

LAW COMMISSION OF INDIA

ONE HUNDRED EIGHTY SIXTH REPORT

ON

PROPOSAL TO CONSTITUTE ENVIRONMENT
COURTS

SEPTEMBER, 2003

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September 23,

Dear Sri Arun Jaitley ji,

I have great pleasure in forwarding the 186th Report of the Law Commission on 'Proposal to constitute Environment Courts'.

Pursuant to the observations of the Supreme Court of India in four judgments, namely, M.C. Mehta vs. Union of India, 1986 (2) SCC 176; Indian Council for Environmental-Legal Action Vs Union of India: 1996(3)SCC 212; A.P. Pollution Control Board Vs M.V. Nayudu:1999(2)SCC 718 and A.P. Pollution Control Board Vs M.V. Nayudu II: 2001(2)SCC62, the Law Commission has undertaken a detailed study of the subject of "Environmental Courts". In the 3rd of the above judgments, reference was made to the idea of a "multi-faceted" Environmental Court with judicial and technical/scientific inputs as formulated by Lord Woolf in England recently and to Environmental Court legislations as they exist in Australia, New Zealand and other countries. Having regard to the complex issues of fact of science and technology which arise in environmental litigation and in particular in the elimination of pollution in air and water, it is now recognized in several countries that the Courts must not only consist of Judicial Members but must also have a statutory panel of members comprising Technical or Scientific experts. We may in this context refer to the recent Report of Dr. Malcolm Grant in UK(2000) and also to the Report of the Royal Commission (23rd Report , March 2002).

With Judicial and Technical inputs on the Bench, the Environmental Courts in Australia and New Zealand function as appellate Courts against orders passed under the corresponding Water Acts, Air Acts and Noise Acts and various Environment related Acts and also have original jurisdiction. They have all the powers of a Civil Court. Some have even powers of a Criminal Court.

The Commission has, therefore, prepared a Report (copy enclosed) containing Chapters I to X reviewing the Laws on "Environment Courts" in each State (or for group of States) and suggested in Chapters IX and X that these Courts must be established to reduce the pressure and burden on the High Courts and Supreme Court. These Courts will be Courts of fact and law, exercising all powers of a civil court in its original jurisdiction. They will also have appellate judicial powers against orders passed by the concerned authorities under the Water (Prevention and Control of Pollution) Act, 1974; Air (Prevention and Control of Pollution) Act, 1981 and The Environment (Protection) Act, 1986 with an enabling provision that the Central Government may notify these Courts as appellate courts under other environment related Acts as well. Such a law can be made under Art. 253 of the Constitution of India, read with Entry 13A of List I of Schedule VII to give effect to decisions taken in Stockholm Conference of 1972 and Rio Conference of 1992.

The proposed Environment Courts at the State level will, in the Commission's view, be accessible to citizens in each State.

It has been, however, reported in the press recently that Government has taken a decision that there will not only be regional authorities constituted under Section 3 of the Environment (Protection) Act, 1986 (for which there can be no objection) but that there will be a single appellate body (consisting inter alia, a Supreme Court Judge) at Delhi. It is also reported that the Union Cabinet has approved this proposal.

The Commission is of the view that if there is a single appellate authority as proposed, at Delhi, it will be almost inaccessible to the citizens of the country in remote parts and serious issues relating to environment will remain un-addressed since there will not be an effective right of access to Courts. The appeal, it will be noticed, is the first opportunity for affected citizens to question decisions taken by the authorities. Further, in the proposal of the Government, there is no provision for technical/scientific inputs in the centralized Appellate Authority. Moreover, the proposal does not make the said Court at Delhi an appellate authority under the Water Act or Air Act but it remains an appellate authority only for purposes of the Environment (Protection) Act, 1986. As at present, the appellate authorities under the Water Act and Air Act are government officials and there are neither Judges nor Technical personnel involved in the decision making process under those Acts and orders passed thereunder are being questioned only under Art. 226 or Art. 32. There is no reason why the appeals under these two Acts should not go before a Judicial body within each State.

The scheme proposed by the Law Commission in this Report, on the other hand, is very comprehensive. The Judicial body will be an Environment Court at State Level consisting of sitting/retired judges or members of the Bar with more than 20 years standing, assisted by a statutory panel of experts in each State. It will be a Court of original jurisdiction on all environmental issues and also an appellate authority under all the three Acts, viz., Water Act, Air Act and Environment (Protection) Act, 1986 and will reduce the burden of High Courts/Supreme Court. There will lie a further statutory appeal direct to the Supreme Court against the judgment of the proposed Environment Court. In our view, this scheme is preferable to the Government's proposal of a single appellate Court at Delhi, which will be beyond the reach of affected parties.

We, therefore, request you to kindly take up the matter with the Ministry of Environment for further discussion at your earliest, before any law is passed in this behalf.

With regards

Yours sincerely,

(M. Jagannadha Rao)

Shri Arun Jaitley
Union Minister for Law and Justice
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Chapter I

INTRODUCTORY

In the Judgment of the Supreme Court of India in A.P. Pollution Control Board vs. M.V. Nayudu: 1999(2) SCC 718, the Court referred to the need for establishing Environmental Courts which would have the benefit of expert advice from environmental scientists/technically qualified persons, as part of the judicial process, after an elaborate discussion of the views of jurists in various countries. In the subsequent follow-up judgment in A.P. Pollution Control Board vs. M.V. Nayudu: 2001(2) SCC 62, the Supreme Court, referred to the serious differences in the constitution of appellate authorities under plenary as well as delegated legislation (the reference here is to the appellate authorities constituted under the Water (Prevention and Control of Pollution) Act, 1974 and Air (Prevention and Control of Pollution) Act, 1981), and pointed out that except in one State where the appellate authority was manned by a retired High Court Judge, in other States they were manned only by bureaucrats. These appellate authorities were not having either judicial or environment back-up on the Bench. The Supreme Court opined that the Law Commission could therefore examine the disparities in the constitution of these quasi-judicial bodies and suggest a new scheme so that there could be uniformity in the structure of the quasi-judicial bodies which supervise the orders passed by administrative or public authorities, including orders of the Government. For instance, these

appellate bodies can examine the correctness of the decision of a pollution control board to grant or refuse a no-objection certificate to an industry in terms of the Water Act. Environmental Courts were advocated in two earlier judgments also. One was M.C. Mehta vs. Union of India: 1986(2) SCC 176 (at page 202) where the Supreme Court said that in as much as environment cases involve assessment of scientific data, it was desirable to set up environment courts on a regional basis with a professional Judge and two experts, keeping in view the expertise required for such adjudication. There should be an appeal to the Supreme Court from the decision of the environment court. The other judgment was Indian Council for Enviro-Legal Action vs. Union of India, 1996(3) SCC 212, in which the Supreme Court observed (see p. 252) that Environmental Courts having civil and criminal jurisdiction must be established to deal with the environmental issues in a speedy manner.

We may also state that the National Environmental Appellate Authority constituted under the National Environmental Appellate Authority Act, 1997, for the limited purpose of providing a forum to review the administrative decisions on Environment Impact Assessment, had very little work. It appears that since the year 2000, no Judicial Member has been appointed. So far as the National Environmental Tribunal Act, 1995 is concerned, the legislation has yet to be notified despite the expiry of eight years. Since it was enacted by Parliament, the Tribunal under the Act is yet to be constituted. Thus, these two Tribunals are non-functional and remain only on paper.

In view of the observations of the Supreme Court in the above said judgments, and having regard to the inadequacies of the existing appellate authorities, - which neither contain judges nor have the assistance of experts - and their limited jurisdiction, - the Commission proposed to review the position with a view to bring uniformity in the constitution of these bodies and the scope of their jurisdiction. These bodies must, in our view, be called 'Environmental Courts' and should consist of judicial members assisted by technical experts. Our scheme as proposed in Chapter IX is that there should be an Environmental Court in each State (or in some cases for one or more States) which should be able to take on the burden of the environmental cases from the High Courts and at the same time decide these cases with the help of experts. An Environmental Court at the level of each State is proposed so as to be accessible to the litigants in each State. The said Court must have appellate jurisdiction over the authorities under Water Act, 1974, Air Act, 1981 and the Environment (Protection) Act, 1986. It is proposed that the Environment Court should exercise original as well as appellate jurisdiction. It should be able to grant all orders which a Civil Court could grant, including the grant of 'compensation' as visualized by the National Environmental Tribunal Act, 1995.

The alternative suggestion for having a single appellate Court at Delhi over the statutory authorities has not appealed to us inasmuch as practically no person or groups of persons residing in any local area who are aggrieved by orders of these authorities will be able to come all the way to Delhi to raise their grievances. If the Court is a single Court in Delhi, it will not be accessible and several environmental issues will remain stagnant, may not be pursued and will remain unadjudicated by a Court of law.

Access to justice, particularly, in matters relating to environment, is an essential facet of Article 21 of the Constitution of India. The proposals for constitution of Environmental Court is dealt with in detail in Chapter IX.

While dealing with this subject of Environmental Courts, which is of great importance for the millions of our country, we have to keep in mind several aspects such as the following:

- (a) The uncertainties of scientific conclusions and the need to provide, not only expert advice from the Bar but also a system of independent expert advice to the Bench itself.
- (b) The present inadequacy of the knowledge of Judges on the scientific and technical aspects of environmental issues, such as, whether the levels of pollution in a local area are within permissible limits or whether higher standards of permissible limits of pollution require to be set up.
- (c) The need to maintain a proper balance between sustainable development and control/regulation of pollution by industries.
- (d) The need to strike a balance between closure of polluting industries and reducing or avoiding unemployment or loss of livelihood.
- (e) The need to make a final appellate view at the level of each State on decisions regarding 'environmental impact assessment'.
- (f) The need to develop a jurisprudence in this branch of law which is also in accord with scientific, technological developments and international treaties, conventions or decisions.

- (g) To achieve the objectives of Art. 21, 47, 48A and 51A(g) of the Constitution of India by means of a fair, fast and satisfactory judicial procedure.

In this context, several important questions arise for consideration:

- (a) In as much as the proposed changes in law, in some respects, (like water) relate to entries in List II of the VII Schedule to the Constitution, can Parliament enact a law under Art 253 of the Constitution for constituting Environmental Courts both in the States as well as the Centre, without the need for legislation by States or even resolutions of State legislatures under Art. 252?
- (b) Should there be one Environment Court in each State?
- (c) Should these Courts oust the jurisdiction of the High Courts/Supreme Court or should it be left to the discretion of these superior Courts to direct parties to first exhaust (seek) the effective alternative remedy before the proposed Environmental Courts? Should the jurisdiction of normal civil and criminal courts be totally ousted?
- (d) Is there need for a further Environmental Appellate Court at Delhi exercising jurisdiction over the State Environmental Courts or should there be a direct appeal to the Supreme Court from the State Environmental Courts?
- (e) What should be the nature of the jurisdiction of the State Environmental Courts, - should it be only appellate jurisdiction against orders of administrative or public authorities and

government but also original jurisdiction, so as to reduce the burden of PILs in the High Courts?

- (f) What should be the composition of the Courts and qualification of the Members?
- (g) What should be the procedure of these Environmental Courts?
- (h) Should public interest or class actions cases be allowed before the these Courts?
- (i) What relief these Courts should be able to grant – ad interim, final, injunctions (permanent and mandatory), appointment of receivers, grant of compensation/damages etc.?
- (j) Should they exercise civil as well as criminal jurisdiction?
- (k) What is the mode of execution of the orders?
- (l) Should the Court have power to punish wilful disobedience of its orders by exercising power of contempt of Court?
- (m) Should the National Environment Tribunal Act, 1995 and the National Environment Appellate Authority Act, 1997 be repealed and powers and jurisdiction of the tribunals thereunder be vested in the proposed State Environmental Courts?

These and various other aspects concerning Environmental Courts are proposed to be discussed in the following Chapters.

Chapter II

UNCERTAINTY OF SCIENCE AND PROBLEMS OF ENVIRONMENTAL COURTS

While the advances in science and technology in the last few decades have been extraordinary, the fact remains that in certain areas concerning environment, where the data play a crucial role, results of experiments conducted by scientific institutions have remained tentative. The results are accurate in proportion to the accuracy of data and to the extent that experiment by use of technology has been able to eliminate all chances of inaccurate conclusions. In a recent book, it is stated:

“Faced with the growing complexity and globality of ecological phenomenon, science has ceased to be omnipotent. Strictly speaking, it is no longer possible to have so-called technical standards that express the facts in a definitive manner. Complete scientific certainty is the exception, rather than the norm. As pointed out in Hans Jones’ ‘The Imperative of Responsibility’, a paradigm of uncertainty has taken the place of certainty; “whereas Descartes recommended that we hold as false everything that can be questioned, faced with planetary risks, it would, on the contrary be advisable to treat doubt as a possible certainty and thus as a fundamentally positive element in any decision.no longer omniscient, science will not have the power categorically to express single truth..... Henceforth, however, when scientists are committed, they will inform the

decision-maker that their knowledge is incomplete and express doubts and differences, even ignorance.....The disappearance of the alliance between knowledge and power will shatter the Weberian myth of the expert providing indisputable knowledge to a politician who takes decisions that reflect the values he defends.”

(Environmental Principles by Nicolas de Sadeleer, Ch.3, ‘Precautionary Principle’, p. 177-178, Oxford University Press, 2002)

The U.S. Supreme Court, in its landmark judgment in Daubert vs. Merrel Dow Pharmaceuticals Inc: (1993) 113 S.ct. 2786 while referring to the different goals of science and law in the ascertainment of truth observed as follows:

“...there are important differences between the quest for truth in the court-room and the quest for truth in the laboratory. Scientific conclusions are subject to perpetual revision. Law, on the other hand, must resolve disputes finally and quickly.”

On the same lines, Mr. Brian Wyne states in his article ‘Uncertainty and Environmental hearing: (Vol.2, Global Env'tl. Change p 111)(1992) as follows:

“Uncertainty, resulting from inadequate data, ignorance and indeterminacy, is an inherent part of science.”

Uncertainty becomes a problem when scientific knowledge is institutionalized in policy-making or used as a basis for decision-making by

agencies and Courts. Scientists may refine, modify or discard variables or models when more information is available: however, agencies and courts must make choices based on existing scientific knowledge. In addition, agency decision-making evidence is generally presented in a scientific form that cannot be easily tested. Therefore, inadequacies in the record due to uncertainty or insufficient knowledge may not be properly considered. (Charmian Barton: The Status of the Precautionary Principle in Australia: (Vol 22, Harvard Environmental Law Rev. p 509 at pp 510-511 (1998).

The reason for scientific inaccuracies can be summarized as follows:

‘The inadequacies of science result from identification of adverse effects of a hazard and then working backwards to find the causes. Secondly, clinical tests are performed, particularly where toxins are involved, on animals and not on humans,- that is to say, are based on animal studies or short term cell-testing. Thirdly, conclusions based on epidemiological studies are flawed by the scientists’ inability to control or even accurately assess past exposure of the subjects. Moreover, these studies do not permit the scientists to isolate the effects of the substance of concern. The latency period of many carcinogens and the toxins exacerbates problems of later interpretation. The timing between exposure and observable effect creates intolerable delays before regulation occurs’ (see Alyson C. Flournay: Scientific Uncertainty in Protective Environmental Decision-Making’ (Vol 15, 1991. Harv. Environmental Law Rev. p 327 at pp 333-335).

From the above survey of views, it is quite clear that the opinions as to science which may be placed before the Court keep the Judge always guessing whether to accept the fears expressed by an affected party or to accept the assurances given by a polluter.

In an earlier case, namely, Vincent vs. Union of India: (AIR 1987 SC 990), a direction was sought in public interest, for banning import, manufacture, sale and distribution of certain drugs as recommended by the Drugs Consultative Committee. In this case the Supreme Court did not think of referring the matter to an independent scientific body but felt compelled to accept the Committee's Report. It said:

“Having regard to the magnitude, complexity and technical nature of the enquiry involved in the matter and keeping in view the far-reaching implications of the total ban of certain medicines for which the petitioner has prayed, we must at the outset clearly indicate that a judicial proceeding of the nature initiated is not an appropriate one for determination of such matters.”

The Court felt that once the experts had approved or disapproved the drugs, the Court will not go into the correctness of their decision.

But, in a latter case, the Supreme Court made an effort to refer the issues to an independent committee of experts. In Dr. Shivrao vs. Union of India: AIR 1988 SC 953, 7500 cartons (200 MT) of Irish Butter were imported into India under the EEC Grants-in-Aid for Operation Flood Programme and supplied to Greater Bombay. The use of the imported

butter was challenged on the ground that the butter was contaminated by nuclear fallout. The Bombay High Court dismissed the writ petition relying on the report of the Atomic Energy Regulatory Board, a statutory body. The Report however referred to 'permissible limits'. Fortunately, when the matter came to the Supreme Court, the Court 'thought it desirable' to appoint a committee of three experts (1) Prof. M.G.K. Menon, (2) Dr. P.K. Iyengar and (3) G.V.K. Rao to go into the correctness of the so called 'permissible limits' and to give its report on the following question:

“Whether milk and dairy products and other food products containing man-made radio-nuclides within permissible levels by the Atomic Energy Regulatory Board on 27th August, 1987, are safe and /or, harmless for human consumption.”

The Committee of Experts gave a Report stating that the 'permissible limits' laid down by the Atomic Energy Regulatory Board were arrived at after due consideration of 'ICRP limits for the General Population', that the said Board had, in fact, allowed a further safety margin and that the levels fixed were 'safe and harmless'. The Court accepted the Report of Experts and confirmed the dismissal of the writ petition.

In like manner, in A.P. Pollution Control Board vs. M.V. Nayudu 1999(2) SCC 718, the Court proceeded to have the claims of the party tested by experts. There the question was whether the industry was a hazardous one and whether, in case it became operational, the chemical ingredients produced would sooner or later percolate into the substratum of the earth, get mixed up with the underground waters which flow into huge lakes

which are the main sources of drinking water to two metro cities. The issue was whether the oil derivatives such as hydrogenated castor oil, 12-hydroxystearic acid, dehydrated castor oil, methylated 12-HAS, DCO, fatty acids and by-products like glycerine, spent bleaching earth, carbon and spent nickel catalyst would enter the underground water streams flowing into the water lakes. Nickel, which was part of the residue, it was common ground, would be poisonous, if it percolated into the lakes. The industry filed a report of an expert which was accepted by the appellate authority constituted under sec. 28 of the Water Act, 1974 manned by a retired High Court Judge. The learned Judge, basing his decision on the opinion of a single scientist which was produced by the industry, came to the conclusion that if the industry became operational, it would not pose any hazard to the drinking water. This decision was affirmed by the High Court in writ jurisdiction under Art 226 of the Constitution of India. The High Court too simply went by the opinion of the expert scientist which was produced by the industry. But the Supreme Court felt that the opinion of the scientist was not tested or scrutinized by any expert body and required it to be thoroughly examined. The Supreme Court sought expert advice from the National Environmental Appellate Authority (NEAA), which consisted of a retired Judge of the Supreme Court and other experts. The NEAA was permitted to take evidence and obtain technical help from other scientific institutions.

The NEAA visited the site, took oral evidence, examined various technical aspects and gave an elaborate report, containing vast scientific data, as to why the industry should not be permitted to operate. It also consulted the Central Ground Water Board. The NEAA Report went

against the industry. When the matter again came before Court, the industry relied upon an earlier order of the A.P. Pollution Control Board that the industry could be permitted to function if certain safeguards were complied with. The industry sought a further opportunity on this limited contention. The Court then referred the matter to the University Department of Chemical Technology, Bombay, to be assisted by the National Geophysical Research Institute, Hyderabad (NGRI). This was done. The reports of these institutions contained an exhaustive detailed discussion of the scientific data which they freshly procured. The NGRI which is the highest scientific body on geology examined the flow of the underground water streams, and its final conclusion

“from results of multi-parameter investigations (i.e. field investigations, hydrogeological studies, geophysical investigations, electric resistivity investigation, magnetic survey and tracer studies) carried out in the areas, is that hydraulic connectivity exists across the dolerite dyke located between Choudergudi and Sirsilmukhi facilitating the groundwater movement..... In the post-monsoon scenario, the groundwater table will go up and thereby may result in more groundwater flow across the dyke.”

It stated that there was sufficient scope for poisonous residual substitutes like nickel percolating underground and reaching the drinking water sources. On that basis, the Supreme Court set aside the judgment of the High Court and the order of the Authority given under sec. 28 of the Water Act and refused permission for the industry to operate. (A.P. Pollution Control Board vs. M.V. Nayudu: 2001(2) SCC 62). The case is a clear

example of the benefit of extensive scientific investigation. If this scientific investigation was not done, the life of millions of citizens in the two cities could have been endangered. The precautionary principle clearly applied here. Because the Appellate Authority and the High Court did not have the benefit of the opinion of any scientific bodies to test the correctness of the report of the single scientist whose report alone was there available to the appellate authority and the High Court, the decision went in favour of the Industry. But, as the Supreme Court had the benefit of the Reports of these institutions, it could arrive at a different conclusion.

As stated earlier, scientific conclusions are based on the ‘data’ and ‘procedures’ applied by the scientific institutions concerned. The conclusions are correct to the extent of the data available or to the extent of the efficacy of the procedure or technology adopted for analysis. With more data and by application of better scientific procedures, or better technology, a more accurate conclusions can always be arrived at.

Instead of leaving it to the discretion of the Courts to refer or not to refer scientific issues to independent experts, we propose to provide a statutory mechanism to provide scientific advice to the Court concerned.

Complex issues of science and technology arise in court proceedings concerning water and air pollution. For example, we have serious problems of cleansing our rivers, streams and lakes, and cleansing, disposal or recycling of waste and sewage, disposal of toxic waste, hospital waste, nuclear waste, radio active material, removal of the effect of detergents, waste-oils, dealing with genetically modified organisms, adverse effects of

pesticides, asbestos etc. A variety of industries like steel, textiles, leather pose different types of problems of pollution. Air pollution from industries and from traffic today is quite grave. Then we have problems of climatic changes, depletion of ozone etc. We have serious problems of noise both at the work place and in residential areas. There are no proper systems for Environment Impact Assessment. There are problems faced in the matter of protection of forests and wild life. The list of issues is unending.

Technical and scientific problems today arise in a variety of ways and at various stages before the Courts. Some questions arise at the stage of initial establishment of an industry. Other issues arise when the effluent-prevention/cleansing mechanisms or the pollution-prevention or pollution-reduction systems are installed by the industry. The industry would say that these safeguards are sufficient but the Pollution Control Boards may say that they are not sufficient. Even where both may agree that the safeguards are sufficient, members of the public may still find water pollution or air pollution unbearable to bear. Then the question would arise whether the running industry has to be closed or be allowed to continue with better safeguards. There would be need for short-term as well as long term remedies. The point here is that if the industry is closed, it may lead to unemployment of hundreds of employees. It may also result in loss of excise duty or sales tax to the Government. If the industry is to be shifted out, land elsewhere may have to be provided, though for a price. In many cases, the plant itself may have to be shifted. Enormous costs will be involved. If the polluting industry is not shifted, there could be serious danger to the health and well being of citizens in that locality. The Supreme Court in several cases has been going into all these aspects and giving

directions for shifting of industries outside the cities, by framing schemes for payment of compensation for workmen, and for their re-employment and providing land for the industry elsewhere etc.

Prevention of pollution and environmental damage is one side of the story. But, we cannot, at the same time, lose sight of the need for development of our industries, irrigation and power projects. Nor can we ignore the need to improve employment opportunities. There is also the need for generation of revenue by way of excise duties or sales tax and increase our exports to other countries. The Courts must therefore be able to perform a balancing task. That cannot be done effectively, unless the Court gets judicial as well as scientific inputs. The Courts cannot simply close down industries based on the evidence produced by the industry concerned

We may here advert to another problem. There are also many who file public interest cases (PILs) against industries as a measure of blackmail. There are industrialists who would think of abusing the legal procedures for their own gain. Some polluting industries would like to close down under Court orders and would thereby want to escape the statutory procedures which otherwise have to be followed for “closure” of industries as contained in the Industrial Disputes Act, 1947 and want to escape paying compensatory wages to workmen. Some others would like to close down or dismantle the plant and sell away prime land to builders. Some others would want concessions from government for shifting their industries to other places. These problems which are like under-currents, should also be taken care of by the proposed Environmental Court.

It is true that the High Court and Supreme Court have been taking up these and other complex environmental issues and deciding them. But, though they are judicial bodies, they do not have an independent statutory panel of environmental scientists to help and advise them on a permanent basis. They are prone to apply principles like the Wednesbury Principle and refuse to go into the merits. They do not also make spot inspections nor receive oral evidence to see for themselves the facts as they exist on ground. On the other hand, if Environmental Courts are established in each State, these Courts can make spot inspections and receive oral evidence. They can receive independent advice on scientific matters by a panel of scientists.

