry could operate in the 'Taj Trapezium', which is about 10,400 sq. km around the Taj Mahal. The polluting industries were directed to either switch to gas fuel or to relocate outside the monument. The Court also ordered the creation of a greenbelt around the Taj and the measures to curb the use of diesel.

In the ongoing V*ehicular Pollution case*[94] the Supreme Court asked the Union government to convert all government vehicles and public transport to run on CNG fuel or on lead free petrol with catalytic converters.

From a traditional viewpoint, the Indian Supreme Court may be viewed as indulging into judicial activism. But in a country of the size of India with a large section of the population

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[92] See note 52.
[93] 1997 AIR (SC) 734.
[94] *M.C.Mehta v Union of India*, WP (C) No.13029 0f 1985.

still underprivileged and illiterate, where gap between law and justice is too wide, where poorer sections can not reach out to courts such an approach by the Supreme Court has certainly reduced the gap between law and enforcement. In the post-independent India, the higher judiciary has succeeded in improving environmental governance through many landmark cases involving complex issues of the environment and human rights.

The position in the UK with regard to the public interest litigation is different. Litigation to protect the environment is minimal because discretionary power is broad and largely non-justiciable and the obstacles to citizens to take developers or polluters to court are substantial. Probably the greatest disincentive to an environmental group in a public interest case is the question of payment of costs. However, recent trend in English courts is that costs are not awarded if applicant had acted in public interest. In *NZ Maori Council v AG of New Zealand*,[95]the Privy Council advised that no order of costs should be made against the applicants which had brought the case in public interest. Likewise in *R v Secretary of* State *for Environment, ex parte Greenpeace Ltd.*[96], no order to costs was made as the applicant brought the case in the public interest. Costs will cease to be disincentive only if the claimant knows, before the litigation begins, that it will not be liable to pay the winners the costs. But English courts are not keen on making such pre-emptive costs orders.

Growth of PIL would require presence of strong laws, relaxation of judicial procedure and standing, activist judges and presence of reformist lawyers supported by legally informed activists etc. In the case of the UK, public interest environmental law remains largely undeveloped primarily because of absence of strong laws, while in India the Supreme Court

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[95] (PC) [1995] 1 WLR 1176.
[96] [1994] Env LR 401.

was armed with constitutional mandate to protect the fundamental rights. The Article 32, right to constitutional remedies, is itself a fundamental right.

However, organisations like Greenpeace, FoE and RSPB have successfully launched some of the important public interest cases. Courts in the UK have granted them standing if they had an arguable point of law.

Another reason for the PIL not growing in the UK on the Indian scale is that the society does not have very strong polarisations in terms of wealth, position and power. This gives little scope to the judiciary to become activist.

Under the present wording of the EC treaty, PIL in environmental matters before the European court is only available to EC institutions and to member states.[97] Individuals and environmental pressure groups face problems on two counts. Firstly, most environmental measures are in the form of Directives and are therefore *prima facie* not reviewable. Secondly, *the locus standi test* itself is very difficult for environmental pressure groups to satisfy. Though courts are found to relax the standing if convinced of the cause to which environmental groups are espousing in public interest.

Section 3 of the HRA obliges all the courts to interpret legislation so as to uphold the Convention rights and this rule of construction will apply to past as well as future legislation. The higher courts will therefore be required to revisit and possibly reverse their previous decisions; in the next few years we are likely in consequence to see a significant erosion of the principle of judicial precedent.[98]

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[97] Kramer, Ludwig. (1996) ' Public Interest Litigation in Environmental Matters before European Courts', *Journal of Environmental Law,* 8:1, p.16.
[98] See note 73.

With the incorporation of the ECHR into the HRA in the UK, European jurisprudence has also come to stay in the domestic courts. This will have profound influence on the domestic environmental law and their interpretations. Under the Town and Country Planning Act 1990, local planning authorities and the Environment Agency do seek information from owners, developers and polluters as part of their statutory duty. Now they may not use that information in prosecution proceedings because Article 6 of ECHR (the right to a fair trial) will be violated. This has been ruled so in the case of *Saunders v UK* [99] by the European Court. The text of the Article does not mention freedom from self- incrimination as under Article 20(3) of the Indian constitution but that certainly amounts to the right to silence in a criminal proceeding.

Public authorities mentioned above in the environmental field now cannot act in a manner, which is incompatible with the Convention rights. This will have wider ramifications in the years to come. Article 2 of the ECHR says that everyone's right to life shall be protected by law. Its counterpart in the Indian constitution is Article 21 i.e. no person shall be deprived of his life or personal liberty except according to procedure established by law. Interpretation of Article 2 of the ECHR will have more importance for public authority in the environmental domain in the UK for not only preventing the harm but also to informing affected parties about the risks involved. This approach is evident in the case of *Guerra v Italy* [100] in 1998 by the European Court.

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[99] *Saunders v UK* (1996) 23 E.H.R.R.

[100] See generally Hart, David. (2000) 'The Impact of the European Convention of Human Rights on Planning and Environmental Law', *Journal of Planning Law,* pp. 117-133.

In the case of *Powell& Rayner v UK* (1990) discussed above the ECHR had ruled that Article 8 of the Convention was not violated. But in the case of *Hatton v UK*[101], the ECHR held that the UK government had failed to strike a balance between the competing interests and as such has violated the rights of the applicants under Article 8 of the Convention. Moreover, review by the domestic courts had been limited to the classic English public law concepts such as irrationality, unlawfulness and did not allow consideration of whether the increase in night flights under the new scheme had represented a justifiable limitation of the right to respect for the private and family life of those living near the Heathrow airport. Thus there has been a violation of Article 13 relating to the right to an effective remedy under the Convention. The applicants were each awarded GBP 4,000 for non- pecuniary damages.[102]

It can be seen that the ECHR will continue to make more impact in the environmental matters in the UK.[103] It is also interesting to note that Articles of the Convention particularly 2,6,8,10,13 and Article 1 of Protocol 1 compare very well with the fundamental rights enshrined under the Indian Constitution from Articles 14-32. This hints to the possibility of the UK courts converging to the same environmental jurisprudence which Indian courts have evolved over the last few decades.

The HRA affords an opportunity to draw lessons from foreign judgments including those from India. As Nelken observed: "we increasingly have the sense of living in an interdependent global system marked by borrowing and lending across porous cultural

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[101] *Hatton v UK* , Westlaw (visited on 21 January 2002).
[102] *Hatton v UK* (36022/97)E.C.H.R. Dated 2 October 2002, available on line at http://www.echr.coe.int (visited on 21 November 2001).
[103] See generally Tromans, Stephen. and Thornton, Justine. (1999) 'Human Rights and Environmental Wrongs, Incorporating the European Convention on Human Rights: Some thoughts on the Consequences for UK Environmental Law', *Journal of Environmental Law*, 11:1, pp. 35-57.

boundaries and the human rights is one of the areas of law with the greatest ability to travel.[104] The judgment in *Alconbury* has held that Article 6 of the ECHR has not been violated by the Secretary of the State. In this case the question was whether certain decision-making processes of the Secretary of State for the Environment under the planning law are compatible with Article 6 (1) of the ECHR as incorporated in the HRA 1998. Hovever, Lord Woolf has been quoted as saying that *Alconbury* 'leaves the door open for greater judicial intervention in the planning process'.[105]

Judicial review of environmental measures can be approached as a matter of 'wrongs', which is concerned with the control of the legality of measures; or as a matter of rights, which focuses on the protection of individual rights against the action of the administration. Locus standi in environmental cases, and, in particular the granting of locus standi to environmental groups, can also be approached as a matter of 'wrongs', which focuses on the accountability of the executive; or as a matter of rights, which looks at the individual interests or rights involved in a case.[106]

The Indian Supreme Court and the High Courts have evolved rights based approach in public interest cases relating to the environment and in the process have developed a novel environmental jurisprudence. Within the UK, the traditional system of environmental regulation has not favoured growth of this liberal attitude by the judiciary. However, enactment of statutes namely the HRA, the Freedom of Information Act, the devolution in governance and a move towards a more formal and participative style of the environmental

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[104] Mc Crudden, Christopher. (2000) 'A Common Law of Human Rights?: Transnational Judicial Conversation on Constitutional Rights', *Oxford Journal of Legal Studies,* 20:13, p.506.
[105] See note 78.
[106] Soriano, Leonor Moral. (2001) 'Environmental Wrongs and Environmental Rights: Challenging the Legal Reasoning of English Judges', *Journal* of *Environmental Law*, 13:3, p.311.

regulation are clear signs of development of a system more conducive to the growth of rights based approach by the judiciary in the UK. The single biggest contribution is expected to arrive from the ECHR. It is hoped that the judiciary in the UK would heavily draw lessons from the Indian Supreme Court in matters of environmental jurisprudence. In fact the process is already on. Suggestions for the establishment of an environmental court in the UK made by Lord Woolf and Professor Malcolm Grant appear to have benefited from the suggestions of the judges of the Indian Supreme Court.

5.6.1 Is there a need for an environmental court?

Environmental courts are in operation in four jurisdictions namely New Zealand, New South Wales, Queensland and South Africa. They have been able to address complex problems of the environmental rights, development and private rights. Therefore the idea of having an environmental court in India and the UK is very timely. Environmental litigation involves complex questions of science, law and the environment. The present system of dispensation of justice does not seem to appreciate the finer dimensions of environmental cases. In his Lord Morris Memorial Lecture, in October 1988, Lord Woolf referred to the parallel of the Environmental Court in New South Wales and said:

> "I have long been in favour of a one stop emporium. A court centre, where environmental, criminal and civil issues can be resolved. Where the need for judges to have the benefit of technical assessors is recognized. A situation where divide between inspectors who conduct inquiries and judges who sit in courts is bridged. A situation where an appropriate team of decision makers can be deployed depending on the nature of dispute."[107]

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[107] Carnwath, Robert. (1999) 'Environmental Litigation: A Way Through the Maze', *Journal of Environmental Law*, 11:1, p.13.

5.6.2 Trivialization of environmental cases

Most of the environmental offences are tried in both the UK and India by courts of magistrates as per the relevant criminal procedure codes. Environmental offences have often been viewed as non-criminal in nature by these courts because of a lack of appreciation of the implications of the damage in question. This leads to mitigation of offences i.e. gravity of the offences gets reduced. Most of the offences have strict liability provision. "This leaves plenty of room to deny culpability in order to attract the sympathy of the bench. This strategy took the form of blaming misfortune and third parties for the offence or assisting that, given that the offence was not deliberate, enforcement was unreasonable restriction on the right to trade."[108]

The EA officials often feel frustrated in courts of magistrates, as the latter often do not understand the complex issues. "In one crown court case, the judge showed signs of his own frustration and admitted that he found the geological evidence presented by the prosecution 'somewhat difficult'"[109] The net result of these is that environmental offences get trivialized in these courts. Empirically the same trend has been found in courts of their Indian counterparts.

5.6.3 Higher Judiciary favours environmental court

The position in higher courts is different with regard to environmental cases. These cases most often generate complex information relating to science, technology and ecology that it becomes very difficult for bench to come to a definite conclusion. This is primarily because

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[108] Prez, Paula de. (2000) ' Excuses, Excuses: The Ritual Trivialisation of Environmental Prosecutions', *Journal of Environmental Law*, 12:1, p.68.

[109] See note 108, p.74.

judges lack expertise in these areas. This has led to proposing environmental courts by higher judiciary both in India and the United Kingdom.

Lord Woolf in his Garner lecture to the UK Environmental Law Association on the theme 'Are the Judiciary Environmentally Myopic'[110] commented upon the problem of increasing specialization in environmental laws and on the difficulty of the courts and pointed out the need for a court or tribunal having a general responsibility for over seeing and enforcing the safeguards provided for the protection of the environment. Lord Woolf pointed out the need for 'a multifaceted, multi skilled body, which would combine the services provided by existing courts, tribunals and Inspectors in the environmental field'. It would be a 'one stop shop', which should lead to faster, cheaper and more effective resolution of disputes in the environmental area.

Robert Carnwath QC advocates the constitution of a unified tribunal with a simple procedure which looks to the need of customers, which takes the form of a court of an expert panel, the allocation of a procedure adopted to the needs of each case, which would operate at two levels: first tier by a single Judge or technical person and a review by a panel of experts presided over by a High Court judge with a broad jurisdiction, not limited to 'Wednesbury' grounds.[111]

In fact, the Indian Supreme Court in two judgments envisaged such an environmental court. As long back as 1986, Bhagvati, Chief Justice in *M.C. Mehta v Union of India and Shriram Foods and Fertilizers* case observed " we would also suggest to the Government of India that since cases involving issues of environmental pollution, ecological destructions and

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[110] See note 59.
[111] Carnwath, Robert. (1992) 'Environmental Enforcement: The Need for a Specialist Court', *Journal of Planning Law*, pp. 806-807.

conflicts over natural resources are increasingly coming up for adjudication and these cases involve assessment and evolution of scientific and technical data, it might be desirable to set up environmental courts on the regional basis with one professional Judge and two experts drawn from the Ecological Sciences Research Group keeping in view the nature of the case and the expertise required for its adjudication. There would of course be a right of appeal to this court from the decision of the environment court."[112]

This matter was also addressed in the *Vellore* case in which Kuldip Singh, J. requested the Chief Justice of Madras High Court to constitute a special bench 'green bench' to deal with this case and other environmental matters. He also said that 'Green Benches' are already functioning in Calcutta, Madhya Pradesh and some other High Courts.[113]

The Indian Supreme Court has pointed out that the Land and Environment Court of New South Wales in Australia, established in 1980, could be the ideal. It is a superior court of record and is composed of four Judges and nine technical and conciliation assessors.[114]

Finally, trivialisation of environmental offences in magistrates' courts and difficulty of higher courts in assessing techno-scientific evidences in environmental cases are well established in both the countries. The question of establishing an environmental court has not gone ahead in India, while in the UK, the final report on the Environmental Court Project has been submitted by Professor Malcolm Grant.[115]

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[112] *AP Pollution Control Board v Prof. M.V. Nayudu (Retd) & others*, Date of Judgment 27 January 1999, Supreme Court of India, pp.14-15, available at http://www.adalat.nic.in (visited 7 January 2002).
[113] *Vellore Citizens Welfare Forum v Union of India* (1997), *Journal of Environmental Law*, 9:2, p.397.
[114] See note 112, p.14.
[115] UK Government (2000), *Environmental Court Project: Final Report*, 17 May 2000, Department of the Environment, Transport and the Regions, available on line at http://www.planning.dtlr.gov.uk/court (visited 24 December 2001).

5.6.4 The UK environmental court project

The final report on the environmental court project prepared by Professor Malcolm Grant identifies five alternative models of an environment court namely a planning appeal tribunal, an environmental division of the High Court, an environmental division of the High Court also incorporating the Lands Tribunal, a separate Environmental Court, a separate two tier Environmental court and the similar model but incorporating also the jurisdiction of the Lands Tribunal.[116] In October 2000 the UK Government rejected the idea of a radical reform and the creation of new Environmental Tribunal or a Court.[117] It would be equally wise of the Government of India to examine the matter of an environmental court as suggested by the Indian Supreme Court.

