

REFORMING THE LIABILITY REGIME FOR AIR POLLUTION IN INDIA

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Abstract

The recent uproar about the toxic levels of pollution in the country's national capital region has once again brought to fore the failure of the regulatory and legal mechanisms in India to control air pollution. Despite an early legislative acknowledgment of the issues relating to air pollution, and regulatory mechanisms set up consequently, India has not been able to restrict the sharp upward trajectory of air pollution. While several issues with regard to the legal and regulatory regime governing air quality in the country deserve serious and urgent consideration, this paper focuses on one issue in particular – the liability regime for violation of air quality standards. The paper is divided into three parts. The first part discusses the relevant provisions of the law pertaining to liability - civil and criminal - for causing air pollution. The second part identifies three critical issues that have emerged in the current liability regime: (1) the Pollution Control Boards do not have the power to levy penalties; (2) criminal prosecution is not an effective solution; and (3) the National Green Tribunal Act does not provide complete relief. The third and final part of the essay proposes a way forward. It is suggested that the Pollution Control Boards need to be granted additional enforcement powers, and administrative fines for violations should be introduced, albeit with certain conditions.

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Introduction

The recent uproar about the toxic levels of pollution in the country's national capital region has once again brought to fore the failure of the regulatory and legal mechanisms in India to control air pollution. According to a World Health Organisation study released in 2014, 13 of the top 20 cities world-wide with the worst quality of air are Indian cities.¹ For decades now the worsening quality of air across the country has been a cause for serious concern; yet the Central and State governments have not been able to contain it. In fact in many ways, governments have not only condoned instances of aggravated pollution, but have also actively permitted pollution to rapidly increase by granting approvals to polluting industries, not taking measures to effectively control vehicular and industrial pollution, and by practically ignoring significant sources of pollution like building construction and diesel generators.

Legislative acknowledgement of the problem of air pollution, and the need to tackle it, came more than three decades ago when the Air (Prevention and Control of Pollution) Act 1981 ['the Air Act'] was passed by the Parliament. But this early acknowledgment of the problem, and regulatory mechanisms set up consequently, have not been able to restrict the sharp upward trajectory of air pollution. Besides amendments made in 1987, and then in 2010 (limited to introducing the National Green Tribunal as a statutory forum for appeal), the Air Act has remained frozen in time, with its key provisions unable to cope with the nature and extent of pollution faced by the country in present times.

While several issues with regard to the legal and regulatory regime governing air quality in India deserve serious and urgent consideration, this essay focuses on one issue in particular –the liability regime for violation of air quality standards. For the purpose of this essay, the liability regime is discussed in the context of violation of statutory provisions – encapsulating both criminal liability under the Air Act, the Indian Penal Code ['IPC'] and the Code of Criminal Procedure ['CrPC'] as well as civil liability under the National Green Tribunal Act 2010 ['the NGT Act'] and the Code of Civil Procedure ['CPC']. It does not, however, discuss the rights-based jurisprudence that has evolved from judgments of the Supreme Court and the High Courts (arising primarily under their writ jurisdiction) recognising a right to pollution free air.² A writ remedy is a constitutional remedy and available notwithstanding statutory limitations. It is

¹ World Health Organisation, *Ambient (outdoor) air pollution in cities database 2014*, available at http://www.who.int/phe/health_topics/outdoorair/databases/cities/en/ (last visited 16 June 2015).

² See Subhash Kumar v. State of Bihar (1991) 1 SCC 420; followed in M.C. Mehta v. Union of India (*Aravalli Mining case*) (2004) 12 SCC 118.

however a discretionary remedy, and courts are generally reluctant to entertain cases if alternative efficacious remedies are available under other statutory provisions.

The essay is divided into three parts. The first part discusses the relevant provisions of the law pertaining to liability for causing air pollution. The second part identifies three critical issues that have emerged in the current liability regime. The third and final part proposes a way forward.