These Environmental Courts need not be Courts of exclusive jurisdiction. However, the High Courts, even if they are approached under Art. 226 either in individual cases or in PIL cases, where orders of environmental authorities could be questioned, may refuse to intervene on the ground that there is an effective alternative remedy before the specialist Environmental Court. As of now, when we have consumer Courts at the District and State level, the High Courts have consistently refused to entertain writ petitions under Art 226 because parties have a remedy before the fora established under the Consumer Protection Act, 1986. We have also the example of special environmental courts in Australia, New Zealand and in some other countries and these are manned by Judges and expert commissioners. The Royal Commission in UK is also of the view that if environmental courts are established, the High Courts may refuse to

entertain applications for judicial review on the ground that there is an effective alternative remedy before these Courts.

It is for the above reasons we are proposing the establishment of separate environmental courts in each State. In Chapter IX, we propose to give the details of the constitution, power and jurisdiction of these Courts.

Chapter III

THE CONSTITUTIONAL MANDATE AND SURVEY OF SUPREME COURT'S JUDGMENTS ON ENVIRONMENTAL ISSUES:

In a very significant manner, the Supreme Court of India observed in Tarun vs. Union of India (AIR 1992 SC 514) in regard to the importance of environmental issues as follows:

“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.”

Such is the importance of the subject under consideration. We shall first refer to the constitutional provisions relating to environment and then to the judgments of the Supreme Court only to show the range of environmental issues that are today being handled by our constitutional Courts.

Constitutional provisions:

The Indian Constitution contains several provisions which require the State and the citizens to protect environment. Though in the Constitution as it stood on 26.1.1950, there was no specific provision for environmental protection, there were other significant provisions. The following provisions in the Constitution as it originally stood, have a bearing on environment:

“Art 21: Protection of life and personal liberty: No person shall be deprived of his life or personal liberty except according to procedure established by law.

Art 42: Provision for just and humane conditions of work and maternity relief: The State shall make provisions for security just and humane conditions of work and for maternity relief.

Art. 47 : Duty of the State to raise the level of nutritional and the standard of living and to improve public health: The State shall regard the raising of the level of nutrition and the standard of living of its people and the improvement of public health as among its primary duties and, in particular, the State shall endeavour to bring about prohibition of the consumption for medicinal purposes of intoxicating drinks and of drugs which are injurious to health.

Art. 49: Protection of monuments and places and objects of national importance: It shall be the obligation of the State to protect every monument or place or object of artistic or historic interest, declared by or under law made by Parliament, to be of national importance, from spoliation, disfigurement, destruction, removal, disposal or export, as the case may be.”

The Stockholm Declaration of 1972, however, resulted in several amendments to the Constitution. Under the Constitution (Forty-second Amendment) Act, 1976 (which came into force on 3.1.1977), Art. 48A was

introduced in Part IV which is the chapter dealing with Directive Principles. It read as follows:

“Art. 48A. Protection and improvement of environment and safeguarding of forests and wild-life: The State shall endeavour to protect and improve the environment and to safeguard the forests and wild life of the country.”

Art 51A(g) was brought into Part IVA of the Constitution which deals with ‘Fundamental Duties’. That Article reads as follows:

“Art. 51A: Fundamental Duties: It shall be the duty of every citizen of India –

(a) to (f):

(g) to protect and improve the natural environment including forests, lakes, rivers and wildlife and to have compassion for living creatures.”

Under the same Forty-Second Amendment, Forest and protection of wild animals and birds were brought into the Concurrent List as entries 17A and 17B.

Judgments of the Supreme Court:

The Supreme Court of India has made immense contribution to environmental jurisprudence of our country. It has entertained quite a lot of genuine public interest litigation (PIL) cases or class-action cases under Art.

32 of the Constitution. So have the High Courts under Art. 226 of the Constitution. These Courts have issued various directions on a number of issues concerning environment as part of their overall writ jurisdiction and in that context they have developed a vast environmental jurisprudence. They have used Art. 21 of the Constitution of India and expanded the meaning of the word 'life' in that Article as including a "right to a healthy environment".

We shall refer to some of the important decisions of the Supreme Court of India.

The first case of considerable importance is the one in Ratlam Municipality vs. Vardhichand AIR 1980 SC 1622 where the Supreme Court gave directions for removal of open drains and prevention of public excretion by the nearby slum dwellers. The matter came up by way of a criminal appeal. The Court relied upon Art 47 which is in the Part IV of the Constitution relating to the Directive Principles. That Article refers to 'improvement of public health'. In that judgment, the Supreme Court gave several directions to the Ratlam Municipality for maintenance of 'public health'. That judgment was followed in B.L. Wadhwa vs. Union of India AIR 1996 SC 2969 and directions were issued to the Municipal Corporation of old Delhi and New Delhi, for removal of garbage etc.

Long before the Court enlarged its levels of scrutiny, the Supreme Court, in Sachidanand Pandey vs. State of West Bengal: AIR 1987 SC 1109, laid down rules which unfortunately sound like Wednesbury rules applied in administrative law. It said:

“Whenever a problem of ecology is brought before the Court, the Court is bound to bear in mind Art. 48A of the Constitution and Art. 51A(g).....When the Court is called upon to give effect to the Directive Principles and the fundamental duty, the Court is not to shrug its shoulders and say that priorities are a matter of policy and so it is a matter for the policy-making authority. The least that the Court may do is to examine whether appropriate considerations are borne in mind and irrelevancies excluded. In appropriate cases, the Court may go further but how much further must depend on the circumstances of the case. The Court may always give necessary directions.”

This limited nature of scrutiny is no longer followed today by the Courts. Today the Courts appoint independent experts and test the claims of parties on the basis of the expert advice that is given to the Court.

The Court referred to the ancient civilization of our country in Rural Litigation & Entitlement Kendra vs. State of UP AIR 1987 359. There the exploitation of limestone from the Himalayas and its adverse effect on the ecology and environment came up for consideration. The Supreme Court stated: “Over thousands of years, man had been successfully exploiting the ecological system for his sustenance but with the growth of population, the demand for land has increased and forest growth has been and is being cut down and man has started encroaching upon Nature and its assets. Scientific developments have made it possible and convenient for man to approach the places which were hitherto beyond his ken. The consequences of such interference with ecology and environment have now

come to be realized. It is necessary that the Himalayas and the forest growth on the mountain range should be left uninterfered with so that there may be sufficient quantity of rain. The top soil may be preserved without being eroded and the natural setting of the area may remain intact. tapping of (natural) resources have to be done with requisite attention and care, so that ecology and environment may not be affected in any serious way, (and) there may not be any depletion of the water resources and long term planning must be undertaken to keep up the national wealth. It has always to be remembered that these are permanent assets of mankind and are not intended to be exhausted in one generation.... Preservation of the environment and keeping the ecological balance unaffected is a task which not only Governments but also every citizen must undertake. It is a social obligation and let us remind every Indian citizen that it is his fundamental duty as enshrined in Art. 51A(g) of the Constitution.” The Supreme Court then referred to the Stockholm Declaration of 1972.

Indian scriptures were quoted again in the case of Rural Litigation & Entitlement Kendra vs. State of UP AIR 1988 SC 2187. While stopping mining in the forest area in Doon Valley, the Supreme Court quoted from the Atharva Veda (5.30.6) to the following effect:

“Man’s paradise is on earth; This living world is the beloved place of all; It has the blessings of Nature’s bounties; Live in a lovely spirit.”

It was pointed out that it was in these forests in the Himalayas that thousands of years ago, our saints did penance and lived. In ancient times, the trees were worshipped as gods and prayers for the upkeep of forests

were offered to the Divine. With the developments in science and outburst of population, the degradation of forests started. The earth's crust was washed away and places like Cherapunji in Assam which used to receive an average rainfall of 500 inches in one year started facing drought occasionally. After referring to the contribution of forests for rainfall, pure-air, good health and to the unfortunate cutting of forests which was responsible for the washing away every year, of nearly 6000 million tones of soil, the Supreme Court referred to the Amendment of the Constitution in 1976 when Art. 48A and 51A(g) were inserted and 'Forests' were shifted from Entry 19 of List II to the List III. The Court also referred to the constitution of the National Committee of Environment and Planning and Coordination by the Government of India in 1972, and to the passing of the Forest (Conservation) Act, 1980.

In State of Bihar vs. Murad Ali Khan, AIR 1989 SC, page 1, the Supreme Court was dealing with an appeal concerning protection to wild life in Kundurugutu Range forest in Bihar. The Supreme Court quoted from a decree issued by Emperor Asoka in the third century BC, that has a particularly contemporary ring in the matter of preservation of wild life and environment. The decree said:

“Twenty six years after my coronation, I declared that the following animals were not to be killed: parrots, mynas, the arunas, ruddy-geese, wild geese, the nandimukha, cranes, bats, queen ants, terrapins, boneless fish, rhinoceroses... and all quadrupeds which are not useful or edible...forests must not be burned.”

The Supreme Court observed:

“Environmentalists’ conception of the ecological balance in nature is based on the fundamental concept of nature as ‘a series of complex biotic communities of which a man is an inter-dependent part’ and that it should not be given to a part to trespass and diminish the whole. The largest single factor in the depletion of the wealth of animal life in nature has been the ‘civilized man’ operating directly through excessive commercial hunting or, more disastrously, indirectly through invading or destroying natural habitats.”

In 1987, the Court laid down principles of strict liability in the matter of injury on account of use of hazardous substances. Under the rule in Rylands vs. Fletcher (1868) LR 3 HL 330, absolute liability for negligence could be imposed only for non-natural use of land and for ‘foreseeable damage. However, such exceptions were held by the Court as no longer available in the case of injury on account of use of hazardous substances. Hazardous industries which produced gases injuring the health of the community took a beating in M.C. Mehta vs. Union of India AIR 1987 SC 1086 (the Oleum gas leak case) where the rule in Rylands vs. Fletcher was modified, holding that the ‘enterprise which is engaged in a hazardous or inherently dangerous industry which poses a potential threat to the health and safety of persons working in the factory and residing in the surrounding areas, owes an absolute and non-delegable duty to the community to ensure that no harm results to anyone on account of hazardous or inherently dangerous nature of the activity which it has undertaken...the enterprise must be absolutely liable to compensate for such harm and it should be no

answer to the enterprise to say that it had taken all reasonable care and that the harm occurred without any negligence on its part...The larger and more prosperous the enterprise, greater must be the amount of compensation payable for the harm caused on account of an accident in the carrying on of the hazardous or inherently dangerous activity by the enterprise.

Ganga river pollution by tanneries was supposed to be stopped in M.C. Mehta vs. Union of India: AIR 1988 SC 1037. Adverting to Art. 48A and 51A(g) the Supreme Court observed:

“...it is necessary to state a few words about the importance of and need for protecting our environment. Art. 48-A of the Constitution provides that the State shall endeavour to protect and improve the environment and to safeguard the forests and wild life of the country. Art 51-A of the Constitution imposes as one of the fundamental duties on every citizen, the duty to protect and improve the natural environment including forests, lakes, rivers and wildlife and to have compassion for living creatures.”

The proclamation adopted by the United Nations Conference on the Human Environment which took place at Stockholm from 5th to 16th of June, 1972 was set out in the judgment. After summarizing the recommendations pertaining to the need for the State to stop exploitation of natural resources, the Supreme Court pointed out that Parliament had thereafter significantly passed the Water (Prevention and Control of Pollution) Act, 1974 and the Environment (Protection) Act, 1986 for preventing environmental pollution.

Declaring that the “right to life” referred to in Art. 21 of the Constitution included the right to free water and air which is not polluted, the Supreme Court stated in Subhash Kumar vs. State of Bihar AIR 1991 SC 420 that applications in the nature of a public interest litigation under Art. 32 would be maintainable by persons or groups genuinely interested. But if the applicant has a motive of personal gain or personal vendetta, such applications must be dismissed.

While restraining 400 licensees who had mining licences granted in Rajasthan to mine lime and dolomite stones in the ‘Sariska Tiger Park’, the Supreme Court, in Tarun Bharat Sangh, Alwar vs. Union of India AIR 1992 SC 514, observed that this kind of litigation should not be treated as the usual adversarial litigation. Petitioners were acting in aid of a purpose, high on the national agenda. Petitioners’ concern for the environment, ecology and the wild life should be shared by the Government.

Holding that the Government had no power to sanction lease of the land vested in the Municipality for being used as ‘open space for public use’, the Supreme Court in Virendra Gaur vs. State of Haryana 1995(2) SCC 577 observed, after referring to the Stockholm Declaration of 1972 and Principle 1 laid down in that Conference and after referring to Art. 48-A, Art. 47 and Art 51A(g), and Art. 21, as follows:

“The word ‘environment’ is of broad spectrum which brings within its ambit, “hygienic atmosphere and ecological balance”. It is, therefore, not only the duty of the State but also the duty of every citizen to maintain hygienic environment. The State, in particular has

duty in that behalf and to shed its extravagant unbridled sovereign power and to forge in its policy to maintain ecological balance and hygienic environment. Art. 21 protects right to life as a fundamental right. Enjoyment of life and its attainment including their right to life with human dignity encompasses within its ambit, the protection and preservation of environment, ecological balance free from pollution of air and water, sanitation without which life cannot be enjoyed. Any contra acts or actions would cause environmental pollution. Environmental, ecological, air, water, pollution etc. should be regarded as amounting to violation of Art. 21. Therefore, hygienic environment is an integral facet of right to healthy life and it would be impossible to live with human dignity without a humane and healthy environment. Environmental protection, therefore, has now become a matter of grave concern for human existence. Promoting environmental protection implies maintenance of the environment as a whole comprising the man-made and the natural environment. Therefore, there is a constitutional imperative on the State Government and the municipalities, not only to ensure and safeguard proper environment but also an imperative duty to take adequate measures to promote, protect and improve both the man-made and the natural environment.”

The case in Indian Council for Enviro-Legal Action vs. Union of India 1996(3) SCC 212 is again one of the landmark judgments of the Court. The case concerned serious damage to mother Earth by certain industries producing toxic chemicals. It was found that the water in wells and streams turned dark and dirty rendering it unfit for human consumption

or even for cattle and also for irrigation. The Court gave several directions including the closure of industries. The decision in the M.C. Mehta vs. Union of India 1987(1)SCC 395 (Oleum Gas Case) as to absolute liability in the case of pollution or damage to life by hazardous industries, was re-affirmed. The view of one of the Judges (Ranganatha Misra CJ) in Union Carbide Corpn. vs. Union of India 1991(4) SCC 584, that the principle of absolute liability laid down in Oleum Gas Case was obiter was held to be wrong. A Committee of experts appointed by the Supreme Court concluded that there was direct correlation between the sludge from the industries, contamination in the wells and streams. Objections to the expertise of the members of the Committee for arriving at the above conclusion, were rejected by the Court. The Court referred to Art. 48A and Art. 51A(g) of the Constitution of India and to the Statement of Objects and Reasons appended to the Bill which later became the Water (Prevention and Control of Pollution) Act, 1974, to the Air (Prevention and Control of Pollution) Act, 1981 and the Environment (Protection) Act, 1986 and to its preamble and finally to the Hazardous Wastes (Management and Handling) Rules, 1989. The Court then referred to the 'Polluter Pays' principle. It said that ss 3 and 5 of the Environment (Protection) Act, 1986 enabled the Central Government to provide remedial measures in this behalf. The Court gave a number of directives. Item 6 of the directions given by the Court (see p 252) refers to the need for establishment of environmental courts 'manned by legally trained persons/judicial officers'.

Foundation for applying the Precautionary Principle, the Polluter Pays Principle and the new Burden of Proof was laid down by the Supreme Court in Vellore Citizens' Welfare Forum vs. Union of India 1996(5) SCC

647 which dealt with pollution from tanneries. The Court also referred to the concept of ‘Sustainable Development’ and to the Stockholm Declaration of 1972 and to the Rio Conference of 1992. After referring to Arts. 47, 48A and 51A(g) and Art. 21, and to the various statutes from 1974 to 1986, the Court observed:

“The traditional concept that development and ecology are opposed to each other is no longer acceptable. ‘Sustainable Development’ is the answer. In the international sphere, ‘Sustainable Development’ as a concept came to be known for the first time in the Stockholm Declaration of 1972. Thereafter, in 1987 the concept was given a definite shape by the World Commission on Environment and Development in its report called ‘Our Common Future’. The Commission was chaired by the then Prime Minister of Norway, Ms. G.H. Brundtland and as such the report is popularly known as ‘Brundtland Report’. In 1991, the World Conservation Union, United Nations Environment Programme and Worldwide Fund for Nature, jointly came out with a document called “Caring for the Earth” which is a strategy for sustainable living. Finally, came the Earth Summit held in June 1992 at Rio which saw the largest gathering of world leaders ever in the history- deliberating and chalking out a blueprint for the survival of the planet. Among the tangible achievements of the Rio Conference was the signing of two Conventions, one on biological diversity and another on climate change. These Conventions were signed by 153 nations. The delegates also approved by consensus, three non-binding documents, namely, a Statement on Forestry Principles, a declaration of principles on

environment policy and development initiatives and Agenda 21, a programme of action into the next century in areas like poverty, population and pollution.”

The Court further observed:

“During the two decades from Stockholm to Rio, ‘Sustainable Development’ has come to be accepted as a viable concept to eradicate poverty and improve the quality of human life while living within the carrying capacity of the supporting ecosystems. ‘Sustainable Development’ as defined by the Brundtland Report means ‘Development that meets the needs of the present without compromising the ability of the future generations to meet their own needs.’ We have no hesitation in holding that ‘Sustainable Development’ as a balancing concept between ecology and development has been accepted as a part of the customary international law though its salient features have yet to be finalized by the international law jurists.”

In the same case, after referring to the Polluter Pays principle, the Supreme Court observed that remediation of the damaged environment is part of the process of ‘Sustainable Development’. It then referred to the Precautionary Principle and the Polluter Pays Principle and New Burden of Proof and supported them on the basis of Art. 21, 47, 48A and 51A(g) of the Constitution. It declared that they have become ‘part of the environmental law of the country’.

In M.C. Mehta vs. Kamal Nath: 1997(1) SCC388, the Supreme Court referred to the 'Public Trust' doctrine and stated that it extends to natural resources such as rivers, forests, seashores, air etc. for the purpose of protecting the ecosystem. It held that by granting a lease to a motel located at the bank of the river Beas which resulted in interference by the Motel, of the natural flow of the water, the State Government had breached the above doctrine. The prior approval granted by the Government of India was quashed, the Polluter Pays Principle was applied and the public company was directed to compensate the cost of restitution of environment and ecology in the area.

The adverse effect of 'Shrimp Culture' in the Coastal Zone notified under the Coastal Zone Regulation Notification dated 19.2.91, under the Environment (Protection) Rules, 1986, came up for consideration in S. Jagannath vs. Union of India: AIR 1997 SC 811. The employers were directed to close the Shrimp Culture industry in view of the ecologically fragile coastal areas and the adverse effect on the environment. The Court directed the employees to be paid six years' wages. It referred to Art. 48A of the Constitution, the damage by aquaculture and shrimp culture in several States resulting in wells and streams in coastal areas becoming saline resulting in pure water not being available for irrigation and for drinking purpose. The Court called for and considered the requests from the Marine Products Export Development Agency (MPEDA), and the State Government. It also considered the Report of the Central Pollution Control Board on 'Coastal Pollution Control', report of the Food and Agriculture Organisation (FAO) of the UN, the Alagiraswamy Report, another Report of team of scientists, the reports of the Neeri (Nagpur), report of Justice Suresh

Committee, the report by Mr. Solon Barraclong & Andrea Finger-Stitil of UN, and then applied the provisions of the Water (Protection and Control of Pollution) Act, 1974, the Polluter Pays principle, the new onus of proof, and referred to the concept of sustainable development. It finally directed the constitution of a high powered 'Authority' under that Act to scrutinize each and every case from the environmental point of view, under sec. 3(3) of Environment (Protection) Act and confer on the authority the requisite power under sec. 5. The authority should be headed by a retired Judge of the High Court and members having expertise in the field of aquaculture, pollution control and environment protection. The Government should confer powers under sec. 5 on the said authority to take appropriate measures. The Authority should implement the 'Precautionary Principle' and the 'Polluter Pays' principle. All aquaculture industries should be closed.

In the course of the discussion, the Supreme Court referred to Art. 253 of the Constitution and the legislative powers of Parliament to make laws in respect of matters in the State List in the VII Schedule. The Court observed: (page 846)

“At this stage, we may deal with a question which has incidentally come up for our consideration. Under para 2 of the CRZ notification, (of the Government of India) the activities listed thereunder are declared as prohibited activities. Various State Governments have enacted coastal aquaculture legislations regulating the (industries) set up in the coastal areas. It was argued before us that certain provisions of the State legislation including that of the

State of Tamil Nadu are not in consonance with the CRZ notification issued by the Government of India under sec. 3(3) of the Act. Assuming that or so, we are of the view that the Act being a Central Legislation, has the overriding effect. The Act, (the Environment Protection Act, 1986) has been enacted under Entry 13 of List I of Schedule VII of the Constitution of India. The said entry is as under:

“Participation in international conferences, associations and other bodies and implementing of decisions made thereat”.

The preamble to the Act clearly states that it was enacted to implement the decisions taken at the United Nations Conference on the Human Environment held at Stockholm in June 1972. The Parliament has enacted the Act under Entry 13 of List I of Schedule VII read with Art. 253 of the Constitution of India. The CRZ notification having been issued under that Act shall have overriding effect and shall prevail over the law made by the legislators of the States.”

In M.C. Mehta vs. Union of India: 1997(11) SCC 312, the Supreme Court dealt with ‘ground water’ management. It directed the Ministry of Environment & Forests, Government of India to appoint Central Ground Water Board as an authority under sec. 3(3) of the Environment (Protection) Act, 1986 permitting it to exercise powers for regulating and control of ground water management. Central Government should confer powers on that authority under sec. 5 to issue directions.

Use of pesticides and chemicals causing damage to health came up for consideration in Ashok (Dr) vs. Union of India: 1997(5) SCC 10. The Supreme Court directed a committee of senior officers to be appointed to look into the matter by gathering information through internet and take suitable measures in future in respect of any other insecticides and chemicals which is found to be hazardous for health.

In Animal and Environment Legal Defence Fund vs. Union of India: 1997(3) SCC 549, the activity of fishing in reservoirs within the areas of the National Park, Madhya Pradesh, came up for consideration. The Court referred to the Wildlife (Protection) Act, and to permits issued thereunder, and observed that the livelihood of tribals should be considered in the context of maintaining ecology in the forest area. If there is shrinkage of forest area, the Government must take steps to prevent any destruction or damage to the environment, the flora and fauna and wild life under the Act, keeping Art 48A and Art. 51A(g) in mind.

The Calcutta tanneries' discharge of untreated noxious and poisonous effluent into Ganga river came up for consideration in M.C. Mehta (Calcutta tanneries matter) vs. Union of India: 1997(2) SCC 411. Referring to the Water (Protection and Prevention of Pollution) Act, 1974 and the Environment (Protection) Act, 1986, and the Pollutor Pays principle, the Supreme Court directed closure of the tanneries, relocation and payment of compensation to the employees.

In M.C. Mehta vs. Union of India: 1997(11) SCC 327, in an elaborate judgment, the Supreme Court dealt with shifting, relocation, closure of

hazardous/noxious/heavy/ large industries from Delhi, and to the utilization of land available as a result thereof and payment of compensation to workmen.

As to preservation of forests, a series of orders were passed by the Supreme Court in T.N. Godavarman Thirumalpad vs. Union of India: 1997 (2) SCC 267; 312 etc. The case concerned the unlawful felling of trees in all forests in the country. Directions were given under the Forest (Conservation) Act, 1980. In 1997(7) SCC 440, the Court appointed a High Powered Committee.

The preservation of the tourists spots near Delhi at the Badkal and Surajkund lakes (located in Haryana, bordering Delhi) came up in M.C. Mehta (Badkal and Surajkund Lakes Matter) vs. Union of India: 1997(3) SCC 715. The Supreme Court referred to Art. 47, 48A and 51A(g) as well as Art 21, the concept of 'sustainable development' and the 'Precautionary Principle' and banned construction activities within the radius of 1 km from the Lakes. It clarified that, in view of the reports of experts from NEERI and the Central Pollution Control Board, it was not advisable to permit large-scale construction activity in the close vicinity of the lakes because if such construction is permitted, it would have an adverse impact on the local ecology. It could affect water levels under the ground and could also disturb the hydrology of the area. NEERI had recommended a green belt of 1 km radius. The Court, however, clarified that where plans were already sanctioned, they should have the further clearance of the Central Pollution Control Board and the Haryana Pollution Control Board..