5.6.5 Proposal for policy transfer

Zweigert and Kotz[118] (1987) have defined comparative law as an intellectual activity with law as its object and comparison as its process. Thus on an intellectual plane, higher judiciary in India and the UK are now on almost same pedestal as the UK is now armed with strong laws namely the ECHR and the HRA. Strong laws have in fact led to the growth of judicial activism in India, which has been criticised by some including Diwan and Rosencranz [119] (2001) and Sathe[120] (2002). However, Pathak, J.had cautioned on the excessive use of PIL in the case of *Bandhua Mukti Morch v Union of India*:[121]

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[116] See note 115, *The Executive Summary.*
[117] Woolf, Harry CJ. (2001) *Environmental Risk: The Responsibilities of the Law and Science*, in The Environmental Law Foundation Professor David Hall Memorial Lecture, 24 May, Brunei Gallery: SOAS p.9.
[118] See text at 1.5.1.
[119] See note 27, p. 304.
[120] Sathe, S.P. (2002) *Judicial Activism in India: Transgressing Borders and Enforcing Limits*, New Delhi: Oxford University Press.
[121] 1984 AIR (SC) 802.

> "An activist court...will need to move with a degree of judicial circumspection. In the centre of a social order changing with dynamic pace, the court needs to balance the authority of the past with the urges of the future."

The Indian Supreme Court has (thus) developed its own powerful environmental jurisprudence.[122] After enactment of the HRA, courts in the UK will increasingly address complex questions of constitutional rights, human rights and the environment. Lesson drawing by courts in the world is already on as Mc Crudden (2000) says: 'courts are talking to one another all over the world.'[123] This study comes to a conclusion that higher judiciary in the UK may draw *inspiration* [124]from the novel environmental jurisprudence developed by the Indian Supreme Court. On the other hand the Indian enforcement agencies should take steps to ensure compliance with various environmental laws rather than some public-spirited citizens performing this function by filing writ petitions in the Supreme Court and the High Courts.

Matter of environmental court has been debated for a long time in India and the UK. Professor Malcolm Grant has made an in depth study of the proposition. Legal transplantation of an environmental court in India and the UK will amount to a reform for which neither government is ready. But this study feels that to overcome the ineffectiveness of government's agencies and conservative approach of judiciary in environmental matters, time for this legal transplantation from the above named four jurisdictions has come. "Both India and the UK may in fact learn lessons from abroad in this matter."[125]

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[122] See note 115, p.2.
[123] See note 104.
[124] See text at 1.5.2..
[125] Rose, R. (2000) 'What Can We Learn from Abroad', *Parliamentary Affairs,* 53:4, pp .628-643.

In the Indian context, it will be advisable to have the environmental court at the level of a bench of a High Court at five places in the country. This would correspond with the regional offices of the Ministry of Environment and Forests. Appeals from the environmental court may lie to the Supreme Court. In the context of England and Wales a division of the High Court may be designated as the environmental court. Appeals may lie to the Court of Appeal. It would be better to leave the Planning Inspectorate intact as the inspectors have been working in an administrative capacity for more than 100 years and it would not be possible for them to adopt to the judicial ethos and conduct. Environmental court in England and Wales is also justified as the HRA 1998 may require development of a new jurisprudence in relation to environmental rights and that the Arhus Convention 1998 contains special provisions relating to access to environmental justice.

This study fully agrees with the comments of Sir Robert Carnwath who says 'I remain confident that the environmental court is an idea whose time will come'.[126]

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[126] See note 84.

6 CONCLUSIONS

6.1 The nature of the problems of environmental protection

Until the 1960s, private law principles of tort or property law were used for resolution of disputes over smoke, contamination of water, and other harms that are now classified as environmental. As the scale and intensity of the harms increased, the private law system proved insufficient to protect society from environmental injury. A revolution in public awareness of widespread and serious harms from economic activities affecting human health and the natural environment led western industrial society in the 1970s to adopt sweeping public law measures for environmental protection, especially for control of industrial pollution. These public law regimes have achieved significant reductions of pollution, but the quality of the environment has actually improved only modestly as a result.

This study has brought out a comparative account of the environmental policy and law in respect of India and the UK.[1] Matters related to the enforcement of the environmental laws and the judicial response also find place in this study.[2] Problems of the environmental protection in India and the UK may be related to the three important dimensions addressed under this study namely:

- Substantive legal principles applicable, and
- Policy/legal instruments deployed, and
- Enforcement of the rules on the ground

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[1] See chapters 2 & 3.
[2] See chapters 4 & 5.

The Indian Supreme Court in the case of *Indian Council for Enviro-legal Action v Union of India* has held that the plethora of the environmental legislation in India has not resulted in preventing environmental degradation, which on the contrary has increased over the years.[3]

The Indian Planning Commission states in the Tenth Five Year Plan (2002-2007) that pollution of air, water and soil is emerging as a serious threat to human health, biodiversity, climate change and economy of the area. The Indian Planning Commission has, therefore, recommended review of existing environmental policy, laws, rules, regulations and executive orders for their better enforcement.[4]

Britain has on the other hand taken a lead in European environmental law by enacting the Environmental (Protection) Acts 1990/1995, which transpose many EC Directives into national law and also by restructuring the environmental enforcement agencies responsible for pollution prevention.[5] These were the impelling justifications for undertaking this comparative study. Problems of the environmental protection in both the jurisdictions can be approached, as stated above, from the angles of problems of substantive legal principles, policy instruments and poor enforcement. I now look at these in turn.

6.1.1 Environmental problems and the substantive legal principles applicable

India and the UK both have a fairly elaborate environmental law regime in place. This has been influenced in great measure by international developments in the field of the environment, domestic pressures and those at EC level in respect of the UK. The Indian

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[3] See text at 1.3.
[4] See text at 1.3.
[5] See text at 1.3.

Supreme Court and the High Courts have also helped growth of environmental regulation in India besides propelling emergence of a novel environmental jurisprudence.

Until peoples' rights and duties towards the environment are made part and parcel of the environmental law regime, substantive rights to environmental protection would not come about. The Stockholm Conference on the Human Environment 1972 is rightly seen as a watershed for development of the environmental law all over the world. From this event onwards many matters formerly covered by common law started finding place in statutory regulations in both the countries. But many more recommendations of the Stockholm Conference 1972 still need to be acted upon, particularly in the matter of the environmental citizenship.

Man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well being, and he bears a solemn responsibility to protect and improve the environment for present and future generations. Hence, on one side of the balance sheet of environmental citizenship are rights of the individual such as those to enjoy an environment of satisfactory quality, to be allowed access to all relevant information about the environment and to be given the opportunity to participate in decision-making on environmental policy and its application in practice. Clearly, the implications of affording such rights to people raise an enormous range of legal and political challenges.[6]

The other side of environmental citizenship comprises the duty that individuals owe to the environment. At its broadest, the duty has been formulated as the imperative of realizing 'sustainable development, that is, development which meets the needs of the

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[6] See text at 2.6.

present without compromising the ability of future generations to meet their own needs'.[7] This imperative extends to all persons in so far as they are made subject to a duty to reduce and eliminate unsustainable patterns of production and consumption and extends to states, among other things, in the obligation to enact effective environmental legislation. [8]

The gulf between the imperative of sustainable development and actual legal provisions has been bridged by a range of substantive policy principles which provide indications as to how the imperative is to be translated into legislative practice. The most common substantive policy principles facilitating sustainable development and associated with environmental law and policy are the precautionary principle, the preventive principle, the polluter pays principle and the principle that environmental damage should be rectified at source. Other policy principles of a procedural nature having a bearing on the environmental legislation also exist (for example, environmental impact assessment). These principles have acquired the status of substantive legal principles in relation to the environment. However, the concept of sustainable development has emerged as the foremost principle in the domain of environmental policy and law.[9]

The polluter pays principles means that the polluter should bear the expense of carrying out the measures decided by public authorities and persons responsible for pollution must pay the costs of such measures as are necessary to eliminate that pollution. This principle aims to internalize some of the social costs of manufacture and industry. The polluter pays principle can be regarded as a fundamental principle of environmental law. However, there are certain ambiguities surrounding the principle of 'polluter pays'. This

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[7] See text at 2.4.6.
[8] See text at 2.6.
[9] See text at 2.6.

is because this principle tends to obscure whether paying the cost of pollution is the real objective or whether this objective should be preventing pollution. Notwithstanding the uncertainties, this principle has been endorsed at almost all levels including those at the Rio Summit 1992 and lies at the root of many statutory obligations and economic instruments for pollution abatement. This aspect will be discussed a little later.

The precautionary principle states that in cases where there are threats to human health or the environment the fact that there is scientific uncertainty over those threats should not be used as the reason for not taking action to prevent harm. This principle finds place in numerous EC and the UK's environmental policies documents. This principle is also an important environmental law principle though opinion is divided about its direct enforceability.

The goal of sustainable development is contained in a number of international policy statements namely Agenda 21 and Forest Principles etc. This goal is also contained in EC and British sources of law assuming the form of legal obligation. Though transposition of the goal of sustainable development into legal principles has become subject of some debate but this trend is continuing.

Article 2 of EC Treaty says that the Community shall promote harmonious, balanced and sustainable development of economic activities. Article 6 of EC Treaty also enjoins integration of environmental protection requirements into other policy areas in particular with a view to promoting sustainable development. Integration of the principle of sustainable development in the UK environmental legislation is due to EC Treaty influence. For example section 4 of the Environment Act 1995 requires the Environment

Agency to contribute towards attaining the objective of achieving sustainable development.

The pace of this administrative and institutional integration is increasing in the UK. The 1999 White Paper on Sustainable Development[10] contains a government commitment to consider incorporating the sustainable development principle as a legal goal for any newly created public body. Other initiatives include the *Greening Government Initiative*[11], which is intended to monitor the achievement of sustainable development across all government activities.

The UK Government's and the devolved administration's air quality policy[12] is under pinned by the principles of sustainable development. Likewise the UK's Waste Strategy 2000[13] aims at sustainable development and prescribes ways and means of waste reduction and reuse. The UK government's policy on forestry issued in September 1991 is sustainable management of existing woods and forests.[14]

The Indian Policy for Abatement of Pollution 1992[15] makes a bold statement that maximum use will be made of a mix of instruments in the form of legislation and regulation, fiscal incentives, and voluntary agreements etc. for pollution prevention. But nothing has happened in the last 10 years except issue of some delegated legislation. There is no reference to sustainable development in the policy. Environmental pollution

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[10] UK Government (1999) *A Better Quality of Life: A Strategy for Sustainable Development for the UK*, Cm 4345, London: HMSO.
[11] UK Government (1999) *The Greening Government Initiative*, Cm 4108, London: HMSO.
[12] UK Government (2000) *The Air Quality Strategy for England, Scotland, Wales and Northern Ireland*, Cm 4548, London: HMSO, P.16.
[13] UK Government (2000) *Waste Strategy for England and Wales Part 1&2*, London: DEFRA.

[14] See text at 2.4.9.
[15] Government of India (1992) *Policy Statement for Abatement of Pollution*: No.H.11013 (2)/90-CPW, New Delhi: Ministry of Environment and Forests, pp.1-14.

in India is tackled under the Air Act, the Water Act and the Environmental (Protection) Act 1986, which also do not contain the goal of sustainable development.

The Indian environmental laws are not based on other environmental law principles namely polluter pays principle, precautionary principle and inter-generational principle etc. The Indian regulatory regime is purely based on the command-and-control approach and without having the internationally recognized environmental law principles ingrained in the provisions of the law. This shortcoming makes the environmental laws in India lack direction. Therefore, problems of environmental protection in India are also a function of the lack of foundation of substantive legal principles in the environmental laws.

As far as the forest protection is concerned, the Indian forest Act 1927 is too old to address the imperatives of modern forest management. The National Forest Policy 1988 though talks of sustainability but the strategy prescribed does not reveal sustainable management of forests.

The Indian constitution has accorded primacy to protection of the environment, forests and wildlife through Article 48-A and Article 51-A. But these constitutional provisions are not justiciable. The Indian Supreme Court and the High Courts have dealt most of the matters relating to environmental protection by a creative interpretation of Article 21, that is protection of life and personal liberty. The Indian courts have held that right to life also includes right to a healthful environment. In getting a relief of this sort, writ jurisdictions of the Indian courts were exploited by public-spirited citizens. Therefore, taking a dispassionate view it can be safely said that the Indian Constitution lacks substantive

basis for environmental protection and this also accounts for one of the reasons of the problems.

Lack of sound environmental law principles in Indian environmental and forest policies and laws is a major hurdle in effective environmental governance. This is the reason that the Indian Planning Commission has recommended for a review of the laws and their revision.

However, the Indian Supreme Court has, premising itself in part on the right to life and to security of the person, emphasized the need to take drastic steps to combat pollution of air and water. It has directed the closure or relocation of industries and ordered that evacuated land be used for community needs. Sustainable development has been held to be 'applicable' in environment litigation, and the precautionary principle and the polluter pays principal have been held to be part of the law of India.[16]

It is now for the Indian Government to initiate the process for restructuring of environmental policies and laws aimed at incorporating the substantive environmental law principles. This would remove the hurdle of lack of substantive legal principles in the Indian laws and then it would be a duty for both the enforcement agencies and public to contribute towards environmental protection without the necessity of igniting the writ jurisdictions of the Indian courts by filing public interest litigation.

6.1.2 Environmental protection and the policy/legal instruments deployed

Environmental policy formulation and implementation involve the strategic exercise of identification of objectives and development of means to achieve them. The process to

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[16] Demerienx, Margaret. (2001). 'Deriving Environmental Rights from the European Convention for the Protection of Human Rights and Fundamental Freedoms', *Oxford Journal of Legal Studies*, September, p.24 available from http://web.lexis-nexis.com

achieve environmental policy goals should at the same time put least restrictions on civil society. This would, therefore, involve selection from a wide range of implementation strategies, which range from compulsion or prohibition at one extreme to information or education at the other. Thus, framing of environmental policy has to address two principal things, which are the goals and the means to achieve them with least burden and more effect.

While the UK has a long tradition of imposing prohibitions upon various kinds of environmental misdeeds through criminal offences and licensing systems, it remains an open question whether alternative approaches to securing environmental objectives might have advantages over the traditional approach. Prominent among the alternatives is the suggestion of the use of economic instruments to regulate pollution might hold advantages which should be pursued in preference to the traditional regulatory approach because they may provide a more efficient means towards the ultimate objective of securing satisfactory environmental protection.

Both India and the UK place predominant reliance on legal regulation for environmental protection. This has been termed 'command-and-control' (CAC) strategy for environmental protection. Such legal regulations are formulated through a four-stage process. The first stage is the establishment of the policy goal. The second stage is the establishment of policy criteria. The third is the establishment of standards, which is the maximum levels of pollutants that will be allowed in the air, water, soil, or work place. The fourth stage in the CAC regime is enforcement.

Predominant reliance on CAC strategy of environmental protection in India and the UK has not improved the environment and on the contrary has hastened the problems. The

difficulties with the legal regulation have been many. Firstly it does not meet environmental objectives at lowest cost, secondly it does not make those responsible for pollution pay fully for the effects of their activities and thirdly it does not encourage dischargers to go beyond the minimum requirements imposed under consents.

Viewed in the above background it can be argued that CAC strategy offers an inefficient approach to environmental protection. These failings were realized by the UK a long time back.

The White paper, *This Common Inheritance*[17] discusses a range of different ways in which economic instruments may be used to further environmental protection. These instruments have been identified as charges, subsidies, and deposit or refund schemes, the creation of a market in pollution credits and enforcement incentives.[18] The economic instruments come within the ambit of market based instruments (MBIs).