1) THE LEGAL REGIME

As the Preamble to the Air Act states, the law was passed to implement the decisions taken at the UN Conference on the Human Environment 1972³ in which India participated.⁴ During the Conference it was decided, *inter alia*, that countries would take appropriate measures to preserve the natural environment, including the quality of air, and control of air pollution.⁵ The Air Act delineates various functions of the Central Pollution Control Board ['CPCB']⁶ and the State Pollution Control Boards ['SPCBs'].⁷ These functions include advising the Central and State Governments (respectively) on matters concerning prevention, control or abatement of air pollution, planning and executing programs for prevention, control or abatement of air pollution, and laying down standards for quality of air.

It is important to mention here that standards for vehicular emissions are proposed and decided by inter-governmental committees (with participation of industry groups) headed by the Joint Secretary, Ministry of Road Transport and Highways ['MoRTH'].⁸ As the MoRTH is responsible for the implementation of the Motor Vehicles Act 1989 under which these standards are issued and enforced, the CPCB and SPCBs along with the Ministry of Environment, Forests and Climate Change have only a minor role to play with regard to regulation of vehicular emissions.

³ Declaration of the United Nations Conference on the Human Environment, 5-16 June 1972, UN Doc. A/Conf.48/14/rev1.

⁴ The Air (Prevention and Control of Pollution) Act 1981 ['the Air Act'], preamble.

⁵ *Id.*

⁶ The Air Act, s. 16.

⁷ The Air Act, s. 17.

⁸ See, Gaurav Bansal and Anup Bandivadekar, OVERVIEW OF INDIA'S VEHICLE EMISSIONS CONTROL PROGRAM: PAST SUCCESSES AND FUTURE PROSPECTS 35 (International Council on Clean Transportation 2013).

According to Section 21 of the Air Act, an industrial plant⁹ cannot be setup without the prior consent of the SPCB to establish or operate such a plant. These consents are referred to as Consent to Establish ['CTE'] and Consent to Operate ['CTO']. Similar consents are required under the Water (Prevention and Control of Pollution) Act 1984 ['the Water Act'].¹⁰ An industrial plant has to obtain a CTE before construction work/ establishing the industrial plant. Once the plant is established along with the pollution control systems as required in the CTE, it may apply for a CTO before commencing operation.¹¹ The State Government has the power to prescribe the application process, including the application fees and the particulars required.¹² While considering an application for consent, the SPCB can undertake such inquiry as it deems fit, and follow the procedure prescribed by the State Government.¹³

The SPCB is required to decide on an application for consent within four months, and issue an order in writing with reasons.¹⁴ It may refuse to grant the consent, or grant it with conditions (including specifications for equipment particularly pollution control equipment).¹⁵ Consents are granted for a limited time period and after the expiry of such time period, the same has to be renewed. The SPCB may cancel a consent before the time period expires or refuse to renew the consent if it is found that the conditions laid down in the consent have not been complied with.¹⁶ The SPCB may also revise the conditions in a consent in case there is technological improvement or otherwise.¹⁷ However, in such

⁹ See, The Air Act, s. 2(k). See, Delhi Pollution Control Committee v. Splendor Landbase Limited, LPA 895/2010, Judgment of the High Court of Delhi dated 23 January 2012. The High Court considered the definition of an 'industrial plant'. It held that 'the inevitable conclusion has to be that prior consent under the Air Act would be needed where a building is proposed to be constructed wherfrom trade would be carried on and since from a shopping mall and from a commercial shopping complex trade is carried on, we hold that prior consent under the Air Act would be required'.

¹⁰ The Water (Prevention and Control of Pollution) Act 1984 ['the Water Act'], s. 25.

¹¹ See, Himachal Pradesh State Pollution Control Board, Office Procedure Manual, 6-7, available at <http://hppcb.nic.in/OfficeManual.pdf> (last visited: 16 June 2015).

¹² The Air Act, s. 54(2)(l).

