

**THE ROLE OF THE COURTS IN GREAT BRITAIN  
PROBLEMS OF THE ENVIRONMENT**

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## INTRODUCTION

For many years the best-known case in English administrative law was *Local Government Board v. Arlidge*.<sup>i</sup> Mr William Arlidge was a very litigious person, doubtless encouraged by his success in 1909 in having a bylaw—which imposed cleanliness duties on landlords—held to be unreasonable,<sup>ii</sup> and his litigiousness entrenched his name in several law reports over the next decade or more.<sup>iii</sup> The *Local Government Board* case, which was decided by the House of Lords just two weeks before the outbreak of the First World War, arose from the refusal by a borough council in London to end an order forbidding the use of a particular house for human habitation because it was deemed to be dangerous or injurious to health. Power to make such an order was under the Housing, Town Planning, etc. Act 1909, one of a series of statutes of the nineteenth and early twentieth centuries where the emphasis was on public health and improved conditions of living.

In the area of housing, the courts, especially in the period immediately before and after the First World War, appeared to be receptive to the legislative wish to secure speedy and effective administrative action.<sup>iv</sup> *Local Government Board v. Arlidge* was so emphatic in relieving administrators of implied procedural constraints that Lord Wright was, years later, to describe it as “the charter of the administrative court”;<sup>v</sup> and in 1951 Professor William Robson wrote, in the third edition of his *Justice and Administrative Law*, that the “rules of natural justice were evolved in the nineteenth century, and they have been almost static since the *Arlidge Case*”.<sup>vi</sup> The case involved a procedural challenge to the manner in which the President of the Local Government Board had, after the holding of a public local inquiry, rejected Arlidge’s appeal from the borough council’s decision. Professor Dicey, prompted at the time to reassess his views on administrative law, interpreted the decision of the House of Lords as establishing the principle that a “Government department when it exercises judicial or quasi-judicial jurisdiction under a statute is bound to act with judicial fairness and equity, but is not in any way bound to follow the rules of procedure which prevail in English courts”,<sup>vii</sup> to which Lord Hewart later added the gloss that “parties to the proceedings have none of the securities against injustice which they enjoy in judicial proceedings before the Courts.”<sup>viii</sup> The rules of natural justice were from the 1930s revived to some extent with regard to administrative procedures involving public local inquiries in such subject areas as housing, compulsory acquisition of land, town and country planning and road developments;<sup>ix</sup> but crucial procedural safeguards have been more effectively underwritten through the Tribunals and Inquiries Act 1971, rules of procedure made under the Act, and regular supervision by the Lord Chancellor’s Council on Tribunals.<sup>x</sup>

The contribution of the courts has been important, but judges have clearly been uneasy when invited to intervene, on procedural or substantive grounds, in administrative procedures involving public local inquiries. The unease has been particularly marked when the policy implications, often with wide environmental significance, are prominent. Awareness of wider environmental concerns is relatively new both in court and outside. For many years the focus was on the relatively narrow issues of public health, hygiene and cleanliness, an approach of which we have recently been reminded by Sir Desmond Heap in an entertaining “reverie” to mark the fortieth anniversary on 1 July 1988 of the coming into force of the revolutionary *Town and Country Planning Act 1947*.<sup>xi</sup> The boundaries of these issues were sufficiently narrow for the courts to be able to intervene, if they chose, when an appropriate challenge could be launched—in, for example, questioning the validity of bylaws on grounds of unreasonableness.<sup>xii</sup> Cases such as *Local Government Board v. Arlidge* reflected an emerging hesitancy, however, as wider issues (including the elimination of bad housing)

began to obtrude; and, after the Second World War judicial withdrawal or abdication became more and more evident in important, wide-ranging areas of government policy affecting the environment. An early indication of the post-war mood was *Franklin v. Minister of Town and Country Planning*,<sup>xiii</sup> where the Minister's duty was to consider objections made at a public local inquiry to a draft New Town Designation Order and then to make the order in terms of the draft or subject to such modification as he thought fit. The public local inquiry held in this case, incidentally, lasted two days only, even though it had far-reaching implications in the proposed development of Stevenage as a new town. Some forty years later we have become accustomed to public inquiries of rather longer duration: the inquiry of 1977 into the extension of the Windscale (now Sellafield) nuclear reprocessing plant lasted 100 working days; an inquiry of 1979-80 into a proposed new coalfield in the Vale of Belvoir lasted 84 days; the inquiry into the third London airport of 1981-83 ended on its 258th day; and the Sizewell B inquiry of 1983-85 into the construction of a pressurized water reactor lasted 340 working days. The problem of these major public inquiries has demanded considerable attention from the Council on Tribunals in recent years.<sup>xiv</sup> When the Stevenage case occurred the scale of future problems could not be foreseen, and the central question was whether the Minister had violated the standards of bias in natural justice by making an admittedly partisan and unequivocal speech (well ahead of the public local inquiry, of the making of a draft order, and even of the enactment of the *New Towns Act* itself) warning, for example, that "if people are fractious and unreasonable, I shall have to carry out my duty".<sup>xv</sup> The House of Lords gave short shrift to the complaints of bias, emphasizing in the terminology of the day that no judicial or quasi-judicial duty had been imposed on the Minister in carrying out his statutory duties. The result would have been the same, whatever the terminology. Even after the transformation of natural justice inspired by *Ridge v. Baldwin*,<sup>xvi</sup> the courts stood apart from policy-heavy administrative procedures.

The judicial approach is vividly demonstrated in the speech of Lord Diplock in *Bushell v. Secretary of State for the Environment*<sup>xvii</sup> in 1980. The Secretary of State's decision to confirm two draft motorway schemes was unsuccessfully challenged on the grounds of natural justice, and Lord Diplock took the opportunity—in terms which echo the views expressed in *Arlidge*—of warning against "applying to procedures involved in the making of administrative decisions concepts that are appropriate to the conduct of ordinary civil litigation between private parties."<sup>xviii</sup> Fair procedures should be observed, of course, but natural justice should be tailored to fit the purpose of a public local inquiry into major proposals, especially those originating in government policy. With *Bushell* in mind, Woolf L.J. said in a later case that, while a local inquiry is important "to the process of consulting and informing local opinion and gleaning local information," it is likely that unnecessary "expense and delay" could result "if an inquiry becomes a forum for the discussion of irrelevant matters."<sup>xix</sup> The issue of procedural fairness, in other words, involves a balancing exercise in determining the adequacy of the process of consultation and information; and the greater the policy content the more likely it is that the balance will be tilted in favour of the administration. So far as wider environmental issues are concerned, the courts in effect have adopted a self-denying ordinance.