Since the 1980s, British environmental policy has undergone a slow but profound change producing a more 'Europeanized' system of control. There is a greater willingness to innovate with environmental instruments.[19] The reasons for this shift are many and varied. These include the Europeanization of national environmental issues and new ways of thinking, for instance about the usefulness of the private sector in environmental protection.

The increasing popularity of new tools such as MBIs and voluntary agreements (VAs) is a reflection of a number of more specific factors. Limitations of regulatory action as a means of achieving sustainability started coming to surface. Process of deregulation in

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[17] UK Government (1990) *This Common Inheritance: Britain's Environmental Strategy*, Cmnd 1200, London: HMSO.

[18] See text at 4.3.7.

[19] See text at 2.4.3 and 2.4.4.

the EU and the UK favoured a more flexible and more cost-effective means of environmental protection. A growing cultural receptivity to new ideas favoured lesson learning and policy transfer from other countries in the areas of VAs and MBIs. In addition to this, new sources of revenue generation from some of the MBIs and international pressure also helped growth of economic instruments for pollution prevention.

The UK can rightly claim to have adopted one of the very first environmental taxes in the world, when in 1909 a tax on petrol was used. Thereafter the progress has been extremely poor though the UK has been in the forefront of the academic study of MBIs. Even the RCEP in 1972 had concluded that we are not convinced that a system of charges would be so effective as consents if properly policed, would guarantee a level of environmental quality. The RCEP was of the opinion that the government does not have the necessary expertise required for MBIs and concluded that a switch over from consents to MBIs cannot be effected at present. Thus, the UK remained aloof while the continental Europe and the USA went ahead with experiments of MBIs in the 1970s.

However, the publication of the *Pearce Report* [20] in 1989 and the White Paper, *This Common Inheritance 1990* invited huge media attention in environmental taxes. The updated version of the White paper in 1992 declared 'a new presumption in favour of economic instruments rather than regulation'. The MBIs became part of the next stage of environmental policy while regulation to stay as a safety net. The MBIs in the UK include unleaded petrol differential, fuel duty escalator, vehicle excise taxes, VAT on fuel and packing recycling notes which can be traded.

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[20] The Pearce Report was submitted to the Department of Environment in 1989. This was later published as Blueprint for a Green Economy. See Pearce, David., Anil, Markandya., and Edward, Barbier. (1989) *Blueprint for a Green Economy*, London: Earthscan.

Over the years taxes and charges have been proposed for a whole range of different sectors and substances including sulphur emissions, water use and water quality, CFCs and aggregates. However some of them have still to take off. Many reasons may be attributed to this. The business has opposed introduction of MBIs as they see them as an extraneous constraint to be resisted. Many sectors are already heavily regulated (e.g. water) therefore there is an unwillingness on the part of the regulators to introduce new MBIs. There is also a lack of proper advocacy for MBIs because it does not put a stigma on pollution unlike the regulation. Some government departments have also opposed introduction of new MBIs. The EU has also not been able to put same level of pressure on the UK for MBIs as it did for Europeanization of the UK's environmental policy and laws.

However, at the end of 2001 a number of innovative proposals for new MBIs were made which included the Landfill Tax, the Climate Change Levy, an Aggregate Tax and the Emission Trading Scheme.[21] These initiatives are undoubtedly innovative and impressive. Inspite of the growing enthusiasm on the part of DEFRA and the treasury, there are areas which need to be attended. For example, well-developed plans to introduce charging schemes relating to water quality and water abstraction are in abeyance. Plans for sulphur trading were proposed and then dropped when they conflicted with regulatory regime. Tradable permits for waste mooted by DEFRA has progressed at low pace. In the spring of 2001, the Government postponed a tax on pesticides in order to placate the farming groups. However, the overall pattern in respect of MBIs in the UK is somewhat muddled and confused.

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[21] See text at 4.4.4.

There has also been criticism of MBIs from some quarters. The basic difficulty is persuading polluters that they have credible property rights in the pollutant they are allowed to emit. Moreover, trading the right to pollute has received strong protests from developing countries including India. "Pollution trading has also failed in Los Angeles, USA".[22] Thus an excessive reliance on single instrument has not been found desirable to achieve environmental goals in all contexts. Accordingly, a better strategy would be to harness the strengths of many strategic instruments. This is the reason why a policy mix has been suggested involving regulations, economic instruments, self-regulations, voluntary agreements and information strategies.

The position in India is considerably behind that of the UK regarding use of MBIs. The Indian Policy Statement on Abatement of Pollution 1992 advocated use of economic instruments. The State of the Environment Report 1999[23] states that 'economic instruments are not in vogue because the regulatory mechanism is quite weak and ineffective'.[24]

The Supreme Court of India has noted in *the CRZ Notification case*[25] that the administrative burden on the pollution control boards are more which prevented them from effectively implementing the coastal regulations. The Pollution Control Boards in India have not been professional in implementing the regulatory regime therefore issue of MBIs by them would be premature. "However, few fiscal incentives are available in

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[22] See text at 4.4.5.

[23] Government of India (1999) *State of the Environment Report: India*, New Delhi: Ministry of Environment and Forest, available online at http://www.envfor.nic.in

[24] See text at 4.2.5.

India for purchase of pollution control equipments and imposition of cess (a kind of charge) on water consumption".[26]

The World Bank is helping the Indian Ministry of Environment & Forests and the Confederation of Indian Industry in devising economic instruments for pollution prevention. However, nothing has come out so far in concrete terms.

On the whole, the problems of environmental protection in India and the UK are also due to the shortcomings of environmental regulations and more importantly on the slow pace in introducing direct fiscal incentives or MBIs for pollution prevention. This lethargy is much more pronounced in India than the UK.

6.1.3Enforcement of environmental legislation

To ensure an effective protection of the environment, not only is appropriate legislation needed but also adequate measures to ensure that it is implemented. The Indian Supreme Court has observed that 'if the mere enactment of laws relating to the protection of the environment was to ensure a clean and pollution free environment, then India would perhaps be the least polluted country in the world. But, this is not so'.[27] The matter of the enforcement of environmental regulations in the UK has on the other hand received significant consideration of the enforcement agencies, the RCEP, EC, the Parliament, academia, media and the judiciary.

The Environment Agency (EA) has expressed satisfaction with its own enforcement record during the period of 1997-98, which has shown a 16 percent increase on the

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[25] *Indian Council for Enviro-Legal Action* 1996 (5) p.281.

[26] See text at 4.2.5.

[27] See text at 1.3.

previous year in the levels of prosecutions.[28] Criticisms of the poor level of enforcement still remain. It has been said that enforcement under the IPC regime is at a lower level than that carried out by HMIP before the EA assumed its functions.[29] A traditional response to such criticisms is that a 'Compliance Strategy', whereby a cooperative approach is adopted towards polluters with prosecution only used as a last resort may be just as effective as a more confrontational approach. Here the chances of regulatory capture also cannot be ruled out in the UK.

The work of the EA has come under severe criticisms from many quarters:

> "The EA takes little or no action against the many known contraventions of authorizations. For example (i) when 47 out of 64 deliveries of wastes were outside the authorized specification (See ENDS Issue No.271 August 1997), the EA's only action was to vary the authorization, and (ii) the report 'Routine Monitoring of Kiln emissions at Castle Cement Clitheroe during September and October 1998 for the Environment Agency shows exceedances of emission limits and gaps in monitoring and data, yet no action has been taken by the EA'".[30]

An examination of enforcement statistics in the UK indicates that the number of substantial pollution incidents is very much higher than the number of cases prosecuted. In 1999-2000, 17,592 waste incidents were investigated by the Agency, leading to conclusion of a mere 342 prosecutions. As regards water discharge consents, 246 prosecutions resulted from the investigation of 14,417 substantial pollution incidents.[31] The EA takes up prosecutions actions in less than a quarter of the worst environmental incidents. An internal and confidential review also indicates that the Agency is failing to comply with its Enforcement and Prosecution Policy, the guidance for which prescribes

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[28] UK Government (1998) *Annual Report and Accounts*, Bristol: Environment Agency.
[29] The Environment Agency's Yawning Accountability Gap, *ENDS Report* 284 (September 1998) p.22.
[30] See Memorandum by Georgia Gill (EA10), Select Committee on Environment, Transport and Regional Affairs Memoranda, available on line at www.parliament.the-stationery-office.co.uk (visited 3 January 2003).
[31] Mehta, A. and Hawkins. (1998) 'Integrated Pollution Control and its Impact: Perspectives from Industry', *Journal of Environmental Law*, 10(1), pp.61-69.

enforcement action according to the nature and extent of environmental harm resulting from the offence. So for example, although the normal response to category 1 incidents is prosecution, only 23% of such incidents, where the offender was identified, lead to such action being taken and in 17% of cases, no action was taken at all.[32]

By analysis it may be stated that the EA is generally successful in those prosecutions, which are brought before courts. This is because the Agency will not pursue weak and less arguable cases and the cases found fit for prosecution have to pass the evidential test. The Agency also recognizes that adverse publicity to potential offenders may be more important than the other consequences of prosecution. This operates on one of the strategies namely 'naming and shaming' the operators with poor compliance records.

To sum up, the EA adopts a cautious approach to use of the criminal process and prosecution is adopted when there is considerable confidence that the evidence will sustain a conviction. Although the consequence is a very high rate of convictions, the number of cases prosecuted is significantly low. And courts are reluctant to impose large fines. This certainly discourages the EA.[33]

Therefore, poor enforcement of the environmental law and regulations is also a feature responsible for environmental problems in the UK to some extent.

In India, the Supreme Court and the Planning Commission have held that environmental regulations are not being enforced leading to severe environmental problems in the country. Pollution control regulations have been put in place by the central government but because of different incentives and priorities of the state governments, their

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[32] Ogus, Anthony. and Abbot, Carolyn. (2002) ' Sanctions for the Pollution: Do We have the Right Regime' *Journal of Environmental Law*, December, p.3, available on line at http://web.lexis-nexis.com (visited 29 December 2002).

[33] See text at 4.4.1.

enforcement is very slack. Because of this factor pollution problems are becoming serious year after year.

Emission standards for automobiles and power plants are rather high but their enforcement is known to be lax. Industrial compliance with air pollution restrictions appears to be rather low. For example, although about 10,000 industrial facilities were identified as producing air pollutants in 1993, only 390 of them were equipped with any pollution control devices. Vehicular pollution has shown increasing trend despite the National Ambient Air Standards being in place.

Indian states enjoy considerable flexibility in adopting specific standards and procedures in regulatory enforcement. There is complete delegation of enforcement authority from the Central Pollution Control Board (CPCB) to the State Pollution Control Board (SPCB). But lack of national support is one of the reasons for ineffective enforcement of the pollution control regulations.

Most SPCBs and CPCB depend on government grants for their survival, although some subsidies are available to them on a project-by-project basis. Because of inadequate funding of these pollution control bodies, their capability to enforce environmental regulations is seriously impaired. For example, the enforcement wing of the Delhi Pollution Control Committee only has strength of three Senior Environmental Engineers, 25 Junior Environmental Engineers and 12 Assistant Environmental Engineers. Given the magnitude of pollution problem in Delhi, such manpower falls short of what is needed for effective enforcement.

The Indian Planning Commission has documented that the pollution control bodies are not able to exercise the powers to force compliance by stopping electricity supply or water because of interference by powerful pressure groups. The position of cases filed by CPCB and SPCBs gives a very dismal picture. Conviction percentage is extremely poor.[34]

Pollution control bodies in India are technical in nature with inadequate manpower. They have not been found to prepare arguable cases for undertaking prosecution in courts. This is the main reason for adverse court verdicts in most of the cases filed by these bodies. Lack of a formal policy on enforcement and prosecution further compounds this problem. The CPCB and the SPCBs have not been competent in administering existing programmes under the regulatory regime. They are mostly busy with administrative works of their organizations. So much so that in the *CRZ Notification Case* [35], the Supreme Court has noted the poor enforcement of environmental laws and recognized the administrative burden on the pollution control boards, which prevented them from effectively implementing the Coastal Regulations. In this case, the Court requested the Union Government to consider setting up State Coastal Management Authorities in each state or zone and also a National Coastal management Authority under section 3(3) of the Environmental (Protection) Act 1986 to assume the responsibility of enforcing these Regulations.

The poor enforcement record of the CPCB and the SPCBs is one of the main reasons for the emergence of judicial activism in India by the Supreme Court and the High Courts. Poor enforcement of the environmental regulations in India is thus the main reason for

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[34] See text at 4.4.1.
[35] See note 25.

most of the environmental problems in the country. This is also the viewpoint of the Indian judiciary and other independent institutions.

6.2 The possibilities for lesson learning in this context

Problems of environmental protection in both India and the UK have been shown to be on account of the substantive legal principles, the policy/legal instruments deployed and enforcement of environmental regulations. An appraisal is therefore required in this context to see the scope for India learning lessons from the sophisticated regulatory regime and their enforcement of the UK.

6.2.1 Lesson learning in the matter of substantive legal principles

Important environmental laws and regulations in the UK contain the objective of sustainable development namely the Environment Act 1995, the Forestry Policy 1991, the Air Quality Strategy and the Waste Strategy etc. Policy documents namely *This Common Inheritance*, *Modernizing Government* [36] and *Greening Government Initiative* also have sustainable development as their central feature.[37] Of all environmental law principles, sustainable development has become most important as it endeavours to strike a right balance between the protection of the environment and social needs.

On the other hand, the environmental laws in India are not based on the internationally recognized environmental law principles. Most archaic of the Indian environmental laws are the Indian Forest Act 1927. This Act has the central focus on extraction and transit of forest produce. This Act does not have any of the known environmental law principles as its goal. This was because modern environmental imperative was unthinkable in 1930s when the Act was made. It is high time that the Indian Forest Act is restructured on the

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[36] UK Government (1999) *Modernising Government*, Cm 4310, London: HMSO.
[37] See text at 6.1.1.

lines of the UK`s Forestry Act 1967 and the Forest Policy of 1991 aimed at achieving sustainable management of forests. This would give a sense of direction to the Indian Forest Act as well as to the forestry establishments. "India`s biodiversity bill 2000 has already drawn lessons from abroad while drafting its various provisions."[38]

The position of Indian pollution control laws is also not satisfactory. The Indian Air Act 1981, the Water Act 1974, the Environment (Protection) Act 1986 predate the Indian Policy on Pollution Abatement 1992. It is therefore understood as to why these Indian environmental laws do not have environmental law principles as their basis. Moreover, the policy statement on pollution abatement1992 does not aim at sustainable development of the environment. It is therefore all the more necessary that all the Indian pollution control laws and the policy on pollution abatement are restructured with the aim of achieving sustainable development. This study recommends legal transplantation of policies and laws from the UK to India including enhancement of penal provisions.

In fact the Indian Supreme Court has already given recognition and acceptance to almost all the internationally recognized environmental law principles while giving judgments in cases involving questions of right to life, liberty, human right and the environment.

Therefore, proposed legal transplantation is already overdue and would certainly enhance the degree of environmental protection. While restructuring the regulatory regime in India, lesson learning should also be extended in procedural matters on the lines of the UK and mention may be made of adopting an integrated approach to pollution prevention (IPC & IPPC), issue of air quality strategy, water strategy, waste strategy as has been done in the UK.

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[38] See text at 3.10.10.