¹³ The Air Act, s. 54(2)(m).

¹⁴ The Air Act, s. 21(4). Interestingly, the consent granting provision under the Water Act includes a deeming provision that the Air Act does not have. Section 25(7) of the Water Act, states that a consent will be deemed to be given after the expiration of four months in case the SPCB has not decided the consent application.

¹⁵ *Id.*

¹⁶ The Air Act, s. 21(4), first proviso.

¹⁷ The Air Act, s. 21(6).

situations the person concerned has to be given a reasonable opportunity to be heard before the SPCB decides.¹⁸

Any person aggrieved by an order issued by the SPCB can challenge the same before an Appellate Authority constituted by the State Government.¹⁹ In accordance with a 1999 order of the Supreme Court, Appellate Authorities have to be headed by a High Court judge (sitting or retired), and a group of scientists of high ranking and experience to help in the adjudication of disputes relating to environment and pollution.²⁰ ‘Person aggrieved’ has been interpreted to include not only persons who may have applied for the consent, and who want to challenge the rejection of the consent application or the conditions included in the consent, as the case maybe, but also persons who would be affected by the industrial plant being granted consent, such as, persons likely to be affected by the emissions from the industrial plant.²¹ Matters that are appealable before an Appellate Authority constituted under this Act cannot be filed before any civil court.²² A decision or order of the Appellate Authority may be appealed against before the National Green Tribunal.²³

The Air Act supports a command-and-control form of regulation with criminal sanctions. Section 22 of the Act prohibits industries from emitting any air pollutant in excess of standards laid down by the SPCB in exercise of its powers under Section 17(1)(g). SPCB can approach a court (not lower than Metropolitan Magistrate or a Judicial Magistrate of the first class) for restraining any person who is likely to cause air pollution.²⁴ The Act also empowers the SPCBs to obtain information about emissions from industrial plants, enter and inspect premises, take samples of emissions and send for analysis.²⁵

¹⁸ The Air Act, s. 21(4), first proviso and s. 21(6).

¹⁹ The Air Act, s. 31.

²⁰ A.P. Pollution Control Board v. Prof. MV Nayudu (1999) 2 SCC 718, para 48; see also, Puducherry Environment Protection Association v. The Union of India, WP No. 19496/2013, Judgment of the High Court of Madras dated 11 April 2014.

²¹ See Gujarat Pollution Control Board v. Parmar Devusinh Shersinh, Special Civil Application No. 11/1989, Judgment of the High Court of Gujarat dated 5 May 2000, in the context of analogous appeals under the Water Act. See also, Vimal Bhai & Others v. Ministry of Environment and Forests & Others, Appeal No. 5/2011, Order of the National Green Tribunal dated 14 December 2011.

²² The Air Act, s. 46.

²³ The National Green Tribunal Act [‘the NGT Act’], s. 16(f).

²⁴ The Air Act, s. 22A(1).

²⁵ The Air Act, ss. 24, 25 and 26.

In case emissions in excess of the permissible standards have occurred or are likely to occur due to an unforeseen incident, the person in charge of the premises has been placed under an obligation to inform the SPCB immediately.²⁶ Any remedial measures undertaken by the SPCB or any other agency to mitigate the impact of such emission of air pollutants is recoverable from the person concerned.²⁷ This provision implicitly recognises and implements the polluter pays principle; a principle that finds statutory expression much later in the National Green Tribunal Act 2010.²⁸ The provision also enshrines the absolute liability principle that was formally introduced to Indian environmental jurisprudence by the Supreme Court of India in its landmark judgment in 1987 in the *Oleum Gas leak* case.²⁹

Through an amendment in 1987, the CPCB and the SPCBs were granted additional powers to issue certain directions to ensure compliance with the provisions of the Act.³⁰ These include directions for closure, prohibition or regulation of any industry, operation or process; or stoppage or regulation of supply of electricity, water or any other service.³¹ Persons to whom such directions are issued are bound to comply

²⁶ The Air Act, s. 23.