Preservation of Taj Mahal came up in M.C. Mehta (Taj Trapezium Matter) vs. Union of India 1997(2) SCC 353 = AIR 1997 SC 734. The Court, after accepting the report of NEERI, directed that, with a view to balance industry and environment, the coke/coal industry within Taj Trapezium Zone must changeover to the use of natural gas or otherwise the industries should stop functioning or shift. The Court gave directions regarding the compensation payable to workmen who may be discontinued pursuant to the directions. It relied upon the Dr. Varadarajan Committee Report of 1995.

Vehicular pollution in Delhi city, in the context of Art 47 and 48 of the Constitution came up for consideration in M.C. Mehta vs. Union of India: 1998(6) SCC 60 and 1998(9) SCC 589. It was held that it was the duty of the Government to see that the air was not contaminated by vehicular pollution. The right to clean air also stemmed from Art 21 which referred to right to life. Lead free petrol supply was introduced in M.C. Mehta vs. Union of India 1998 (8) SCC 648 and phasing out old commercial vehicles more than 15 years old was directed in M.C. Mehta vs. Union of India 1998(8) SCC 206. These judgments are important landmarks for the maintenance of clean air in Delhi.

The Supreme Court observed that illegal mining in Doon Valley was to be assessed by a Committee appointed by the Court and matter had to be investigated. (T.N. Godavarman Thirumalpad vs. Union of India 1998(2) SCC 341 and 1998(6) SC 190). Felling and removal of felled trees in the State of J&K was prohibited by the Court in T.N. Godavarman Thirumalpad vs. Union of India: AIR 1998 SC 2553.

In regard to the poor efficiency of the Common Effluent Treatment Plants (EFTPs) at Patancheru, Bolaram and Jeedimetla in Andhra Pradesh, the Supreme Court, in India Council for Environ-legal Action vs. Union of India: 1998(9) SCC 580, gave directions that the industries should not be allowed to discharge effluents which exceeded permissible levels and they should install systems which would release effluents upto the permissible levels. The areas concerned had showed tremendous ground water pollution by industrial effluents.

Similar directions were issued in case of UP industries which were discharging effluents beyond the permissible limits and directions were issued in World Saviour vs. Union of India: 1998(9) SCC 247.

Issue of Urban solid waste management came up for consideration in Almitre H. Patel vs. Union of India: 1998(2) SCC 416 and the Court appointed a committee to go into the questions.

The appointment of a Committee by the Supreme Court for management of hazardous wastes lying in the docks/ports/ICDS came up in Research Foundation for Science vs. Union of India: 1999(1) SCC 223. The authorities having custody of wastes were directed not to release or auction the wastes till further orders. This was in the context of the Hazardous Wastes (Management and Handling) Rules, 1989.

Pollution from effluents from distillery attached to a Sugar industry came up for consideration in Bhavani River Sakthi Sugars Ltd. RE: 1998(6) SCC 335.

In M.C. Mehta vs. Union of India: 1998(2) SCC 435, the Court criticized the casual manner in which the Pollution Control Board gave consent. The Supreme Court referred to the constitution of the appropriate authority under section 3(3) of the Environment Protection Act for the National Capital Territory. Regarding such committees for other States, directions were again issued in T.N. Gudavarman Thirumalpad vs. Union of India: 1999(9) SCC 151.

Right to clean air and the need for slowly eliminating 'diesel' for motor vehicles came up in M.C.Mehta vs. Union of India (matter regarding diesel emissions) 1999(6) SCC 9. Right to life was held to include right to good health and health care. M.C. Mehta vs. Union of India 1999(6) SCC 9.

Hot mix plants meant to supply hot mix for the runways in airports and the pollution by the smoke emitted by them came up for consideration in M.C. M'ehta vs. Union of India 1999(7) SCC 522.

Coastal Regulation Zone for Mumbai came up for discussion in P. Navin Kumar vs. Bombay Municipal Corpn: 1999(4)SCC 120.

Deficiencies of the judicial and technical inputs in environmental appellate authorities were elaborately discussed in A.P. Pollution Control

Board vs. Prof. M.V. Nayudu 1999(2) SCC 718. (This case has been elaborately discussed in Chapter II.) It referred to uncertainties in scientific evidence, to the Precautionary Principle, the new Burden of Proof and Polluter Pays Principle, and required a detailed study into the question whether environmental courts which should comprise not only of judges but also as to scientists/environmentalists to effectively assess expert evidence.

Preservation of the environment around Beas river in Himachal Pradesh came up for consideration in M.C. Mehta vs. Kamal Nath 1999(1) SC 702. Court's power to impose fine or special damages came up in M.C. Mehta vs. Kamal Nath 2000(6) SCC 213. Providing clean drinking water for Agra town came up for consideration in D.K. Joshi vs. Chief Secretary, State of UP: 1999(9) SCC 578.

Need to bring about awareness of environmental issues came up for consideration in M.C. Mehta vs. Union of India: 2000(9) SCC 411.

Denotification of Chinkara Sanctuary by the State Legislature under sec. 26A(3) of the Wildlife (Protection) Act, 1972 was upheld in Common Education & Research Society vs. Union of India 2000(2) SCC 599. The denotification resulted in permitting a restructured and controlled mining in an area of 321-56 km of Narayan Sarovar Chinkara Sanctuary. It was held that the economic development of an impoverished and backward area, was equally important - Environmental protection and economic development would have to be balanced.

The Supreme Court observed that the Pollution Control Board and their appointees or experts were accountable for the wrong advice. (Pollution Control Board vs. Mahabir Coke Industry: 2000(9) SCC 344).

Three experts who gave a clean chit to certain industrial units, in respect of levels of emissions while advising the Pollution Control Board, were given show cause notices by the Supreme Court as their report was not in conformity with the evidence which showed existence of severe air pollution.

In the matter of criminal prosecution for offences relating to environmental pollution, the liberal attitude of the High Court in the matter of the quantum of punishment was seriously criticized by the Supreme Court in U.P. Pollution Board vs. Mohan Meakins Ltd.: 2000(3) SCC 745. It was observed that the Courts could not afford to deal lightly with cases involving pollution of air and water. The Courts must share the parliamentary concern on the escalating pollution levels of our environment. Those who discharge noxious polluting effluents into streams appear to be totally unconcerned about the enormity of the injury which they are inflicting on the public health at large, to the irreparable impairment it causes on the aquatic organisms, and to the deleterious effect it has on life and health of animals. Courts should not deal with the prosecution for pollution-related offences in a casual or routine manner.

There was a serious dispute about the correctness of a latter Report of the Central Pollution Control Board, in regard to pollution, as it contained certain adverse findings which were not pointed out by it in an earlier inspection Report. The Court then felt, in the facts of the case, that another independent agency should inspect the site, in the presence of the officers of the Central Pollution Control Board, and file a report. (Imtiaz Ahmed vs. Union of India 2000(9) SCC 515).

Processing of hazardous waste and finding out the number of industries releasing such waste came up for consideration in Research

Foundation for Sciences vs. Union of India 2000(9) SCC 41. Directions were issued to the Union Government to file particulars.

One of the major irrigation projects in the country relating to construction of Dam on Narmada river came up for consideration in Narmada Bachao Andolan vs. Union of India: 2000(10) SCC 664. We shall deal with this case in some detail. In that case there was a final award by the Tribunal constituted under the Inter-State Water Disputes Act, 1956 published on 12.12.79. The Dam was to be of the height of 455 feet. The Tribunal gave its directions regarding submergence, land acquisition and rehabilitation of displaced persons. It stipulated that no submergence of any area should take place unless the oustees were rehabilitated. The Tribunal allocated the utilizable water stream to four States. The Narmada Control Authority (NCA) was directed to be constitute for implementation of the award. Eight years later, on 24.6.1987, the Ministry of Environment and Forests granted 'environmental clearance' to the Sardar Sarovar Project subject to the following conditions:

1. NCA will ensure that environmental safeguards are planned and implemented pari passu with progress of work on the project.
2. Detailed surveys/studies will be carried out as per the schedule proposed.
3. The rehabilitation plans which have to be drawn up should be completed ahead of the filling up of the reservoir.

Initially a letter of one B.D. Sharma was treated as a PIL and a direction was given on 20.9.91 by the Supreme Court to constitute a committee to monitor the rehabilitation of oustees. But in April 1994,- seven years after the Ministry gave clearance – the Narmada Bachao Andolan filed a writ petition to stop the construction of the dam and prayed for not opening the sluices.

The Supreme Court called for various reports. The construction was halted in May 1995 and the case was finally decided in the year 2000. (Narmada Bachao Andolan vs. Union of India: 2000(10) SCC 664. The project involved construction of a network of over 3000 large and small dams. The three learned Judges were unanimous that the PIL of April 1994 was belated and could not be allowed to seek to stop the project itself. Two learned Judges found that Environmental Impact Assessment Notification under the Rules made under the Environment (Protection) Act, 1986 was issued much later on 27.1.94 and was not retrospective and applicable for the purpose of grant of clearance by the Ministry earlier on 24.6.87. The clearance given on 24.6.1987 in fact required that the NCA could ensure that ‘environmental safeguard measures’ be taken and therefore the project did not require any further environmental impact assessment to be done. Adverting to the Precautionary Principle laid down in Vellore Citizens’ Welfare forum vs. Union of India 1996(5) SCC 647 and distinguishing A.P. Pollution Control Board vs. M.V. Nayudu: 1999(2) SCC 718, the Supreme Court said that the Precautionary Principle and the Burden of Proof rule – (which shifted the burden to the person or body which was interfering with the ecology, to prove that there is no adverse impact) – would apply to a polluting project or industry where the extent of damage likely to be inflicted, is not known. But where the effect on ecology or environment on account of the setting up of an industry is known, what has to be seen is whether the environment is likely to suffer, and if so, what mitigative steps have to be taken to efface the same. Merely because there will be a change in the environment is no reason to presume that there will be ecological disaster. Once the effect of the project is known, then the principle of sustainable development would come into play and that will ensure that mitigative steps are taken to

preserve the ecological balance. Sustainable development means what type or extent of development can take place which can be sustained by nature/ecology with or without mitigation. In the present case, the dam is not comparable to a nuclear establishment nor to a polluting industry. No doubt, the construction of a dam would result in the change of environment but it will not be correct to presume that the construction of a large dam like this will result in an ecological disaster. India has an experience of 40 years in construction of dams. Those projects did not lead to environmental disasters but have resulted in upgradation of ecology. On the above reasoning, two learned Judges (out of three) felt that inasmuch as rehabilitation was provided by the award, there was no violation of Article 21. The court issued directions as to allotment of land to oustees. There was no need to have another authority to monitor rehabilitation. The NCA could itself do this. Its decision could be reviewed by the Review Committee. (One of the three Judges however felt that environmental impact assessment was necessary and the construction work should stop till such assessment was made).

The provision of s.3 (2) (v) of the Environment Protection Act, 1986 and ss. 2 (e), 2(k) and 17, 18 of the Water (Prevention and Control of Pollution) Act, 1974 came up for consideration again in *A.P. Pollution Control Board (II) v. Prof. M. V. Naidu* (2001) 2 SCC 62. The court relied upon *Narmada Bachao Andolan v. Union of India* (2000) 10 SCC 664 and *A.P. Pollution Control Board (I) v. Prof. M. V. Naidu* (1999) 2 SCC 710 and held that once the State Government issued an order prohibiting location of any industry within 10 km radius of the lakes which were providing drinking water to two cities, the State Government ought not to

have granted exemption as it offended the precautionary principle. Without permission of the Pollution Control Board, no industry could be established.

While dealing with the construction of a hotel in Goa for a sea-beach resort, the Supreme Court in ***Goa Foundation v. Diksha Holdings Pvt. Ltd.*** (2001) 2 SCC 97 held that economic development had to be maintained. The permission granted by the State Government was based upon a proper consideration of the Coastal Regulation Zone (CRZ) notification dated 19.2.1991 issued by the Ministry of Environment and Forests, Government of India under ss.3 (1) and 3 (2) (v) of the Environmental Protection Act, 1986 and Rule 5 (3) (d) of the Rules and approved by the Coastal Zone Management Plan of the State of Goa. The plot of land allotted to the hotel fell within an area ear-marked as settlement (beach/ resort) by notification of the Governor of Goa under the Goa, Daman and Diu Town and Country Planning Act, 1974 and situated in category CRZ–III.

Need for balance between development and preservation of ecology was again stressed in ***Live Oak Resort (Pvt.) Ltd. v. Panchgani H.S. Municipal Council*** (2001) 8 SCC 329.

With reference to vehicular pollution in Delhi and implementation of the orders for introduction of CNG, the court passed a series of orders in ***M.C. Mehta v. Union of India*** (2001) 3 SCC 763, 756 and (2002) 4 SCC 356.

Smoking cigarettes in public places was prohibited by the Supreme Court in ***Murli S. Deora v. Union of India*** (2001) 8 SCC 765. The right to clean air was part of the right to life under Article 21.

In ***Hinch Lal Tiwari v. Kamla Devi*** (2001) 6 SCC 496 the Supreme Court held that healthy environment enables people to enjoy a quality of life which is the essence of the rights guaranteed under Article 21.

Concern for safety and well-being of wildlife in zoos came up for consideration in a case where a tiger was skinned alive in a zoo. The provisions of Article 48-A of the Constitution and the Wildlife (Protection) Act, 1972 (ss.38 (a), 38 (c), 38 (h) and 38 (j)), the provisions of the Forest Act, 1927 also were considered. (*Navin M. Raheja v. Union of India* (2001) 9 SCC 762)

The Supreme Court pulled up the Madhya Pradesh State Pollution Control Board for not taking any interest and, in fact, acting negligently in the matter of discharging its functions since various industries were discharging pollutants in contravention of the provisions of the laws: *State of M.P. v. Kedia Leather and Liquor Ltd.* (2001) 9 SCC 605.

In *Bittu Seghal v. Union of India* (2001) 9 SCC 181 (Judgment dated 31.10.1996) the court gave a direction to the State of Maharashtra in regard to the protection of Dahanu Taluka, regarding CRZ – notification of the Government of India dated 19.2.2001 and the Regional Development Plan as approved by the Government of India (subject to conditions) on 6.3.1996. The court directed the Central Government to constitute an authority under s.3 (3) of the Environment Protection Act, 1986 to be headed by a retired Judge of the High Court and to confer on the authority powers required to protect the region, control pollution and issue directions under s.5 and for taking measures as stated in s.3 (2) (v) 2 (x) and (xii) of that Act. The said authority was to bear in mind the Precautionary Principle and the Polluter Pays Principle.

Cleaning and developing ponds which had dried up was part of the duty of the Government under Article 21. (*Hinch Lal Tiwari v. Kamla Devi* (2001) 6 SCC 496).

Closure, shifting, re-location of polluting industries in the residential areas of Delhi came up again in *M.C. Mehta v. Union of India* (2002) 9 SCC 481, 483 and 534.

Protection of monuments and religious shrines came up in *Wasim Ahmed Saeed v. Union of India* (2002) 9 SCC 472. The court held that shifting of 24 licensed shops from the vicinity of the religious shrine of Dargah of Salim Chishti in Agra as recommended by the Archaeological Department, did not violate Article 21.

In *M.C. Mehta v. Union of India* (2002) 4 SCC 356, the Supreme Court held that one of the principles underlying environmental law is that of sustainable development. The principle means that such development which also sustains ecology can take place. The essential features of sustainable development are (a) precautionary principle and (b) the polluter pays principle.

In *N.D. Jayal vs. Union of India*: (dt. 1.9.2003), the Supreme Court considered the issues arising out of construction of the Tehri Dam. One of the important issues related to environment impact assessment, rehabilitation of oustees etc.

Summary

The above judgments of the Supreme Court of India will show the wide range of cases relating to environment which came to be decided by the said Court from time to time. The Court has been and is still monitoring a number of cases. It will be noted that the Court constantly referred environmental issues to experts, and the Court has been framing schemes, issuing directions and continuously monitoring them. Some of these

judgments of the Supreme Court were given in original writ petitions filed under Art. 32 while the others were decided in appeals filed under Art 136 against judgments of the High Courts rendered in writ petitions filed under Art 226.

These cases have added tremendous burden on the High Courts and the Supreme Court. The proposal for Environmental Courts is intended to lessen this burden, as already stated. But that as it may, the Supreme Court has, in the various cases referred to above, laid down the basic foundation for environmental jurisprudence in the country.

CHAPTER IV

ENVIRONMENTAL COURTS IN OTHER COUNTRIES

We had referred to the need for establishing environmental courts in Chapter II. In this Chapter, we shall refer to the constitution or proposals for constitution of environmental Courts in other countries. Australia and New Zealand have taken the lead in establishing Environmental Courts which are manned by Judges and Commissioners. The Commissioners are generally persons having expert knowledge in environmental matters.

Australia:

New South Wales

In Australia, in the State of New South Wales, the Land and Environmental Court was established by legislation in 1980 under the Land

and Environment Court Act 1979. (At the same time, the Environmental Planning and Assessment Act, 1979 was also enacted.) It is a superior court of record and is composed of Judges and nine technical and conciliation assessors. Its jurisdiction combines appeal, judicial review and enforcement functions in relation to environmental and planning law. Proceedings can be commenced by anyone.

We shall refer to the provisions of the NSW Act of 1979 in some detail. The broad outlines of that Act, rather than certain details, are important for us. We find that, in certain respects, the classification of various classes of cases and the mode prescribed for filing appeals is quite complicated under the NSW law. We would however be only adopting the broad scheme of the NSW Act.

Under sec. 7 of the NSW Land and Environment Court Act, 1979 of New South Wales, it is stated that the Court shall consist of the Chief Judge and such other Judges as may be appointed by the Governor. Section 12 contemplates appointment of Commissioners of the Court by the Governor and the qualifications prescribed for them are as follows:

- “(a) Special knowledge of and experience in the administration of local government or town planning;
- (b) Suitable qualification and experience in town or country planning or environmental planning;

- (c) Special knowledge of and experience in environmental science or matters relating to protection of the environment and environmental assessment;
- (d) Special knowledge of and experience in the law and practice of land valuation;
- (e) Suitable qualifications and experience in architecture, engineering, surveying or building construction;
- (f) Special knowledge of and experience in the management of natural resources or the administration and management of Crown lands, lands acquired under the Closer Settlement Acts and other lands of the Crown, or
- (g) Suitable knowledge of matters concerning land rights for Aborigines and qualifications and experience suitable for the determination of disputes involving Aborigines, or
- (h) Special knowledge of and experience in urban design or heritage.”

Section 12 further states as follows:

“In appointing Commissioners, the Minister should ensure, as far as practicable, that the Court is comprised of persons who hold qualifications across the range of areas specified in this subsection.”

Clause (2A) of sec. 12 states that a person may be appointed as a full-time Commissioner or a part-time Commissioner. Clause (2B) of sec. 12 states that a part-time Commissioner will be treated as guilty of misbehaviour if,

during the term of his or her appointment, the person appears as an expert witness, or acts as the representative of any party, in proceedings before the Court. Clause (3) states that one of the full-time Commissioners may, by the instrument of the Commissioner's appointment or by a subsequent instrument, be appointed to be Senior Commissioner. Clause (4) points out that Schedule 1 contains the conditions of service of Commissioners.

Section 13 permits appointment of Acting Commissioners for a time not exceeding 12 months to be specified in the instrument of appointment.

Section 14 refers to disqualifications of Commissioners. Section 15 deals with appointment of other officers of the Court.

Section 16 (in Division 2 of Part 3) deals with the jurisdiction of the Court generally. It reads as follows:

“Section 16. (1) The Court shall have the jurisdiction vested in it by or under this Act or any other Act.

(1A) The Court also has jurisdiction to hear and dispose of any matter not falling within its jurisdiction under any other provision of this Act or under any other Act, being a matter that is ancillary to a matter that falls within its jurisdiction under any other provision of this Act or under any other Act.

(2) For the purposes of this Act, the jurisdiction of the Court is divided into 7 clauses, as provided in this Division.”

Section 17 to 21, 21A and 21B deal with these 7 clauses of jurisdiction. Section 17 deals with appellate jurisdiction under various Acts relating to planning and production. Section 18 deals with appeals under statutes relating to local government, miscellaneous appeals and applications which are listed in various clauses of the sections. Section 19 deals with land-tenure, valuation, rating and compensation matters – viz. appeals and references or proceedings under various Acts. Section 20(1) deals with proceedings under various Acts relating to environmental planning and protection and, development contract, civil enforcement. Section 20(2) states that the Court has the same civil jurisdiction as the Supreme Court would have, but for section 71, to hear and dispose of proceedings:-

- “(a) to enforce any right, obligation or duty conferred or imposed by a planning or environmental law or a development contract,
- (b) to review, or command, the exercise of a function conferred or imposed by a planning or environmental law or a development contract,
- (c) to make declaration of right in relation to any such right, obligation or duty or the exercise of any such functions, and
- (d) whether or not as provided by section 68 of the Supreme Court Act, 1970, to award damages for a breach of a development contract.”

Subsection (3)(a) gives a list of various Acts as falling within the meaning of as ‘planning or environmental law’. Subsection (3)(b) and (c) include within the meaning of ‘planning or environmental law’, the following, namely:-

- “(b) any statutory instrument made or having effect thereunder or made for the purposes thereof, including any deemed environmental planning instrument within the meaning of the Environmental Planning and Assessment Act 1979 or
- (c) as respectively in force at any time, whether before, on or after 1 September, 1980”.

Subsection (4) states that the provisions of the Supreme Court Act, 1970 and the rules thereunder, relating to the enforcement of judgments and orders of the Supreme Court apply to the enforcement of any judgment or order of the Court in proceedings referred to in class 4 of its jurisdiction. Subsection (5) states that ‘development contract’ means an agreement implied by sec. 15 of the Community Land Management Act 1989, sec. 281 of the Strata Schemes (Freehold Development) Act, 1973 or sec. 49 of the Strata Schemes (Leasehold Development) Act, 1986.

Section 21 refers to Class 5 ‘environment planning and protection’ summary enforcement. It states that the Court has jurisdiction to hear and dispose of in a summary manner, proceedings under various statutes (a) to (hb) and clause (i) refers to “any other proceedings for an offence which an Act provides may be taken before, or dealt with by, the Court.”

Section 21A (class 6) deals with appeals from convictions relating to environmental offences. It states that the Court has jurisdiction (referred to in this Act as Class 6 of its jurisdiction) to hear and dispose of appeals under Part 5B of the Justices Act, 1902, other than appeals under Division 3A of that Part.

Section 21B (class 7) deals with ‘other appeals relating to environmental offences’ It states that the Court has jurisdiction (referred to in this Act as class 7 of its jurisdiction) to hear and dispose of appeals under Division 3A of Part 5B of the Justices Act, 1902.

Section 22 deals with the jurisdiction to determine the matter ‘completely and finally’ to avoid multiplicity of actions while sec. 23 refers to jurisdiction to pass orders, including interlocutory orders. They are as follows. Section 22 reads as follows:

“Section 22: The Court shall, in every matter before the Court, grant either absolutely or on such terms and conditions as the Court thinks just, all remedies to which any of the parties appears to be entitled in respect of a legal or equitable claim properly brought forward by that party in the matter, so that, as far as possible, all matters in controversy between the parties may be completely and finally determined and all multiplicity of proceedings concerning any of those matters, may be avoided.”

Section 23 refers to ‘making of orders’ and reads as follows:

“Section 23: The Court has power, in relation to matters in which it has jurisdiction, to make orders of such kinds, including interlocutory orders, as the Court thinks appropriate.”

In sections 24, 25 of Division 2 of Part 3, ‘claim for compensation’ (i.e. compulsory land acquisition) has also brought within the purview of the Court including determination of estate, interest and amount.

Sections 25B to 25D of Division 3 of Part 3 deal with orders of conditional validity for certain ‘development consents’. It permits invalidation of consents to development for not taking steps or complying with conditions of the consent granted by the Minister under the Environmental Planning & Assessment Act, 1979.

Sections 26 to 28 in Division 2 of Part 4 refer to the ‘Distribution of business among the Divisions’ of the Court. These are:

- (a) Environmental Planning and Protection Appeals Division.
- (b) Local Government and Miscellaneous Appeals Division.
- (c) Land Tenure, Valuation, Rating and Compensation Division.
- (d) Environmental Planning and Protection and Development Contract Civil Enforcement Division.
- (e) Environmental Planning and Protection Summary Enforcement Division and
- (f) Environmental Appeals Division.

Section 29 in Division 3 of Part 4 permits the Court to sit at such places as the Chief Justice may direct. Sec. 30 vests the power to distribute business in the various Divisions of the Court, in the Chief Judge. Provision is made in sec. 31 for transfer from one Division to another.