6.2.2 Lesson learning in the areas of policy/legal instruments deployed

India and the UK have for long relied on the CAC approach to the enforcement of the environmental laws. Environmental economists the worlds over have said that CAC regime is doing a bad job and is environmentally inefficient. They have recommended use of market-based instruments (MBIs) as complements to achieve the goals of environmental policy. Many European nations and the USA have started experimenting with economic instruments for pollution prevention.

In fact, the UK has been pioneer in using economic instrument when a tax was introduced on Petrol in 1909. Thereafter, the growth of MBIs has been slow. However, after the publication of *This Common Inheritance 1990* and *the Pearce Report 1989*, the UK has moved fast on the path of developing MBIs for pollution abatement. At the end of 2001, a number of innovative proposals were made in the UK in the area of MBIs namely the Landfill Tax, the Climate Change Levy, an Aggregate Tax and the Emission Trading Scheme etc. Some of the market-based instruments announced in the UK had to be dropped because of opposition from businesses and other interests. However, voluntary agreements for nature conservation have good prospects in the UK.

Contrary to the UK, India has not even started experiments with economic instruments for pollution abatement despite policy pronouncement for the same in 1992. Therefore, it is appropriate if India increases the pace of selection of economic instruments, which may act as a complement to the CAC regime of environmental protection. In this context, India may draw lessons from the UK as the latter has made definite progress in the matter. This is also because the Indian regulatory system has a lot in common with the UK's regulatory system. There is, therefore, similarity of context. Over-dependence on a

single instrument has not been found very helpful therefore a policy mix is what which is required for bettering the environmental governance.

Progress in the area of economic instruments in India is confined to the level of some government committees and nothing substantial has come up so far. Therefore, it is also an appropriate time that the methodological problems are addressed by the Indian policy makers while undertaking the exercise of selection of MBIs.

Specifically, there are so many possible permutations of instrument and institutional interactions as to make the task of producing a general causal model of relationships between the multiple variables impractical, even if problems of context specificity were overcome.[39]

Another methodological difficulty in evolving MBIs in Indian context would be political and cultural traits. For example, the USA's regulatory framework is based on adversarial model while UK's system is based more on cooperation and self-regulation. India follows both the systems therefore instrument choice has to address these methodological difficulties. This also indicates a need for caution about the extent to which India may learn lessons in adopting MBIs from the UK due to the sophisticated nature of the latter`s regulatory system.

6.2.3 Lesson learning in the area of enforcement of environmental regulations

This is an area of special focus under this study. Approaches to enforcement of the environmental regulation in the UK have developed over a long period of time. Enforcement not only means prosecution but also observance of various customs and practices of environmental regulatory agencies and the regulatory instruments in vogue

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[39] Gunnigham, Neil. and Sinclair, Darren. (1999), 'Regulatory Pluralism: Designing Policy Mixes for Environmental Protection', *Law & Policy*, 21:1, p.51.

for achieving the objectives of environmental regulations. "The British approach to enforcement has been marked by three styles namely compliance approach (co-operative), deterrent approach and responsive approach".[40]

Many empirical studies conducted in 1980s and 1990s on the activities of environmental enforcement bodies in England have all confirmed the adoption of a 'compliance' style of enforcement, which is marked by a sense of cooperation between the regulators and the operators.

The empirical studies (particularly those by Richardson et al. and Hutter) have indicated that a range of enforcement mechanisms was utilized for maintaining good relationships between regulators and operators. This involved use of advice and education about environmental problems, formal and informal warnings and prosecutions being adopted as the last resort in forcing compliance. Main thrust of enforcement style has been to obtain compliance with scientific and technical matters of regulations rather than following a sanction based approach.

After Europeanisation of the of the UK's environmental policy and law there appears to be a shift towards deterrence style of enforcement, notwithstanding the fact that the Environment Agency only takes up most arguable cases for prosecution. However, it cannot be said that a deterrence style of enforcement has been adopted across the board in the UK.

Enforcement decision in the UK is also marked by many factors namely legal, cultural, economic and political.

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[40] See text at 4.3.4.

Empirical studies conducted in the early 1990s by Richardson et al. (1982) revealed that there is great variation in enforcement styles in different regions. It was found that in a particular area number of prosecutions brought were 90% of all reported violations while in other area there was no prosecution though reports of infractions were many. The research also found that enforcement officers were disturbed by a lack of consistency in enforcement practices. They favoured a more explicit policy applicable for the entire England. They were in fact keen to apply procedural reasonableness and application of predetermined rules to guide the exercise of discretion.

These studies have in fact contributed a great deal towards understanding the patterns and styles of the enforcement of the environmental laws in the UK. These have also shaped the evolution of the current policy on enforcement and prosecution. Under these studies method of interviews, among others, has been followed as mode of data collection.[41]

The majority of officers (interviewed) of all ranks believed that control could not be achieved without the cooperation of industry and they ardently supported a cooperative/accommodative approach to enforcement in preference to a policy of confrontation.[42] In addition to social and economic factors determining the enforcement patterns, it is the matter of resource constraints also which normally play a part with the regulatory agencies. For example high costs involved in installing monitoring systems for sewage works force the regulatory agencies to adopt a cooperative approach. This is also evident in setting the consent conditions, as prior consultation with operators would lead to its smooth implementation.

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[41] See text at 4.3.4.

[42] Richardson, Genevra. et al. (1982) *Policing Pollution: A Study of Regulation and Enforcement*, Oxford: Clarendon Press, pp 96-97.

The inadequacy of research conducted by the regulatory authority and the poor state of scientific knowledge in some fields (such as waste) in regard to the consent-setting process were other constraints, which favoured the cooperative approach to enforcement in the UK. This is because the work of environmental agencies was technically and scientifically based rather than founded on concepts of rules, sanctions and other penalties.

Like Richardson (1982),[43] Hutter (1988)[44] had conducted an empirical study of the law enforcement procedures of environmental health officers and the study leads to a similar conclusion that environmental offenders may not be classified in the category of criminals. "Moral culpability is seen as an important element of crime and accordingly it is only a minority of offenders who are felt to deserve a taste of formal legal enforcement methods."[45] This also leads to a selective implementation of the principle of strict liability in serious violations while in less serious ones its application is not thought to be convincing. This means there is a need of an alternative system to address the moral culpability involved in environmental offences.[46]

The Law Commission of England and Wales has given thought to these issues. It has been recommended that environmental health officers should use non-judicial measures to enforce the law, failing which deterrence methods should be used. It has also been suggested that the requirement of negligence could be substituted for strict liability in existing legislation.[47]

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[43] See text at 4.3.4.
[44] Hutter, Bridget M. (1988) *The Reasonable Arm of the Law: The Law Enforcement Procedures of Environmental Officers*, Oxford: Clarendon Press.
[45] See note 44, p.179.
[46] See text at 4.3.4.
[47] Law Commission Working Paper No.30 (1970) *The Mental Element in Crime*, as contained in reference at note at 44, p.180.

Hutter (1988) found that most of the officers interviewed stated their reluctance to prosecute even the unscrupulous offender as fines were too low to act as deterrence. They sought enhancement of fines and strengthening of various environmental laws. The Hutter's study has also highlighted the necessity of cooperation between the regulators and the operators as stated by those interviewed. The environmental health officers favoured this approach as the operators get a limited incentive to comply with the law and moreover the law does not offer a speedy solution to a problem. Cooperation has also been found to contribute to a friendly working atmosphere for the regulators and the operators.

Bargaining is an important feature of the British style of enforcement. This is also known as rule-making negotiation. This discouraged the Authority from exercising the powers of unilateral imposition available under the legislative regime. In the UK, the regulators and the operators are interdependent on each other and they know that costs of achieving their objectives outside the negotiated settlement would be far more. This understanding underpins the compliance approach in the UK.

In the course of time the EA issued its Enforcement and Prosecution Policy in 1998[48], which was in fact inspired from a similar policy developed by the erstwhile the National River Authority in England.

The Enforcement and Prosecution Policy[49] sets out the general principles in relation to enforcement and prosecution. The purpose of the enforcement is to protect the environment and the EA expects voluntary compliance, failing which enforcement should be used where necessary. Underlying this are four principles namely proportionality,

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[48] UK Government (1998) *Enforcement and Prosecution Policy*, Bristol: Environment Agency for England.
[49] See text at 4.3.5.

consistency, transparency and targeting. Prosecution is expected to be taken in relation to breaches, which have significant environmental consequences, operating without the relevant licence, excessive or persistent breaches of statutory requirements and reckless disregard for quality standards.

The enforcement policy is to be used in conjunction with associated functional guidelines.[50] These guidelines relate enforcement to the Common Incident Classification Scheme (CICS), which is a rational system for recording incidents, assessing a response level and categorizing incidents. With regard to environmental protection and water management, an incident which has an actual environmental impact can fall into one of three categories: 'major' (category 1), 'significant' (category 2) or 'minor' (category 3) and there is a fourth category to cover incidents where there is no environmental impact. The guidelines indicate that the occurrence of a category 1 incident should generally lead to prosecution, whereas category 2 incidents might result in prosecution or formal caution.

The policy on prosecution has received a mixed response. Some say that the policy has been successful while others have been critical of it.

Statistics indicated under section 6.1.3 reveal that the number of cases prosecuted is less than the number of violations. It is worth quoting the rejoinder by the Head of the Legal Services and the Chief Prosecutor of the Environment Agency, England and Wales:

> "The statistics quoted, however, could have been presented in a border context and when set against the Agency's Common Incident Classification Scheme (CICS), it is arguable that rather a different picture emerges. For instance, in the year 2000 there were 1,287 incidents, which fell within categories 1 and 2, and of those, just 99 fell into category 1. It is those incidents, which are most likely to generate a response by way of prosecution. The vast bulk of substantiated incidents, which were investigated by the Agency, fell into categories 3 and 4 and

[50] See text at 4.3.6.

> in respect of those a lesser response can be anticipated. During that year for example, 534 formal cautions which were administered by the Agency together with the service of 399 Notices, quite apart from the numerous warnings given."[51]

In September 2001, the Environment Agency produced its third report on the environmental performance of the companies regulated by it. It is stated that prosecutions rose by 18% in the year 2000 (694 prosecutions in 2000 compared to 566 in 1999). This included the prosecution of 340 individuals either along with the prosecution of a company or that fault committed by them in their own right.

It has been stated that the EA adopts a cautious approach in taking decisions to prosecute. It should be appreciated that the EA is simply following the *Code for Crown Prosecutors*[52], a policy for all those associated with criminal prosecution. This policy says that no prosecution should be initiated until there is sufficient evidential basis to proceed.

The compliance approach to enforcement has further been substantiated in respect of regulation of water companies. Less dependence on formal methods of enforcement like prosecution and more dependence on informal methods of control (cooperative) have resulted in better compliance with regulations.[53]

To sum up, the British style of enforcement comprises of a cooperative approach, failing which prosecution is resorted to. This practice has been evolved and perfected over a fairly long time. And the Enforcement and Prosecution Policy has been quite successful in achieving this style of enforcement of environmental regulation. The stated purposes

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[51] Navarro, Rik. and Stott, David. (2002), 'A Brief Comment Sanctions for Pollution', *Journal of Environmental Law*, available on line at www.lexis-nexis.com (visited 29 December 2002).

[52] *Code for Crown Prosecutors* available online at http://www.cps.gov.uk (visited 3 May 2003).

[53] Atkinson, Carl. (1999), 'The Regulation of Drinking Water Quality: Control by Cooperation rather than Enforcement', *Environmental Law Review*, 1:3, available on line at www.lexis-nexis.com (visited 5 January 2003).

of the policy, namely ensuring that preventive or remedial action is taken to protect the environment, securing compliance with a regulatory regime and providing appropriate sanction for a criminal offence appear to have been well founded with satisfactory results. Indian environmental regulations do not have sufficient flexibility to seek cooperation from operators. This gives the enforcement agencies no choice but to adopt a sanction-based approach. This study would recommend a cooperative model to secure compliance with the set standards - that is before a violation occurs and impose the sanction-based approach in post violation situations, thus making violations costly both in terms of civil and criminal liability.

In addition to adopting a judicious mix of cooperative and deterrence models of enforcement, a number of other steps are also recommended for better enforcement of the environmental laws in India:

- Promoting non-litigation remedies for resolving environmental conflicts.
- Providing in the existing regulatory framework for an effective process of bargaining/negotiation with the regulated.
- Placing greater reliance on existing traditions and customs of communities.
- Strengthening the legal infrastructure in the Ministry of Environment & Forests like creating a think tank on pollution control (on the lines of the RCEP) and making the CPCB and the SPCB more professional.

It is against this background that this study recommends adaptation of the UK`s Policy on Enforcement and Prosecution by the Indian environmental enforcement agencies. However, before such adoption, some empirical studies on the lines of *Policing Pollution*

(Richardson) and *The Reasonable Arm of the Law* (Hutter) should be conducted. Such empirical studies should primarily focus on studying the diverse enforcement patterns in India following a socio-legal approach. They would generate data about violations of regulations, prosecutions, convictions and informal methods used by the enforcement agencies to secure compliance. The studies would throw some light on the poor degree of effectiveness of Indian environmental legislation and should also enumerate social and political factors responsible for poor compliance of the laws. The insight thus obtained will be helpful in making necessary changes in the Indian environmental law regime and also to incorporate necessary changes while adopting the UK's Policy on Enforcement and Prosecution. It is quite strange that such an empirical study has so far not been conducted in India.

Such study would need to address the methodological problems as assessment of the success of enforcement of the environmental laws often entails some difficulties. No simple indicators are available to show as to how successful have the enforcement procedures been. An examination of the reports and data maintained by the Indian enforcement agencies would reveal such details as number of visits to the operators, number of complaints registered, number of prosecutions launched and outcome of the court cases.

This clearly shows that the present state of data management by the Indian enforcement agencies throws little light on the enforcement scenario. This methodological problem should be overcome while an empirical study is commissioned in India for study of the reasons of poor enforcement of the environmental laws. Because of the contextual similarity with the UK it is expected that almost the same result would be obtained

following such a study in India. It would, however, be prudent to wait for the outcome of such a study before adoption of the UK's policy on enforcement and prosecution.

This study has not been able to pinpoint flaws with the British enforcement of the environmental laws, which India might like to avoid. This is however an area, which is open to further research.

6.3. Importance of the role played by legal frameworks, court and the use different policy instruments

The problems of pollution and resource degradation have become more pronounced in India following the mode of development based on heavy industrialization. The UK has also faced environmental problems following rapid industrialization. Good initiatives to overcome this have taken place in the UK but these have not been adequate.

In the formative years the law making was on an ad hoc basis and mostly reactive in nature. This is the main reason for having environmental laws in different segment with multiplicity of government bodies for their implementation. One reason for this fragmentation was a lack of parliamentary time provided by the Government of the day and also lack of importance given to issues of environmental conservation. There has been a perceptible shift in the issues of environmental conservation and resource degradation after the Stockholm Conference 1972 which again got perfected following the Earth Summit 1992. It was between these periods that environmental laws and policies also started undergoing rapid transformation in India. Another important factor for this change in approach to environmental issues has been the influence of the European Community (EC) in the context of the UK.

The EC has well developed environmental policy and law in the form of Directives. The direction of environmental policy is shifting from the more traditional reactive methods of solving environmental problems towards the prevention of harm. In this regard adoption of the Integrated Pollution Control (IPC) regime and the Integrated Pollution Prevention and Control (IPPC) following the EC Directive are important manifestations of change in approach. The command and control regime in India and the UK has been criticized by environmental economist on the ground that the system does not give incentive to business for pollution abatement. In turn, market-based instruments have been recommended for complementing CAC regime. This also finds mention in the policy documents of the UK and India. Principles like the polluter pays and precautionary principle etc. have become the corner stone of new environmental policy in India and the UK and have also received judicial recognition.