Judicial attitudes to administrative procedures involving public local inquiries might be regarded as unrepresentative of judicial attitudes generally. From *Arlidge* to *Bushell* the judges have

overtly sought to respond to Parliament's intentions; and statutory provision for procedural safeguards, including setting up inquiries themselves, may have discouraged (though not excluded) additional safeguards implied through natural justice. The fact that public inquiries have become increasingly concerned with wider environmental issues over the past twenty years—largely because of a wider environmental awareness among objectors and others—has reinforced rather than created judicial caution. Are the judges, however, more receptive and creative in other areas of law, and are they equipped to undertake a more vigorous role in adjudicating on issues of environmental importance?

## I. ENVIRONMENTAL CONSERVATISM: THE ROLE OF THE COURTS

In various branches of the law the courts have shown a considerable measure of caution in dealing with environmental matters. Once again there is a danger in generalising, but illustrations of a hesitant judicial approach—which may well be in some instances entirely understandable or justified—can be found in administrative law and in the law of tort.

One of the underlying problems of administrative law is that of justiciability. Wide environmental issues are bound to face objections based to a large extent on the argument that they are not justiciable or triable in a court of law. In 1987, for instance, the Friends of the Earth sought leave to apply for judicial review of the decision by the Secretary of State for Energy to allow the construction of the Sizewell B nuclear generating plant.<sup>xx</sup> The requirement of leave, incidentally, is peculiar to the provision for applications for judicial review in England and Wales; it does not apply in equivalent procedures in Ontario, British Columbia and Alberta. In *Re Friends of the Earth*<sup>xxi</sup> leave was refused by Kennedy J. on the ground that the application had not been made promptly. His Lordship agreed, however, that there was standing and that at least one of the grounds of challenge was arguable. On a renewed application to the Court of Appeal for leave to apply for judicial review—this was in effect an appeal against refusal of leave—the applicants again failed, principally because none of their five proposed grounds of challenge was deemed to be arguable. The main ground of challenge, which depended on an interpretation of a section in the Nuclear Installations Act 1965, was seen by one appellate judge as a matter where the applicants' recourse "had to be to the methods of political persuasion by which the law was altered, and not to the process of judicial review."<sup>xxii</sup> This was a recognition that the interpretation for which the applicants argued would have prevented any licence for the generation of energy by nuclear power, and the courts were not prepared to venture into such an area of national policy. With reference to the parallel issue of nuclear weapons, Lord Radcliffe said in a criminal decision of 1962:

*The more one looks at it, the plainer it becomes, I think, that the question whether it is in the true interests of this country to acquire, retain or house nuclear armaments depends upon an infinity of considerations, military and diplomatic, technical, psychological and moral, and of decisions, tentative or final, which are themselves part assessments of fact and part expectations and hopes. I do not think that there is anything amiss with a legal ruling that does not make this issue a matter for judge and jury.*<sup>xxiii</sup>

The question of promptitude in the *Friends of the Earth* case also illustrates the judicial approach. The application for leave had been made within the stated period of three months from the Minister's decision, but even so it was felt—particularly by Kennedy J.—that the applicants had unjustifiably left it to the last moment. Sir John Donaldson M.R. accepted that the Friends of the Earth had acted responsibly in weighing up the cost and desirability of litigation, but he also drew attention to the need to avoid unnecessary delay and cost to the Central Electricity Generating Board. That balancing process is at first sight somewhat surprising: the period of three months is short enough in any event, especially when measured against the length of the Sizewell B inquiry. Had the central issue of interpretation been regarded as arguable, however, the Court of Appeal would, irrespective of the delay, have been prepared to grant leave. The importance of the ground of challenge has to be considered in the balancing process. Nevertheless, the attention given to promptitude underlines the judicial approach, already seen in cases from *Arlidge* to *Bushell*, exhibiting both caution and a readiness to assist the administration to avoid unnecessary delay and cost.

In another threshold field of administrative law, that of standing, environmental issues can also cause difficulties for the courts. Two well-known Australian cases offer a useful illustration of this. Both were concerned with the application and adaptation of the rule in *Boyce v. Paddington Borough Council*<sup>xxiv</sup> as to the circumstances in which a plaintiff can seek a declaration or injunction without joining the Attorney-General, particularly on the question whether the plaintiff has suffered “special damage peculiar to himself from the interference with the public right.” In *Australian Conservation Foundation Inc. v. Commonwealth of Australia*<sup>xxv</sup> there was a challenge to certain decisions involving the establishment of a resort and tourist area at Farnborough in central Queensland. The High Court, by a majority, held that the Foundation lacked standing. Gibbs J. was prepared to re-write *Boyce* to allow standing where the plaintiff has “a special interest in the subject matter of the action”, but a special interest “does not mean a mere intellectual or emotional concern” and, as Stephen J. added, a person does not gain standing “because he voices a particular concern and regards the actions of another as injurious to the object of that concern.”<sup>xxvi</sup> Yet, shortly afterwards in *Onus v. Alcoa of Australia Ltd.*,<sup>xxvii</sup> two members of an Aboriginal community were allowed standing to challenge the construction of an aluminum smelter on land in Victoria containing Aboriginal relics. Stephen J. recognized that the distinction between this case and the *A.C.F.* case “is not to be found in any ready rule of thumb, capable of mechanical application”, and Gibbs C.J. frankly stated that the “position of a small community of aboriginal people of a particular group living in a particular area which that group has traditionally occupied, and which claims an interest in relics of their ancestors found in that area, is very different indeed from that of a diverse group of white Australians associated by some common opinion on a matter of social policy which might equally concern any other Australian”.<sup>xxviii</sup> In his dissent in the *A.C.F.* case, Murphy J. claimed with some justification that the concept of standing “is closely tied to justiciability and to notions of judicial power,”<sup>xxix</sup> and the words of Gibbs C.J. in *Onus* remind us that justiciability raises questions both of what can be tried in the courts and of what the courts are prepared to try.<sup>xxx</sup> A general concern about nuclear weapons, for example, was not sufficient to give standing for a challenge to the Australian government over its policy on nuclear weapons.<sup>xxxi</sup>