What is of special significance is that sec. 33 states that the jurisdiction in classes 1, 2, 3 can be exercised by the Judge, or one or more commissioners (i.e. environmental planning and protection appeals (Class II) and land tenure, valuation, rating and compensation matters (Class III)).

But only a Judge according to sec. 33, can exercise jurisdiction under classes 4, 5, 6 (i.e. environmental planning and protection and development contract civil enforcement (class 4); environmental planning and protection summary enforcement (class 5); appeals from convictions relating to environmental offences (class 6)).

There is a special situation, referred to in sec. 33, that jurisdiction under sec. 16(1A)(i.e. ancillary matters) has to be exercised by a Judge but he may be assisted by one or more Commissioners in accordance with sec. 37. Under sec. 37, the jurisdiction under Class 1, 2, 3 can also be exercised by the Judge – assisted by one or more commissioners. Various other provisions are made in sec. 37.

Section 34A refers to proceedings in Class I relating to Environmental Planning and Assessment Act of 1979. Sec. 34B refers to on-site hearing – sec. 34C to arrangements in dealing with court-hearing matters; sec. 35 refers to Inquiries by Commission in cl. 3, sec. 36 refers to delegation to Commission by the Court in respect of matters falling under sec. 97 of Environmental Planning and Assessment Act, 1979. Under sec. 36(1A), the Government may, by Regulation, add to or alter or omit items in Schedule 2 or insert a new Schedule.

Section 37 refers to places where Commissioners sit with a Judge and the procedure relating thereto.

Section 38 states that proceedings in class 1, 2, 3 shall be conducted with as little formality and technicality as possible and with as much expedition. The Court is not bound to follow rules of evidence. It may obtain assistance of any person having professional or other qualifications relevant to any issue. Sec. 39 refers to power of Court of Appeal – which can take additional evidence. Various other details are referred to in other sub sections. Section 39A refers to joinder of parties in appeals. Sec. 40 refers to additional powers of Court – protection of easements. Section 48 refers to procedure where defendant does not appear, sec. 49 as to what would happen if either party does not appear and sec. 50 as to what should happen if both parties appear. Section 51 gives power to consolidate cases; Section 52 to payment of costs, sec. 53 to enforcement of fines or orders. Section 55 to the effect of aiding, abetting, counseling or procuring commission of offences.

Finality of the Court's orders is referred to in Part 5 in secs. 56 etc. Under sec. 56 orders will be final except as stated in Division 2 of Part 5 or except in regard to criminal appeals.

Division 2 of Part 5 (sec. 56A) permits appeal to the Court in class 1, 2, 3 matters against the Commissioners. Otherwise appeals from classes 1, 2, 3 to the Supreme Court. Sec. 58 refers to powers to appellate Court including suspension, etc. Part 5A refers to 'Mediation and neutral evaluation' by the Court. Referral is only by consent of parties. Various details as to confidentiality etc. are referred to.

Part 6 of Division 2 deals with miscellaneous matters, e.g. proceedings to be in open Court, issue of process, costs which may be awarded by the Court but not by Commissioners, except with consent of Court; interest payable on deposits, vexatious litigants and transfer from Supreme Court, Rules, Regulations.

The above are broadly the provisions of the N.S.W. Act, 1979 regarding Environmental Courts. While certain broad features commend themselves to us, we find that the classification of cases and the proceedings into various classes appears to be quite complicated. In our view, a simpler method is necessary so far as procedure in the Indian Environmental Courts is concerned.

New Zealand:

The N.Z. Environment Court was established under the Resource Management (Amendment) Act, 1996 by amending the 1991 Act and it replaced the former Planning Tribunal. Prior to the introduction of the Resource Management Act, 1991 (RMA), the statute that applied was the New Zealand's Town and Country Planning Act, 1977 which was based on the British Model. (A detailed account by Mr. Mark Southgate is available from the Supplementary Memorandum published by the Royal Society (UK) (2000) for the protection of Birds (PI. 19(a)) and is adopted hereunder (with minor changes) in view of its precise and correct assessment of the provisions of the New Zealand Act).

The Environmental Court in New Zealand under the Amendment Act of 1996 is an independent specialist Court consisting of Environment Judges (who are at the level of the District Judge) and the Environment Commissioners (technical experts). They are appointed for a period of five years each time by the Governor-General on the recommendation of the Minister of Justice. In appointing the Judges and Commissioners, the Governor-General is to have regard to the need to ensure a mix of knowledge and experience – including commercial and economic affairs; local government; community affairs; planning and resource management; heritage protection; environmental science; architecture; engineering; minerals; and alternative disputes resolution processes.

The Environment Court encourages mediation and arbitration and a high proportion of cases are resolved by such agreement, usually presided by an Environmental Commissioner alone. However, all such agreements are not given effect unless they have been looked at by the Court, which may alter the settlement. Where adversarial processes do occur in the Court, they are primarily aimed at developing high quality information to allow the Court to reach a decision.

The New Zealand Environment Court usually consists of one Environmental Judge and two Commissioners, - except in enforcement proceedings which are matters of law and are presided over by a Judge alone. (Even under the NSW Act of 1979, enforcement is always by the Judge or with his consent).

The New Zealand Environment Court is not bound by rules of evidence and it is free to establish its own rules of procedure. Consequently, the proceedings are often less formal than those in other Courts. Lawyers do normally represent the parties but anyone may appear in person and the Court encourages individuals and groups to represent themselves.

The right of appeal, on resource-consent decisions, to the Environment Court extends to any person who makes a submission on that consent, i.e. to third parties, and to applicants. Third parties may also apply to the Court for an order to enforce the RMA against anyone else. The Environmental Court decisions may be appealed to the High Court on questions of law only.

The Environment Court of New Zealand also hears references on regional and district statements and plans (development plan equivalents) and appeals from resource-consents (planning application equivalents); it can make declarations, i.e. interpret the law; and it can enforce the RMA through Civil or Criminal proceedings. Local authorities are obliged to make necessary amendments in the plans to give effect to the Court's decisions. Decisions by the Court on consents given by local authorities can be taken afresh, after taking new evidence. The Court's duties include avoiding, remedying or mitigating adverse effects on the environment and a general duty to promote sustainable management, in accordance with the RM Act.

Even policy judgments and decisions are the ‘daily diet’ of the New Zealand Environmental Court as stated by Mr. B. Birdsong in his Oxford Fellowship Report (1998), Auckland, on “Adjudicating sustainability (1998) New Zealand’s Environment Court and the Resource Management Act.”

On the positive side, the N.Z. Environment Court provides environmental expertise, both legal and technical, and a track record of environmental decision-making, in public interest. The Court has also a duty to promote sustainable management when hearing cases afresh, as stated in the Act. The environmental expertise would help address the need for greater environmental expertise within the Inspectorate also in certain planning cases.

Another advantage is that the Court itself hears cases relating to enforcement and views breaches of environmental legislation seriously. It can impose and does impose significant fines. It can also hear enforcement cases referred to it by third parties, - enforcement is not at the discretion of the local authorities, as it is in the UK. In fact, the criticism of the Magistrate’s Courts in UK and other Courts is that sometimes they fail to impose appropriate punishment for breaches of planning control or environmental legislation. The seriousness of environmental offences are better appreciated by Environmental Courts in New Zealand.

The NZ Act encourages alternative dispute resolution – e.g. Mediation, conciliation or other procedures to facilitate the resolution of disputes before the initial hearing of the case. These provisions have proved very successful.

However, there is some criticism of the Court's power to impose costs against unsuccessful parties but imposition of costs is a normal feature of litigation except where plans or policy statements or public interest is involved. It is however pointed out by critics as to why costs could go as high as \$8,500 upto \$20,000, and that for that reason threats by developers about costs could discourage genuine objections. The criticism against taking a vast range of evidence is not correct because the experts on the Bench could always cut short unnecessary evidence.

The 1999 Amendments to the New Zealand Act of 1991, have been summarized as follows: (See Angelo Rego). The Bill was aimed to address several components of the law. Firstly, it was designed to reduce unnecessary delays and costs in the procedure without undermining the objectives. Secondly, there are a number of provisions relating to heritage and archaeology, which recognize the protection of historic heritage as a matter of national importance and brings archaeological controls from the NZ Historic Places Act, 1993. In addition to this, the Bill aims at strengthening the national environmental standards and national policy statement provisions. The Bill introduces a new definition of 'environment' which focuses more closely on the biophysical environment and narrows the human element to health, safety, amenity and cultural values.

Three other important amendments are those relating to the 'resource consent processing', the 'direct referral to the Environmental Court' and the 'use of Environment Commissioners' to hear cases and take decisions. These changes allow applicants to choose whether their applications will be

processed by the Council or by a private consent processor and to have complex or contentious applications referred directly to the Environmental Court. Applicants and those who oppose applications will also be able to choose whether they want the Council or an independent commissioner to hear the case and make the decision. This was designed to improve the impartiality of decision-making and remove any appearance of bias or conflict on the part of the decision-maker.

The NZ Bill was introduced in the House in July 1999, and the Report of the Select Committee came on 8.5.2002, and further changes were suggested by the Report of the Business-compliance-Costs Panel, Government announced further changes.

The NZ Resource Management Act, 1991 consists of 433 sections and 11 Schedules and consists of 15 parts. After Parts 1 to 10, we have the Environmental Court in Part II (sections 247 to 308). Part 11 deals with 'Declarations, Enforcement and Ancilliary Powers' (section 309 to 343D).

There are in all 110 sections from section 297 to 343D which deal with the Environmental Court, as per the 1999 Amendment to the NZ Act of 1991. We shall briefly refer to some of the sections and to the sub headings in Part 11 and 12.

Section 247 names the erstwhile Planning Tribunal as the Environment Court, sec. 248 deals with its Membership, sec. 249 with the eligibility for appointment as an Environment Judge or alternate Environment Judge; sec. 250 deals with the appointment of not more than 8

such Judges. Basically they are District Judges in service; sec. 251 deals with the Principal Environment Judge. Section 252 states when an alternate Environment Judge may act.

Environment Commissioners and Deputy Environment Commissioners are contemplated by the Act. Sec. 253 refers to their eligibility. It states that the Environment Commissioner must have knowledge and experience in

- (a) Economics, commercial and business affairs, local government, and community affairs;
- (b) Planning, resource management and heritage protection;
- (c) Environmental sciences, including the physical and social sciences;
- (d) Architecture, engineering, surveying, minerals technology, and building construction;
- (da) Alternate dispute resolution processes;
- (e) Matters relating to Treaty of Waithangi & Kaupapa Maori,

and sec. 254 refers to the appointment of a Commissioner for not more than 5 years. Sec. 255 mentions when a Deputy Environment Commissioner may act. Section 256 with the oath of office for the Commissioner or Deputy Commissioner.

Sections 257, 258 deal with procedure for resignation and removal of members by the Governor-General, including the Judge for inability or

misbehaviour. Removal of a Judge will not amount to cancellation of his appointment as a District Judge.

Section 259 refers to special advisors, sec. 260 to ‘officers of the Environment Court’ i.e. Registrar and other offices. Sec. 261 refers to ‘Protection from legal proceedings’. Sec. 262 refers to members of the Environment Court who are rate-payers and it is made clear that it is not a disqualification to be a rate-payer if one is proposed to be appointed to the Environment Court. Sec. 263 deals with remuneration of Environment Commissioners and special advisors. Sec. 264 refers to Annual Report of Registrar to be submitted to the Minister concerned in charge of Courts.

In the NZ Act, procedure of the Environment Court is dealt with separately. Sec. 265 refers to the sittings of the Court and its quorum. Quorum will be one Judge and one Commissioner, except in relation to some sections, where quorum consists of the Judge alone. The decision of the majority of members of the Court will hold good and if there is no majority, the decision of the presiding member will prevail; sec. 266 says constitution of Court is not to be questioned; sec. 267 refers to conferences and procedure and powers; sec. 268 to ‘Alternative Dispute Resolution by one of the Members by way of mediation or conciliation or other procedure. These persons are not disqualified to act as Judges later.

Powers of the Court and procedures are defined in several sections. Sec. 274 deals with ‘representation at proceedings’; Section 274(1) states that in proceedings before the Court under the Act, the Minister, any local authority, any person having any interest in the proceedings greater than the

public generally, any person representing some relevant aspect of public interest, and any party to the proceedings, may appear and may call evidence on any matter that should be taken into account in determining the proceedings. Others must give 10 day notice to the Court, if they wish to appear; sec. 275 refers to appearance in person or representative, and section 276 with 'Evidence'. It states that the Court may receive any evidence which it considers appropriate or it may call for any evidence which it considers will assist in the making of a decision or a recommendation and call any person before it for that purpose. The Court is not inhibited by the principles of law about evidence that apply to judicial proceedings. Sec. 277 states that hearings and evidence has to be public subject to certain specific exceptions. Sec. 278 states that the Environment Court to have powers of s District Court; sec. 279 to powers of an Environment Judge sitting alone. He may strike off vexatious proceedings. Sec. 280 refers to powers of Environment Commissioners sitting without Environment Judge and section 281 to waivers and directions; sec. 282 invests the Court with power to commit for contempt, sec. 283 take action for non-attendance or refusal to co-operate; sec. 284 to witnesses allowances, sec. 285 to costs through the District Court, sec. 286 to enforcing order as to costs; sec. 287 permits reference of question of law to the High Court; sec. 288 refers to privileges and immunities of witnesses and counsel.

Appeals, inquiries and other proceedings before the Environment Court are dealt with by sections 289 to 291. Sec. 289 deals with 'Reply to Appeal or request for inquiry'. Sec. 290 refers to powers of Environment

Court in regard to appeals and inquiries; sec. 291 refers to other proceedings before the said Court.

With regard to Plans and Policy statements, the Environment Court is given special powers. Sec. 292 deals with ‘Remedying defects in Plans’, sec. 293 to the power of the Court to order changes to policy statements and plans. Sec. 294 refers to review of decision of Environment Court if new and important evidence becomes available or there has been a change in circumstances which might affect the decision.

Sec. 295 states that decision of the Environment Court is final; sec. 290 states that ‘No review of decisions unless right of appeal or reference to inquiry exercised’. The section states that if there is a right to refer any matter to the Environment Court or to appeal to that Court against a decision of a local authority or any person under the Act, any other Act or regulation, no application for review under Part I of the Judicature Act, 1972 can be made and no proceedings seeking a writ of mandamus, prohibition or certiorari or a declaration may be heard by the High Court, “unless the right has been exercised by the applicant in the proceedings and the Environmental Court has made a decision.” Sec. 297 says that decision of Court has to be in writing; sec. 298 to judicial notice of documents.

The next question is as to appeals from decision report or recommendation of the Environment Court. Sec. 299 states that appeal shall be ‘on a question of law’ to the High Court. Sections 300 to 307 refer to the procedure in the High Court in the appeals against the Environment Court, sec. 308 deals with appeals to Court of Appeal.

Part 12 deals with declaration, enforcement and ancillary powers which have to be exercised only by the Judge or Court. Section 309 says proceedings have to be heard by an Environment Judge (i.e. not a Commissioner/Dy. Commissioner). Sections 310 and 311 & 312, 313 deal with nature of declarations and procedure; sec. 314 to 321 with Enforcement orders by the Environmental Court; sec. 322 to 325B with 'Abatement notices' (i.e. Abatement of nuisance) and appeal to Court and stay; section 326 to 328 with 'Excessive Noise', sec. 329 with 'Water shortage', section 330 to 331 to 'Emergency Works', sec. 332 to 335 to 'power of entry and search', sec. 336 to 'Return of Property', section 337 to return of property seized under warrant'.

Offences are dealt with in sec. 338 to 343. Section 338 refers to 'offences against this Act', sec. 339 to 'Penalties' like imprisonment for 2 years or fine up to 200 thousand dollars and if the offence is a continuing one, upto 1000 dollars per day. Violation of some sections results in summary convictions; sec. 339A refers to 'Protection against imprisonment for dumping and discharges offences involving foreign ships', sec. 339B to 'additional penalty for certain offences for commercial gain upto three times the said gain', sec. 339C to the 'Amount of fine or other monetary penalty recoverable by distress and sale of ship or from agent'; sec. 340 deals with 'liability of principal for acts of agents', sec. 341 refers to strict liability and defences'. Subsection (1) of sec. 341 states that, in any prosecution for an offence in respect of certain sections (sections 9, 11, 12, 13, 14, 15) it is not necessary that defendant intended to commit the offence. Subsection (2) permits exceptions in case (a): (i) action or event was

necessary for saving or protecting life or health or preventing serious damage to property or avoiding actual or likely adverse-effect on the environment; and (ii) the conduct of the defendant was reasonable in the circumstances, and (iii) the effects of the action or event were adequately mitigated or remedied by the defendant after it had occurred or (b): the action or event was due to an event beyond the control of the defendant – including natural disaster, mechanical failure or sabotage and in each case (i) the action or event could not reasonably have been foreseen or been provided against by the defendant; and (ii) the effects of the action or event were adequately mitigated or remedied by the defendant after it occurred. Subsection (3) states that the above defences can be raised only by leave of Court if applied for within 7 days after service or notice. Sec. 341A refers to ‘liability and defences for dumping and storage of waste or other matter’ with similar defences, sec. 341B to ‘liability and defences for discharging harmful substances’. In the case of discharge of harmful substances, contaminants, or water in breach of sec. 15B, it is not necessary that defendant intended to commit the offence. Defences, in relation to discharges from shops are similar to those under sec. 341. Sec. 342 to ‘fines to be paid to local authority instituting prosecution’; sec. 342 refers to ‘Discharge from ships’ (repealed).

Infringement offences are defined in sec. 343A. Infringement offence means an offence specified as such in regulations made under sections 360 (1)(ba). ‘Infringement fee’ in relation to the above offences means the amount fixed by regulations made under sec. 300(1)(bb) as the ‘infringement fee’ for the offence. Sec. 343B refers to ‘commission of infringement offence’ and states that any person who is alleged to have

committed an infringement offence may either be proceeded against for the offence under the Summary proceedings Act, 1957 or be served with an infringement notice as provided in sec. 343C; sec. 343C refers to ‘infringement notices’ and sec. 343D refers to ‘Entitlement to infringement fees’ of the local authority.

These are basically the provisions of the Act relating to Environmental Courts in Part 11 and 12.

In New Zealand, the statutes which deal with environment are the ‘Water and Soil Conservation Act, 1967; the Clean Air Act, 1972; the Noise Control Act, 1982; Marine Farming Act, 1971; Harbour Act, 1950; Forests Act; Historic Places Act; Local Government Act; Transit NZ Act; etc.

Schedule 1 deals with ‘Preparation, changes and review of Policy statement and Plans’, Schedule 2 refers to ‘Matters that may be provided for in Policy statement and Plans; then comes Schedule 3; Schedule 4 with Assessment of effects on the Environment. (Other Schedules upto 11 deal with certain other aspects’.

Summarising the functions of the NZ Environment Court, it is seen that it consists of Environmental Judges, who are also District Court Judges in office and of Environmental Commissioners. The Court has a Central Registry at Wellington and holds sittings throughout New Zealand. Normally, the panel will consist of one Environment Judge and two Environment Commissioners (except where enforcement proceedings involve questions of law). Parties before the Court are usually represented

by lawyers, but anyone may appear in person, or be represented by an agent. The Court is not bound by the rules of evidence and the proceedings are often less formal than the general Courts. Most of the Court's work involves public interest questions. The jurisdiction of the Environmental Tribunal consists of matters arising under (1) the Resource Management Act, (2) References about the consents of regional and district statements and plans; and appeals arising out of applications for resource consent; (3) The consents applied for may be for a land use, for a sub-division, a coastal permit, a water permit or a discharge permit or a combination of these.

The Environment Court's work includes:

- (1) issue of directions authorizing public works such as energy projects, hospitals, schools, prisons, sewage works, refuse landfills, fire-stations, major roads and bypasses; and also major private projects – for example, dairy, factories, tourist resorts, timber-miles and shopping centers.
- (2) Classification of water, water permits for dams and diversions, taking of geothermal fluids, discharges from sewerage works, underground mines; maximum and minimum levels of lakes and flows of rivers, and minimum quality standards; and water conservation orders.
- (3) Land sub-division approvals and conditions, development levies, car-parking contributions, reserve contributions, development levy fund distribution, road upgrading contributions, regional roads, limited access to roads and stopping roads.

- (4) Environmental effects of prospecting, exploration and mining, including underground, open pit and alluvial mining.
- (5) Enforcement proceedings (including interim enforcement orders, declarations about the legal status of environmental activities and instruments, existing and proposed, and appeals against abatement notices.)

Some of the issues that arise before the N.Z. Environment Court are:

- (1) Water and hydrothermal resources, including use for electricity generation.
- (2) Levying and distribution of public funds (reserves and development levies).
- (3) The physical environment, including the coast, bush, landform, lakes, rivers, productive soil.
- (4) Noise environment and cost of protecting the environment from noise nuisance.
- (5) Public safety, e.g. bulk LPG installations, exposure to earthquake risk, flooding, erosion.
- (6) Mining in reserves, developments in coastal environment, regional planning.
- (7) Social issues including social effects of mining or other industrial projects.

United Kingdom:

In UK, the Department of Environment was set up in Nov. 1970. The statutes governing environment are the Wildlife and Countryside Act, 1981, the Water Act, 1989, the 1990 Planning Acts and the Environment Protection Act, 1990 (EPA). The Town and Country Planning Act, 1990 consolidated the legislations for England and Wales and amendments were made to the Planning and Compensation Act, 1990. The Scottish legislation is the Town and Country Planning Act, 1997. The Scottish Environment Protection Agency was established in 1996.

The Environment Agency in England and Wales was established in 1996 to bring together functions previously exercised by the National Rivers Authority (created in 1989) and Her Majesty's Department of Pollution. Then came the Environment Act, 1995 which deals with the Agency's powers.

The House of Lords held in R vs. Secretary of State for Environment, Transport and the Regions ex parte Alconbury Development Ltd. & Others" 2001 UKHL 23 that the role of the Secretary of State, as both policy-maker and a decision-maker in individual planning cases (such as call inns) was, (when taken together with the right of Judicial review), compatible with the requirement under the European Convention on Human Rights.

The above decision of the House of Lords (according to the Royal Commission on Environmental Pollution)(23rd Report on Environmental Planning, March 2002 para 5.33) dealt only with the position of the Secretary of State, and recognized that planning decisions in general raise questions of civil rights. The judgment had significantly left open the

position of planning inspectors making delegated decisions, the extent to which third parties have rights, and the extent to which other areas of environmental regulations are equally subject to such principles.

The Magistrate Courts, the Crown Courts (Appellate Courts) the Court of Criminal Appeals; the County Court and the High Court were and are dealing with the planning and environmental cases. It was felt that there should be one Court or Tribunal to deal with the whole range of planning and appeal and enforcement work, including the levy of penalties. This was pointed out in the report 'Enforcing Planning Control' (HM SO May 1989) by Robert Carnworth Q.C. (See "Environmental Enforcement: the need for a Specialist Court" Journal of Planning & Enforcement, 1992 p. 798). While some of the other recommendations were accepted in bringing forward the Planning and Compensation Act, 1991, there was no response in regard to the need for a unified system of Courts.

At that juncture, Lord Woolf, in his Garner lecture to U.K.E.L.A. on the theme 'Are the Judiciary Environmentally Myopic' summed up the problems of increasing specialization in environmental law and on the difficulty of Courts, in their present form, moving beyond their traditional role of detached 'Wednesbury' review. (The speech of Lord Woolf is printed in 1992 J.E.L. Vol 4, No.1, p.) He went on to discuss the benefits of

“...having a Tribunal with general responsibility for overseeing and enforcing the safeguards provided for the protection of the environment...The Tribunal could be granted a wider discretion to

determine its procedure so that it is able to bring to bear its specialist experiences of environmental issues in the most effective way.”

The Tribunal, according to Lord Woolf, should have the benefit of architects, surveyors and a ‘multi-disciplined adjudicating panel’ with broad discretion over rights of appearance; power to instruct independent counsel on behalf of the Tribunal or members of the public; resources for direct investigation by the Tribunal itself; incorporation into the Tribunals of the existing Inspectorate to deal with ‘cases of lesser dimensions’. Lord Woolf concluded:

“I hope...I have said enough...to indicate that what I am contemplating is not just a Court under another name, nor is it an existing Tribunal under another name. It is a multi-faceted and multi-skilled body which would combine the services provided in existing Courts, Tribunals and Inspectorate in the environmental field. It would be a ‘one stop shop’ which should lead to faster, cheaper and the more effective resolution of disputes in the environmental area. It would avoid increasing the load on already overburdened lay institutions by trying to compel them to resolve issues with what they are not designed to deal. It could be a forum in which Judges could play a different role. A role which enabled them not to examine environmental problems with limited vision. It could however be based on our existing experience, combining the skills of the existing inspectorate, the lands Tribunal and other administrative bodies. It could be an exciting project.”