Moreover, following the Earth Summit 1992, developments at the EC level and those at the levels of India and the UK have seen adaptation of sustainable development principle as the most important criteria for protection of the environment. Further, the environmental issues have successively got internationalized on account of sweeping changes at the international forum. This has important inputs from lawmakers and courts in India in so far as development and evolution of new environmental law principles are concerned.

It would be worth stating that environmental law has not developed as a self-contained discipline but has borrowed ideas and postulates from a wide variety of subjects. The result of this is that the care of the environment does not become integrated, as borrowed ideas had not aimed protection of the environment. For instance, the private law of torts

aims at protection of interest in land and it becomes difficult to use the private law for protection of the un-owned environment. However, private law of torts and negligence has been used for environmental protection over a fairly long time in India and the UK for securing environmental protection. But, following the judgment in the *Cambridge Water Case* the spirit has dampened. It is worth quoting the following passage of Lord Goff:

> "Given that so much well informed and carefully structured legislation is now being put in place for this purpose, there is less need for the courts to develop a common law principle to achieve the same end, and indeed it may well be undesirable that they should do so."[54]

The above ruling by Lord Goff hints at the following:

- That Parliament is more competent to create a coherent and well-structured system of environmental regulation than are the courts through developing common law principles on ad hoc and case-by-case basis.
- That Parliament has a greater democratic legitimacy than the courts when it comes to shouldering the responsibility for prevention of damage to the environment.

Another example of the judicial reluctance to develop the law on environmental protection is in those cases, which have an aspect of European law to them. This is because EC has issued a large number of Directives and regulations on many aspects of the environmental protection. These are shaping the environmental law regime in the UK. Therefore, judicial intervention for development of common law principles for environmental protection has not been found desirable. There is also a demand for establishment of an environmental court and substantial work has been done in the

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[54] *Cambridge Water Company Ltd. v Eastern Countries Leather plc* [1994] 2AC 264, available online at http://web.lexis-nexis.com (visited 26 May 2003).

context of the UK.[55] This is on account of the fact that courts are not able to appreciate the complex issues of the environment when the cases come to them for adjudication. However, the UK Government has not accepted the report on the Environmental Court Project. In India this matter has not progressed at all.

To address the problems of environmental pollution and resource degradation in India and the UK the remedy of judicial review has been used. Relaxation of the principle of standing has led to development of public interest litigation in India, which has taken the shape of judicial activism.

In the background of what has been stated above it is worthwhile to undertake an examination in respect of the following:

- What role ought to be played by lawmakers and what role should be played by courts in the process of environmental protection.
- What are the relative strengths and weaknesses of court based mechanisms for the purposes of achieving the objectives of environmental policy.
- To what extent are courts appropriate instruments for formulating principles applicable to and managing and directing environmental protection as distinct from being providing redress to individuals who suffered harm?
- How does the evidence from India concerning the success/failure of enforcement action through the courts effect conclusions about the likely effectiveness of an environmental court as an instrument for enhancing environmental protection?

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[55] See generally the *Environmental Court Project Final Report* by Professor Malcolm Grant available on line at http://www.planning.dtlr.gov.uk (visited 24 December 2001).

6.3.1 Role of lawmakers in environmental protection

Despite the rapid industrialization of the 19th century and the technological developments of the 20th, the health of the environment was long taken for granted. But since the mid 1960s the protection of the environment has become an issue of international importance. Environmental law began establishing elaborate system of regulations for environmental protection. However, environmental law could not match the developments taking place at the international level. One of the reasons for this lax development of the environmental law the world over and India and the UK in particular was that protection of the environment was having international ramifications.

The *Chernobyl* amply demonstrated that pollution does not respect national frontiers and that national laws are inadequate to deal with damage arising from such incidents. The future development of environmental law will therefore be an international rather than a national phenomenon. This will require a fundamental change in attitudes of lawmakers in that rather than realize the situation as it is they will have to address the question of how the law may be developed to serve contemporary human purpose and the goal of achieving sustainable development.

This may sound a fundamental change in approach to law making but it has a sound precedent in maritime law where national legal systems developed and applied laws within a framework of international treaties and conventions.[56] Indeed, oil pollution at sea was the first environmental problem to be tackled internationally: a United Nations Convention was concluded in 1954 and the Inter-governmental Maritime Consultative Organization (IMCO) an UN agency that has been operating in the field of environmental regulation since its creation in 1958.

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[56] See text at 3.9.2.

The main impetus for the development of environmental law came from the UN Conference on the Human Environment held in Stockholm in 1972 and the EEC first programme of action on the environment. The UK Control of Pollution Act 1974 and the Indian Water Act 1974 were in response to these initiatives. However, these Acts could not meet the desired purpose.

Lawmakers in India and the UK have followed a reflexive approach to law making, which principally involves enacting laws pursuant to emergent environmental problems. In this category can be cited the case of Indian Environmental (Protection) Act, 1986 which was enacted following the Stockholm Conference 1972.

The Earth Summit 1992 and associated developments have thrown open a large number of environmental law principles namely polluter pays principle, precautionary principle, sustainable development principle, international equity etc. Other guidelines include features like the global environment is a common concern of humanity (IUCN Covenant, Principle-13), common but differentiated responsibilities (Rio Declaration, Principle-2), notification and consultation (Rio Declaration, Principle-19), environmental impact assessment (Rio Declaration, Principle-17), integration, meaning in order to achieve sustainable development environmental protection shall constitute an integral part of the development process (Rio Declaration, Principle-4), public participation and right to development etc.

National representatives including heads of governments who happen to be members of their parliaments also have finalized most of the international treaties and conventions. Parliament is charged with a responsibility to enact laws addressing the emerging problems. Environmental pollution and resource degradation are some of the burning

problems faced by society. Lawmakers should therefore, disassociate themselves from law making on ad hoc basis and in a reactive manner. They would do well to review, modify and enact such environmental legislation, which not only addresses the problems of the environment more holistically but also incorporates the internationally recognized environmental law principles most importantly sustainable development. Lawmakers in India would need to take note of this more as compared to the UK as none of the Indian environmental policies and laws incorporates the principles of sustainable development.

It would be appropriate to make a mention of an aspect of difference in the attitudes of developed and developing country. Developing country like India believes that developed countries like the UK follow a highly consumption oriented pattern of living and they contribute more to global environmental problems like greenhouse effect and CFCs release etc., therefore they should bear the cost of environmental restoration more than the developing countries. Developed countries should also transfer environmentally efficient technology to developing countries at reasonable costs. Since environmental problems are transboundary in nature therefore lawmakers in the UK should ponder over these demands of developing countries and should take such initiative that bridges the gaps in perceptions by enacting/amending the environmental regulations of the UK. This will also show a direction to other developed countries and further initiative in this direction on their part will make significant contributions to address environmental problem more effectively at global levels.

6.3.2 Role of courts in environment protection

Environmental problems have received adequate attention the world over in the last two decades. National governments have endevoured to legislate for securing environmental protection and courts have been playing important roles in this process. This matter has been reviewed under this study and attempt has been made to find out true bearing of courts in environmental management. *Defending the environment* by Joseph Sax in 1970 had discussed the role of the courts and the possible development of the doctrine of public trust and the use by the citizen of private actions in the courts.[57] It was also advanced by subsequent authors that courts and environmental enforcement agencies should be engaged in a collaborative partnership in decision-making.

If we look at the historical development of environmental law in the UK and India then we find that the courts have been at the forefront of that evolution.[58] The earliest phase of environmental law in the UK has been in the form of action for nuisance. The courts have been alive to the emerging social reality and have played matching judicial roles. An instance was not encouraging claims in nuisance to hypersensitive litigants aimed at not only protecting peoples' interest in land but also facilitating industrial revolution in the UK. Courts have played vital roles in four areas namely:

- Claims in tort e.g. negligence and rule in *Rylands v Fletcher*.
- Defining the ambit of the criminal law in respect to pollution offences.
- Property law, easements, riparian rights.
- Judicial review of the actions and decisions of public authorities exercising powers in respect of the regulation of the environment.

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[57] See generally Mc Auslan, Patrick. (1991), 'The Role of Courts and other Judicial Type Bodies in Environmental management', *Journal of Environmental Law*, 3:2, p.195.
[58] See text at 5.1.

Many international and EC environmental law principles have found place in domestic legislation in India and the UK. These principles are often in the most elementary and skeleton forms. Courts have used these principles in adjudication in India very heavily in environmental matters. The rationale for their use can be constructed from two related arguments. First, the use of the environmental principles can be linked to judicial activism in the sphere of the environment. Although such activism is not based entirely on the environmental principles, they do provide a useful basis for action. One justification for judicial activism of particular relevance to EC environmental policy is inertia on behalf of the legislative and the executive branches. There are arguments that courts can within limits be active to remove the structural infirmities of the legislative and executive branches. There are instances that the legislative institutions have not been active in the environmental field in some respects then this leaves sufficient justification for judicial intervention to improve the environment. Secondly, the location of the principles is a significant factor in the legitimacy of the use. They are within the Treaty itself, rather than a policy document, and they are there because the Member States have chosen to incorporate them.

Courts have also functioned as source of law for environmental protection through case law. They have enriched the understanding of environmental legislation through their creative interpretations and this has certainly helped the cause of environmental protection. Generally, substantive environmental cases come before the courts in three different ways. Firstly, to resolve the question of definition in a primary or secondary legislation. Here, the courts' interpretation of the definition becomes the law. Secondly, courts have developed principles of environmental protection in common law cases.

Finally, courts have also acted as a forum for review if government or regulatory agencies are using the powers granted to them in a lawful and reasonable manner. Due to these interventions, courts have made significant contribution to environmental protection and they should continue to do so.

Courts have acted as institutions to those who seek to take up issues of environmental protection. Before providing redress to people in environmental cases, courts have to adequately address issues of standing, the timing of actions and the availability and effect of remedies as well as difficulties of cost and obtaining the evidence to proceed. A further issue is the new possibilities of litigation arising from the recent constitutional changes in the UK in relation to devolution and human rights. In the context of India, courts have gone too far in treating issues of human rights having a bearing on the environment. In this process, the Indian Supreme Court and the High Courts have developed a novel environmental jurisprudence.

The environmental jurisprudence developed by the Indian Supreme Court has become a rich source of law and many countries including the UK are drawing lessons while addressing similar cases related to the environment and human rights. After the enactment of the HRA 1998, courts in the UK are increasingly addressing complex issues of human rights and the environment. Their creative interventions increase our understanding of discrete environmental and constitutional provisions.

Courts would also need to address legal and practical obstacles to be overcome before cause of environmental protection could be ensured. In some areas, such as standing, the courts should contribute developing the law to reflect the range of environmental interests now considered to be important in our society. In others such as the cost of litigation,

wider reforms of legal aid, process and procedure are required to be done by courts themselves alone. Courts should positively contribute on these procedural aspects, which will take efforts to protect the environment to a greater height.

6.3.3 Strengths and weaknesses of court based mechanisms

In an ideal situation, implementation of environmental regulations in India and the UK would have contributed a great deal to achieve the environmental policy goals. But this is not so. Regulatory regime based on CAC style of enforcement has been found to be deficient. Therefore, there is a move towards compliance (cooperative) style of enforcement, which includes a range of policy instruments aimed at enlisting cooperation of the regulated/operators.

Due to constraints on the part of regulatory agencies, there will always be a role for individuals or interest groups to further environmental protection using a variety of means. In addition to private prosecutions, other opportunities include common law, judicial review and public interest litigation in the context of India while in the context of the UK in addition to these the opportunity of EC law is also available.

These avenues can be collectively called court based mechanism (CBM) and each of them has its own strengths and weaknesses. These CBMs have been discussed at length[59]. Here an analysis will be made of their efficacy in achieving the environmental policy goals and in securing environmental protection.

The common law can offer an opportunity for individuals to enforce the environmental standards but its limit as a tool of environmental protection has surfaced. A promising line of cases had indicated the necessity of showing a proprietary interest in a nuisance

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[59] See chapter 5.

action, but the House of Lords' decision in *Hunter v Canary Wharf*[60] has made it clear that this is an essential requirement. A similar constraining of the common law to deal with environmental protection can be found in the *Cambridge Water Case*, where foreseeability of the relevant damage is a key requirement of both negligence and nuisance actions. Lord Goff has made it clear that it is for Parliament to develop the law in the area of environmental protection and not the judiciary.

Other weaknesses of common law as a tool of environmental protection include excessive costs, delay, its reactive nature and lack of requirement to use the damages to benefit the environment. However, where standards are established, the foreseeability criteria can be met there still remains opportunities for interest groups to fund actions for relevant individuals. Another shortcoming of common law is that someone has to approach court for getting relief in environmental harm. In other words an aggrieved person has to formally make a compliant to court for pollution prevention. Thus, this remedy is litigant oriented.

Roots of modern environmental law can be found in the tort of nuisance. This served the cause of environmental protection, though indirectly, for a very long time. Despite many weaknesses of the common law, it contains many general principles, which could have been used to protect human health and the environment. But necessity of having environmental regulation was realized quite early. This was mainly because of an under-utilization of the common law due to a number of associated social, political and economic reasons.

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[60] *Hunter v Canary Wharf Ltd.* [1997] 2 WLR 684.

It can therefore be argued that common law's potential for providing a deterrent effect, especially in the current climate of inadequate fine levels, low prosecutions and depleting legal aid resources, remains high. This presupposes that the judiciary in civil courts is more likely to calculate damages in such a way as to provide this effect, but it should not be forgotten that successful litigants are under no obligation to use these damages for the benefit of the environment.

Judges in modern times have taken a conservative view to the development of common law as a tool of environmental protection. But the key point is that should this trend continue and belie the noble purpose common law has served as a tool of environmental protection for more than a century. A more balanced approach will be to let the common law and public law co-exist and may be used as a supplement or complement for securing environmental protection in India and the UK rather than common law being fully supplanted by public law.

Judicial review is a useful device in that it may be used in a preventive capacity and applicants do not need to have a proprietary interest. Indian and the UK's environmental law regulations have built-in provisions to challenge the wide discretionary powers of enforcement agencies. In particular, the UK's EPA 1990 is seen to possess the tool of judicial review for achieving this where decisions of the enforcement bodies do not directly affect individuals and other interest groups, the appeal provisions do not apply then the remedy of judicial review is the only avenue to pursue.

Courts in the UK have enhanced the role of judicial review in that the rules of *locus standi* have now been sufficiently relaxed to allow anyone with a genuine interest in the subject matter of challenge to have the relevant standing. Although, there may still be

concern about fluctuating standards in this context, the proposals of EC advocating greater access to environmental justice in public law would strengthen this trend.

One of the prime drawbacks of using judicial review in general is its concern with procedural rather than substantive flaws. It can deal with the merits of a decision only so far as they are deemed unreasonable; this is a very restrictive test. Other problems include the high cost of pursing a civil action, which is likely to place it beyond the reach of most individuals, legal and is only available to a limited extent for judicial review. The UK courts have also helped here by not always allocating costs against the unsuccessful litigants where the public law challenge involved an important point of law having a bearing on health of people and the environment. Added to this is the delay, which is endemic given the sheer number of claims for judicial review. Therefore it can be said that access to justice by this route to secure environmental protection entails many difficulties.