In the course of the *A.C.F.* judgments, some reliance was placed on the decision of the Supreme Court of the United States in *Sierra Club v. Morton*,<sup>xxxii</sup> where Stewart J. for the Court declared that they would not construe the federal Administrative Procedure Act<sup>xxxiii</sup> to authorize judicial review at the behest of organizations or individuals who seek to do no more than vindicate their own value preferences through the judicial process.<sup>xxxiv</sup> The Sierra Club was denied standing in its efforts to block development in the Mineral King Valley in the Sierra Nevada Mountains; but the denial was on narrow grounds, there were three dissents, and the *Sierra Club* decision “does not constitute a substantial setback to the trend in favour of environmental standing” which has been “one of the most striking recent administrative law developments.”<sup>xxxv</sup> Indeed, shortly after *Sierra Club*, standing was allowed to a body called Students Challenging Regulatory Agency Procedures (SCRAP) on the claim that failure by the Interstate Commerce Commission “to suspend a 2.5% freight rate increase may discourage the transportation of recyclable materials, thus retarding the use of recycled materials, causing further consumption of our forests and natural resources [...] and resulting in more refuse and undisposable materials to further pollute the environment.”<sup>xxxvi</sup> It is open to question whether other common law jurisdictions would go so far, though the Court of Appeal in New Zealand, not unused to ploughing new ground on standing, held that an environmental interest group could challenge procedures laid down as to the construction of an aluminum smelter near Dunedin.<sup>xxxvii</sup> Environmental groups may benefit from the widespread tendency of late to liberalize rules of standing in administrative law, and in England and Wales it is likely that the process of liberalization will continue to be greater in applications for judicial review (protected by the leave requirement) than in private actions for declarations and injunctions.<sup>xxxviii</sup>

The patchiness and unpredictability of the judicial response in areas of administrative law, where environmental issues arise, will not come as a surprise to those familiar with the impact of environmental issues in the law of tort. That the law of tort failed to keep pace with the Industrial Revolution has been accepted and explained by writers such as Professor John McLaren,<sup>xxxix</sup> who develops the interesting point that “the Common Law was not inherently restrictive of successful claims in nuisance against industrial polluters.”<sup>xl</sup> Other factors, including legal costs and the problem of proving cause and effect, could be critical and such factors have also restricted the impact of negligence or the rule in *Rylands v. Fletcher*<sup>xli</sup> in environmental control. Some of the larger gaps in this control have, of course, been filled through planning laws or through the development of statutory regulatory powers, but there is still room for judicial initiative and individual cases in tort can still have important symbolic value.<sup>xlii</sup> There are evidently important conceptual developments in India<sup>xliii</sup> in the aftermath of Bhopal, and a recent decision of the Supreme Court of Ireland gives some ground for optimism in facing problems of causation in the context of nuisance.<sup>xliv</sup> Some problems of causation, of course, seem overwhelming, not least in seeking to prove a causal link between radiation and cancer;<sup>xlv</sup> but it is worthy of note that in the recent case of *Pearce v. Secretary of State for Defence*,<sup>xlvi</sup> the House of Lords held that the Crown could not rely on statutory immunity under the *Crown Proceedings Act 1947*<sup>xlvii</sup> to prevent an action for negligence by a former soldier in the Royal Engineers who had been on Christmas Island during a series of nuclear tests in 1958 and subsequently became seriously ill.

There are serious obstacles, however, in the way of using the law of tort as a weapon against environmental harm. Government policy, as in so many areas of law, can obtrude, as it did in the case of *Budden v. BP Oil Ltd. and Shell Oil Ltd.*<sup>xlviii</sup> where, on the matter of lead in petrol, Megaw L.J. suggested that Parliament had given “tacit consent” to the relevant regulations and that the courts “could not properly be asked to make decisions, by way of litigation under the adversary procedure, the effect of which would, or might, be that the courts would lay down and require to be enforced by the courts” a different and contradictory policy. Another problem is the availability of defences based on statutory authority. In *Allen v. Gulf Oil Refining Ltd.*,<sup>xlix</sup> a person who lived near an oil refinery sued on the basis of nuisance and negligence. She and other neighbours spoke of noxious odours, vibration, noise, and flames; but the action was resisted on the ground that the operation of the refinery was allowed by a private statute of 1965. The House of Lords confirmed that the defence of statutory authority was available, though the views expressed in the dissenting speech of Lord Keith and in the Court of Appeal show a strong sense of unease about the boundaries of the defence. In urging a strict construction of the statutory provisions, Lord Keith said that it “is the duty of those promoting private Acts to make plain the precise extent to which they propose to derogate from the common law rights of those who may be affected by their proposals.”<sup>1</sup>

There have been decisions where the courts have been prepared to take the existing law to its full extent. Professor McLaren has reminded us, with reference to the nineteenth century, that the “saga of Mr. Tipping and the St. Helen’s Smelting Co. ended in the grant of an injunction in Chancery and the closing down of the company’s plant. The pressure of an injunction issued against Birmingham Corporation at the instigation of C.D. Adderley in 1858 to restrain it from dumping raw sewage into the River Thames ultimately induced the Corporation to introduce sewage treatment facilities.”<sup>li</sup> Such instances, however, are relatively rare, but this is partly because so much has been entrusted since the nineteenth century to a variety of government agencies. Superimposed upon the common law is a battery of statutory discretionary powers which are important means, frequently with little or no prospect of legal proceedings, of implementing official policy. In addition, the adequacy of statutory powers depends on the political or official response to new environmental demands in the form of legislation, regulations or informal codes of practice. In these areas of official powers and official response, there is a considerable amount of environmental conservatism, which helps to explain why the courts have hitherto not been prominent in environmental protection.