In the article by Robert Carnworth, Q.C., referred to earlier, the author has dealt with the strength and weakness of the existing jurisdictions in England in the areas of (i) enforcement procedures, (ii) the public inquiry, (iii) judicial review and statutory appeals, (iv) local ombudsman, and (v) Lands Tribunal and stated

“With the impetus given by Sir Harry Woolf, there is now an opportunity to review the structure of the Courts and agencies concerned with the supervision of environmental law. Such a review should start by a pooling of ideas and experiences of all those involved in the practical working of the present system – specialist Judges and lawyers; the local ombudsman; the planning inspectorate, local authorities and other relevant public agencies; voluntary groups, business organizations etc. The aim should be a pragmatic evolution towards a logical and simplified structure, incorporating the best of existing practice and procedure.”

Lord Woolf again, in another lecture in May 2001, suggested that there was a case for some new form of Environment Court or Tribunal. This was in his ‘Environmental Law Foundations Prof. David Hall Medical Lecture’ while speaking on the subject ‘Environmental risk: the responsibilities of the law and science’.

It was at that stage that a major study was undertaken by Prof. Malcolm Grant of Cambridge in what is known as the “Environment Court Project”. The Report on the project was published on February 18, 2000. It was prepared by the Dept. of Land Economy, University of Cambridge. The

project initiated and supported by the Dept. of Environment Transport and Regions (IETR) and had the support of the Financial Management and Performance Review of the Planning Inspectorate made in 1995-96. The purpose of the project was to study the concept of an Environment Court in the background of experience in other countries, such as Australia and New Zealand. The Report identified the following ten characteristics that help define the concept though it did not firmly recommend such a Court for UK (see 2000 JPL p 453 'The Case for an Environmental Court'). These are:

- (a) a specialist and exclusive jurisdiction;
- (b) a power to determine merits appeals;
- (c) vertical and horizontal integration – (by which is meant a wide environmental jurisdiction which integrates both subject matter and different types of legal proceedings);
- (d) the hallmarks of a court or tribunal;
- (e) dispute resolution powers – (even disputes over the formulation of policy as well as a more traditional adjudication.);
- (f) expertise – (the members would be specialists in environmental issues);
- (g) access – (there would be broad rights of access to the Court);
- (h) informality of proceeding (such as use of alternative dispute resolution procedures);
- (i) costs (this is linked to the need for access and involves means of overcoming the problem of high costs inhibiting access); and

- (j) capacity for information.

Comment has been made that the above ten criteria are quite general and that they lack clarity. While it is true that the above criteria may be common to several types of modern Courts or Tribunals not necessarily dealing with ‘environment’, the fact remains that these general criteria are equally suitable and applicable for Environmental Courts also.

Prof. Malcolm Grants’ Project Report published in May 2000 recommended six possible alternative arrangements ranging from a ‘Planning Appeals Tribunal’ to an ‘Environmental Court’ as a division of the High Court.

As regards discussions within Town and Country Planning systems, the Royal Commission no doubt stated in its 23rd Report on Environmental Planning (March 2002) (para 5.35) that what was needed was “a system that commands public confidence, improves consistency, is effective at reaching decisions and is not unduly costly. Our main consideration is with merits appeals. With the Administrative Court now established within the High Court, we are not convinced that there is any need for a specialist environmental court dealing with judicial review or statutory appeals on legal grounds so far as the Town and County planning systems were concerned. Criminal offences concerning planning and environmental matters are probably best left to the ordinary criminal courts, though there is a case for improved guidance on sentencing and more training, especially for magistrates”.

Finally, the Royal Commission recommended establishment of Environmental Courts so far as environmental matters outside the Town and County planning systems, for establishment of an Environmental Court, as follows:

“...there is a great deal of inconsistency at present, both in whether there is a right of appeal on merits and in who decides any such appeal. Some appeals are made to the Secretary of State. Others, such as those concerning contaminated land or statutory nuisances, are made to the magistrate’s Courts, which often lack the expertise to handle the considerable technicalities involved. In many contexts, for example, the granting of consents in relation to genetically modified organisms, there is no right of appeal on merits. Procedures have grown up haphazardly with no apparent underlying principle, and we consider they fail to provide a system appropriate for contemporary needs. We recommend the establishment of Environmental Tribunals to handle appeals under environmental legislation other than the town and country planning system, including those now handled by planning inspectors.” (para 5.36)

The Royal Commission observed (para 5.37) that establishing an Environmental Tribunal would be a significant contribution to a more coherent and effective system of environmental regulation. As to its constitution, and scope of appeals from it, the Commission said:

“We envisage such a Tribunal would consist of a legal chairperson and members with appropriate specialized expertise. It would rapidly

develop the authority and understanding needed to handle complex environmental cases. We envisage several tribunals would be established to cover England and similar tribunals for Wales, Scotland and Northern Ireland. On points of law, there would be right of appeal from the Tribunal to the High Court. Applications for judicial review or environmental matters would not be considered by the High Court unless the applicant had exhausted any remedy available from the Environmental Tribunal or from other sources.”

The ‘alternative remedy’ principle as exercised by our High Courts in India in jurisdiction under Art. 226 is clearly accepted here.

As to the jurisdiction and powers of the Environmental Courts, the Royal Commission stated (para 5.38):

“The precise jurisdiction of the Environmental Tribunal would be a matter for government, but we have indicated in box 5B various areas that would be appropriate. We envisage civil litigations will continue to be handled by the civil courts and criminal matters by the criminal courts. The new Tribunals would take over such functions as the present jurisdiction of magistrates’ courts on such subjects as contaminated land and statutory nuisance. Although, in general, the Tribunal should have the final rights of decision on appeals submitted to it, there may be cases of acute policy sensitivity where it ought to make a recommendation to the Minister rather than the final decision, and the Alconbury decision implies that such a mechanism would be consistent with the Human Rights Act. It also would then be similar

to that of a planning inspector where a planning appeal is received by the Secretary of State. The Tribunal's main concern would be with appeals, but it might have some original jurisdiction, for example, in deciding statutory nuisance cases currently taken by complaints to a magistrate's court."

Thus, the proposal is for the Environmental Court would have 'appellate' as well as 'original' jurisdiction. They would not oust the normal civil and criminal jurisdiction of ordinary Courts but would remain special Courts for environmental issues.

The Box 5B contains a chart at the bottom of which we have the 'New Regional Environmental Tribunals' which will hear appeals on 'environmental matters'. These are appeals from (a) decisions of Environmental Agencies (in respect of IPPC, discharge to water courses waste licences etc.) (b) appeals, currently heard by magistrate's courts, from notices served by local authorities in relation to contaminated land and statutory nuisances, (c) designation of sites of special scientific interest and Habitat Regulations, (d) decision of Secretary of State on licences for genetically modified organisms and other government decisions where there is no right of appeal at present other than by judicial review.

In UK, the Criminal Courts would deal with environmental offences in the same way as at present; one Court in each County might be designated to deal with environmental offences. The Civil Courts would continue to deal with environmental disputes between private parties on issues such as nuisance or negligence.

The Commission went on to recommend (see para 5.39) to combine the Environmental Tribunal with the Planning Inspectorate to establish a ‘Planning and Environmental Tribunal’ (on the lines of some of the options considered by Professed Grant). That would resolve the doubts remaining about the position of planning inspectors in relation to the Human Rights Act. It would be an advantage to have a firm institutional linkage between the appeals system for land use and the procedures for a more specialized environmental regulation. Such a development, the Royal Commission said, may come after some time. But the Commission’s view was that it was preferable for a tribunal to start by taking over and consolidating the wide variety of other procedures for environmental regulation, rather than risk being swamped by the much greater volume of appeals.

As to locus standi, so far as judicial review matters are concerned, the Royal Commission had a liberal view when it stated (see para 5.40) that a

“very important distinction between appeals on merits and judicial review is that appeals by way of judicial review are not restricted to the applicant. Third parties such as a neighbour or amenity groups may also bring judicial reviews against, say, the decision of a local planning authority to grant planning permission, the Environmental Agency to grant an IPPC licence, or the decision of the Secretary of State on a merits appeal. To do so, they have to satisfy the Court that they have ‘sufficient interest’.... Contemporary practice is far more liberal. Local amenity groups and national environmental

organizations have frequently been granted leave to bring judicial review, particularly if they made representations concerning the original applications.”

The Royal Commission then referred to the 1990 E.C. Directive on the freedom of access to information on environment as implemented in U.K. by the Environment Information Regulations 1992 and the 1998 Convention on ‘Access to Information, Public Participation in Decision Making and Access to Justice’ on Environmental Matters (see paras 5.41 to 5.47) and to several aspects as to locus standi of individual and environmental organizations in respect of planning and development as well as environmental matters.

U.K. has not yet established Environmental Tribunals for environmental issues, but it appears to us that the country is in the process of establishing such Courts soon.

The following is the further literature on the subject in respect of U.K.:

- (i) William Birties: “Why we need an Environment Court’
(Legal Week, 2000, 2(1), 19
- (ii) Freshfields: “The Environmental Courts Concept”
(Comm LJ 2000 17(28-31))
- (iii) Editorial: “The case for an environmental court”
((2000) JPL 453)

- (iv) Editorial: “The Govt’s response to the Grant Report on an Environmental Court” ((2000) JPC B 95)
- (v) Paula de Prez: ‘An environmental court: the case for inclusion of a criminal law jurisdiction’ (Environmental Law and management (2000, 12(5), 191)
- (vi) Martyn Day, Richard Stein and William Birties:
“An Environmental Court Part-I” [(2001) 151 New LJ 630; Part II (2001) 151 New LJ 672].
- (vii) “Do we need an environmental court?”
(In House Lawyer No. 81, June 2000, 64.)

Canada, Europe and USA

We shall not go into details but briefly state that the environmental disputes are being decided by the following Courts in Canada, Europe and USA.

(A) Canada:

- (a) Alberta: Environmental Appeals Board
- (b) Ontario: Environmental Assessment and Appeals Boards

(B) Europe:

- (a) Denmark: Environmental Appeals Board.
- (b) Irish Republic: The Planning Appeals Board.

(c) Sweden: Environmental Courts and the Environmental Court of Appeal (see the new Environmental Code)

See also James Hurst: "Sweden: the Environmental Code. EELR (1999)8 (5) pp 134-135

(C) U.S.A. : The Vermont Environmental Court.

Chapter V

Environmental Courts or appellate environment bodies in India as at present

General jurisdiction of various civil, criminal and constitutional Courts:

We have referred, in detail in Chapter III, to the case law showing the wide range of powers exercised by the High Courts and the Supreme Court on a variety of environmental issues under Art. 226 and Art. 32 respectively. Apart from these superior Courts, the subordinate civil courts exercise powers in regard to public and private nuisances. (See sec. 9 and also sec. 91 of the Code of Civil Procedure Code, 1908). Criminal Courts exercise powers under various sections of the Indian Penal Code (IPC) dealing with offences relating to environment. Chapter XIV of the IPC refer to offences under sections 269, 270 (neglecting or doing malignant acts likely to spread infectious diseases dangerous to life, disobedience of quarantine rules (sec. 271), fouling water of public spring or reservoir (sec. 277), making atmosphere noxious to health (sec. 278), negligent conduct with respect to poisonous substances, fire or combustible matter, explosive substances, machinery, and pulling down or repairing buildings; animals (sec. 291), endangering life or personal safety of others (sections 336 to 338), mischief (sec. 425), mischief by injury to works of irrigation or by wrongly diverting water (sec. 430), mischief by injury to public road, bridges, river or channel (sec. 431), mischief by causing inundation or obstruction to public drainage, attended with damage (sec. 432), and culpable homicide (sec. 299 to 304A). Chapter X of the Code of Criminal

Procedure, 1973 also contains provisions for enforcement of various provisions of the substantive law (for e.g. sec. 133 CrPC).

In addition, new offences are created by sections 41 to 50 (Chapter VII) of the Water (Prevention and Control of Pollution) Act, 1974; sections 37 to 46 (Chapter VI) of the Air (Prevention and Control of Pollution) Act, 1981, sections 14 to 18 of the Public Liability Insurance Act, 1991, sec. 3A, 3B of the Forest (Conservation) Act, 1980; sec. 51 to 58 (Chapter VI) of the Wild Life (Protection) Act, 1972; sec. 15 to 17 of the Environment (Protection) Act, 1986. All these offences today go for trial before the ordinary criminal courts. The appropriate criminal court will deal with the matter and is identified on the basis of the territorial jurisdiction and depending upon its power to award sentence of imprisonment to any person for particular number of years. The appeals on the criminal side are governed by the laws relating to criminal procedure.

Obviously, whether the matter is one of civil nature or criminal nature, once it is taken cognizance by any Court subordinate to the High Court, it will be dealt with by the said civil or criminal court along with the other cases before it and environmental cases are not normally given any priority in the matter of disposal. Of course, if the issue comes before the High Court or the Supreme Court under writ jurisdiction whether the matter is one brought by the affected party or parties or in a Public Interest litigation, these Courts take up these matters faster but the cases are not taken up day by day as may be done by an Environmental Court dealing exclusively with such cases.

What we mean to say is that none of the above Courts are courts having exclusive jurisdiction as regards environmental issues and the result is that there is delay in their disposal as compared to the time within which any special Environmental Court dealing only with issues relating to environment could have taken. It cannot be disputed that environmental matters have to be taken up early, monitored from time to time and be finally disposed of by a procedure quicker than that obtaining now. Further, the Courts today lack independent expert advice on environmental matters by a statutory panel attached to the Court and depend mostly on the expert evidence that may be adduced by the parties. We have already pointed in the previous chapters, the need for experts in environment to be associated with the Courts dealing with these cases.

Special Acts and appellate powers:

Environment (Protection) Act & Rules made thereunder:

Section 3(3) of the Environment (Protection) Act, 1986 enables the Central Government to constitute an authority or authorities for the purpose of exercising and performing such of the powers and functions of the Central Government under that Act (including the power to give directions under sec. 5 of that Act) and for taking measures with respect to the matters referred to in sec. 3(2) and subject to the supervision and control of the Central Government.

Several rules have been framed under section 25 of the Environment (Protection) Act, 1986. These rules provide for 'authorities' who implement

the rules and also provide for ‘appellate authorities’ who are all officers or Departments of Government. Various rules have been made under sec. 25. Some rules framed under the Act regarding appointment of ‘authorities’ do not prescribe appellate authorities.

In the Hazardous Wastes (Management and Handling) Rules, 1989, Rule 18 provides for an appeal against any order of grant or refusal of an authorization by the Member-Secretary, State Pollution Control Board (or any officer designated by the Board) – to the Secretary, Department of Environment of the State Government.

In the Rules of 1989 relating to Manufacture, Storage and Import of Hazardous chemicals, Rule 2(b) refer to the ‘authority’ mentioned in Col. 2 of Schedule 5 as being the authority which will perform various functions under Rule 3. The said Schedule 5 designates various authorities or persons to exercise the functions such as (1) Ministry of Environment and Forests under Environment (Protection) Act, 1986; (2) Chief Controller of Imports and Exports under the Import and Export (Control) Act, 1947; (3) The Central Pollution Control or the State Pollution Control Board or Committee under the Environment (Protection) Act, 1986; (4) Chief Inspectors of Factories under the Factories Act, 1948; (5) Chief Inspector of Dock Safety appointed under the Dock Workers (Safety, Health and Welfare) Act, 1987; (6) Chief Inspector of Mines appointed under the Mines Act, 1952; (7) Atomic Energy Regulatory Board appointed under Atomic Energy Act, 1972; (8) Chief Controller of Explosives appointed under the Explosives Act and Rules, 1973. No provision is made for an appeal in these Rules.

In the Municipal Solid Wastes (Management and Handling) Rules, 2000, various functions are to be performed by the Municipal Authority, State Governments, Union Territories, Central Pollution Control Board and State Pollution Control Board or Committee. No appeal provision is made.

In the Ozone Depleting Substances (Regulation & Control) Rules, 2000, various functions have to be performed by the authority specified in Schedule V thereof. Here, in Col (4), the Schedule specifies the ‘authority’ and Col. 6 specifies the appellate Authority also. The appellate authorities are Secretary, Ministry of Environment and Forests, or in certain cases, the Dy. Secretary in the same Ministry.

In the Noise Pollution (Regulation & Control) Rules, 2000, Rule 2(c) defines ‘authority’ as an authority or officer authorized by the Central Government or the State Government, as the case may be, in accordance with the laws in force and includes a District Magistrate, Police Commissioner or any officer not below the rank of a Deputy Superintendent of Police. There is a definition of ‘Court’ in Rule 2(d) but the Rules do not deal with the functions of the ‘Court’. No appellate authority is referred.

Bio-Medical Waste (Management & Handling) Rules, 1998 defines ‘Prescribed Authority’ under Rule 7 for enforcement of the Rules and designates the authority as the State Pollution Control Board in States or such Committees in Union Territories. Rule 13 defines the appellate authority as the authority to be notified by the State Government or Union Territory.

Thus, it will be seen that in the various Rules made under sec. 3 of the Environment (Protection) Act, 1986, there are authorities/(or in some cases) appellate authorities constituted but there is no appeal to a judicial body. Nor do the appellate authorities, wherever they are constituted, have any expert assistance. They are all bureaucrats.

Water (P&CP) Act, 1974 and Rules made thereunder:

The Water (P&CP) Act, 1974 contains provisions for ‘appeals’ to an appellate authority, to be constituted by the State Governments to deal with appeals by persons aggrieved by orders of State Board and then a revision to the State Government. (See sec. 25 and 26).

The Union Territory of Chandigarh, on 11.4.88, appointed three officers of Government as the appellate authority for purposes of sec. 28 of the Water (P & Co of P) Act, 1974. The Pondicherry Government, on 5.4.88, appointed its Chief Secretary as the appellate authority. The Delhi Administration appointed a single person appellate authority on 18.2.92 who is the Financial Commissioner.

Haryana (Prevention and Control of Water Pollution) Rules, 1978 (22.12.78) state in Rule 23 that the appellate authority shall consist of two persons to be nominated by the Government and must have the following qualifications with qualification of graduate in Engineering and a third person who is a law graduate with 3 years experience as a lawyer.

Maharashtra Water (Prevention & Control of Pollution) Rules, 1983 prescribe an appeal to the 'appellate authority' to be designated by the State Government. Punjab Water (Prevention & Control of Pollution) Appeal Rules, 1978 provide for an appeal to the appellate authority. It is not clear who is designated under these Rules.

Uttar Pradesh Water (Consent for Discharge of Sewerage and Trade Effluents) Rules, 1981 provides for an appeal to an appellate authority specified by the Government.

Only in Andhra Pradesh, the appeal under sec. 28 of the Water Act, 1974 read with AP (Water P & P) Rules, 1977 lies to a High Court Judge. (See A.P. Pollution Control Board vs. Prof. M.V. Nayudu 1999(2)SCC 718 at 735.)

Thus, except in Andhra Pradesh, there is no appeal to a body which consists of a Judicial Member. There are also no experts to assist the appellate authority.

Air (P&CP) Act, 1981 and Rules made thereunder:

The Air (P&CP) Act, 1981, contains provision in sec. 31 for 'appeals' to an appellate authority to be constituted by the State Government.

The Andhra Pradesh Air (Prevention and Control) Rules, 1982 Rule 37 speaks of an appeal to the appellate authority against orders of the State Board. Gujarat Rules, 1983 also provide in Rule 18 for an appeal. So does

Rule 24 of the Haryana Rules, 1983. Rule 25 of the Karnataka Rules, 1983 provide for an appeal. Kerala Rules, 1984, provide for an appeal under Rule 34 to the appellate authority. Rule 21 of Madhya Pradesh Rules provide for the appeal. Rule 32 of the Maharashtra Rules deal with appeals. Tamil Nadu Rules, 1983, provide for appeal in Rule 35. West Bengal Rules, 1983 provide for appeal in Rule 17. The Union Territories Rules, 1983 provide for appeal in Rule 17. We do not have any evidence before us to say that the appeals lie to a Court or a judicial officer who is also having expert advice.

Summary of the appeal provisions in the above Acts and Rules (Lack of judicial and expert inputs):

It will be noticed that several of the special statutes e.g. Environment (Protection) Act, 1986, Water (P&CP) Act, 1974, Air (P&CP) Act, 1981, delegate power to the State Governments/Union Government to designate appellate authorities. The appeals lie generally, as can be seen from the above paragraphs, to various officers of government or Departments of Government. Except in one or two cases, the appeals do not lie to a judicial body comprising a judicial officer. In no case does the appellate authority have the assistance of experts in the field of environment.

In the light of the discussion in the earlier chapters and experience of establishment of Environmental Courts abroad, the Law Commission is of the opinion that the present system is not satisfactory so far as disposal of these appeals are concerned. The appeal is practically the first opportunity for a party or even third parties affected by pollution, to seek relief. In the

view of the Commission, such appeals must lie to an appellate Court having special jurisdiction and must comprise of persons who have or had judicial qualifications or have considerable experience as lawyers. They must also be assisted by experts in environmental science. As stated in the earlier chapters, it is now well recognized in several countries that the appeals must lie to Court manned by persons with judicial knowledge and experience, assisted by experts in various aspects of environmental science.

Chapter VI

Two other statutory Environmental Tribunals and Defects therein

National Environment Tribunal Act, 1995:

This enactment was made by Parliament, as stated in the preamble, to provide for strict liability for damages arising out of any accident occurring while handling any hazardous substance and for the establishment of the Tribunal for effective and expeditious disposal of cases arising from such accidents, with a view to giving relief and compensation for damages to person, property and the environment and for matters connected therewith or incidental thereto. Liability under sec. 3 is to be on basis of 'no fault' and under sec. 4 compensation is payable. Under sec. 9(1), the Tribunal shall consist of a Chairperson and such members as Vice-Chairpersons/Judicial Members and Technical members as the Central Government deems fit. It can sit in Benches but each Bench must consist of a Judicial and Technical member. Chairman shall be person who is or has been a Judge of the Supreme Court or High Court, or has at least been Vice-Chairman for 2 years. A Vice-Chairman should be a person (a) who is or has been a Judge of a High Court or was a Secretary to Government of India for at least 2 years or has held any other post in Central or State Government, carrying a scale of pay which is not less than that of a Secretary to Govt. of India or (c) held post of Addl. Secretary in Govt. of India for 5 years and has acquired knowledge of or experience in legal, administrative, scientific or technical aspects of the problems relating to environment, or has at least 3 years experience as a Judicial member or a

Technical member; or (3) a Judicial Member must be one who is or has been qualified to be a Judge of a High Court or has been a member of the Indian Legal Service and has held a post in grade I of that service for at least 3 years. A Technical Member is a person who has adequate knowledge of or experience in or capacity to deal with administrative, scientific or technical aspects of the problems relating to environment. No appointment of the Chairperson or Vice-Chairperson can be made without consultation of the Chief Justice of India. No appointment of a Judicial or Technical Member can be made except on the recommendation of a Selection Committee appointed by the Central Government consisting of

- (a) Chairperson of the Tribunal.
- (b) Secretary, Govt. of India, Ministry of Environment and Forests.
- (c) Secretary, Ministry of Law, Justice and Company Affairs.
- (d) Director-General, Council of Scientific and Industrial Research.
- (e) An Environmentalist to be nominated by the Central Government.

Term of office of Chairperson, Vice-Chairperson and other Members is 5 years. Appeals lie to Supreme Court on question of law.

It may be stated that so far as the National Environmental Tribunal is concerned, since the Act itself has not been notified, the Tribunal has not been constituted in that last eight years. The fact remains that neither the Chairperson, nor Vice-Chairman nor Judicial or Technical Members have been appointed to this Tribunal in the last eight years. Such an important environmental Tribunal envisaged by Parliament has unfortunately not come into being. In fact, if there is tragedy like the Bhopal one, there is now no Tribunal which would grant damages expeditiously.

There are other aspects concerning the powers of the above Tribunal. It can only award compensation. It should have been given all powers which a Civil Court enjoys – so that it can grant declarations, permanent and mandatory injunctions, possession etc. No doubt, there is provision for the Tribunal sitting in Benches but the scheme does not envisage Court in each State. Further, the Members other than Judicial Members, are not always or necessarily experts in environmental matters. For example, under sec. 10(2) (b), if a Secretary to Government is appointed as Vice-Chairman, he need not possess any experience in environmental matters. It is not clear why only in the case of an Addl. Secretary who could be appointed as Vice-Chairman under sec. 10(2)(c), experience in environmental matters is a condition precedent. Similarly under sec. 10(3)(b), it is not stated that a member of the Indian Legal Service who can be appointed as a Judicial member need be person who has done some work in the field of environment. Again, so far as Technical members under sec. 10(4) are concerned, they can be persons only with administrative or scientific knowledge without any experience in problems relating to environment.