²⁷ The Air Act, s. 23(3).

²⁸ For a comprehensive exposition on the polluter pays principle, see Lovleen Bhullar, 'Making the Polluter Pay in India: Scope and Limitations of Environmental Law', in Shibani Ghosh (ed.), ANALYTICAL LEXICON OF PRINCIPLES AND RULES OF INDIAN ENVIRONMENTAL LAW (2015) (publication in process, manuscript available on request).

²⁹ M.C. Mehta v. Union of India (*Oleum Gas leak* case) (1987) 1 SCC 395. The Supreme Court in this case held (para 31):

"... an enterprise which is engaged in a hazardous or inherently dangerous industry which poses a potential threat to the health and safety of the 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 held to be under an obligation to provide that the hazardous or inherently dangerous activity in which it is engaged must be conducted with the highest standards of safety and if any harm results on account of such activity, 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."

³⁰ The Air Act, s. 31A.

³¹ *Id*, explanation. While discussing the ambit of closure directions, the High Court of Delhi in Gopi Nath Pvt. Ltd. v. Department of Environment Govt. of N.C.T. of Delhi (1998) 72 DLT 536 held:

"Closing down all industrial activity is neither the purpose nor the object of the Act. Prevention of pollution is. If one particular component is the cause of pollution, the Board may well, subject to the provisions of the Act, direct its closure but it cannot seal the entire unit bringing thereby even unoffending activities to a standstill."

with them.³² An appeal against such directions of the CPCB or SPCB lies before the Appellate Authority,³³ and an appeal against an order of the Appellate Authority lies before the National Green Tribunal.³⁴

If any person fails to comply with Section 21 or Section 22 or directions issued under Section 31A, a penalty is imposable under Section 37 of the Air Act. Failure to comply would include situations wherein a plant is established or commences operation without the necessary consent, or it violates the conditions stipulated in the consent letter by, for instance, exceeding the permissible emission standards or not installing the requisite pollution control equipment. Such failure is punishable by an imprisonment of not less than one and half years which may extend up to six years along with a fine.³⁵ In case such failure continues, an additional fine may be imposed which may extend to five thousand rupees for every day during which such failure continues after the conviction for the first such failure. If the failure continues beyond a period of one year after the date of conviction, the offender shall be punishable with imprisonment for a term of not less than two years, but which could extend up to seven years with fine.³⁶ Penalties for other offences such as providing false information to obtain consent from a SPCB; obstructing a person authorized by a Board from exercising his functions; damaging any work or property belonging to a Board, etc. are provided under Section 38. The penalty for such offences is an imprisonment for term that may extend up to three months or a fine up to an amount of ten thousand rupees or both. Contravention of any provision of the Act for which a penalty is not provided specifically under Section 37 or 38 is punishable with a term of imprisonment which may extend upto three months or with fine or both.³⁷ In case such contravention continues, an additional fine may be imposed.³⁸

The penalties mentioned in the Act have to be imposed by a court of law and cannot be levied by the SPCBs directly. The concerned SPCB, or an officer authorised by it, has to initiate the criminal prosecution by

³² The Air Act, s. 31A.

³³ The Air Act, s. 31. Although the provision does not specifically refer to directions issued under s. 31A, it is presumed that ‘order’ in s. 31 covers such directions.

³⁴ The NGT Act, s. 16(f).

³⁵ The Air Act, s. 37(1). It may be noted that the amount of fine is not specified in the Air Act. However, Section 29 of the Code of Criminal Procedure 1973 provides that a Judicial Magistrate First Class or a Metropolitan Magistrate can impose fines up to ten thousand rupees.

³⁶ The Air Act, s. 37(2).

³⁷ The Air Act, s. 39.