## **II. ENVIRONMENTAL CONSERVATISM: OUTSIDE THE COURTS**

There are many examples of official caution, hesitancy and delay with regard to the environment. The governmental response to proposals for legislation or other change has frequently been slow and sometimes defensive; and, to add to the confusion, there can be unpredictable changes of mind on important issues of law or administration. The Fifth Report of the Royal Commission on Environmental Pollution, for instance, appeared early in 1976,<sup>lii</sup> it was concerned with air pollution, and one of its central recommendations was that, because “of the connections that exist between different forms of industrial pollution” there should be a unified pollution inspectorate in order to ensure “a more concerted approach to dealing with difficult industrial pollution

problems.”<sup>liii</sup> Only in 1982 did the Government respond to the Fifth Report, and it stated that “all in all” the proposal for a unified pollution inspectorate would not be accepted.<sup>liv</sup> In its Tenth Report in 1984, the Royal Commission re-stated its view,<sup>lv</sup> however, and in 1986 the Government finally agreed to establish “Her Majesty’s Inspectorate of Pollution” to “develop a more coherent approach to the control of industrial emissions to air, water or land and to provide advice which will help the other pollution control authorities to carry out their statutory responsibilities.”<sup>lvi</sup> The new body materialized on 1 April 1987 “in the apparent absence of any of the controversy which surrounded its first proposal.”<sup>lvii</sup>

What may have influenced the Government’s change of heart in 1986 was the growing recognition, in Europe and elsewhere, of cross-media problems of pollution. The European Community’s involvement in environmental matters dates from 1973 on the basis of “an agreed re-interpretation” of the fundamental objectives of the Treaty of Rome,<sup>lviii</sup> and the European impact upon British Law and practice is more and more evident. One of the proposals of the Royal Commission in its Seventh Report in 1979,<sup>lix</sup> which concerned agriculture, centred on the Pesticide Safety Precautions Scheme—a non-statutory agreement between government departments and the relevant industrial associations. One of the characteristic emphases in the United Kingdom in its response to environmental problems has, incidentally, been “on extra-statutory procedures, voluntary codes of practice, ‘government by circular’ and the like;”<sup>lx</sup> and this may in its turn explain why many environmental matters do not come before the courts. On pesticide control, the Royal Commission proposed that the control scheme should at least have a statutory basis, adding that statutory provision would have “a possible additional advantage” in bringing the United Kingdom into line with other Member Countries of the Community.<sup>lxi</sup> In its formal response in 1983 the Government was unimpressed;<sup>lxii</sup> but in Part 3 of the *Food and Environment Protection Act 1985*<sup>lxiii</sup> extensive reserve powers with regard to pesticides have, after all, been entrusted to Ministers.<sup>lxiv</sup>

Consider also the problem of environmental assessment of projects. Numerous European initiatives have been designed to secure adoption of assessment schemes in Member Countries, but there was considerable opposition in the United Kingdom. It was argued, for instance, that an EIA would add to bureaucracy and encourage litigation. The litigation might be on the adequacy of an EIA, along the lines explored in New Zealand in the aluminum smelter proceedings where the Court of Appeal stressed that the question is essentially one of degree,<sup>lxv</sup> but it could be on a variety of substantive and procedural issues. A British Minister stressed that the Government wanted “to avoid legislation which could be difficult to enact, hard to implement and—by virtue of its uncertainties—be a source of litigation and dispute.”<sup>lxvi</sup> Nevertheless, the European pressure has proved irresistible, and the Directive on Environmental Assessment had to be implemented in Member Countries by 1 July 1988.<sup>lxvii</sup> Environmental assessment, according to one comment, “is the first direct influence of the European Community on British land use planning” and, it is claimed, it will require no less than 17 separate pieces of subordinate legislation.<sup>lxviii</sup>

The trend is undoubtedly towards more statutory provisions and more formality in environmental controls. Old habits and attitudes survive, however, and the pragmatic style so characteristic of the British approach is likely to survive in many areas. The Royal Commission has



spoken of “a tradition, both in legislation and administrative practice, of pragmatism, of gradual, negotiated (rather than mandated) raising of standards, and of caution in not going beyond what is seen by the parties concerned as reasonably practicable,”<sup>lxxix</sup> a tradition reflected in a Ministerial comment on the original proposal for a unified pollution inspectorate that he (the Minister) was confident “that a cooperative, pragmatic, cross-sectoral and preventive approach will see us through.”<sup>lxxx</sup> The value of flexibility is still recognized and will continue to be recognized, but there is bound to be a mounting response to pressures (such as those from Europe) for more definition. Indeed, such are the pressures that the Royal Commission’s recommendations in its Ninth Report about lead in petrol were accepted almost instantly by the Government,<sup>lxxxi</sup> which was well aware of Community developments. Broader international demands have also become more and more obvious, as in the area of oil pollution at sea (the subject of the Royal Commission’s Eighth Report),<sup>lxxxii</sup> and the Royal Commission has recently indicated that the choice of a Best Practicable Environmental Option “must take account of environmental effects at the local, national and international levels. For example, the BPEO for the generation of electricity from coal-fired power stations—to take an example which has been of intense international concern for the past 10 years—ought to be determined on the basis of international as well as national effects.”<sup>lxxxiii</sup>

The complexity of widescale environmental policy-making is such that the courts have relatively little part to play—because of considerations of competence, justiciability, and democratic acceptability—but the impact of environmental policy in particular situations would seem to bring the courts back into prominence. We have seen that the theoretical potential of the law of tort has not been realised. What, then, of the apparatus of statutory controls? Should not the courts be involved in the front line of enforcement? There are various reasons why, at least, in the United Kingdom, the potential has once again not been realised, and the fault by no means rests with the courts alone.