If one looks at the consistent pattern in other countries, as pointed out in Chapter IV, the Environmental Court should consist of Judicial Members and Environmental experts. The reason is that if they are expected to exercise normal judicial function of a Civil Court (as now proposed), or as a Court of original and appellate jurisdiction, there is no scope for appointing administrative officials or public servants other than judicial officers/members of the Bar with considerable experience. The Commission is of the view therefore that the Environmental Court must be

manned by persons with judicial experience in the High Court and Members of the Bar with at least 20 years standing and have to be assisted by Environmental experts.

The National Environmental Appellate Authority Act, 1997

This Act was, as stated in the preamble, intended to provide for the establishment of a National Environmental Appellate Authority to hear appeals with respect to restriction of areas in which any industries, operation or process (or class of industries, operation or processes) shall be carried out or shall not be carried out subject to safeguards under the Environmental (Protection) Act, 1986.

Under sec. 4 of the Act, the Appellate Authority was to consist of a Chairperson, a Vice-Chairperson and such other Members not exceeding three, as the Central Government may deem fit. Under sec. 5, the qualification for appointment as Chairperson is that a person who has been

- (a) a Judge of the Supreme Court
- (b) the Chief Justice of High Court

A person cannot be appointed as Vice-Chairman unless he has (a) held for two years the post of a Secretary to Govt. of India or any other post under the Central/State Govt. carrying a scale of pay which is not less than that of a Secretary to Govt. of India and (b) had expertise or experience in administrative, legal, management or technical aspects of problems relating to environmental management law or planning and development.

It will be noticed that there is some difference between the above provisions and those under the National Environment Tribunal Act, 1995. But here too, the Secretary to Govt. need not necessarily have experience in environmental matters to be appointed as Vice-Chairman.

The term of office is three years.

It is understood that the Appellate Tribunal did not have much work in view of the narrow scope of its jurisdiction as per notification issued. It dealt with very few cases. After the term of the first Chairman was over, no appointment has been made.

Thus these two National Environmental Tribunals are today unfortunately non-functional. One had only jurisdiction to award compensation and never actually came into existence. The other came into existence but after the term of the first Chairman ended, none has been appointed.

It is in the background of this experience with the laws made by Parliament with regard to Environmental Tribunals that we propose to make appropriate proposals in chapter IX for constitution of environmental courts which can simultaneously exercise appellate powers as a Civil Court, and original jurisdiction as exercised by Civil Courts. These proposals will be contained in Chapter IX.

CHAPTER VII

Can a law made by Parliament under Art. 252 (like the Water (P&CP) Act, 1974), be amended by Parliament under a law made under Art. 253?
What is the purpose of Art. 247?

An important issue that arises when we are contemplating a Central Act on ‘Environmental Courts’ by Parliament, revolves round Arts. 252 and 253 of the Constitution of India. As explained below, the said Articles enable Parliament to make laws with respect to matters falling under List II (State List) in the Seventh Schedule of the Constitution in regard to which the State Legislature is entitled to make legislation.

We shall initially refer to Art. 252 and Art. 253.

Art. 252 deals with the power of Parliament to legislate for two or more States by consent and adoption of such legislation by any other State. It reads as follows:

“Art. 252: (1) If it appears to the Legislatures of two or more States to be desirable that any of the matters with respect to which Parliament has no power to make laws for the States except as provided in Articles 249 and 250 should be regulated in such States by Parliament by law, and if resolutions to that effect are passed by all the House of the Legislatures of those States, it shall be lawful for Parliament to pass an Act for regulating that matter accordingly, and any Act so passed shall apply to such States and to any other States

by which it is adopted afterwards by resolution in that behalf by the House or, where there are two Houses, by each of the Houses of the Legislatures of that State.

(2) Any Act so passed by Parliament may be amended or repealed by an Act of Parliament passed or adopted in like manner but shall not, as respects any State to which it applies, be amended or repealed by an Act of the legislature of that State.”

Art. 253 contains a non-obstante clause. It reads as follows:

“Art. 253. Legislation for giving effect to international agreements: Notwithstanding anything in the foregoing provisions of this chapter, Parliament has power to make any law for the whole or any part of the territory of India for implementing any treaty, agreement or convention with any other country or countries or any decision made at any international conference, association or other body.”

Entry 13 of List I of Schedule VII reads as follows:

“Participation in international conferences and associations and other bodies and implementing decisions made thereat”

The above entry enables Parliament to make laws under this entry even though the subjects may fall within the domain of the State Legislatures. Art. 253 gives overriding power to Parliament in this behalf. In S. Jagannath vs. Union of India: 1997 (2) SCC 87, the Supreme Court observed that Art. 253 is in conformity with the object declared by Art. 51

(c) (fostering respect for international law and treaty obligations), Treaty-making and implementing of treaties etc. and is subject to Union legislation, under Entry 14, List I. Art. 253 (entering into treaties and agreements and conventions) by the use of the words “notwithstanding the foregoing provisions”, empowers the Union Parliament to make laws with regard to entries in List II, insofar as that may be necessary for the purpose of implementing the treaty obligations of India. Thus, an enactment made under Entry 13, List I, Schedule VII (participation in international conferences etc.) read with Art. 253 to implement an international agreement would override and prevail over any inconsistent State enactment.

We shall next refer to the entries in List I (Union List), List II (State List) and List III (Concurrent List) of the Seventh Schedule which contain the list of legislative powers of Parliament and the States, in so far as some environmental related matters are concerned.

List I (Union List): Atomic energy and mineral resources (Entry 6); industries declared necessary for defence (Entry 7); shipping and navigation (Entry 24); maritime shipping and navigation (Entry 25); industries expedient in national interest (Entry 52); regulation and development of oil field and mineral oil resources (Entry 53); regulation and development of mines and minerals (Entry 54); regulation and development of inter-state river or river valleys (Entry 56); fishing and fisheries (Entry 57).

List II (State List): Public health and sanitation (Entry 6); agriculture (Entry 14); preservation, protection and improvement of animal stock (Entry 15);

water, water supplies, irrigation, canal, drainage and embankment (Entry 17); fisheries (Entry 21); regulation of mines and mineral development (subject to the provisions of List I with respect to regulation and development under the control of the Union) (Entry 23); industries subject to the provisions of Entries 7 and 52 of List I (Entry 24).

List III (Concurrent List): Prevention of cruelty to animals (Entry 17); forests (Entry 17A); protection of wild animals and birds (Entry 17B).

The Tiwari Committee appointed by Government for “Recommending Legislative Measures and Administrative Machinery for Ensuring Environment Protection” (1980) (Dept. of Science and Technology, New Delhi), recommended that a new entry as ‘environmental protection’ be introduced in List III to enable the Central as well as State Governments to legislate on environmental subjects. This has not been done so far.

But, it is undoubted that under various Articles, such as Arts. 252 and 253, Parliament has power to pass central legislations on subjects in the State List (List II) of the Seventh Schedule, in certain circumstances.

So far as prescribing an appellate Court like the proposed Environment Court by law to be made by Parliament under Art. 253 by amending the Air (P&CP) Act, 1981, the Environment (Protection) Act, 1986, there is no difficulty because these two laws have also been made by Parliament in exercise of its legislative powers under the same Art. 253. The issue arises only so far as the Water (P&CP) Act, 1974 is concerned

which was made by Parliament in exercise of its legislative powers under Art. 252(1) and not under Art. 253. Question is whether it can be amended only by following the procedure of State Legislatures passing resolutions or whether, without following such a procedure, the Water (P&CP) Act, 1974 can be amended by Parliament by passing an amending law under Art. 253 for the purpose of providing appellate jurisdiction to the proposed Environmental Court under the Water (P&CP) Act, 1974?

The Water (P&CP) Act, 1974 was enacted after some States desired Parliament to enact law under Art. 252(1) on the subject of 'water' etc. which are in List II (State List) for the purpose of uniformity. Those State Legislatures had passed resolutions for that purpose. After Parliament passed those laws, several other States adopted the Water (P&CP) Act, 1974. In view of Art. 252(2), if such a law is passed by Parliament under Art. 252(1) in respect of a matter in List II for the purpose of amendment in the said law, it is necessary to follow the same procedure envisaged by Art. 252(1) by way of State resolutions. Clause (2) of Art. 252 requires such a procedure to be followed.

But, the Air (P&CP) Act, 1981 was, however, passed by Parliament not under Art. 252 but under Art. 253 which enables Parliament to make laws in respect of subjects in List II, if it is for the purpose of implementing "any treaty, agreement or convention with any other country or countries or any decision made at any international conference, association or other body."

The Air Act (P&CP) Act, 1981 in its Preamble, expressly refers to the “decisions taken at the United Nations Conference on the Human Environment held in Stockholm in June 1972, in which India participated”, and the decision was that countries should ‘take appropriate steps for the preservation of the national resources of the earth which, among other things include the preservation of the quality of air and control of air pollution’. The preamble further states that ‘it is considered necessary to implement the decisions aforesaid insofar as they relate to the preservation of the quality of air and control of air pollution’. Thus, Parliament resorted to Art. 253 rather than to Art. 252 while passing the Air (P&CP) Act, 1981. That Act can be amended by another law by Parliament under Art. 253.

The Environment (Protection) Act, 1986 was also passed by Parliament under Art. 253 and the preamble refer to the decisions taken at UN Conference on the Human Environment held at Stockholm in June 1972 on the protection and improvement of human environment. The preamble states that “it is considered necessary further to implement the decisions aforesaid insofar as they relate to the protection and improvement of environment and the prevention of hazards to human beings, other living creatures, plants and property”. The above Act can, therefore, also be amended by Parliament under another law if passed under Art. 253.

The National Environment Tribunal Act, 1995 in its preamble squarely relies on the ‘United Nations Conference on Environment and Development’ held at Rio de Janeiro in June 1992, in which India participated, calling upon States to develop national laws regarding liability and compensation for the victims of pollution and other environmental

damages. It also states that it was considered expedient “to implement the decisions of the aforesaid Conference so far as they relate to the protection of environment and payment of compensation for damage to persons, property and environment while handling hazardous substances”. This Act can, therefore, be amended or repealed by another law if made by Parliament under Art. 253.

The National Environment Appellate Authority Act, 1997 is an Act to provide for the establishment of a National Environment Appellate Authority to hear appeals with respect to restriction of areas in which any “industries, operation or process”, “or class of industries, operations or processes” shall not be carried out or shall be carried out subject to certain safeguards under the Environment (Protection) Act, 1986 and for matters connected therewith or incidental thereto”. In view of its linkage with the above Act of 1986, there is thus no difficulty in amending or repealing this Act by an Act to be made by Parliament under Art. 253.

Thus, so far as constituting an Environment Courts with appellate powers, there is no difficulty with regard to amending the Air (P&CP) Act, 1981 (passed expressly for the purpose of implementing the decision taken at the Stockholm Conference, 1972) or in regard to the Environment (Protection) Act, 1986 (passed for the same purposes of the 1972 Conference). These two Acts are also referable to Art. 253 and the new law conferring such appellate powers on the proposed Environment Court can be made by Parliament under Art. 253, by amending or repealing provision in the three enactments, namely, the Air (P&CP) Act, 1981, the Environment (Protection) Act, 1981 and the National Environment

Appellate Authority Act, 1997, under Art. 253 once again. Similarly, the National Environment (Tribunal) Act, 1995 can also be repealed or amended under Art. 253.

Question, however, arises, as stated earlier, with reference only to the Water (P&CP) Act, 1974 which was expressly passed under Art. 252, whether it would require, in view of clause (2) Art. 252, passing of fresh resolutions by the State Legislatures as envisaged by that clause for the purpose of deleting sec. 28 which enables appellate powers to be conferred by the State Government and transfer the appellate powers to the proposed Environmental Court. This has become necessary because, as at present, the States (except A.P.) have constituted appellate authorities consisting of bureaucrats.

This question is, however, not difficult to answer.

We shall first explain the scope of Art. 253. Parliament chooses to exercise powers under Art. 253, where Parliament feels it necessary to make a law for implementing international agreements, or treaties or decisions taken at international conferences in which India has participated. This power of Parliament is an independent power and is not controlled by Art. 252. Further, Art. 253 opens with the words, “Notwithstanding anything in the foregoing provisions of this Chapter”. The non-obstante clause puts the matter beyond doubt and is applicable not only for making a law by Parliament on the subject for the first time under Art. 253 (e.g. Air (P&CP) Act, 1981) when no law on the subject was made earlier by Parliament either under Art. 252 or under any other of the foregoing Articles preceding

Art. 253 (i.e. Art. 245 to 252), but also where Parliament wants to exercise its special powers under Art. 253 even where it had passed a law under Art. 252 based on the resolutions of State Legislatures. In other words, where, under Art. 252 pursuant to desire of the States which passed resolutions (e.g. the Water (P&CP) Act, 1974), Parliament had passed an Act under Art. 252, still Parliament if it later feels that such a law requires to be amended or repealed for the purpose of “implementing international agreements or treaties or decisions taken at international conferences” in which India has participated, it is, in the opinion of the Commission, clearly permissible for Parliament to exercise its special powers under Art. 253 to pass an amending or repealing Act (under Art. 253) for the purpose of amending or repealing such earlier law made by Parliament under Art. 252, in regard to a matter falling under List II. The Parliament’s power under Art. 253 is an independent power and is not confined to a law made for the first time but is also applicable for the purpose of amending or modifying a law made by Parliament under Art. 252. The power of Parliament under Art. 253 to do so is further clearly safeguarded by the non-obstante clause in the opening part of Art. 253. The words “foregoing provisions of this chapter” in the opening clause, “Notwithstanding anything in the foregoing provisions of this Chapter” permit Art. 253 to override Articles 245 to 251 of the Chapter but also to override both the clauses (1) or (2) of Art. 252 in that Chapter, which precede Art. 253.

When Art. 253 thus overrides clause (2) of Art. 252, there is no difficulty in stating that though the Water (P&CP) Act, 1974 was one expressly passed by Parliament under Art. 252 in respect of a matter in List II (after resolutions were passed by State Legislatures), the said law made

by Parliament can be amended or modified or repealed under Art. 253, without following the procedure indicated in clause (2) of Art. 252 for the purpose of implementing decisions taken in international conferences 'for protection of environment'. All that is necessary is that while passing such amending or repealing Act, amending the Water (P&CP) Act, 1974, Parliament must state in the preamble that Parliament is passing the amending law for giving effect to international agreements, treaties or decisions taken at international conferences. In the present context, such conferences are the 1972 Stockholm Conference and the Rio de Janeiro Conference of 1992.

We have to refer here to another aspect concerning the Water (P&CP) Act, 1974. The said Act was passed by Parliament pursuant to resolutions passed by the legislatures of the State of Assam, Bihar, Gujarat, Haryana, Himachal Pradesh, J&K, Kashmir, Karnataka, Kerala, Madhya Pradesh, Rajasthan, Tripura and West Bengal. The Act was adopted under Art. 252 by the States of Sikkim ((1989), Meghalaya (1977), Maharashtra (1989), Manipur (1988)).

It appears to us that the Water (P&CP) Act, 1974 has not been adopted in some States as such.

We are also aware that certain amendments made by Parliament by Act 53/78 following the procedure under Art. 252(2) to the Water (P&CP) Act of 1974 are yet to come into force in some States which had passed resolutions for enacting the Principal Act or which had adopted it later, because some of those States have not yet passed fresh resolutions adopting

the Amending Acts. Such a situation has arisen because the Amending Act of 1978 was not specifically passed by Parliament under Art. 253 for giving effect to international agreements, treaties or decisions taken at international conferences. If Parliament had passed the amending law of 1978 under Art. 253, there would have been no need for the States to pass resolutions in their Legislatures or to adopt the amending law of 1978 amending the Water (P&CP) Act, 1974. After all, the idea is to have uniform laws in all the States if they are made to implement decisions taken at international environment-related conferences.

Two proposals can be considered here.

- (1) One is that sec. 28 of the Water (P&CP) Act, 1974 be substituted under the proposed Act, prescribing an appeal to the Environment Court. The said amendment will then get incorporated in the parent Act and will substitute sec. 28 in all those States where the Water Act is in force, either because of its original resolution or because of subsequent adoption. But, in those States where the Water (P&CP) Act, 1974 has not come into force at all, it is possible to make a provision in the proposed Act that the proposed sec. 28 giving a right of appeal to the Environment Court shall alone be applicable whenever the Water (P&CP) Act, 1974 is adopted in those States, or
- (2) We may, instead, provide that notwithstanding anything in sec. 28, Water (P&CP) Act, 1974, the person aggrieved by an order of Pollution Board passed under sec. 25 or 26 of Water Act, can appeal to the Environment Court. Such a provision would apply

to Water (P&CP) Act, 1974 where it is now in force or where it will be adopted in future.

In our view, the second proposal is preferable inasmuch as it will be referable to Art. 253 and will have overriding effect over the Act passed under Art. 252, even where the States, which have not so far adopted the Act, would opt to adopt the parent Act of 1974 or the Act as amended in 1978 or in some other manner.

Summarising our conclusion,- the Air (P&CP) Act, 1981 and the Environment (Protection) Act, 1986 were passed by Parliament with reference to the Stockholm Conference of 1972 (i.e. under Art. 253) and the National Environment Tribunal Act, 1995 was passed by Parliament by referring to the Rio de Janeiro Conference, 1992 and the National Environment Appellate Authority Act, 1997 was passed specifically for the purpose of enforcing the safeguards under the Environment (Protection) Act, 1986. Therefore, there is no difficulty for Parliament passing a law relating to Environment Courts in exercise of its powers under Art. 253 to amend or repeal the Air (P&CP) Act, 1981, The Environmental (Protection) Act, 1986, National Environment Tribunal Act, 1995 and National Environment Appellate Authority Act, 1997. Similarly, such a law made under Art. 253 can override the provisions of sec. 28 of the Water (P&CP) Act, 1974 which enables the State Government to constitute the appellate authorities. The power which was given to the State Government under the Water (P&CP) Act, 1974 in sec. 28 to constitute appellate authorities can be superceded by fresh provisions of law proposing Environment Courts, as the

appellate Court, in the manner stated above. Such a law can be passed under Art. 253 of the Constitution.

Art. 253 and special law for Environment Courts: Does it flow from any decision in an International conference to which India is a party?

The question is whether the constitution of separate Environment Courts by a statute of Parliament under Art. 253 could be justified by tracing this as an act of implementation of any decision taken at an International Conference? If it is so, invoking Art. 253 to make such a law will be permissible for Parliament.

There are two answers to this question.

- (A) The fact that the National Environment Tribunal Act, 1995 and the National Environmental Appellate Authority Act, 1997 were passed by Parliament (as analysed earlier in this chapter), for the purpose of implementing the decisions at the Rio Conference of 1992 and Stockholm Conference of 1972 show that the proposed Environmental Courts Act can also be similarly passed by Parliament. All these Acts are intended to provide speedy adjudicatory bodies in respect of disputes arising in environmental matters.
- (B) The Rio Declaration of 1992 expressly refers to 'remedies' to achieve the objects of the Declaration made at the Conference.

Principle 10 of the Rio Declaration on Environment and Development, 1992 refers to effective access to ‘judicial and administrative proceedings including redress and remedy’ and states that they ‘shall be provided’.

Principle 10 reads as follows:

“Principle 10: Environmental issues are best handled with the participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making process. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided.”

Principle 10 of the Rio Declaration, clearly requires Judicial remedies to be provided. There is, therefore, no difficulty in Parliament invoking its special powers to make a law on the subject of ‘Environmental Courts’ under Art. 253, even if it be that there is an encroachment into the entries in List II of Schedule VII relating to ‘Water’, which is a State subject.

The proposed Courts will also be referable to Art. 247 read with Entry 13 of List I

The Central Government can establish ‘additional Courts’ for purposes of implementation of statutes made by Parliament or for implementation of pre-existing statutes as on 26.1.1950, referable to List of VII Schedule under Art. 247.

Art. 247 reads as follows:

“Art. 247: Power of Parliament to provide for the establishment of certain additional Courts – Notwithstanding anything in this Chapter, Parliament may by law provide for the establishment of any additional Courts for the better administration of laws made by Parliament or of any existing laws with respect to a matter enumerated in the Union List.”

Entry 13 of List I reads: “Participation in international conferences, associations and other bodies and implementing of decisions made thereat”.

Text of Art. 247 is drawn from the Canadian Constitution. The Calcutta High Court dealt with this Article elaborately in Indu Bhushan De vs. State: (AIR 1972 Cal). But the words ‘additional Courts’ have not come for interpretation. In our view, the words ‘additional Courts’ must be construed widely and apply also to special Courts like the proposed Environment Courts. The word ‘additional’, in our view, mean additional to the overall number of Courts existing and it is not necessary that there should be an existing class of such Courts. In fact, whenever the Central Government establishes Courts for a particular class of cases for the first time, this provision is attracted and it is not an argument to say Art. 247

cannot be invoked unless there are existing Courts for that class of cases. Otherwise, Art. 247 can never be invoked at all. When such Courts are and can be established for the first time, it cannot be argued that there were no such Courts earlier and hence they cannot be established even initially. Some day or other, they must be established for the first time.

Further, in view of Art. 11A in List III, inserted by the 42nd Constitution (Amendment) Act, 1976, deleting these words from Art. 3 of List II, Parliament can establish these proposed Environment Courts under the head 'Administration of Justice'. The word 'Courts' in that Article cover the proposed Environmental Courts which are Civil Courts. See Re Special Courts Bill, 1978 = AIR 1979 SC 69.

Right of Appeal to Supreme Court

The right to a statutory appeal to the Supreme Court is referable to Entry 77 of List I of VII Schedule. Such a right of appeal is now available against orders of the CEGAT, the MRTP Tribunal, Consumer (Protection) Act, 1986, and POTA (see Chapter IX for a detailed discussion) and new amendments to the Companies Act, 1956.

Chapter VIII

Environmental Courts to follow certain fundamental principles

We are of the view that the Environment Court must follow the following principles. These principles must be part of the proposed statute dealing with Environmental Courts.

Polluter Pays Principle

The Polluter Pays Principle was first adopted at international level in the 1972 OECD Council Recommendation on Guiding Principles concerning the International Aspects of Environmental Policies. The 1974 principle experienced revival by OECD Council in 1989 in its Recommendation on the Application of the Polluter Pays Principle to Accidental Pollution, and the principle was not to be restricted to chronic polluter. In 1991, the OECD Council reiterated the Principle in its Recommendations on the Uses of Economic Instruments in Environmental Policy.

The European Council adopted it in its Recommendation 75/436 in 1975 and reiterated in the Fifth Environmental Action Programme and in the 2001 EC Guidelines and in the Waste Framework Directive 1991 and Art. 10 of the Directive 1999/31/EC and Art. 99 Directive 2000/Cr/EC. It was adopted in single European Act (SEA) by Art. 130 R(Z) (new Article 174(2)) and Art. 130 of the EC Treaty.

National laws in Belgium, France, Germany have adverted to this principle.

In international law, the principle is incorporated in the 1980 Athen Protocol, the 1992 Helsinki Convention on the Transboundary Effects Industrial Accidents, the 1993 Lugano Convention on Civil Liability for Damage Resulting From Activities Dangerous to Environment. A host of other treaties and conventions are set out (at pp. 23, 24) in 'Environmental Principles' (by Nicolas de Sadeler, Oxford 2002).

This principle was first stated in the Brundtland Report in 1987. This principle was also adverted to in Indian Council for Enviro-legal Action vs. Union of India 1996(3) SCC 212. It was stated; (p 246 at para 65)

“...we are of the opinion that any principle evolved in this behalf should be simple, practical and suited to the conditions obtaining in this country..... Once the activity carried on is hazardous or inherently dangerous, the person carrying on such activity is liable to make good the loss caused to any other person by his activity irrespective of the fact whether he took reasonable care while carrying on his activity”.

In Vellore Citizens' Welfare Forum vs. Union of India: 1996(5) SCC 647,
(at 659), Kuldip Singh J stated:

“The ‘Polluter Pays Principle’ as interpreted by this Court means that the absolute liability for harm to the environment extends not only to compensate the victims of the pollution but also the cost of restoring the environmental degradation. Remediation of the damaged environment is part of the process of ‘Sustainable Development’ and as such the polluter is liable to pay the cost to the individual sufferers as well as the cost of reversing the damaged ecology.”

This principle of compensating the victim as well as the environment is laid down in sec. 3 of the National Environment Tribunal Act, 1995. Section 3(1), as already stated, refers to the compensation payable and it will be as per the heads specified in the Schedule. The Schedule contains items (a) to (n) out of which items (a) to (e) relate to the individual affected by the polluter while items (f) to (n) relate to the environmental damage, including that to the flora and fauna.