In addition to this, there are other substantive restrictions on the usefulness of judicial review. For example, when a claim for judicial review is heard, the merits of the case are not considered. Thus, when a decision of an administrative body is quashed or a duty is enforced, it does not follow that the final decision of the administrative body will be to the liking of the individual seeking judicial review. This acts as a disincentive in this type of court-based mechanism for environmental protection.

India has borrowed the constitutional tool of writ petition from England where prerogative writs have been issued for centuries. The Indian Supreme Court and the High Courts have the power under Article 32 and 226 to issue writ to public authorities for

performing some specific orders. This remedy has been used in India very extensively for securing environmental protection.[61]

When traditional means to redress environmental problems do not succeed, this remedy has successfully been used more in the Indian context. The relative speed, simplicity and cheapness of the writ remedy have made it very popular with litigants. Normally, the delay between filing of a writ petition and the granting of a writ is far less than the time required to obtain a decree in a civil suit and in writs there are fewer intervening proceedings between filing and judgment. The filing fee for a writ is nominal compared with the high *ad Valorem* court fees that must be paid in an ordinary civil suit.

In addition to these, the expense of presenting oral evidence is eliminated as facts are set forth in the affidavits of the parties. Further, approaching the highest courts directly for a writ reduces the likelihood of prolonged litigation in subsequent appeals.

Limitations of the higher courts in the matter of issue of writs are there which include the petitioner's standing to institute proceedings (*locus standi*), the exhaustion of alternative remedies and the principle of *res judicata* and the time within which the writ may be sought (*laches*). These are matters of judicial policy and act as safeguards lest this constitutional remedy be misused. However, when questions of fundamental rights and the environment are concerned, courts have often relaxed the procedural requirements.

The Indian courts have relaxed the traditional rules of *locus standi* in such cases, which involved questions of fundamental rights and the environment. Courts in India construed such cases as representing violation of human rights. This has given rise to a spurt in such cases often grouped as public interest litigation. Enactment of the HRA 1998, the Freedom of Information Act, the devolution in governance and a move towards

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[61] See text at 5.4.

participatory style of environmental regulation in the UK are clear signs that public interest litigation will grow on a wider scale. "The British Judiciary has already decided many cases for removing this infirmity (procedural hurdles) from the British laws."[62]

One demerit with the remedy of writ and PIL is that enforcement agencies for the environment become deactivated in the matter of implementation of environmental regulations on their own. The Indian courts have also witnessed delays in deciding PIL cases because of their unusual spurt. This is being overcome by issuing interim directions in the nature of continuing mandamus so that enforcement agencies perform their regulatory functions enjoined under various environmental laws.

The UK has some limited provisions for statutory civil liability but this has not been comprehensive and is not without flaws. However, EC's *White Paper on Environmental Liability* [63] is expected to promote UK's statutory civil liability provisions. Indian laws also do not have adequate provisions for citizens to launch prosecution in cases of environmental problems. Power to prosecute lies with the government. However, under section 19 of the Indian EPA 1986, a citizen may prosecute an offender by a complaint to a magistrate. But prior to this, the complainant must give the government 60 days notice of the intention to complain. Private prosecutions entail adherence to strict rules of evidence. The remedy of private prosecution also faces difficulty in collecting samples under the pollution control laws, which confer the power to draw effluent samples exclusively on government officials.

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[62] See text at 5.5.2.

[63] European Commission (2000) *White Paper on Environmental Liability*, available online at http://www.europa.eu.int/comm (visited 3 May, 2003).

European Community law application is another tool for enforcing matters related to environmental protection in the context of the UK. Though, there was no reference to the environment in the original Treaty of Rome but in a series of cases, a typically creative European Court of Justice (ECJ) has justified environmental objectives and the EC Treaty now makes explicit reference to it. Under Article 10 of the EC Treaty the UK is obliged to implement and apply EC law. Developing ECJ and UK case law have made it clear that in the event of conflict, the former shall prevail. As a result it is possible for actions to be taken against the environmental enforcement bodies for failing to carry out its obligations under the Treaty or secondary legislation made under it. Individuals may claim damages from the UK government for failure to implement a Directive from EC. For this to apply the Directive must give the individual identifiable rights and must be a causal link between the failure to implement and the damage suffered by the individual.

But at present the potential utility of EC environmental Directives for interested parties seems to be a largely theoretical possibility despite favourable case law by ECJ and UK courts.

6.3.4 Is judiciary an appropriate instrument for formulating principles and directing environmental protection

Under conventional legal methodology courts have been treated as institutions/instruments for striking a reasonable balance between private rights and public interests or between conflicting public or private interests culminating in redressal of grievances of either of the parties. Constitutional provisions in India and the UK also confer rights on higher courts to issue writs. The Indian constitution has a fundamental right conferred on every citizen to avail remedy through writs.

The Indian Supreme Court's interpretation that the fundamental right to life does include the right to a clean environment elevates what is otherwise an ordinary legal right to that of a basic human right constitutionally protected through writ jurisdiction of the Supreme Court and the High Courts. Therefore, despite failure of administrative and legal arrangements in the effective protection of the environment, human right standards and procedures have advanced the cause of right to a clean environment by putting administrators on the defensive and generating a positive enthusiasm to give priority to environmental issues.

The Indian Supreme Court has done it by relaxing the requirement of *locus standi* when questions of the environment and human rights were brought before it. This has given to an unparalled growth of public interest litigation (PIL) in India. A feature of many PIL cases is the court's ingress into field traditionally reserved for the executive. "Prof. Baxi describes this gradual judicial takeover of the direction of administration in a particular arena from the executive as creeping jurisdiction. This has also been known as judicial activism. An example of this is the *Dehra Dun Quarrying Case*."[64] The Indian Supreme Court judgments are replete with such cases. In such cases, the Supreme Court not only formulated principles but also created a mechanism to ensure compliance of its orders by the executive. In other words, it entered into the shoes of the executive.

The case of *MC Mehta v Union of India*[65] is worth mentioning. This case dealt with escape of oleum gas injuring many persons. In this case, the principle of absolute liability as a common law principle was formulated. While commenting on the applicability of the rule in *Rylands v Fletcher*, the court said:

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[64] See text at 5.4.5.
[65] 1987 AIR (SC) 1083.

> "Evolved in the 19th century at a time when all these developments of science and technology had not taken place (and) cannot afford any guidance in evolving any standard of liability consistent with the constitutional norms and needs of the present day economy and social structure."

The challenge for the court was to evolve new principles and lay down new norms, which would adequately deal with new problems, which arise, in a highly industrialized economy. The court has creatively done it by formulating the *principle of absolute liability* adopting a no-fault liability standard. The court also formulated another principle in this case that the larger and more prosperous the enterprise, greater must be the amount of compensation payable by it.

While treading the path of judicial innovation, the Supreme Court has internationalized/formulated an impressive range of concepts and principles. These include the principle of absolute liability, the principle of sustainable development, the polluter pays principle, the precautionary principle and the public trust doctrine and these now have firm footing in the Indian environmental jurisprudence. The Supreme Court has firmly held the view that law should not remain static and that it has to evolve to meet the challenges arising out of new situations. Law has to grow in order to satisfy the needs of the fast changing society and to keep pace with the economic development.

Many jurists fear that the broadening of the rule of standing may lead to a number of frivolous and vexatious litigations while others feel that courts cannot deal with large number of cases thus coming to it and it will lead to delay. Some are also critical of the role of judiciary in taking over the reins of administration.

It is stated that a whimsical plaintiff cannot mislead a vigilant court and to overcome the delay, courts may evolve a procedure to screen the cases. In fact, the Indian Supreme Court has evolved such a procedure by constituting a PIL cell.

The basic question is if courts are the institutions for formulating environmental principles and directing the course of environmental protection. In this connection it is stated that why courts in India and the UK have done it. They have done it because of poor record of enforcement agencies. They have not done it *suo moto*. When cases are brought to them, they examine all aspects of law, procedures and their enforcement. Courts try to reach out to the core of the problems by their probing. This generates a wealth of information. They marshall all such information together and deduce some norms and empirical formulations. These formulations when tallying in other cases become postulates or principles, which can convincingly be applied in similar cases.

Parliaments are supposed to do this churning process before enacting any legislation but they cannot do because of heavy demand on the parliamentary time. Executive machinery more often than not takes a mechanistic view of legislation and their enforcement. The net result is that the environment suffers. Judicially formulated principles often aim at helping governments and parliaments. In fact these two institutions in amending/enacting new environmental legislation have acted upon many judicial recommendations. Judges are not mimics. When a law comes before a Judge he has to invest it with meaning by developing and moulding it.[66]

Therefore, there is no harm in courts formulating environmental principles while adjudicating cases. In fact case law has only helped law making, functioning of executives and formulation of international treaties and conventions. Judiciary taking

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[66] See quotation of P N Bhagwati, CJ at text 5.6.

upon the reins of administration is an area, which has come under criticism. This appears more needed in India for brief spells than in the UK. This is because the enforcement agencies have not been able to provide satisfactory enforcement of the regulatory provisions.

Forest destruction continued unabated in the northeast India. On receiving a PIL in the matter, the Supreme Court issued wide-ranging directions to the executives (see Appendix 1). This judicial intervention halted the loss of forests and biodiversity in the region. However, this is a temporary solution to the problem. This is because PIL and consequent judicial activism cannot be regarded as the panacea of all environmental ills. Howsoever exhaustive and creative the judicial intervention may be it is the executive machinery, which implements the directions. For such implementation the enforcement agencies would need financial support from the government. State Governments and the Central Government in India do not spend even a quarter of the requisite finances on the protection of the environment and resource conservation. In such situations compliance of the court's orders often becomes difficult and a long drawn affair. This has been seen in many important cases on the environment and forest conservation namely the *CNG case* and the *Forest Conservation case*. Therefore, courts should be aware of this limitation. They have also applied restraint on them in many cases. But judicial activism on the merits of a case certainly proves successful in inducing compliance with the law in the Indian context.

The UK has not seen emergence of judicial activism on Indian scale as there is no such flagrant violation of human rights and record of the enforcement agencies is not unsatisfactory.

6.3.5 Environmental court as an instrument of environmental protection

Environmental law regime in India and the UK to protect the environment reflects its piecemeal origin. Most of the regulatory mechanisms were created long time back before the kind of damaging factors they are now required to regulate or prevent. When these mechanisms were created the number of pollutants and processes were very few unlike the modern times when one witnesses significant increase in toxic substances, nuclear hazards, genetically modified organisms and the greenhouse effect capable of causing irreversible damage to the environment.

The world is entering into the era of sustainable development therefore the regulatory institutions have to appreciate this dominant principle as also its associated principles namely polluter pays principle and precautionary principle etc. However, modern regulatory institutions are not equipped to address these emerging social and environmental realities.

Consideration of issues relating to the environment involves an appraisal of detailed scientific and technical information, which the present structure of regulatory institutions and courts are not able to do.

Most of the environmental cases are triable in the magistrates' court. These courts lack appropriate expertise in understanding the true nature of environmental crimes such as dumping of waste on land or into controlled waters. There are also instances when the environment related cases get trivialized during the course of court's proceedings.[67] The High Courts in both the countries also face difficulty while dealing with complex toxic tort cases. When they are exposed to a vast amount of complex scientific and technical data, the standard of decision-making falls. And those having responsibility to prove the

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[67] See text at 5.6.2.

cases in court fail to do so within the existing procedural and evidential requirements resulting into polluters going scot-free.

Environmental agencies in India and the UK have grown over the years in an incremental and gradual manner. This has also created problems in the matter of jurisdiction, which is scattered over different parts of the legal system. In the context of the UK, appeals from decisions of government departments and some regulatory bodies are dealt with by inspectors from the Planning Inspectorate, the Department of Trade and Industry or other departments. Other matters such as appeals against local authority abatement notices and contaminated land remediation notices go to magistrates' courts.

Statutory appeals against other decisions of local authorities and government departments lie to the High Courts and disputes about land compensation to the Lands Tribunal. Criminal matters relating to the environment will either be determined by magistrates' courts or in more serious offences, the Crown Court. These separations of jurisdictions have given rise to a scope for confusion and delay. Thus for obtaining relief in an emergent environmental problem, various remedies have to be sought from a variety of courts. The net result of this is that the environment suffers.

Environmental decision-making has also undergone a paradigm shift. It was the Stockholm Conference 1972 which focused environmental problems. Before this event, environmental problems were not sensitized among policy makers. But the Earth Summit 1992 brought about a structural change in our approach to the environment and development. Principle of sustainable development became the new mantra of environmental management.

Courts handling judicial review following the principle of *wednesbury unreasonableness* do not seem to have imbibed the recent trends in the environmental management. However, some activist judges in both the jurisdictions have expanded the scope of judicial review to effectively address problems of the environment. But no institutional reform in courts has been undertaken.

It is on account of the reasons and infirmities of the present court structure in the UK that idea of having an environmental court for England and Wales was mooted in the early 1990s.

There have been many pressures and arguments for having an environmental court in the UK so that judges may have the benefit of specialist persons while deciding complex cases on environmental maters. These are[68]:

- The Carnwath Report on enforcing planning control, published in 1989,
- Lord Woolf's Garner lecture of 1991, and his Lord Morris lecture of 1997,
- The communication issued by the European Commission in 1996 regarding the transposition, implementation and enforcement of community environmental law which includes need to improve opportunities for access to national courts.
- The Human Rights Act 1998, which may require a review of the position of the Planning Inspectorate in relation to executive government (in the light of criticisms voiced in *Bryan v UK*) and which also creates an opportunity for the development of a novel jurisprudence in relation to environmental rights.
- The Aarhus Convention, concluded in 1998 under the auspices of the Council of Europe which contains special provisions relating to access to environmental justice.

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[68] See note 55.

- The Woolf reforms to the civil justice system which aim at changing case management in the civil courts and which have implications for the dealing of environmental disputes.

In the background of the above, an environmental court has been suggested for the UK. Such a court shall be a specialist court with exclusive jurisdiction with power to determine appeals on merits based on expertise not available in general courts. This court should be able to adjudicate on the whole range of environmental regulations and all types of suits. This court also should be independent from government and should be capable of making binding decisions. The environmental court will have expertise taken from experts drawn from different streams, and will take care to provide access to people with least cost following an informality of procedure and should be capable of innovations including developing a new environmental jurisprudence.

Principle 10 of the Rio Declaration says that at the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities. It also says that effective access to judicial and administrative proceedings, including redress and remedy, shall be provided. All these requirements strongly justify establishing an environmental court.

However, there are two objections to a specialist environmental court. The first involves the maintenance of the rule of law while the other relates to the sovereignty of Parliament. The rule of law requires the equal subjection of all people including the government to the law administered by the courts. A special court would single out certain litigants for special treatment and this might offend against the rule of law.

Second objection is that a government policy (becoming justicible) will erode the authority of Minister and in turn of Parliament.[69]

Firstly, establishment of a specialist court would not lead to erosion of the concept of rule of law and infact this concept will be further enriched by development of a new environmental jurisprudence by such a specialist court. This is high time that such concepts are made to face the reality of law, social change and environmentalism in the 21st century. Answer to the second objection that such a court will erode the authority of Ministers. It is worthwhile to state that in most matters Ministers have already delegated their powers to inspectors and reporters like in planning appeals. In other words, the principle of ministerial accountability has already been breached in such cases.