In the first place there is nothing, apart from the rapidly evolving European Community relationship, to provide a constitutional bolstering for environmental control. The United Kingdom adheres strictly to the doctrine of Parliamentary Sovereignty in a unitary structure, and the result is that we have no cases comparable to the *Franklin Dam* case in Australia which “involved a head-on collision between a State policy of economic development and a federal policy of environmental protection.”<sup>lxxxiv</sup> Regional issues within the United Kingdom have to be resolved outside the courts, though it is probably rare for there to be a major constitutional perspective even in such countries as Australia, the United States and doubtless Canada.

Secondly, there has been considerable inaction on the part of Parliament, so much so that pollution control law in the United Kingdom has been described as “diffuse, uncodified and (in the case of much of the Control of Pollution Act 1974) obscure to all but the expert practitioner.”<sup>lxxxv</sup> Efforts to secure improvements in presentation—for example, by a wholesale revision of the Public Health Acts—were initially encouraged at official level, but they have secured relatively low priority in the legislative timetable. One has to bear in mind that there is only one Parliament for the whole of the United Kingdom, and the priorities of legislation are almost entirely determined by the national Government. This governmental control also means that the bringing into effect of

legislation can depend on Ministerial discretion, and even now in 1988 the *Control of Pollution Act 1974* is not fully in force.<sup>lxxvi</sup>

Thirdly, the attitudes of industry and the commercial world have not favoured recourse to the courts, either directly or indirectly. Some industrial representatives have supported extra-statutory mechanisms of environmental control, others have been slow to lend their weight to proposals for legislative reform and clarification. Then there is the perennial assertion of confidentiality, which has been discussed in general in the Second and Tenth Reports of the Royal Commission and often in other publications. In the Tenth Report, the Royal Commission looked specifically at trade secrets, the public's competence to interpret environmental data (coupled with assertions of the dangers of vexatious litigation), administrative costs (the alleged danger of creating "a bureaucratic burden with little tangible benefit"), "environmental rights" (the public, said the Royal Commission, "must be considered to have a right, analogous to a beneficial interest, in the condition of the air and water and to be able to obtain information on how far they are being degraded"), the effect of secrecy on risk perception ("Secrecy—particularly the half-kept secret—fuels fear"), and the auditing of pollution control authorities (with the argument that more information might stimulate stricter regulation).<sup>lxxvii</sup> The Commission's conclusion, which was later echoed in the Eleventh Report on waste management,<sup>lxxviii</sup> was in favour of the maximum possible openness in all legislative and administrative controls.<sup>lxxix</sup> The problems of proof which face litigants in environmental matters are very large without adherence to unnecessary secrecy, but this is truly an area where old habits die hard.

Fourthly, the attitudes of officials involved in the enforcement of the law—in the United Kingdom there has been a strong preference for informal negotiation rather than compulsion—directly affect access to the courts. Wide discretionary powers are entrusted to a wide variety of people concerned with water, waste, air, noise, chemicals, and planning.<sup>lxxx</sup> In its Fifth Report, on air pollution, the Royal Commission accepted that "an aggressive policy of confrontation "might be undesirable",<sup>lxxxi</sup> but it wished more to be done in securing enforcement of the law. Depending on the nature of the activity in question, there could be problems of administrative enforcement—for example, where a local authority drags its feet in taking action against noise—and the remedy here could range from heavy-handed recourse to the courts or by complaint to an ombudsman. Recent decisions of the local ombudsman in England have concerned unreasonable delays in dealing with a noise nuisance caused by neighbours, failure by a council to serve a notice to secure the abatement of noise nuisance from a transport distribution centre, and failure to carry out the necessary inquiries to establish whether the noise from kennels near the complainant's home constituted a statutory nuisance.<sup>lxxxii</sup>

There has long been difficulty over prosecution policies in the context of public health, industrial safety and environmental protection. Various inspectorates, wedded to the idea of securing advances by negotiation and good will, have been reluctant to bring to bear the full weight of the criminal law. Some years ago a Committee, under Lord Robens, which has been appointed to look at Safety and Health at Work, considered the enforcement of a number of regulatory statutes and spoke of "a very considerable body of opinion to the effect that the sanctions of the criminal law

have only a very limited role to play in improving standards of safety and health at work.<sup>lxxxiii</sup> This philosophy—which is reflected widely in environmental control—does not appear to have changed, and it is strengthened by continuing and obvious difficulties in assembling the evidence on which to base many types of prosecution. Moreover, it is perhaps unfortunate that the Robens Committee, in rejecting ready recourse to the courts, agreed that criminal proceedings should be turned to principally “where the imposition of exemplary punishment would be generally expected and supported by the public. We mean by this offences of a flagrant, wilful or reckless nature which either have or could have resulted in serious injury.”<sup>lxxxiv</sup> Such an argument would seem to inject an element of pre-judgement into individual cases: the role of the courts ought not to be reduced to that of wielding a big stick at the behest of the prosecutor. At the same time, prosecutors could argue that there is a need to revise the available penalties on a regular basis, in order to ensure that prosecutions really do have an impact; and there is evidence that a combination of administrative action and court proceedings can have an impact. In the area of noise, for instance, environmental health officers at local level can recommend noise abatement orders, which are often a useful means of avoiding or sometimes preceding recourse to the courts.<sup>lxxxv</sup>

A fifth reason why the courts are not in the front line in environmental protection is that the procedures of the courts are often ill-adapted for the resolution of major environmental issues. We have already seen examples of this, and of course there are intricate issues in other areas where the procedures of the courts have been sorely stretched. The pressures were seen in the 1980s in a Scottish case involving a challenge to the fluoridation of water where the legal proceedings extended for just over 200 days,<sup>lxxxvi</sup> though it is worth recalling that the longest speech in the House of Commons this century (4 hours, 23 minutes) concerned the same vexed topic of fluoridation.<sup>lxxxvii</sup> Concern about long delays, legal costs, the excessive orality of adversary proceedings, and many other alleged features or deficiencies of the legal system demand external reform; and the recent Civil Justice Review in England gives a vivid indication of what might be achieved.<sup>lxxxviii</sup> In a brief passage which may have some bearing on environmental matters raised in civil proceedings, for instance, there is some discussion of class actions and representative actions,<sup>lxxxix</sup> and the Review Body endorsed a recent judicial comment that the possibility of class actions should be looked at in a special study.<sup>xc</sup> There may, indeed, be an urgent need for a body to assess procedures, both civil and criminal, specifically with reference to environmental matters, and such a body could also take on board for environmental matters the growing demands for specialization in the legal profession.<sup>xc</sup>