Hazardous substances – Absolute liability

Absolute or strict liability is one where fault need not be established. It is no-fault liability.

Initiatives such as the 1993 Lugano Convention on Civil Liability for Damage Resulting from Activities Dangerous to Environment; the European

Commission Green Paper on environmental liability (1993) and the Chapter on liability for contaminated land of the Swedish Environment Code (2000), suggest that the polluter pays principle calls for the establishment of a strict liability regime. There are four Nuclear Conventions, one of 1960, two of 1963 and another of 1971 which lay down strict liability. There are others dealing with oil spill-overs of 1969, 1971 and 1992 which too impose strict liability. More recently, in its White Paper on Environmental Liability, the European Commission stressed that liability independent of fault must be favoured for two reasons: first, it is very difficult for plaintiffs to establish fault in environmental liability cases; and secondly, it is the person who undertakes an inherently hazardous activity, rather than the victim or society in general, who should bear the risk of any damage that might ensue.

Our Courts or statutes have, however, not extended the principle of strict liability to all cases where 'Polluter Pays Principle' applies, but have confined such absolute liability only to cases where injury to person or property is occasioned by use of 'hazardous' substances.

In the Oleum Gas Leak case (M.C. Mehta vs. Union of India) AIR 1987 SC 1086, the Supreme Court laid down that an enterprise which is engaged in a hazardous or inherently dangerous industry which poses a potential threat to the health and safety of persons working in the factory and to those residing in the surrounding areas, owes an absolute and non-delegable duty to the community to ensure that no harm results to any one on account of hazardous or inherently dangerous nature of the activity which it has undertaken. The enterprise must be absolutely liable to compensate for such harm and it should be no answer to the enterprise to

say that it had taken all reasonable care and that the harm occurred without negligence on its part. The larger and more prosperous the enterprise, greater must be the amount of the compensation payable for the harm caused on account of an accident in the carrying on of the hazardous or inherently dangerous activity by the enterprise. The principles laid down in Ryland vs. Fletcher: LR 3 H.L. 330 were modified. It is no longer permissible in the case of injury by use of hazardous substances, to prove merely that the injury was not foreseeable or that there was no unnatural use of the land or premises by the factory, as was the position under the law laid down in Rylands vs. Fletcher. This principle was reiterated in Indian Council for Environ-Legal Action vs. Union of India 1996(3) SCC 212 (see p 246, para 65) and other cases by the Supreme Court of India.

The above principle (called ‘no fault’ principle) was, in fact, incorporated in sec. 3 of the National Environmental Tribunal Act, 1995, read with the special definition of the words ‘accident’ in sec. 2 (a) and ‘handling’ in sec. 2(e) and ‘hazardous substance’ in sec. 2(f) of that Act. Sec. 2(a) and 2(e) refer to hazardous substances which are used or handled and which cause the ‘accident’. Sec. 2(f) defines ‘hazardous substance’ as any substance or preparation which is defined as hazardous in the Environment (Protection) Act, 1986 and exceeding such quantity as specified by the Central Government under the Public Liability Insurance Act, 1991. Sec. 3 states as follows:

“Sec. 3: Liability to pay compensation in certain cases on principle of no fault:

- (1) Where death of, or injury to, any person (other than a workman) or damage to any property or environment has resulted from an accident, the owner shall be liable to pay compensation for such death, injury or damage under all or any of the heads specified in the Schedule.
- (2) In any claim for compensation under subsection (1), the claimant shall not be required to plead and establish that the death, injury or damage in respect of which the claim has been made was due to any wrongful act, neglect or default of any person.

Explanation: (i) ‘workman’

(ii) ‘injuries’

(3) ”

Clause (3) refers to apportionment of liability between different tort feasons. In the Schedule, there are clauses (a) to (n). Clauses (a) to (e) deal with damage to person or property, clause (f) to (n) deal with damage to ecology.

Precautionary Principle

The precautionary principle had its origin in the mid-1980s from the German Vorsorgeprinzip. The decisions adopted by States within the North Sea Ministerial Conference mark the first use of this principle in international law. Explicit reference is made to it in the 1984 Bremen Ministerial Declaration of the International Conference on the Protection of

North Sea, the 1987 London Ministerial Declaration of the Second International Conference for the Protection of the North Sea, the 1990 Hague Declaration of the Third Conference on the Protection of the North Sea and the 1995 Declaration of the Fourth Conference on the Protection of the North Sea.

It was expanded in the field of marine pollution since 1980 and came to be set out in the 1990 OPRC Convention and various other Conventions. It was then extended to protection of coastal areas and fisheries sector and to atmospheric pollution. (See Environmental Principles, Oxford, 2002 by Nicolas de Sadeleer p 94-95).

It soon came to be included as a general principle of environmental policy in the U.N. Economic Commission of Europe in 1990 (UNECE) in Bergen; in 1989 by the Governing Council of the UN Environment Programme (UNEP); in 1990 by the Council of Ministers of the Organisation of African Unity (CAU); and of the 1990 Ministerial Conference on the Environment of the UN Economic Commission for Asia and Pacific (ESCAP) and finally in January 1991 in the Environment Ministers of the Organisation for Economic Co-operation and Development (OECD).

It then came to be accorded universal recognition in Principle 15 at Rio in the 1992 UN Conference on Environment and Development which resulted in the Declaration on Environment and Development. Similarly, the 1992 Framework Convention on Climatic Change (UNFCCC) also refers

to it. So does the preamble to the 1992 Convention on Biological Diversity (CBD).

It has been accepted by the European Court of Human Rights and applied by WTO Dispute Resolution Bodies, the International Tribunal for the Law of the Sea, the European Community Law.

National legislations in the EC Member States (Germany, France, Belgium, Sweden) have adopted it. It is applied in UK because of Art 174 (2) of EC Treaty. It is applied also by US Courts and in Australia.

The Supreme Court of India, in the case of Vellore Citizens' Welfare Forum vs. Union of India 1996(5) SCC 647 referred to the precautionary principle and declared it to be part of the customary law in our country.

The Principle is contained in Principle 11 of the Principles laid down in the UN General Assembly Resolution on World Charter for Nature, 1982 and was reiterated in the Rio Conference of 1992 in its Principle No. 15. It reads as follows:

“Principle 15: In order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities, where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for proposing cost effective measures to prevent environmental degradation”.

In the Vellore case, 1996 (5) SCC 647, Kuldip Singh J referred to this principle as part of our law: (p 660 para 14)

“In view of the above mentioned constitutional and statutory provisions, we have no hesitation in holding that the precautionary principle and the polluter pays principle are part of the environmental law of the country.”

In the A.P. Pollution Control Board case 1999(2) SCC 718, the Supreme Court referred to an article (Vol 22 Harv. Envtt L Rev 1998 p 509 at 547) to this principle as follows (see para 34):

“There is nothing to prevent decision-makers from assessing the record and concluding that there is inadequate information on which to reach a determination. If it is not possible to make a decision with ‘some’ confidence, then it makes sense to err on the side of caution and prevent activities that may cause serious or irreversible harm. An informed decision can be made at a later stage when additional data is available or resources permit further research. To ensure that greater caution is taken in environmental management, implementation of the principle through judicial and legislative means is necessary”.

The Principle of Prevention

The Prevention Principle takes care of reckless polluters who would continue polluting the environment in as much as paying for pollution is a small fraction of the benefits they earn from their harmful acts or omissions.

Prevention of pollution must therefore take priority over compelling the polluter to cough up.

The Train Smelter case was an international award which directed Canada to install protective measures to stop pollution in the neighbouring countries arising out of a foundry. This was treated as a transboundary obligation under international law. This principle was engrafted in Principle 21 of the 1972 Stockholm Declaration on Human Environment which stressed the 'responsibility (of States) to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or areas beyond the limits of national jurisdiction'. This was reiterated in Principle 2 of the Rio Declaration. This principle is incorporated in the 1979 LRATP Convention, the 1985 Vienna Convention for the Protection of the Ozone layer and the 1992 (B) and the Preamble of the UNFCCC. This is also a part of E.C. Law.

There are treaties based on this principle on the subjects of marine environment, highseas fisheries, protection of rivers, atmospheric pollution, the Alps, Antarctica etc. (See Environmental Principles by Nicolas de Sadeleer, Oxford 2002, pp 62 to 65.

The concept of sustainable development draws support from the Prevention Principle as stated in ICJ's ruling in Gabakovo-Nagymares case, relating to dam on the Danube.

National laws have also recognized this principle. Swiss, Danish, Belgian, French, Greek laws incorporate this principle. So does the US

Pollution Prevention Act, 1990 (ibid, Nicolas de Sadeleer, page 70 to 72). Best available Technologies (BAT) is another aspect of this principle. Environment Impact Assessment is the crucial procedure which seeks to ward off prevention. This is reiterated in Principle 17 of the Rio Declaration.

Principle of New Burden of Proof:

The UN General Assembly Resolution of 1982 on World Charter for Nature established this principle. It stated:

“Activities which are likely to pose a significant risk to nature shall be preceded by an exhaustive examination; their proponents shall demonstrate that expected benefits outweigh potential damage to nature...”

EC Law also demonstrates the shift in the burden in the case of use of drugs, pesticides, food products, additives, food stuffs etc. EC’s new hazardous wastes lists 200 categories of listed wastes.

In US, though the Supreme Court in Industrial Union Department AFL – CIU vs. American Petroleum Institute 448 US at 632-635 (1980) put the initial burden on the regulator, several American statutes have shifted the burden of proof – as Federal Foods and Drug Act (21 U.S.C. sec. 348(c) (3)A), The Federal Insecticide, Fungicide and Rodenticide Act (FIFA) (21. USS sec. 360(a)(4)(B), Marine Mammal Protection Act. (16 USC sec. 1371) and the ESA. The WTO Appellate body has also applied this principle.

Environmental Impact Assessment is intended to reduce the uncertainties attached to potential impacts of a project.

In the Vellore Case 1996(5) SC 647, Kuldip Singh J observed (see p 658)(para 11) as follows:

“(iii) the ‘onus of proof’ is on the actor or the developer/industrialist to show that his action is environmentally benign.”

In A.P. Pollution Control Board case: 1999 (2) SCC 718 (at p 734) it was explained that the ‘precautionary principle’ has led to the new ‘burden of proof’ principle. In environmental cases where proof of absence of injurious effect of the action is in question, the burden lies on those who want to change the status quo. This is often termed as a reversal of the burden of proof, because otherwise, in environmental cases, those opposing the change could be compelled to shoulder the evidentiary burden, a procedure which is not fair. Therefore, it is necessary that the party attempting to preserve the status quo by maintaining a less polluted state should not carry the burden and the party who wants to alter it, must bear this burden.

Sustainable Development:

Development of the countries and eradication of poverty must be balanced against conservation of environment. Principle 3 of the Earth Summit Declaration (1992) at Rio states that the ‘right to development must be fulfilled so as to equitably meet developmental and environmental needs of present and future generations’. Principle 4 states that in order ‘to achieve sustainable development, environmental protection shall constitute an integral part of the development process and cannot be considered in isolation of it’. Principle 5 states that all ‘States and all people shall cooperate in the essential tasks of eradicating poverty as an indispensable requirement for sustainable development, in order to decrease the disparities in standards of living and better the needs of the majority of the people of the world’. Principle 6 requires that the special situation and needs of developing countries shall be given priority. Principle 7 requires that developed countries acknowledge the responsibility they bear in the international pursuit of sustainable development. Principle 8 requires that in order to achieve sustainable development and a higher quality of life for all people, States should reduce and eliminate unsustainable patterns of production and consumption and promote appropriate demographic policies. Principle 9 requires improvement in capacity building for sustainable development. Principle 27 requires States and people to cooperate for the purpose of sustainable development.

In Gabakovo vs. Nagymares: the ICJ ruling on the dam on Danube (1997), the majority observed that the ‘concept of sustainable development’ arose out of the need to reconcile economic development with the protection of environment. Weeramantry J, went further and observed that the concept has become a principle of modern international law.

Art. 37 of the December 2000 Charter of Fundamental Rights of the European Union refers specifically to the principle of 'sustainable development'. The preamble to the WTO Agreement too refers to it. So does the WTO Ministerial Declaration of 2001. Art. 2 of the EC Treaty refers to it.

This concept was mentioned in the Bruntland Report, 1987. The principle of 'sustainable development' is at the basis of the fundamental principles of the law of environment. The principle was referred to in Vellore Citizens' Welfare Forum case : 1996(5) SCC 647. It was stated that there is today no conflict between 'development' and 'safeguarding ecology'; it is a viable concept which has been developed after two decades from Stockholm to Rio; it is a principle which seeks to eradicate poverty and improve the quality of human life while living within the carrying capacity of the supporting ecosystem. The Bruntland Report stated as follows:

“Development that meets the needs of the present without compromising the ability of the future generations to meet their own needs.”

It is a principle which balances development and ecology. The 'polluter Pays' principle is part of this concept as it requires the polluter to restore the status quo ante as it stood before the pollution.

In Narmada Bachao Andolan vs. Union of India 2000(10) SCC 664, it was pointed out that when the effect of a project is known, then the principle of sustainable development would come into play which will ensure that mitigative steps are and can be taken to preserve the ecological balance. “Sustainable development means what type or extent of development can take place which can be sustained by nature/ecology with or without mitigation.”

In fact, in several modern constitutions, the fundamental right to protect the environment from degradation is coupled with the right to sustainable development. The latest Constitution of South Africa is an example where Art. 24 deals with this aspect. It reads as follows:

“Article 24: Everyone has the right –

(a) to an environment that is not harmful to their health or well being; and

(b) to have the environment protected, for the benefit of present and future generation, through reasonable legislative and other measures that –

(i) prevent pollution and ecological degradation;

(ii) promote conservation; and

(iii) secure ecologically sustainable development and use of national resources while promoting justifiable economic and social development.”

The National Commission to Review the Working of the Constitution refers to the right to safe drinking water, clean environment and proposed the insertion of Art. 30D in the Constitution. Art. 30D as recommended by the Commission reads as follows:

“Art. 30-D. Right to safe drinking water, prevention of pollution, conservation of ecology and sustainable development.-

Every person shall have the right –

- (a) to safe drinking water;
- (b) to an environment that is not harmful to one's health or well being; and
- (c) to have the environment protected, for the benefit of present and future generations so as to –
 - (i) prevent pollution and ecological degradation;
 - (ii) promote conservation; and
 - (iii) secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development.”

The above Commission states in paras 3.22.1 and 3.22.2 (Vol. 1) that the right to healthy environment and its protection and the right to development are “group rights” now loosely described as “third generation rights”. The right to “sustainable development” has been described by the UN General Assembly as an inalienable right. The Declaration recognizes that “Human being is the central subject of the development process and that the development policy shall make the human being the main participant and beneficiary of development”. “Development” is defined as “a comprehensive, economic, social, cultural and political process, which aims at the constant improvement of the well being of the entire population in development and in the fair distribution of benefits therefrom”. The Rio Conference of 1992 declared human beings as centers of concern for sustainable development. Human beings are, it is said, entitled to a healthy and protective life in harmony with nature (Principle 1). “In order to achieve sustainable development, environmental protection shall constitute an integral part of the development process and cannot be considered in isolation of it”. The 1997 Earth Summit meeting of 100 nations in New York affirmed these principles.

Public trust doctrine:

The 'public trust' doctrine was referred to by the Supreme Court in M.C. Mehta vs. Kamal Nath: 1997 (1) SCC 388. The doctrine extends to natural resources such as rivers, forests, sea shores, air etc., for the purpose of protecting the eco-system. The State is holding the natural resources as a trustee and cannot commit breach of trust. In the above case, the State's order for grant of a lease to a motel located on the bank of the river Beas which resulted in the Motel interfering with the natural flow of the water, was quashed and the public company which got the lease was directed to compensate the cost of restitution of environment and ecology in the area.

Inter-generational equity:

Principles 1 and 2 of the 1972 Stockholm Declaration refer to this concept. Principle 1 states that Man bears solemn responsibility to protect and improve the environment for the present and future generations. Principle 2 states that the national resources of the Earth must be safeguarded for the 'benefit of the present and future generations through careful planning or management, as appropriate'.

Principle 3 of the Rio Declaration, 1992 also states that the right to development must be fulfilled so as to equitably meet developmental and environmental needs of present and future generations.

The UN General Assembly Resolution 37/7 of 1980 also refers to the need for maintaining the balance between development and conservation of nature in the interest of present and future generations.

Over-exploitation of earth, water and other natural resources by the present generation must be prevented so as to preserve them for the benefit of future generations.

The Philippines Supreme Court entertained a case by a group of citizens representing the future generations for preservation of the ecology. (Minors Oposa vs. Secretary of the Dept. of Environment and Natural Resources (DENR) (1994) 33 ILM 173 (see Right of Future Generations by K.I. Vibhuti Vol. 21 Academy Law Review p. 219-235.)

The Constitution of Philippines of 1987 confers in Art. 11, sec. 16 a fundamental right to a balanced and healthful ecology and mandates the State 'to protect and advance the right of the people to a balanced and healthful ecology in accord with the rhythm and harmony of nature'. The then President of the Philippines issued an executive order in 1987 in that behalf which specifically referred to the right so conferred 'not only for the present generation but for future generation as well'.

In Minors Oposa, a group of Filipino minors named OPASA, joined by their respective parents, representing their own generation as well as generations yet unborn, urged the Supreme Court to enforce their and their unborn successors' constitutional right to a balanced and healthful ecology guaranteed under Art. 11, sec. 16 and sought cancellation of all existing

logging permits issued by the Dept. of Environment and Natural Resources (DENR) to different companies on the basis of the Timber Licence Agreements (TLAs) and for restraining the DENR from accepting, processing, reviewing or approving the TLAs.

The Supreme Court allowed the applicants to file the case and emphasized the duty of the State as parens patriae. The Court observed that the petitioner's 'personality to sue on behalf of the succeeding generations can only be based on the concept of intergenerational responsibility'. The Court said:

“Needless to say, every generation has a responsibility to the next to preserve that rhythm and harmony for the full enjoyment of a balanced and healthful ecology. Put differently, the minors' assertion of their right to sound environment constitutes, at the same time, the performance of their obligation to ensure the protection of that right for generations to come. The present generation, the Court opined, is a trustee and guardian of the environment for succeeding generations. Or else, the future generations would inherit nothing but 'parched earth'”.

These and other principles must be required to be applied by the Environment Courts and provision must be made therefor in the statute.

CHAPTER IX

Proposals for Environmental Courts in India

As pointed out in Chapter I, Environmental Courts manned by a Judge and two experts at the regional level was advocated by the Supreme Court in M.C. Mehta vs. Union of India, 1986 (2) SCC 176 (at 202). This was reiterated by the Supreme Court in Indian Council for Enviro-Legal Action vs. Union of India, 1996 (3) SCC 212. Finally, the need for such Environment Courts was referred to in A.P. Pollution Control Board vs. M.V. Naidu, 1999 (2) SCC 718 and in the follow up case in A.P. Pollution Control Board II vs. M.V. Naidu, 2001 (2) SCC 62, the Court required the Law Commission to go into this question.

We have referred, in Chapter V, to the existing Court-system in India in regard to environmental issues and also to the scheme of appointment of bureaucrats as appellate authorities by the State Governments under sec. 28 of the Water (P&CP) Act, 1974 or sec. 31 of the Air (P&CP) Act, 1981 or by the Central government under sec. 25 of the Environment (Protection) Act, 1986. These appeals under the special Acts at present are being disposed of by senior public servants nominated by the Governments. Presently, appeals are neither to a judicial body (except under the Water (P&CP) Act, 1974 in Andhra Pradesh) nor to an expert in the field of environment.

For the first time, when the National Environment Tribunal Act, 1995 was passed, Parliament thought that the Tribunal should be manned by a member of the superior Judiciary. Similarly, in 1997 when the National Environment Appellate Authority, 1997 was constituted, the authority was to consist of a retired Supreme Court Judge and Members having scientific experience etc. But, these Tribunals are now non-functional.

In our view, it is necessary that all the appellate powers now conferred under the (a) Water (P&CP) Act, 1974, (b) the Air (P&CP) Act, 1981 and (c) the appellate authority constituted under various Rules made under the Environment (Protection) Act, 1986 must go before the proposed Environment Court, which shall consist (in each State or a group of States) of three Judicial Members, who are (a) either sitting or retired Judges of a High Court or (b) experienced Members of the Bar (with not less than 20 years standing). These three Judicial Members have to be assisted by three environmental experts (to be called Commissioners) in each Environmental Court. It will be permissible to have one Environmental Court for more than one State. Union Territories may avail the Environment Court of the neighbouring State. Delhi can perhaps have a separate Environment Court.

Appellate Jurisdiction

It is now proposed, as stated earlier, that there will be an Environment Court in each State (or group of States) and will have appellate jurisdiction. It will have appellate jurisdiction which is now being exercised by officers of the Government under the special Acts. Pending appeals under the Water (P&CP) Act, 1974, Air (P&CP) Act, 1981 and under the Rules

framed under the Environment (Protection) Act, 1986 must be transferred to the proposed Environment Court in each State and all future appeals must be filed in the said Court. Sec. 28 of the Water (P&CP) Act, 1974 and sec. 31 of the Air (P&CP) Act, 1981 must be amended, as stated earlier, stating that the appeals shall hereafter lie to the Environment Court under the proposed Act and that pending appeals shall stand transferred to the said Court. Similarly, a provision must be inserted in the Environment (Protection) Act, 1986 stating that all appeals against orders passed by the various authorities under the Rules made under that Act shall be filed in the concerned Environment Court at the level of each State (or group of States) and that pending appeals before appellate authorities constituted under the said Rules shall also stand transferred to the Environment Court.

A provision may also have to be made in the proposed Environment Courts Act enabling the Central Government to issue notifications from time to time, notifying that the Environment Court will be the appellate authority in respect of orders passed under any other Central Act and also enabling the State Governments, with the approval of the Central Government, to notify, from time to time, the Environmental Court as the appellate Court for purposes of other State Acts.

The National Environment Tribunal Act, 1995 was a law intended to award compensation to those affected by hazardous substances and we propose that this relief of damages which was to be granted by the National Environment Tribunal - for injury on a strict liability basis - should be a relief which will be granted by the proposed Environment Court. This will

necessitate repeal of the National Environment Tribunal Act, 1995 and bringing those provisions into the proposed Act.

It is also proposed that the relief which could have been granted by the Environment Appellate Authority under the National Environment Appellate Authority Act, 1997 should now be granted by the proposed Court, in respect of violation of safeguards under the Environment (Protection) Act, 1986 and the appellate powers contemplated by sec. 11 of that Act be now granted to the proposed Court. This will require repeal of the National Environment Appellate Authority Act, 1997 and transfer of those provisions into the proposed Act.

We are also of the view that the appeals against awards passed by the Collector under sec. 8 of the Public Liability Insurance Act, 1991 (which deals with compensation payable for injury to person or property on account of hazardous substances) should lie to the proposed Environment Court. Sec. 8 of that Act contemplates that the compensation payable and paid under sec. 7 shall go in reduction of any compensation payable “under any other law”.

The proposed Environment Court will be entitled to pass interlocutory orders, including ad interim and ex parte orders pending the appeals.

The appeals by the proposed Court must be entertained on payment of a fixed court fee of Rs.500.

Original Jurisdiction

The proposed Court shall have original jurisdiction on environmental disputes with all powers of a Civil Court and shall grant (apart from the damages contemplated under the National Environment Tribunal Act, 1995 in the case of injury on account of use of hazardous substances in its original jurisdiction) all reliefs which a Civil Court can grant under the Code of Civil Procedure, 1908 or other statutes like the Specific Relief Act, including declaration, setting aside of orders by public authorities or the State, permanent injunction, mandatory injunction, appointing receivers to manage the property, damages or compensation, possession etc. The Court can be approached by way of an original petition. The proposed Court shall also be entitled to pass all interlocutory orders – both ad interim and final, pending disposal of the original petitions. A fixed court fee of Rs.1000 should alone be payable in the original petitions that may be filed before the proposed Court. The Court must have powers to award exemplary costs if frivolous or vexatious original petitions are filed.

Definition of ‘environment’ as in sec. 2(f) of the Environment (Protection) Act, 1986 can be engrafted into the proposed Act as follows:

“‘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-organism and property.”

We can have a provision defining ‘environmental pollution’ as in sec. 2C(b)(c) of the 1986 Act.

So far as the jurisdiction of the Court is concerned, it must be provided that the Court will have jurisdiction

- (a) to protect the right to safe drinking water and the right to an environment that is not harmful to one's health or well being and
- (b) to have the environment protected for the benefit of present and future generations so as to
 - (i) prevent environmental pollution and ecological degradation
 - (ii) promote conservation and
 - (iii) secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development.