In the background of the above it may be stated that there may be objections in setting up a special court but not for setting up a special tribunal. Role of court is confined to review of legality while tribunals are concerned with rights and obligations of parties as also with merits of the case.

Could a tribunal combine the different functions of a court and a traditional tribunal? Can it combine the appellate function with those of remediation, review and punishment? Remediation in this context refers to the issuing of directions to someone in breach of environmental control requiring them not to do something or alternatively to do something so as to secure compliance with the control. It corresponds with the civil enforcement jurisdiction of the Land and Environmental Court of New South Wales.[70]

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[69] See generally Day, Martyn. et al. (2001) 'An Environmental Court – Part 1', *New Law Journal*, 151, available on line at http://www.lexis-nexis.com (visited 11 January 2003).

[70] See generally Rowan – Robinson, Jeremy. (1993), 'Environmental Protection: The Case for a New Dispute Resolution Procedure', *Journal of the Law Society of Scotland*, 38:1, p.5.

This hints to the possibility of enlarging the jurisdiction of a traditional tribunal to attend to environmental cases in the context of the UK.

Report of Professor Malcolm Grant[71] identifies five alternative models of an environmental court. In the context of what has been discussed so far it would have been appropriate to designate a division of the High Court in England and Wales as Environmental Court with provision to move the Court of Appeal for appeals. Such a court will certainly contribute a great deal to redress environmental problems by taking help of experts and technical persons in assessing complex scientific and environmental data. Such a court will also be able to develop a new jurisprudence in view of the HRA 1998 and the Aarhus Convention 1998 by laying down its own procedures.

In India, the inherent limitations of the judicial system to review substantive questions relating to the environment makes it desirable to establish an alternative forum with an alternative strategy. As early as 1987, the Indian Supreme Court was convinced of the need for scientific and technological expertise as an essential input to judicial decision-making. It went a step further by suggesting to set up Environmental Courts on the regional basis with one professional judge and two experts drawn from the Ecological Science Research Group keeping in view the nature of the case and the expertise required for its adjudication.

For review of environmental decisions, it is necessary to have the mechanism of environmental courts or tribunals competent enough to analyse objectively the environmental, legal and policy issues. The National Environmental Tribunal Act 1995 provides such a structure. However, the jurisdiction of the Tribunal is limited to determination of compensation for accidents while handling hazardous substances

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[71] See text at 5.6.4.

whereas there are a host of other problems to be decided, examined and reviewed. A draft bill was prepared in 1990 called the Environment Court Bill, which was to a great extent in line with the need for a new alternative forum and strategy. It provided for institution of environment commissions to help the Environment Court in investigation. It also guaranteed environmental groups the access to information. However, the draft bill was not introduced in Parliament for enactment.

The Government of India should revive the bill for consideration of Parliament again so that the Environment Court may be established. In fact the Indian Supreme Court has recommended in a large number of cases for this. Mention may be made of the *M.C. Mehta v Union of India in 1986, the Shriram Food & Fertilizers Case 1986, A P Pollution Control Board v Prof. M.V. Nayudu, 1999 and the Vellore case in 1996.*

An environmental court in the Indian context will also be able to address poor enforcement of environmental laws and help grow the environmental jurisprudence when cases relating to the environment and human rights violations are brought before it. There will therefore be less need for the Indian Supreme Court to follow the path of judicial activism, which has attracted criticisms from some jurists. This is because an environmental court will be able to internalize most of the concerns of the environmental protection. And there will always be the remedy of appeal to the Supreme Court from the decisions of the environmental court.

Thus India and the UK both are in the same position where the higher judiciary favours establishment of an environmental court so as to provide a 'one-stop-shop' but the respective governments are not prepared for a reform in the institutional matters of the existing court structure. It can only be hoped that the idea of establishing environmental

court in both the jurisdictions is revived and implemented. This study is hopeful that it would gain support from lawmakers, policy makers and governments in both India and the UK.

6.4 Summary of Recommendations

This study makes the following recommendations:

1. Indian Policy Statement for Abatement of Pollution 1992 should be redesigned to give sharp focus to environmental pollution (see above 2.6.1).

2. Indian State Pollution Control Boards should be strengthened to effectively address the problems of pollution. In the mean time, forest officials may be assigned the duty and power in respect of pollution prevention at local and regional level (see above 2.6.1).

3. Indian Ministry of Environment and Forest should issue an air quality strategy, water strategy and waste strategy on the lines of those existing in the UK (see above 2.6.1).

4. India should integrate the programme of sustainable development and all departments should adopt a unified approach. (see above 2.6.1).

5. Indian States Forest Departments should issue a vision statement for sustainable management of forest and appropriate strategy to this effect may be put in place (see above 2.6.1).

6. Indian environmental laws need substantial restructuring for achieving goals of environmental policies as well as to meet her treaty obligations (see above 3.10.10).

7. India should adapt an integrated approach to pollution prevention in the manner of the UK Environmental (Protection) Act 1990 and the UK Pollution Prevention and Control Act 1999, the latter making Integrated Pollution Prevention and Control (IPPC) operational (see above 3.10.10).

8. India should enhance penal provisions in various environmental laws so that they may act as deterrence to willful violators (see above 3.10.10).

9. Indian Forest Act 1927 should be restructured to achieve the aims of the National Forest Policy 1988 and other international environmental law principles including sustainable development (see above 3.10.10).

10. The Government of India should establish a permanent professional and autonomous body on environmental pollution on the lines of the Royal Commission on Environmental Pollution (RCEP) (see above 3.10.10).

11. Indian Central Pollution Control Board should issue a policy on prosecution and detailed guidance notes on the lines of the Environment Agency's Prosecution Policy and Functional Guidelines. Like wise forest departments in India should also issue policy on prosecution and enforcement for efficient implementation of the forestry laws (see above 4.4.6).

12. Indian Ministry of Environment and Forest should expedite introduction of incentive based instruments to supplement the command and control regime (see above 4.4.6).

13. England should increase use of broad based instruments including policy mix for achieving the objects of various environmental policies more effectively (see above 4.4.6).

14. Indian environmental enforcement agencies should take steps to ensure compliance with environmental laws rather than some public-spirited citizens performing this function by filing writ petitions in the Indian Supreme Court and the High Courts for environmental protection (see above 5.6.5).

15. The higher judiciary in the UK may draw *inspirations* from the novel environmental jurisprudence developed by the Indian Supreme Court (see above 5.6.5).

16. Both India and the UK may learn lessons from abroad in establishing an environmental court (see above 5.6.5).

APPENDIX 1

(As available on Indian JUDIS CD on 17 April 2002)

T.N. GODAVARMAN THIRUMULKPAD VS UNION OF INDIA & ORS.

PETITIONER:
T.N. GODAVARMAN THIRUMULKPAD
RESPONDENT:
UNION OF INDIA & ORS.

DATE OF JUDGEMENT: 12/12/96

JUDGE NAME:
J.S. VERMA, B.N. KIRPAL

ACTS/RULES/ORDER:

HEADNOTE:

JUDGEMENT:

(With W.P.(Civil) No. 171/96)

O R D E R

In view of the great significance of the points involved in these matters, relating to the protection and conservation of the forests throughout the country, it was considered necessary that the Central Government as well as the Governments of all the States are heard. Accordingly, notice w as issued to all of them. We have heard the learned Attorney General for the Union of India, learned counsel appearing for the States and the parties/applicants and, in addition, the learned Amicus Curiae, Shri H.N. Salve, assisted by Sarvashri U. U. Lalit, Mahender Das and P.K. Manohar. After hearing all the learned counsel, who have rendered very able assistance to the court, we have formed the opinion that the matters require a further indepth hearing to examine all the aspects relating to the National Forest Policy. For this purpose, several points which emerged during the course of the hearing require further study by the learned counsel and, therefore, we defer the continuation of this hearing for some time to enable the

learned counsel to further study these points.

However, we are of the opinion that certain interim directions are necessary at this stage in respect of some aspects. We have heard the learned Attorney General and the other learned counsel on these aspects.

It has emerged at the hearing, that there is a misconception in certain quarters about the true scope of the Forest Conservation Act, 1980 (for short the `Act') and the meaning of the word "forest" used therein. There is also a resulting misconception about the need of prior approval of the Central Government, as required by Section 2 of the Act, in respect of certain activities in the forest area which are more often of a commercial nature. It is necessary to clarify that position.

The Forest Conservation Act, 1980 was enacted with a view to check further deforestation which ultimately results in ecological imbalance; and therefore, the provisions made therein for the conservation of forests and fore matters connected therewith, must apply to all forests irrespective of the nature of ownership or classification thereof. The word "forest: must be understood according to its dictionary meaning. This description cover all statutorily recognised forests, whether designated as reserved, protected or otherwise for the purpose of Section 2(i) of the Forest Conservation Act. The term "forest land", occurring in Section 2, will not only include "forest" as understood in the dictionary sense, but also any area recorded as forest in the Government record irrespective of the ownership. This is how it has to be understood for the purpose of Section 2 of the Act. The provisions enacted in the Forest Conservation Act, 1980 for the conservation of forests and the matters connected therewith must apply clearly to all forests so understood irrespective of the ownership or classification thereof. This aspect has been made abundantly clear in the decisions of this Court in Ambica Quarry Works and ors. versus State of Gujarat and ors. (1987 (1) SCC 213), Rura' Litigation and Entitlement Kendra versus State of U.P. (1989 Suppl. (1) SCC 504), and recently in the order dated 29th November, 1996 in W.P.(C) No.749/95 (Supreme Court Monitoring Committee vs. Mussorie Dehradun Development Authority and ors.). The earlier decision of this Court in State of Bihar Vs. BanshiRam Modi and ors. (1985 (3) SCC 643) has, therefore, to be understood in the light of these subsequent decisions. We consider it necessary to reiterate this settled position emerging from the decisions of this court to dispel the doubt, if any, in the perception of any

State Government or authority. This has become necessary also because of the stand taken on behalf of the State of Rajasthan, even at this late stage, relating to permissions granted for mining in such area which is clearly contrary to the decisions of this court. It is reasonable to assume that any State Government which has failed to appreciate the correct position in law so far, will forthwith correct its stance and take the necessary remedial measures without any further delay.

We further direct as under:-

I. General:

1. In view of the meaning of the word "forest" in the Act, it is obvious that prior approval of the Central Government is required for any non-forest activity within the area of any "forest". In accordance with Section 2 of the Act, all on-going activity within any forest in any State throughout the country, without the prior approval of the Central Government, must cease forthwith. It is, therefore, clear that the running of saw mills of any kind including veneer or ply-wood mills, and mining of any mineral are non-forest purposes and are, therefore, not permissible without prior approval of the Central Government. Accordingly, any such activity is prima facie violation of the provisions of the Forest Conservation Act, 1980. Every State Government must promptly ensure total cessation of all such activities forthwith.

2. In addition to the above, in the tropical wet ever-green forests of Tirap and Changlang in the State of Arunachal Pradesh, there would be a complete ban on felling of any kind of trees therein because of their particular significance to maintain ecological balance needed to preserve bio-diversity. All saw mills, veneer mills and ply-wood mills in Tirap and Changlang in Arunachal Pradesh and within a distance of 100 Kms. from its border, in Assam, should also be closed immediately. The State Governments of Arunachal Pradesh and Assam must ensure compliance of this direction.

3. The felling of trees in all forests is to remain suspended except in accordance with the Working Plans of the State Governments, as approved by the Central Government. In the absence of any Working Plan in any particular State, such as Arunachal Pradesh, where the permit system exists, the felling under the permits can be done only by the Forest Department of the State Government or the State Forest Corporation.

4. There shall be a complete ban on the movement of cut

trees and timber from any of the seven North-Eastern States to any other State of the country either by rail, road or water-ways. The Indian Railways and the State Governments are directed to take all measures necessary to ensure strict compliance of this direction. This ban will not apply to the movement of certified timber required for defence or other Government purpose. This ban will also not affect felling in any private plantation comprising of trees planted in any are which is not a forest.

5. Each State Government should constitute within one month an Expert Committee to:

(i) Identify areas which are "forests", irrespective of whether they are so notified, recognised or classified under any law, and irrespective of the ownership of the land of such forest;

(ii) identify areas which were earlier forests but stand degraded, denuded or cleared; and

(iii) identify areas covered by plantation trees belonging to the Government and those belonging to private persons.

6. Each State Government should within two months, file a report regarding:-

(i) the number of saw mills, veneer and plywood mills actually operating within the State, with particulars of their real ownership;

(ii) the licensed and actual capacity of these mills for stock and sawing;

(iii) their proximity to the nearest forest;

(iv) their source of timber.

7. Each State Government should constitute within one month, an Expert Committee to assess :

(i) the sustainable capacity of the forests of the State qua saw mills and timber based industry;

(ii) the number of existing saw mills which can safely be sustained in the State;

(iii) the optimum distance from

the forest, qua that State, at which the saw mill should be located.

8. The Expert Committees so constituted should be requested to give its report within one month of being constituted.

9. Each State Government would constitute a Committee comprising of the Principal Chief Conservator of Forests and another Senior Officer to oversee the compliance of this order and file status reports.

II. FOR THE STATE OF JAMMU & KASHMIR:

1. There will be no felling of trees permitted in any "forest", public or private. This ban will not affect felling in any private plantations comprising of trees planted by private persons or the Social Forestry Department of the State of Jammu & Kashmir and in such plantations, felling will be strictly in accordance with law.

2. In `forests', the State Government may either departmentally or through the State Forest Corporation remove fallen trees or fell and remove diseased or dry standing timber, and that only from areas other than those notified under the Jammu & Kashmir Wild Life Protection Act, 1978 or any other law banning such felling or removal of trees.

3. For this purpose, the State Government will constitute an Expert Committee comprising of a representative being an IFS Officer posted in the State of Jammu & Kashmir, a representative of the State Government, and two private experts of eminence and the Managing Director of the State Forest Corporation (as Member Secretary) who will fix the qualitative and quantitative norms for the felling of fallen trees, diseased and dry standing trees. The State shall ensure that the trees so felled and removed by it are strictly in accordance with these norms.

4. Any felling of trees in forest or otherwise or any clearance of land for execution of projects, shall be in strict compliance with the Jammu & Kashmir Forest Conservation Act, 1990 and any other laws applying thereto. However, any trees so felled, and the disposal of such trees shall be done exclusively by the State Forest Corporation and no private agency will be permitted to deal with this aspect. This direction will also cover the submerged areas of the THEIN Dam.

5. All timber obtained, as aforesaid or otherwise, shall be utilised within the State, preferably to meet the timber and fuel wood requirements of the local people, the

Government and other local institutions.

6. The movement of trees or timber (sawn or otherwise) from the State shall, for the present, stand suspended, except for the use of DGS & D, Railways and Defence. Any such movement for such use will -

a) be effected after due certification, consignment-wise made by the Managing Director of the State Corporation which will include certification that the timber has come from State Forest Corporation sources; and

b) be undertaken by either the Corporation itself, the Jammu & Kashmir Forest Department or the receiving agency.

7. The State of Jammu & Kashmir will file, preferably within one month from today, a detailed affidavit specifying the quantity of timber held by private persons purchased from State Forest Corporation Depots for transport outside the State (other than for consumption by the DGS & D, Railways and Defence). Further directions in this regard may be considered after the affidavit is filed.

8. No saw mill, veneer or plywood mill would be permitted to operate in this State at a distance of less than 8 Kms. from the boundary of any demarcated forest areas. Any existing mill falling in this belt should be relocated forthwith.