³⁸ *Id.*

filling a complaint against the alleged offence in a court not inferior to that of a Metropolitan Magistrate or a Judicial Magistrate First Class.³⁹ Following an amendment introduced in 1987 to increase public cooperation in the implementation of the law, any person other than the SPCB can also file a complaint against an alleged offence, but such person has to give a notice of not less than sixty days to the SPCB of his or her intention to approach the court.⁴⁰ In such cases, the SPCB is required by law to provide all relevant reports in its possession to the complainant.⁴¹

Other than the provisions of the Air Act, instances of air pollution can also be prosecuted under the IPC, and action may be taken under the CrPC.⁴² Section 268 of the IPC defines the offence of public nuisance,⁴³ and actions causing air pollution could potentially be brought within the definitional ambit of Section 268.⁴⁴ Section 278 makes the act of voluntarily vitiating the atmosphere and making it noxious to the health of persons, an offence punishable with a fine.⁴⁵ The Kerala High Court in a 1999 judgment found that smoking in public places was an offence under Section 278, IPC.⁴⁶ Offences under Section 268 and 279,

³⁹ The Air Act, s. 43(1). See P. Pramila v. State of Karnataka, 2015 SCC OnLine SC 348. In this case the complaint was filed by the Regional Officer under s. 37 of the Air Act. The Supreme Court set aside the complaint as it was not filed by the competent authority under the Act. The Court held:

“The “officer authorised in this behalf” was not authorised by the provisions of Section 43 of the Air Act, or by any other provision thereof, to further delegate, the authority to file complaints. The Chairman of the Board, therefore, had no authority to delegate the power to file complaints, to any other authority, for taking cognizance of offences under the Air Act.”

⁴⁰ The Air Act, 43(1)(b).

⁴¹ The Air Act, 43(2).

⁴² See generally, P. Leelakrishnan, ENVIRONMENTAL LAW IN INDIA, ch. 2 (Lexis Nexis, 3rd ed 2008, Reprint 2013).

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

A common nuisance is not excused on the ground that it causes some convenience or advantage.

Sections 290 and 291 of the IPC stipulate the punishment for the offence of public nuisance.

⁴⁴ A case law search on the *manupatra* database for cases raising air pollution issues and relying on Section 268 IPC did not provide much information.

⁴⁵ **278. Making atmosphere noxious to health.**—Whoever voluntarily vitiates the atmosphere in any place so as to make it noxious to the health of persons in general dwelling or carrying on business in the neighbourhood or passing along a public way, shall be punished with fine which may extend to five hundred rupees.

⁴⁶ K. Ramakrishnan v. State of Kerela, AIR 1999 Ker 385. The Court held:

“There can be no doubt that smoking in a public place will vitiate the atmosphere so as to make it noxious to the health of persons who happened to be there. Therefore, smoking in a public place is an offence punishable under Section 278, IPC.”

IPC are both non-cognizable and bailable offences. With a fine of a paltry amount of five hundred rupees, and the likelihood of a long trial period, prosecution under these provisions are unlikely to effectively deter polluters.

Action can be taken against persons under Section 133 of the CrPC for undertaking certain activities which are injurious to the ‘health or physical comfort of the community’. Industries or process that are emitting air pollutants and causing adverse health impacts and discomfort to the people living nearby can also be issued a notice by the Magistrate under this provision to stop such polluting activities. The Supreme Court in *Kachrulal Bhagirath Agrawa v. State of Maharashtra*⁴⁷ upheld an order under Section 133 stopping the storing and transportation of dry chillies from a godown as it was a public nuisance causing pollution and physical discomfort to persons residing nearby. The Court held:

“The guns of Section 133 go into action wherever there is public nuisance. The public power of the Magistrate under the Code is a public duty to the members of the public who are victims of the nuisance, and so he shall exercise it when the jurisdictional facts are present. ... The conduct of the trade must be injurious in presenti to the health or physical comfort of the community. There must, at any rate, be an imminent danger to the health or the physical comfort of the community in the locality in which the trade or occupation is conducted.”⁴⁸