Recognition of the demands for specialization in the legal profession is an indication of the desirability of considering general substantive as well as procedural questions. The Civil Justice Review looked in some detail at housing cases before the courts, commenting that public complaints “about the complexity of housing law, procedure and jurisdiction have crystallized in recent years around various proposals for a housing court, a housing tribunal or reforms to existing judicial bodies”<sup>xcii</sup>—a reminder of the extreme complexity of reform in complex areas. Sometimes there can be isolated proposals for change in the law, as in a recent complaint by the National Society for Clean Air on Crown Immunity from clear air legislation<sup>xciii</sup> or in suggestions by the Widdicombe Committee on changes in rules of standing and legal aid to help in actions against local authorities.<sup>xciv</sup> What is surely needed, however, is a fullscale assessment of the capability of the

courts in handling all sorts of environmental issues and of the feasibility of setting up alternative procedures in the form of tribunals or inquiries.

Progress in environmental control will to a large extent, of course, continue to be sought and achieved outside the courts of law. The problems of nuclear energy are an obvious example of the sorts of issues which can be resolved only extra-judicially in most circumstances, raising as they do such questions as energy demands, reactor safety, radioactive waste, and the threat of terrorism and sabotage. At policy-making stages in a wide range of environmental matters there are problems of risk assessment which could not easily be settled in a court of law. Nevertheless the courts have a role to play, sometimes in conjunction with other bodies such as tribunals, because the concentrated publicity of court proceedings and the independence of the adjudicators can be important factors in reassuring the public about the efficacy of some kinds of environmental control. What we seem to do at the moment, however, is to stumble from one field to another, from one kind of control to another, from one set of laws to another; and little has been done to study in depth the underlying problems of substance and procedure. It is unlikely that uniformity of approach can be achieved; but a specialized review body could examine a wealth of matters including pre-trial proceedings, the presentation of evidence, the use of assessors, the reduction of orality, the funding of appropriate litigation, the training of lawyers and judges, and much else, to seek a system where delay, cost and inaction are significantly reduced.

Public pressure for change will vary, and it is often influenced by particular, highly publicised events. It is hence all the more important to undertake a comprehensive survey of the law's deficiencies, such as they are, and the prospects for reform, such as they are. The possibilities of international cooperation would be highly relevant, and countries with common legal backgrounds may gain from each others' experiences in environmental control. The urgency of the problems of environmental pollution was recognized in a White Paper of 1970<sup>xcv</sup> in words which compel attention:

*Profound changes in ecological systems have occurred in the hundreds of millions of years which make up geological time. But the changes were slow, and even after man's emergence about a million years ago, change continued to be very slow. Human beings were few in number and scattered, and they did not do much to their surroundings. With the explosive population growth and industrialization of the last hundred years, all this has changed. Vastly increasing numbers of people, on a vastly increasing scale, now dig the earth to take and make what they want; they cut down forests, breed animals, grow crops and fish the seas; and from everything that is made or eaten, pollution is generated.*

## ENDNOTES

- i. *Local Government Board v. Arlidge*, [1915] A.C. 120 [hereinafter *Local Government Board*]. See Dicey, “The Development of Administrative Law in England” (1915) 31 L.Q.R. 148; Jennings, “Courts and Administrative Law—the Experience of English Housing Legislation” (1936), 49 Harvard L.R. 426 at 439-41; Lord Hewart of Bury, *The New Despotism* (London: E. Benn, 1929) at 180 -191; Williams, “The Donoughmore Report in Retrospect” (1982) 60 Public Ad. 273 at 275-76.
- ii. *Arlidge v. Islington Corporation*, [1909] 2 K.B. 127.
- iii. See *R. v. Hampstead B.C.*, ex p. Woodward (1917), 116 L.T. 213; *Arlidge v. Tottenham U.D.C.*, [1922] 2 K.B. 719.
- iv. See e.g. *Johnston v. Maconochie*, [1921] 1 K.B. 239.
- v. “Liberty and the Common Law” (1945) 9 Camb. L.J. 2 at 10.
- vi. (London: Stevens & Sons, 1951) at 538.
- vii. Dicey, *supra* note 1 at 149.
- viii. Lord Hewart, *supra* note 1 at 167.
- ix. See e.g., *Errington v. Minister of Health*, [1935] 1 K.B. 249; *Fairmount Investments Ltd v. Secretary of State for the Environment*, [1976] 1 W.L.R. 1255
- x. The Tribunals and Inquiries Act was originally enacted in 1958 and the Council on Tribunals came into being in that year. See Williams, “The Council on Tribunals: The First Twenty-Five Years”, (1984) P.L. 73. Two sets of revised rules - the Town and Country Planning (Inquiries Procedure) Rules and the Town and Country Planning Appeals (Determination by Inspectors) (Inquiries Procedure) Rules - were made in 1988, with the stated aim of making the planning inquiry process “as efficient and effective as possible, while not impairing the fairness and impartiality of inquiry proceedings, or the ability of participants to make representations which are relevant to the decision” (Mr. W. Waldegrave, Minister for Housing and Planning, written answer in the House of Commons). Two non-statutory codes of practice were issued on the same day: see [1988] J.P.L. 533-34.
- xi. D. Heap, “Forty Years On - A Somewhat Irreverent Reverie” [1988] J. of P. E. L. 375; *Town and Country Planning Act 1947* (U.K.), 1947, c. 51.
- xii. See e.g., *R. v. Wood* (1855), 5 E & B 49; *Stiles v. Galinski*, [1904] 1 K.B. 615; *Nokes v. Corp. of Islington*, [1904] 1 K.B. 610; *Arlidge v. Islington Corp.*, [1909] 2 K.B. 127; *Attorney-General v. Denby* [1925] Ch. 596; *Townsend's (Builders) Ltd. v. Cinema News & Property Management Ltd.*, [1959] 1 All E.R. 7. The judges, however, were well aware in these bylaw cases of the need for judicial restraint: see *Kruse v. Johnson*, [1898] 2 Q.B. 91 at 99.
- xiii. [1948] A.C. 87.
- xiv. See the latest Annual Report of the Council on Tribunals, that for 1986/87, HC 234 (26 January 1988) at 4.1 and 4.2.
- xv. *Supra* note 13 at 91. To cries of “Dictator” and “Gestapo” the Minister (Mr. Lewis Silkin) declared: “The project will go forward[...] Stevenage will in a short time become world famous -(Laughter).” One mark of the hostility to the designation of Stevenage as a new