III. FOR THE STATE OF HIMACHAL PRADESH AND THE HILL REGIONS OF THE STATES OF UTTAR PRADESH AND WEST BENGAL:

1. There will be no felling of trees permitted in any forest, public or private. This ban will not affect felling in any private plantation comprising of trees planted in any area which is not a `forest'; and which has not been converted from an earlier "forest". This ban will not apply to permits granted to the right holders for their bonafide personal use in Himachal Pradesh.

2. In a `forest', the State Government may either departmentally or through the State Forest Corporation remove fallen trees or fell and remove diseased or dry standing timber from areas other than those notified under Section 18 or Section 35 of the Wild Life Protection Act, 1972 or any other Act banning such felling or removal of trees.

3. For this purpose, the State Government is to constitute an expert Committee comprising a representative from MOEF, a

representative of the State Government, two private experts of eminence and the MD of the State Forest Corporation (as Member Secretary), who will fix the qualitative and quantitative norms for the felling of fallen trees and diseased and standing timber. The State shall ensure that the trees so felled and removed are in accordance with these norms.

4. Felling of trees in any forest or any clearance of forest land in execution of projects shall be in strict conformity with the Forest Conservation Act, 1980 and any other laws applying thereto. Moreover, any trees so felled, and the disposal of such trees shall be done exclusively by the State Forest Corporation and no private agency is to be involved in any aspect thereof.

IV. FOR THE STATE OF TAMIL NADU:

1. There will be a complete ban on felling of trees in all forest areas'. This will however not apply to:-

(a) trees which have been planted and grown, and are not of spontaneous growth, and

(b) are in areas which were not forests earlier, but were cleared for any reason.

2. The State Government, within four weeks from today, is to constitute a committee for identifying all "forests".

3. Those tribals who are part of the social forestry programme in respect of patta lands, other than forests, may continue to grow and cut according to the Government Scheme provided that they grow and cut trees in accordance with the law applicable.

4. In so f ar as the plantations (tea, coffee, cardamom etc.) are concerned, it is directed as under:

a) The felling of shade trees in these plantations will be -

i) limited to trees which have been planted, and not those which have grown spontaneously;

ii) limited to the species identified in the TANTEA report;

iii) in accordance with the recommendations of (including to the extent recommended by) TANTEA; and

iv) under the supervision of the statutory committee constituted by the State Government.

b) In so far as the fuel trees planted by the plantations for fuel wood outside the forest area are concerned, the State Government is directed to obtain within four weeks, a report from TANTEA as was done in the case of Shade trees, and the further action for felling them will be as per that report. Meanwhile, eucalyptus and wattle trees in such area may be felled by them for their own use as permitted by the statutory committee.

c) the State Government is directed to ascertain and identify those areas of the plantation which are a "forest" and are not in active use as a plantation. No felling of any trees is however to be permitted in these areas, and sub-paras (b) and (c) above will not apply to such areas.

d) There will be no further expansion of the plantations in a manner so as to involve encroachment upon (by way of clearing or otherwise) of "forests".

5. As far as the trees already cut, prior to the interim order of this court dated December 11, 1995 are concerned, the same may be permitted to be removed provided they were not so felled from Janmam land. The State Government would verify these trees and mark them suitably to ensure that this order is duly complied with. For the present, this is being permitted as a one time measure.

6. Insofar as felling of any trees in Janmam lands is concerned (whether in plantations ore otherwise), the ban on felling will operate subject to any order made in the Civil Appeal Nos. 367 to 375 of 1977 in C.A. Nos. 1344-45 of 1976. After the order is made in those Civil Appeals on the I.As. pending therein, if necessary, this aspect may be re-examined.

7. This order is to operate and to be implemented, notwithstanding any order at variance, made or which may be made by any Government or any authority, tribunal or court, including the High Court.

The earlier orders made in these matters shall be read, modified wherever necessary to this extent. This order is to continue, until further orders. This order will operate and be complied with by all concerned, notwithstanding any order at variance, made or which my be made hereafter, by any authority, including the Central or any State Government or any court (including High Court) or Tribunal.

We also direct that notwithstanding the closure of any saw mills or other wood-based industry pursuant to this order, the workers employed in such units will continue to be paid their full emoluments due and shall not be retrenched or removed from service for this reason.

We are informed that the Railway authorities are still using wooden sleepers for laying tracks. The Ministry of Railways will file an affidavit giving full particulars in this regard including the extent of wood consumed by them, the source of supply of wood, and the steps taken by them to find alternatives to the use of wood.

I.A. Nos. 7,9,10,11,12,13 and 14 in Writ Petition (Civil) No. 202 of 1995 and I.A. Nos. 1,3,4,5,6,7,8 & 10 in Writ Petition (Civil) No. 171 of 1996 are disposed of, accordingly.

List the matter on February 25, 1997 as part-heard for further hearing.

APPENDIX 2

ENFORCEMENT AND PROSECUTION POLICY

THE ENVIRONMENT AGENCY
ENFORCEMENT AND PROSECUTION POLICY

INTRODUCTION

1. The Environment Agency's aim is to provide a better environment for England and Wales both for the present and for the future. It will achieve much of this through education, by providing advice and by regulating the activities of others. Securing compliance with legal regulatory requirements, using enforcement powers including prosecution, is an important part of achieving this aim.

2. The Agency's functions are extensive. They include pollution control, waste regulation, the management of water resources, flood defence, fisheries, conservation and navigation. The activities dealt with range from the regulation of recreational pursuits to the most complicated industrial processes.

3. Agency staff work with Local Government and other Regulators on matters such as planning, air pollution, public health and occupational safety to ensure coherent regulation. They also work with many conservation bodies, voluntary groups and non governmental organisations in order to achieve common goals.

4. The Agency regards prevention as better than cure. It offers information and advice to those it regulates and seeks to secure co-operation avoiding bureaucracy or excessive cost. It encourages individuals and businesses to put the environment first and to integrate good environmental practices into normal working methods.

5. This Policy sets out the general principles which the Agency intends to follow in relation to enforcement and prosecution. It is to be used in conjunction with more detailed specific guidance for staff in respect of each of the Agency's functions. The implementation and effectiveness of the Policy will be monitored by the Agency.

PURPOSE AND METHODS OF ENFORCEMENT

6. The purpose of enforcement is to ensure that preventative or remedial action is taken to protect the environment or to secure compliance with a regulatory system. The need for enforcement may stem from an unlicensed 'incident' or from a breach of the conditions of a licensed activity. Although the Agency expects full voluntary compliance with relevant legislative requirements and licence provisions, it will not hesitate to use its enforcement powers where necessary.

7. The powers available include enforcement notices and works notices (where contravention can be prevented or needs to be remedied), prohibition notices (where there is an imminent risk of serious environmental damage), suspension or revocation of environmental licences[1], variation of licence conditions, injunctions and the carrying out of remedial works. Where the Agency has carried out remedial works, it will seek to recover the full costs incurred from those responsible.

8. Where a criminal offence has been committed, in addition to any other enforcement action, the Agency will consider instituting a prosecution, administering a caution or issuing a warning.

PRINCIPLES OF ENFORCEMENT

9. **The Agency believes in firm but fair regulation**. Underlying the policy of firm but fair regulation are the principles of; ***proportionality*** in the application of the law and in securing compliance; ***consistency*** of approach, ***transparency*** about how the Agency operates and what those regulated may expect from the Agency, and ***targeting*** of enforcement action.

Proportionality

10. In general, the concept of proportionality is included in much of the regulatory system through the balance of action to protect the environment against risks and costs.

11. Some incidents or breaches of regulatory requirements cause or have the potential to cause serious environmental damage. Others may interfere with people's

enjoyment or rights, or the Agency's ability to carry out its activities. The Agency's first response is to prevent harm to the environment from occurring or continuing. The enforcement action taken by the Agency will be proportionate to the risks posed to the environment and to the seriousness of any breach of the law.

Consistency

12. Consistency means taking a similar approach in similar circumstances to achieve similar ends. The Agency aims to achieve consistency in, advice tendered, the response to pollution and other incidents, the use of powers and decisions on whether to prosecute.

13. However, the Agency recognises that consistency does not mean simple uniformity. Officers need to take account of many variables; the scale of environmental impact, the attitude and actions of management and the history of previous incidents or breaches. Decisions on enforcement action are a matter of professional judgement and the Agency, through its officers, needs to exercise discretion. The Agency will continue to develop arrangements to promote consistency including effective arrangements for liaison with other enforcing authorities.

Transparency

14. Transparency is important in maintaining public confidence in the Agency's ability to regulate. It means helping those regulated and others, to understand what is expected of them and what they should expect from the Agency. It also means making clear why an officer intends to, or has taken enforcement action.

15. Transparency is an integral part of the role of Agency Officers and the Agency continues to train its staff and to develop its procedures to ensure that:-

- where remedial action is required, it is clearly explained (in writing, if requested) why the action is necessary and when it must be carried out; a distinction being made between best practice advice and legal requirements.

- opportunity is provided to discuss what is required to comply with the law before formal enforcement action is taken, unless urgent action is required, for example, to protect the environment or to prevent evidence being destroyed.

- where urgent action is required, a written explanation of the reasons is provided as soon as practicable after the event.

- written explanation is given of any rights of appeal against formal enforcement action at the time the action is taken.

Targeting

16. Targeting means making sure that regulatory effort is directed primarily towards those whose activities give rise to or risk of serious environmental damage, where the risks are least well controlled or against deliberate or organised crime. Action will be primarily focused on lawbreakers or those directly responsible for the risk and who are best placed to control it.

17. The Agency has systems for prioritising regulatory effort. They include the response to complaints from the public about regulated activities, the assessment of the risks posed by a licence holder's operations and the gathering and acting on intelligence about illegal activity.

18. In the case of regulated industries, management actions are important. Repeated incidents or breaches of regulatory requirements which are related may be an indication of an unwillingness to change behaviour, or an inability to achieve sufficient control and may require a review of the regulatory requirements, the actions of the Operator and additional investment. A relatively low hazard site or activity poorly managed has potential for greater risk to the environment than a higher hazard site or activity where proper control measures are in place. There are, however, high hazard sites (for example, nuclear installations, some major chemical plants or some waste disposal facilities) which will receive regular visits so that the Agency can be sure that remote risks continue to be effectively managed. The Agency will continue to develop models and tools to enable risks to be assessed and compared.

PROSECUTION

Purpose

19. The use of the criminal process to institute a prosecution is an important part of enforcement. It aims to punish wrongdoing, to avoid a recurrence and to act as a deterrent to others. It follows that it may be appropriate to use prosecution in conjunction with other available enforcement tools, for example, a prohibition notice requiring the operation to stop until certain requirements are met. Where the circumstances warrant it, prosecution without prior warning or recourse to alternative sanctions will be pursued.

20. The Agency recognises that the institution of a prosecution is a serious matter that should only be taken after full consideration of the implications and consequences. Decisions about prosecution will take account of the Code for Crown Prosecutors.

Sufficiency of Evidence

21. A prosecution will not be commenced or continued by the Agency unless it is satisfied that there is sufficient, admissible and reliable evidence that the offence has been committed and that there is a realistic prospect of conviction. If the case does not pass this evidential test, it will not go ahead, no matter how important or serious it may be. Where there is sufficient evidence, a prosecution will not be commenced or continued by the Agency unless it is in the public interest to do so. Public interest factors that can affect the decision to prosecute usually depend on the seriousness of the offence or the circumstances of the offender.

Public Interest Factors

22. The Agency will consider the following factors in deciding whether or not to prosecute:

- **environmental effect** of the offence,
- **foreseeability** of the offence or the circumstances leading to it,
- **intent** of the offender, individually and/or corporately,
- **history** of offending,

- **attitude** of the offender,
- **deterrent effect** of a prosecution, on the offender and others.
- **personal circumstances** of the offender

23. The factors are not exhaustive and those which apply will depend on the particular circumstances of each case. Deciding on the public interest is not simply a matter of adding up the number of factors on each side. The Agency will decide how important each factor is in the circumstances of each case and go on to make an overall assessment.

Companies and Individuals

24. Criminal proceedings will be taken against those persons responsible for the offence. Where a Company is involved, it will be usual practice to prosecute the Company where the offence resulted from the Company's activities. However, the Agency will also consider any part played in the offence by the officers of the Company, including Directors, Managers and the Company Secretary. Action may also be taken against such officers (as well as the Company) where it can be shown that the offence was committed with their consent, was due to their neglect or they 'turned a blind eye' to the offence or the circumstances leading to it. In appropriate cases, the Agency will consider seeking disqualification of Directors under the Companies Act.

Choice of Court

25. In cases of sufficient gravity, for example serious environmental damage over a wide area, where circumstances allow, consideration will be given to requesting the magistrates to refer the case to the Crown Court. The same factors as listed in paragraph 22 (above) will be used, but including consideration of the sentencing powers of the Magistrates' Court.

Penalties

26. The existing law gives the courts considerable scope to punish offenders and to deter others. Unlimited fines and, in some cases, imprisonment may be imposed by the higher courts. The Agency will continue to raise the awareness of the

courts to the gravity of many environmental offences and will encourage them to make full use of their powers. Examples of penalties presently available to the courts for certain environmental offences are:-

- Magistrates' Courts; up to 6 months imprisonment and/or £20,000 fine.
- Crown Court: up to 5 years imprisonment and/or an unlimited fine.

27. The Agency will always seek to recover the costs of investigation and Court proceedings.

Presumption of Prosecution

28. Where there is sufficient evidence, the Agency will normally prosecute in any of the following circumstances:-

incidents or breaches which have significant consequences for the environment or which have the potential for such consequences. The Agency takes seriously such incidents or breaches.

carrying out operations without a relevant licence. It is a pre-requisite to successful regulation that those required to be regulated come within the appropriate licensing system.

excessive or persistent breaches of regulatory requirements in relation to the same licence or site.

failure to comply or to comply adequately with formal remedial requirements. It is unacceptable to ignore remedial requirements and unfair to those who do take action to comply.

reckless disregard for management or quality standards. It is in the interests of all that irresponsible operators are brought into compliance or cease operations.

failure to supply information without reasonable excuse or knowingly or recklessly supplying false or misleading information. It is essential that lawful requests for information by the Agency are complied with and that accurate information is always supplied to enable informed regulation to be exercised.

obstruction of Agency staff in carrying out their powers. The Agency regards the obstruction of, or assaults on, its staff while lawfully carrying out their duties as a serious matter.

impersonating Agency staff. The Agency regards impersonation of staff, for example, in order to gain access to premises wrongfully, as a serious matter.

Alternatives to Prosecution

29. In cases where a prosecution is not the most appropriate course of action, the alternatives of a caution or warning will be considered, the choice depending on the factors referred to above.

30. A caution is the written acceptance by an offender that they have committed an offence and may only be used where a prosecution could properly have been brought. It will be brought to the Court's attention if the offender is convicted of a subsequent offence.

31. A warning is a written notification that, in the Agency's opinion, an offence has been committed. It will be recorded and may be referred to in subsequent proceedings.

32. As with a prosecution, additional enforcement mechanisms may also be used in conjunction with a caution or warning.

Working with other Regulators

33. Where the Agency and another enforcement body both have the power to prosecute, the Agency will liaise with that other body, to ensure effective co-ordination, to avoid inconsistencies, and to ensure that any proceedings instituted are for the most appropriate offence.

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