While criminal liability for air pollution is covered by the Air Act, the IPC and the CrPC, the National Green Tribunal Act provides for civil liability for acts causing air pollution (besides providing the statutory appellate mechanism against orders of the SPCB as discussed above). The National Green Tribunal ('Tribunal') has original jurisdiction over all civil cases raising a substantial question relating to environment, including enforcement of any legal right relating to the environment.⁴⁹ Such question must arise from the implementation of seven laws listed in the Schedule to the NGT Act including the Air Act.⁵⁰ Substantial question relating to environment includes instances where there is a direct violation of a statutory provision that impacts or is likely to impact the community at large (not just an individual or a group of individuals); that the gravity of damage to the environment is substantial or that the damage to

⁴⁷ (2005) 9 SCC 36.

⁴⁸ *Id.*, para 11.

⁴⁹ The NGT Act, s. 14(1).

⁵⁰ *Id.*, and the NGT Act, schedule I.

public health is broadly measurable; or the applicant could show that the environmental consequences are being caused by a specific activity or a point source of pollution.⁵¹

The Tribunal can order relief and compensation to victims of pollution, and order restitution of property damaged and environment of the area.⁵² Compensation can be paid under heads mentioned in the Schedule II to the NGT Act that includes death, disability, injury or sickness, loss of wages, medical expenses etc.⁵³ The Act makes the person responsible for causing the damage to the environment (for example, owner of a polluting factory) liable for paying the compensation as determined by the Tribunal.⁵⁴ In case of an accident, the Tribunal has to apply the no fault liability principle⁵⁵ – following the absolute liability principle laid down by the Supreme Court in the *Oleum Gas leak* case.⁵⁶ The Act also requires the Tribunal to apply the polluter pays principle (along with the sustainable development principle and the precautionary principle) while deciding cases.⁵⁷

Other than the power to determine compensation, the Tribunal can issue interim orders including granting interim injunction or stay, and orders requiring any person to cease and desist from committing or causing any harm to the environment.⁵⁸ The Tribunal can execute its order as a decree of a civil court, and for this purpose it has all the powers of a civil court.⁵⁹ An order of the Tribunal may be challenged before the Supreme Court.⁶⁰

The Tribunal has used its powers to issue a variety of orders to tackle the issue of air pollution. In a matter concerning environmental damage, particularly air pollution, in the Rohtang Pass region of Himachal Pradesh, the Tribunal has issued several orders including restricting the number of vehicles going to the

⁵¹ The NGT Act, s. 2(1)(m).

⁵² The NGT Act, s. 15.

⁵³ The NGT Act, schedule II.

⁵⁴ The NGT Act, s.17.

⁵⁵ The NGT Act, s. 17(3).

⁵⁶ See *supra* n 29.

⁵⁷ The NGT Act, s. 20.

⁵⁸ The NGT Act, s. 19(3).

⁵⁹ The NGT Act, s. 25.

⁶⁰ The NGT Act, s. 22.

Pass per day, directing the payment of a fee for environmental compensation by each vehicle, and differentiating between petrol and diesel vehicles (the latter being more harmful), directing the government to avoid traffic congestion, etc.⁶¹ While responding to rising air pollution in the National Capital Region ('NCR'), the Tribunal has directed that diesel vehicles older than ten years and petrol vehicles older than fifteen years will not be registered in the NCR.⁶² The Tribunal has also issued detailed orders to reduce pollution caused from construction activities in the NCR.⁶³

The Civil Procedure Code (CPC) also provides remedy for public nuisance, and therefore is a potential legal remedy against air pollution. As in any other civil suits, a declaration, injunction or any other appropriate remedy may be sought. Interestingly, in such cases persons filing the suit need not prove that special damage has been caused to them.