- town was that the name boards on the local railway station were changed to “Silkingrad” - see Frank Shaffer, *The New Town Story* (1970), ch. 4; Harold Orlans, *Stevenage: A Sociological Study of a New Town* (1952).
- xvi. [1964] A.C. 40.
  - xvii. [1981] A.C. 75 [hereinafter *Bushell*]. See Williams, “Public Local Inquiries - Formal Administrative Adjudication” (1980) 29 I.C.L.Q. 701 at 715-18.
  - xviii. *Ibid.* at 95.
  - xix. *R. v. Secretary of State for Transport, ex parte Gwent County Council*, [1987] 1 All E.R. 161 (C.A.).
  - xx. *Re Friends of the Earth* [1988] J.P.L. 93 (C.A.).
  - xxi. (U.K.), 1965, c. 57.
  - xxii. *Supra* note 20 at 98, per Gibson L.J.
  - xxiii. *Chandler v. Director of Public Prosecutions*, [1964] A.C. 763 at 798-99.
  - xxiv. [1903] 1 Ch. 109 at 114 per Buckley J [hereinafter *Boyce*].
  - xxv. (1980-81), 146 C.L.R. 493 [hereinafter *A.C.F.*].
  - xxvi. *Ibid.* at 557, 530, 539, respectively.
  - xxvii. (1981-82), 149 C.L.R. 27 [hereinafter *Onus*].
  - xxviii. *Ibid.* at 42, 37, respectively.
  - xxix. *Supra* note 24 at 554.
  - xxx. See S.D. Hotop, *Principles of Australian Administrative Law*, 6th ed., (1985) at 298-302; M. Aronson and N. Franklin, *Review of Administrative Action* (1987) at 619-30; *Fraser Island Defenders Organization Ltd. v. Hervey Bay Town Council* (1983), 2 Qd.R. 72; *Coe v. Gordon* (1983), 1 N.S.W.L.R. 419.
  - xxxi. *Ingram v. Commonwealth of Australia* (1980), 54 A.L.J.R. 395 (original jurisdiction of High Court). See also, *Re Greenpeace Foundation of British Columbia and Environment Minister* (1981), 122 D.L.R.(3d) 179 (standing refused to challenge importation of killer whales).
  - xxxii. 405 U.S. 727 (1972) [hereinafter *Sierra Club*].
  - xxxiii. 5 U.S.C. 500.
  - xxxiv. *Supra* note 32 at 740.
  - xxxv. B. Schwartz, *Administrative Law. A Casebook*, 3rd ed., (Little Brown, 1988) at 711-12.
  - xxxvi. *United States v. Students Challenging Regulatory Agency Procedures* (SCRAP), 412 U.S. 669 (1973), per White J. (dissenting) at 722. See also, *Save Our Wetlands v. Sands*, 711 F.2d 634. (5th Cir. 1983); B. Schwartz, *Administrative Law*, 2nd ed., (1984) at 8.19 (“Environmental Standing”).
  - xxxvii. *Environmental Defence Society Inc. v. South Pacific Aluminium Ltd.* (No. 3) (1981), 1 N.Z.L.R. 216.
  - xxxviii. See Williams, “Administrative Law In England: The Emergence of a New Remedy” (1986) 27 William and Mary L.R. 715 at 730-39.
  - xxxix. See J. McLaren, “Nuisance Law and the Industrial Revolution - Some Lessons from Social History” (1983) 3 Oxford J.L.S. 155.
  - xl. *Ibid.* at 194. See also, Ogus and Richardson, “Economics and the Environment: A Study of Private Nuisance” [1977] 36 Camb. L.J. 284.

- xli. (1868), L.R. 3 H.L. 330.
- xl. See generally, D. Hughes, *Environmental Law* (1986), ch. 1; A. de Grandis-Harrison, "Environmental Law - English Developments" (1987) Law Society's Gazette 2180.
- xliii. See *Mehta v. Union of India* (1987), 1 S.C.C. 395; Bergman, "Union Carbide's Sabotage Theory" (1988) 138 New L.J. 420.
- xliv. See the Editorial ("The Hanrahan Case - A Popular Supreme Court Decision") in (1988) 6 Irish L.T. 185.
- xl. See Brahams, "Radiation: proving the causal link with cancer" (1988) 138 New L.J. 570.
- xlvi. [1988] 2 All E.R. 348.
- xlvii. (U.K.), 1947, c. 44.
- xlvi. (1980), 124 S.J. 376; *The Times* L.R. for 8 May 1980; Macrory, "Lead in Petrol - No Cause for Action?" [1981] J.P.L. 258.
- xlix. [1981] A.C. 1001.
- l. *Ibid.* at 1020.
- li. *Supra* note 37 at 220.
- lii. U.K., *Royal Commission on Environmental Pollution* [hereinafter *RCEP*], Cmnd. 6371, Fifth Report ("Air Pollution Control: An Integrated Approach"). The Royal Commission, a standing body, was set up in 1970 and has so far produced twelve reports. The latest (Twelfth) Report ("Best Practicable Environmental Option") appeared in February 1988 (Cm. 310).
- liii. Fifth Report, *Ibid.* paras. 261-62.
- liv. *Air Pollution* (Pollution Paper No 18: The Government response to the Fifth Report of the Royal Commission on Environmental Pollution) (1982) para. 7.
- lv. *RCEP*, Cmnd. 9149, Tenth Report ("Tackling Pollution - Experience and Prospects") 3.31 - 3.32.
- lvi. Fifth Report, *supra* note 52 1.10.
- lvii. I. Barker, "BPEO and the Way Ahead for the NSCA" (1987) 17 Clean Air 135 at 137. BPEO stands for Best Practicable Environmental Option, the subject of the Twelfth Report (RCEP), and Clean Air is the journal of the NSCA (National Society for Clean Air).
- lviii. *Supra* note 55 3.9; Spedding, "Environmental Law - the European Context" (1987) Law Society's Gazette 333.
- lix. Cmnd. 7644 ("Agriculture and Pollution").
- lx. *Supra* note 55 3.48.
- lxi. *RCEP*, Cmnd. 7644, 3.106.
- lxii. *Agriculture and Pollution* (Pollution Paper No. 21) (The Government response to the Seventh Report of the *Royal Commission on Environmental Pollution*) (1983) para. 24.
- lxiii. (U.K.), 1985, c. 48.
- lxiv. Regulations were soon made under the Act: see (1986) Clean Air 126-27.
- lxv. *CREEDNZ Inc. v. Governor-General* [1981], 1 N.Z.L.R. 172 at 175-76
- lxvi. House of Lords, Vol. 419, c. 1346 (Lord Bellwin, 30 April 1981).
- lxvii. EEC/85/337. The Directive is entitled "The Assessment of the Effects of Certain Public and Private Projects on the Environment".