Explanation has to be added to the above (proposed) provision that the jurisdiction shall include

- (a) the protection of natural environment, forests, wild life, sea, lakes, rivers, streams, fauna and flora;
- (b) preservation of natural resources of the earth;
- (c) prevention, abatement and control of environmental pollution including water, air and noise pollution;
- (d) enforcement of any legal or constitutional rights relating to environment and pollution under the Constitution of India or under any other law for the time being in force;
- (e) protection of monuments and places, objects of artistic or historical interest of national importance as declared by the law made by Parliament.

Jurisdiction of ordinary Civil Court and conflict of decisions

We have already stated that we are not ousting the jurisdiction of the Civil Courts to entertain environment related disputes. As of now, for example, if a chimney in a neighbour's house is releasing polluted air or a small sewage channel from one house or land is creating pollution to a neighbour's house or land, parties in villages are able to approach the nearest munsif Courts which are quite accessible to these villages. If we oust the jurisdiction of these Courts, villagers cannot be expected to go all the way to the seat of the Environment Court for each adjournment and contest the same. (May be, if a large section of people is involved, they may be able to contest the case in the Environment Court, even if it is located at a distant place.) In fact, even in Australia and New Zealand, the jurisdiction of ordinary Courts is not ousted. Proposals in UK are also likewise. We are here only proposing to provide special Courts,- like the Consumer fora – which parties may easily approach, if they want a speedy or specialist Court. In fact, the Consumer (Protection) Act, 1986 states that the Act is in addition to the remedies under ordinary law.

But, on the question of finality, it has to be provided that if an adjudication has become final in the Civil Court (or in the Environmental Court) it should be binding on the parties and parties cannot be allowed to move the Environmental Court (or Civil Court) which has not yet been approached.

If a dispute on some subject matter is pending in the Environment Court and another similar case is filed later in the Civil Court, or vice versa, parties can always obtain stay of the latter proceeding from the Court where the latter case is filed by filing an application on the same principle as in sec. 10 of Civil Procedure.

Rules of evidence and Conciliation/Mediation

The proposed Court will not be bound by rules of evidence and can lay down its procedure. It can entertain oral and documentary evidence and consult experts. It shall, however, have to observe principles of natural justice. The Judicial Members and the Commissioners may, if necessary, make spot inspections and record oral evidence.

The proposed Environment Court should encourage Conciliation and Mediation at any stage of the proceeding – be it an appeal or an original petition.

Environmental Principles to be applied

Obviously, the proposed Court will have to apply the fundamental principles of environmental law as stated in Chapter VIII.

The statute must state that the Environment Court must keep in mind the Precautionary Principle, Polluter Pays Principle, New Burden of Proof Principle, Prevention Principle, Strict Liability so far as hazardous

substances are concerned, Public Trust doctrine, Concept of inter-generational equity and the Concept of Sustainable Development.

Repeal of the National Environmental Tribunal Act, 1995 and the National Environment Appellate Tribunal Act, 1997

The National Environmental Tribunal Act, 1995 and the National Environment Appellate Tribunal Act, 1997 must be repealed and provisions relating to the jurisdiction and powers of those Tribunals must be incorporated in the proposed Act.

Amendments to the Water (P&CP) Act, 1974, the Air (P&CP) Act, 1981 and the Environment (Protection) Act, 1986

Sec. 31 of the Air (P&CP) Act, 1981 be suitably amended for providing appeals to the Environment Court and a separate section must be introduced in the Environment (Protection) Act, 1986 that appeals shall lie to the proposed Environment Courts.

An extra provision must be made in the proposed Act so far as the Water (P&CP) Act, 1974 is concerned that, notwithstanding anything in the Water (P&CP) Act, 1974 appeals shall lie to the proposed Environment Court, not only in the States where the principal Act is in force but also in States in which it may be brought in force in future.

Power to frame schemes and monitor them

The Environment Court, in our view, must have power to frame schemes and monitor them and also have power to modify the schemes from time to time. If one looks at the problems raised in several cases and the directions issued by the Supreme Court, it will be observed that such a power is necessary to be vested in these Courts. Take the case of air, water pollution, which are caused by an industry or a group of similar industries located in an area. Directions may have to be issued for their shifting, for closure of the industry temporarily and for directing payment of wages to the employees to cover two or three years of their wages; for directing local authorities to provide necessary amenities at the new location, like water and electricity, or to direct the industries to install effluent plants etc. A variety of issues arise simultaneously, involving several departments of the Central/State Government or local authorities. The Environment Court must be able to provide an “environmental solution” to grave problems like the one mentioned above and unless it has power to frame comprehensive schemes which will involve issuing directions to various departments, the solution cannot be implemented. Such a comprehensive jurisdiction is now being exercised both by the Supreme Court and High Courts. In our view, the proposed Courts must have similar powers. They will also have to monitor the schemes till they are successfully implemented on ground and, if necessary, modify the schemes from time to time.

Execution of orders and contempt procedure

It was prescribed in sec. 25 of the National Environment Tribunal Act, 1995, that whoever fails to comply with an order of the proposed

Tribunal should be liable for imprisonment upto a term of 3 years or with fine which may extend upto Rs.10 lakhs or with both. (We are aware that sec. 19 of the National Appellate Authority Act, 1997 prescribed imprisonment upto seven years and fine upto rupees one lakh or both.) Obviously, the punishment could be awarded only by the normal criminal courts competent to award such punishment. This could take a pretty long time.

So far as execution of its orders are concerned, proposed Courts must have all powers which a Civil Court has for execution and should also be able to exercise contempt jurisdiction. There is no difficulty in conferring such a power on these Courts. The Commission is of the view that having regard to the fact that big industries which pollute the environment (or our streams, lakes and rivers or air) come before the Court, there is need to invest the Court with contempt powers so that the Court can, by way of summary proceedings, see that its orders are effectively implemented instead of taking out lengthy proceedings by way of execution or proceedings under the criminal law. Parliament can invest these proposed Courts with such a power by law made under Entry 14, List III of the VII Schedule.

Power to mould appropriate relief

Normally, Civil Courts do not grant relief which is not prayed for. But, like Writ Courts, these environment Courts must be able to mould any relief appropriate to the facts and circumstances of the case.

Therefore, we are of the view that, in the original petitions or in appeals, the proposed Courts should have power to grant any other relief other than what is sought for, which is suitable in facts and circumstances of the case.

Locus standi

So far as locus standi before the proposed Court in original petitions is concerned, it must be as wide as it is today before High Courts/Supreme Court in the writ jurisdiction in environment matters. This is the position in Australia and New Zealand also. Any person or organization who or which is interested in the subject matter or in public interest must be able to approach the Court. As stated earlier, the Court must be permitted to impose exemplary costs in case of frivolous or vexatious litigation.

Amicus curiae

There must be provision for intervention by individuals/organization and also power in the Court to appoint amicus curiae.

Qualification of Judicial Members

So far as the persons who man the proposed Environment Court are concerned, as stated earlier, there will be three Judicial Members assisted by three expert Commissioners. In the light of the fact that the proposed Court will have all powers of a Civil Court, original and appellate, we are of the view that the Courts should be manned only by Judicial Members drawn

from the Judiciary or the Bar. We are not dealing here with the constitution of Tribunals like the Administrative Tribunals or Tax Tribunals which were established to decide dispute in service matters or tax matters. We are here dealing with a Court which is exercising powers of a regular Civil Court in its original jurisdiction and in its appellate jurisdiction while dealing with environmental matters. It will not be permissible or appropriate to appoint members lacking judicial or legal expertise.

Provision relating to qualification must be on the following lines:

- “(1) The qualification for appointment of Chairman and Members shall be that they must be persons;
- (a) who are or who have been Judges of a High Court ;
 - (b) advocates of a High Court or two or more of such High Courts in succession with a standing of not less than twenty years.

Explanation: Preference shall be given to those who have had experience in environmental matters whether as Judges or lawyers.”

We have proposed a three Judge Court, inasmuch as very complicated and important questions (affecting the entire State in which the proposed Court is located), would come before the Court and we have felt that it is not sufficient to empower a Single Member Court to deal with such important and grave issues. As of now such matters are dealt with by a Bench of two or more Judges in the High Courts and Supreme Court. There must therefore be at least two Judicial Members but, in order to deal with

situations where there is a difference of opinion, it will be necessary to have an odd number of Judicial Members, namely, three. The quorum must be two Judicial Members.

The Court must also be assisted by a statutory panel of Technical/Scientific personnel called Commissioners as is done in Australia and New Zealand. Having regard to the variety of issues that come before Environment Courts, it will be necessary to have a panel of at least three such Commissioners. Their role will be advisory and they have to be present in the Court during the course of the hearings. They are not Members of the Court but are a statutory panel intended to independently advise and assist the Court in analyzing and assessing scientific or technological issues. At least one Commissioner must always be present in the Court. In case the Court feels that any other expert in a different branch than those in the panel is to be examined, the Court may on its own or in consultation with the panel of Commissioners, refer the matter for opinion to other expert/experts in the particular field under consideration.

Qualification of Commissioners

The Members in the panel of three Commissioners which is advisory and which is attached to each Environment Court must, in our view, be qualified in the following manner. Each commissioner must have

- “(1) a degree in environmental sciences together with at least five years experience as an environmental scientist or engineer, or

- (2) adequate knowledge of and experience to deal with various aspects of problems relating to environment, and in particular the scientific or technical aspects of environmental problems including protection of environment and environment impact assessment.”

We also recommend an Explanation to be inserted on the model of sec. 12 of the NSW Land and Environment Act, 1979, with a slight modification, as follows:

“In appointing Commissioners, it must be ensured, as far as practicable, that they are persons who hold qualifications and experience across the range of areas in regard to which issues of environment or ecology arise”

Criminal and judicial review jurisdiction kept out

We have deliberately kept criminal appellate jurisdiction and judicial review jurisdiction exercised today by the High Courts, beyond the purview of the proposed Courts. In respect of offences under the Penal Code or the Special Act like the Water (P&CP) Act, 1974 or the Air (P&CP) Act, 1981 and the Environment (Protection) Act, 1986 or any other offence connected with environment, parties or the State have therefore to go before the normal Criminal Courts and to the criminal appellate Courts having jurisdiction according to the procedural law applicable. We have examined the matter in detail and felt that, in the abstract sense of power, Art. 253 read with Entry 13 of List I (Schedule VII) would enable criminal

appeals/revisions from the trial Courts, in so far as they are presently filed in High Courts, - whether in case of conviction or acquittal – could be shifted to the Environment Court. In this context, Entry 13, 95 of List I and Entries 1, 2, 11A and 46 of List III would be relevant.

But, we have not come across any special law (except the TADA or the POTA) where the appellate jurisdiction of the High Court in criminal matters has been taken away from the High Court and vested in another Court at the State level, manned by retired judges. In order to avoid unnecessary litigation as to the competency of Parliament to make law transferring the criminal appellate jurisdiction to another Court at State level, we have decided not to touch the criminal appellate procedure as it now stands.

Likewise, we have not thought it fit to enable the Environmental Courts, to have judicial review powers exercised by the High Court under Art. 226 of the Constitution of India. We have felt that it is sufficient to vest original civil jurisdiction as exercisable by a Civil Court, in the Environmental Courts. If we vest powers of Judicial review as under Art. 226, then there may be need to subject the orders to the writ jurisdiction of High Courts as held in L. Chandra Kumar vs. Union of India, 1997 (3) SCC 261.

No doubt, the Environment Court exercising powers of a Civil Court or as an appellate Court in civil jurisdiction, may be technically amenable to writ jurisdiction of the High Court but inasmuch as we are providing an appeal to the Supreme Court, the High Courts may decline to interfere on

the ground that there is an effective alternative remedy of appeal on law and fact to the Supreme Court, as explained later in this Chapter.

Appeal to Supreme Court

We are also of the view that Parliament can, under Entry 13 of List I read with Art. 253 or Entry 95 of List I or Entry 11A and 46 of List III, provide for a statutory appeal direct to the Supreme Court.

Remuneration

Remuneration of Members and Commissioners shall be as may be prescribed by the Central Government.

Method of appointment and other matters

The method of appointment of the Judicial Members shall be by the Central Government in consultation with State Government, the Chief Justice of the State/Union Territory concerned and the Chief Justice of India. The method of appointment of the Commissioners shall be by the State Government/Union Territory concerned in consultation with the Chief Justice of the State concerned and the Chairman of the proposed Environment Court.

A Commissioner who has a pecuniary interest direct or indirect or is connected with the subject matter or any of the parties to a dispute shall not

be entitled to give any report in regard to the dispute. Every Commissioner shall inform the Chairman of the Court if he has any such connections.

The three Members of the Commission (i.e. the three retired Judges of High Court) and the three Commissioners in the panel must have five years tenure.

The Court shall have a Registrar and such other officers and staff as may be decided by the Rules made by the Central Government, in consultation with the Chief Justice of India.

The procedure for resignation and removal of Members (i.e. the three retired Judges of the High Court) will be on the same model as in sec. 13 of the National Environment Tribunal Act, 1995.

So far as the Commissioners are concerned, the proviso for resignation may be on the model of sec. 13(1) of the above Act of 1995. So far as removal is concerned, it shall be on the basis of such rules as may be prescribed by government, but the inquiry must be by a retired Judge of a High Court.

Other provisions like sec. 15, 16, 17 of the National Environment Tribunal Act, 1995 can be enacted so far as the position after expiry of tenure, financial and administrative powers, staff of Court.

Provision like secs. 25, 26, 27, 28, 29 and 31 of the said Act of 1995, can be added to take care of 'offences', 'protection' etc. Protection against

legal proceedings for acts performed in good faith must be there for the Judicial Members and the Commissioners.

Oath of office to the Judicial Members has to be administered by the Governor of the State in which the proposed Court is located or by his delegate. If a Court is established exclusively for a Union Territory, such oath may be administered by the Lt. Governor or his delegate.

Resignation by the Judicial Members or the Commissioners may be submitted to the Central Government. The Commissioners can submit resignations to the State Government.

Appeals to Supreme Court will persuade High Court not to interfere normally on the principle of 'alternative effective remedy'

As stated earlier, the proposal for a statutory appeal to the Supreme Court of India, both on fact and law, will be an important reason as to why the High Court will not normally interfere with the orders of the Environment Court. The case in L. Chandra Kumar vs. Union of India, AIR 1997 SC 1125 referred to earlier, is distinguishable because there the statute (the Administrative Tribunals Act) made under Art. 323A sought to transfer judicial review power of the High Courts under Art. 226 to a statutory Tribunal and excluded the power of the High Court to interfere. Further, the statutes of the Administrative Tribunals Act did not provide for any statutory appeal to the Supreme Court in the manner we are now proposing. It was because of the above scheme of that Act, the Supreme Court felt that the powers of the High Court under Art. 226, 227, which are part of the

basic structure of the Constitution, could not be taken away and, therefore, the orders of the Administrative Tribunal would be amenable to Art. 226 before our Division Bench. The above decision does not apply here inasmuch as our proposal is not to take away any judicial review powers of the High Court either specifically or remotely, nor to vest such powers in the proposed Courts. Firstly, the proposed Court is a Civil Court with original jurisdiction in environmental matters and an appellate jurisdiction against orders passed by public authorities under three enactments (or other enactments to be notified). Secondly, we are proposing an effective alternative remedy of a statutory appeal to the Supreme Court on law and fact. The Court which we are proposing is not a Tribunal under Art. 323A nor one under Art. 323B, even on the basis that the list of subjects referred to in Art. 323B for constituting such special Tribunals is not exhaustive.

We may point out that the Monopolies and Restrictive Trade Practices Act, in sec. 55 provides appeals against the orders of the Commission to the Supreme Court. Likewise, sec. 130E of the Customs Act, 1962 and sec. 35L of the Central Excise and Salt Act, 1944 provides for appeal to the Supreme Court. The Consumer (Protection) Act, 1986 provides appeal for the District Forum to the State Forum and from the State Forum to the National Forum. From National Forum judgments in certain cases, appeal lies to Supreme Court. The High Courts, within whose territorial jurisdiction these Courts are located do not normally entertain writ petitions. Further, it is held that they will not ordinarily interfere under Art. 226 or 227 in respect of order of Consumer fora because the Consumer (Protection) Act, 1986 provides an effective alternative remedy of appeal. (see long list of judgments of High Court referred to in Commentary on the

Act by J.N. Barowalia (2nd Ed., 2000) (pp. 195 to 206) and Commentary by Shri Dilip K. Sheth (2001) (pp.66 to 69).

The Supreme Court has held, in a number of cases, that High Court will not normally interfere if there is an effective alternative right of appeal: S. Jagadeesan vs. Ayya, AIR 1984 SC 1512; Titagarh Paper Mills vs. State of Orissa, AIR 1983 SC 603.

Apart from this, when issues of environment raise serious disputes of fact, where oral as well as expert evidence is necessary, the High Courts are ill-suited to decide the issues on the basis of affidavits alone: Jai Singh vs. Union of India, AIR 1977 SC 898; Than Singh vs. Supat, AIR 1964 SC 1419.

It is, therefore, proposed that appeals against the orders of the Environmental Court shall lie to the Supreme Court of India. We are here adopting the appeal procedure that was contained in sec. 24 of the National Environment Tribunal Act, 1995. Further, the scheme of the Consumer (Protection) Act, the Monopolies and Restrictive Practices Act, Customs and Excise Act, Companies Act and other statutes is similar, where a right of appeal direct to the Supreme Court is given. Appeals under the proposed Act must be on fact and law.

This is a legislation by Parliament under Art. 253 of the Constitution for the purpose of implementing the decisions in regard to protection to environment taken in the Stockholm Conference, 1972 and the Rio de Janeiro Conference of 1992 and in national interest. Further, the Courts are

appellate bodies for purpose of Central Acts, Water Act, 1974, Air Act, 1985, Environment (Protection) Act, 1986 etc. Therefore, it is the duty of the Parliament to provide for the establishment of additional Courts and the Central Government has to bear the cost of establishing and maintaining these Courts under Art. 247 of the Constitution of India. Art. 247 reads thus:

“Art. 247. Power of Parliament to provide for the establishment of certain additional Courts: Notwithstanding anything in this Chapter, Parliament may by law provide for the establishment of any additional Courts for the better administration of laws made by Parliament or of any existing laws with respect to a matter enumerated in the Union List.”

These Courts obviously come within the words in the first part of the last clause of Article 247, namely, “better administration of laws made by Parliament”. (The second part of the clause deals with existing laws as on 26.1.50 which are with respect to matters in List I). There can be Environment Court for more than one State as stated earlier. Union Territories could avail of the Court in the neighbouring State. Delhi can have a separate Court.

We, therefore, recommend that a law be made by Parliament under Art. 253 for constitution of Environmental Courts in each State (or group of States) having original and appellate jurisdiction as stated in this Chapter and having jurisdiction on environmental issues. The Courts will be manned each by three members with judicial or legal experience as stated

and a panel of expert Commissioners. An appeal against the judgment shall be to the Supreme Court of India. The procedure to be followed by the Court will be as stated in this Chapter.

Other formal provisions like power of appointment of staff, rule-making power, laying in the Houses of Parliament, can be made on the same lines as those contained in the recent amendment to Companies Act, 2002 or as in the Administrative Tribunals Act, 1985.

CHAPTER X
RECOMMENDATIONS

On the basis of our discussion in previous chapters, we recommend the following, namely:

1. In view of the involvement of complex scientific and specialized issues relating to environment, there is a need to have separate 'Environment Courts' manned only by the persons having judicial or legal experience and assisted by persons having scientific qualification and experience in the field of environment.
2. In order to achieve the objectives of accessible, quick and speedy justice, these 'Environment Courts' should be established and constituted by the Union Government in each State. However, in case of smaller States and Union Territories, one court for more than one State or Union Territory may serve the purpose.
- 3.(a) In view of the provisions contained in Art. 253 read with Entry 13 of List I of VII Schedule to the Constitution of India, Parliament is having exclusive jurisdiction to enact a law for the purpose of establishment of Environment Courts, because various decisions relating to protection and improvement of environment and preservation of natural resources of earth, were taken in International Conferences held at Stockholm in 1972 and at Rio-de-Janeiro in 1992, in which India also participated.

(b) The following words in Art. 253, “Notwithstanding anything in the foregoing provisions of this Chapter”, enable the Parliament to enact a law even on subjects falling in State List. Art. 253 is having overriding effect over Arts. 245 to 252.

(c) In view of the non-obstante clause in Art. 253, Parliament while enacting a law exercising power under Art. 253, may touch or enter into an enactment made under Art. 252(1) without following the procedure prescribed in Art. 252(2). Therefore, the provisions of the Water (Prevention and Control of Pollution) Act, 1974, which were enacted by the Parliament under Art. 252(1), can be altered by a subsequent law made by the Parliament under Art. 253 without following the procedure laid under Art. 252(2).

4.(a) The proposed Environment Court shall consist of a Chairperson and at least two other members. Chairman and other members should either be a retired Judge of Supreme Court or High Court, or having at least 20 years experience of practicing as an advocate in any High Court. The term of the Chairperson and members shall be 5 years.

(b) Each Environment Court shall be assisted by at least three scientific or technical experts known as Commissioners. However, their role will be advisory only. The qualifications of the Commissioners is given in Chapter IX (supra).

5.(a) The proposed Environment Court shall have original jurisdiction in the civil cases where a substantial question relating to ‘environment’

including enforcement of any legal or constitutional right relating to environment is involved. Details of this aspect are given in Chapter IX.

(b) The jurisdiction of civil courts is not ousted.

(c) The proposed Environment Court shall also have appellate jurisdiction in respect of appeals under:

(i) The Environment (Protection) Act, 1986 and rules made thereunder;

(ii) The Water (Prevention and Control of Pollution) Act, 1974 and rules made thereunder:

(iii) The Air (Prevention and Control of Pollution) Act, 1981 and rules made thereunder;

(iv) The Public Liability Insurance Act, 1991.

The Central and State Governments may also notify that appeal under any other environment related enactment or rules made thereunder, may also lie to the proposed Environment Court.

6.(a) The proposed Court shall not be bound to follow the procedure prescribed under the Code of Civil Procedure, 1908, but will be guided by the principles of natural justice. The Court shall also not be bound by the rules of evidence contained in the Indian Evidence Act, 1872.

(b) The proposed Court shall have all powers of civil court including power to punish for contempt, as discussed in Chapter IX.

(c) The minimum quorum for hearing a case, shall be two members including the Chairperson. At least one Commissioner should also remain present during the hearing of a case.

The proposed Court can pass all kinds of orders, final or interlocutory. It can also award damages, compensation and can also grant injunctions (permanent, temporary and mandatory). Details are given in Chapter IX.

(d) The proposed Environment Court shall follow the principle of strict liability in case of hazardous substance, polluter pays principle, precautionary principle, preventive principle, doctrine of public trust, Inter-generational equity and sustainable development.

(e) The locus standi before the proposed Environment Court in original jurisdiction shall be as wide as it is today before High Court/Supreme Court in the writ jurisdiction in environmental matters.

(f) The proposed Environment Court shall also have power to frame schemes relating to environmental issues, monitor them and modify the schemes.

7. The proposed enactment for establishment of these Environment Courts should also contain other ancillary and miscellaneous provisions which are necessary, for example provisions regarding other staff, funds, place of sitting etc.

8(a) In view of the appellate powers of the proposed Environment Court, provisions relating to appeals contained in:

- (i) Environment (Protection) Act, 1986 and rules made thereunder;
 - (ii) The Air (Protection and Control of Pollution) Act, 1981 and rules made thereunder;
 - (iii) The Public Liability Insurance Act, 1991
- are required to be suitably amended.

(b) The proposed enactment should also contain a provision, namely,

“Notwithstanding anything contained in sec. 28 of the Water (Prevention and Control of Pollution) Act, 1974, any person aggrieved by the order passed by the State Board under sec. 25, 26 or 27 may prefer appeal to the Environment Court”.

9. The National Environment Tribunal Act, 1995 and The National Environmental Appellate Authority Act, 1997 may be repealed and provisions regarding functions and powers of the Tribunal and the Appellate Authority contained in those Acts be suitably transferred in the proposed enactment for establishment of the Environment Court.

10. Appeal against the orders of the proposed Environment Court, shall lie before the Supreme Court on the question of facts and law.

11. The powers of High Courts under Arts. 226, 227 of the Constitution of India and of the Supreme Court under Art. 32 of the Constitution of India shall not be ousted.

We acknowledge the extensive contributions made by Dr. S. Muralidhar, Part-time Member of Law Commission of India in preparation of this Report.

We recommend accordingly.

(Justice M. Jagannadha Rao)
Chairman

(Dr. N.M. Ghatate)
Vice-Chairman

(T.K. Vishwanathan)
Member-Secretary

Dated: 23.09.2003