- lxviii. See [1988] J.P.L. 593-94. The most important subordinate legislation, the Town and Country Planning (Assessment of Environmental Effects) Regulations 1988 (S.I. No. 1199) came into force on 15 July 1988. A Circular of the Department of the Environment (No. 15/88; Welsh Office No. 23/88) has been issued on "Environmental Assessment". Projects which will invariably require assessment under the Planning Regulations include railways, aerodromes and crude-oil refineries; but there are some 80 types of project requiring assessment only if they are "likely to have significant effects on the environment."
- lxix. *Supra* note 55, 3.4.
- lxx. *Ibid.* 3.32.
- lxxi. ("Lead in the Environment") *RCEP*, Cmnd. 8852 of 1983, Ninth Report. See *Lead in the Environment* (Pollution Paper No. 19, The Government Response to the Ninth Report of the Royal Commission on Environmental Pollution) (1983).
- lxxii. *RCEP*, Cmnd. 8358 of 1981 ("Oil Pollution of the Sea").
- lxxiii. Twelfth Report, *supra* note 52 1.14.
- lxxiv. M. Cooper, *The Franklin Dam Case* (1983) at 1. The case is *Commonwealth v. Tasmania* (1983), 57 A.L.J.R. 450. See Bates, "The Tasmanian Dam Case and Its Significance in Environmental Law" (1984) 1 *Env. and Planning L.J.* 325.
- lxxv. *Supra* note 55.
- lxxvi. See the *Control of Pollution Act 1974* (Commencement No. 19) Order 1988, S.I. 1988 No. 818, bringing into force (on 6 June 1988) certain provisions of Part I of the Act relating to the collection and disposal of waste and the providing of receptacles for waste. Other Commencement Orders are listed at [1988] J.P.L. 467-69.
- lxxvii. The quotations are from 2.49, 2.51 and 2.52 respectively, of Cmnd. 9149, *supra* note 55.
- lxxviii. *RCEP*, Cmnd. 9675 of 1985, Eleventh Report ("Managing Waste: The Duty of Care") 1.16 - 1.17.
- lxxix. *Supra* note 55 2.77.
- lxxx. See de Grandis-Harrison, *supra* note 39.
- lxxxi. Fifth Report *supra* note 52 para. 227.
- lxxxii. See *The Local Ombudsman*, Annual Report for 1987/1988, at 12; *The Local Ombudsman*, Annual Report for 1986/87, at 28. Both are reports for the Commission for Local Administration in England.
- lxxxiii. *RCEP*, Cmnd. 5034, para. 255.
- lxxxiv. *Ibid.* para. 263.
- lxxxv. See Bettle, "Noise: The Problem of Overlapping Controls" (1988) J.P.L. 79; Hawks and Himan, "Noise Pollution Law Enforcement" [1988] J.P.L. 84. Noise abatement orders, if ignored, can lead to heavy fines and penalties. Abatement orders have been made with regard to a pedigree bantam cockerel (*Daily Telegraph*, 31 March 1979, at 3), the gospel singers of the First Born Church of Living God choir, and the ventilation system at a newspaper plant (*Times*, 21 July 1987, at 3).
- lxxxvi. *McColl v. Strathclyde Regional Council*, [1984] J.P.L. 351, Outer House (Lord Jauncey). After 121 days of the proceedings, it was reported (*Times*, 8 January 1982, at 3) that the trial "could be matched for soporific tedium only by a Festival Fringe production of the complete



- Ibsen cycle in original Norwegian.”
- lxxxvii. See *Times*, 7 March 1985, at 1. The M.P. involved was Mr. Ivan Lawrence; the all-time record (6 hours) apparently belongs to Henry Brougham in 1828. The 1985 proceedings concerned the Water (Fluoridation) Bill.
- lxxxviii. Report of the Review Body on Civil Justice, Cm. 394 of 1988. The Review, which was set up by the Lord Chancellor in 1985, looks at court structure, procedure, judicial administration, and access to justice.
- lxxxix. *Ibid.* para. 274-276.
- xc. *Davies v. Eli Lilly & Co* [1987], 3 All E.R. 94 at 96 (Sir J. Donaldson M.R.).
- xc. See *A Time for Change* (Report of the Committee on the Future of the Legal Profession the Marre Report) presented to the General Council of the Bar and the Council of the Law Society, July 1988, 16.16 - 16.21.
- xcii. *Supra* note 88, Cm. 394, para. 665.
- xciii. *The Guardian*, 12 September 1988, at 2.
- xciv. The Report of the Committee into the Conduct of Local Authority Business, Cmnd. 9797 of 1987. The Government’s Response appeared as Cm. 433 of 1988, and the relevant parts are 6.34 - 6.38.
- xcv. *RCEP (“The Protection of the Environment”)*, Cmnd. 4373 of 1970 para. 2.