2) ISSUES

The state of air quality in most cities and towns of India indicates that the present liability regime is not designed or implemented to suitably punish those responsible for air pollution or deter future violations. The current regulatory model has evidently failed to achieve the objectives of the Act. For regulation of air pollution under the Air Act to be even moderately successful, several conditions have to be met. First, there has to be a credible threat of enforcement and sanctions have to be proportionate to the damage done and prohibitively expensive. Second, data collection and monitoring capacity of the regulatory agency has to be very strong, and it should be able to revise standards and technical protocols regularly to respond to evolving environmental conditions. Third, information asymmetries have to be minimised across the board. Fourth, transparency and accountability provisions have to be strong enough to disincentivise corruption and other malpractices.

There are various underlying causes for why the aforementioned conditions are either poorly met or not met at all in India – legal, institutional, political, financial, bureaucratic, and cultural – and each of these

⁶¹ See Court on its own Motion v. State of Himachal Pradesh, Application No. 237 (THC)/2015, before the National Green Tribunal, Principal Bench. See in particular Orders dated 6 February 2014 and 5 May 2015.

⁶² See Vardhaman Kaushik v. Union of India, Original Application No. 21/2014, Order dated 7 April 2015 of the National Green Tribunal, Principal Bench.

⁶³ See *Id*, Order dated 4 December 2014 of the National Green Tribunal, Principal Bench.

require in depth analysis. For the purposes of the present essay, focussing particularly on the liability regime for air pollution, there are at least three critical issues that are affecting the effectiveness of the existing enforcement mechanism:

2.1) Pollution Control Boards cannot levy penalties

Under the Air Act although the SPCBs and the CPCB are the key government agencies required by law to check rising air pollution, they are not empowered to levy any penalty on offending units, as the power to impose penalties lies with the criminal courts. The Boards can direct the closure of an offending unit or cut off/ regulate its water or power supply.

Closure of units may check the immediate cause of pollution, but it could lead to other problems such as unemployment, (negative) impacts on the market of particular products, wastage of resources (e.g. raw materials purchased by the unit), economic losses incurred by various actors along with the unit owner etc. In such cases, the directions may not be proportionate to the extent of violation. Closure directions would also not restitute the damage already caused to the environment or compensate the suffering caused to people affected by the air pollution. Furthermore, these directions would require inter-agency coordination to be brought into effect. Therefore, such directions do not offer an adequate or effective response to air pollution.

The language of Section 31A is open ended ('any directions'), but it has been interpreted to exclude any direction which could amount to a penalty, as penal powers have to be specifically provided in a statute. The High Court of Delhi has found that the grant of a consent cannot be made conditional on the payment of a penalty or fine or furnishing a bank guarantee, and the Boards cannot direct payment of environmental damages, as this would amount to levying a penalty.⁶⁴ Therefore, besides issuing show cause notices (which need not stop the polluting operations of a unit), or sending closure notices (which may be a disproportionate response), the Boards have little enforcement heft.

⁶⁴ See Splendor Landbase Ltd. v. Delhi Pollution Control Committee (2010) 173 DLT 52, upheld in Delhi Pollution Control Committee, *supra* n 9.

2.2) Criminal prosecution is not an effective solution

Litigation in courts could take very long to reach any conclusion. During the pendency of the case, unless a stay order is issued by the court restraining the offending unit from continuing its operations, the unit could continue to pollute. A matter could go through several appellate/revision forums and each forum could take time to conclude proceedings. An example of such protracted litigation was highlighted in *Uttar Pradesh Pollution Control Board v. Mohan Meakins Ltd.*,⁶⁵ where the Supreme Court finally decided a matter relating to the pollution of a river seventeen years after the prosecution was launched by the SPCB. The time taken to conclude legal proceedings does not augur well for effective and timely pollution abatement. Along with the length of time taken to conclude legal proceedings, a low conviction rate in such cases, also lowers the deterrent impact of criminal prosecution.

Problems in pursuing legal proceedings are further aggravated by the fact that the Boards have limited capacity to pursue such cases diligently. Studies have shown that SPCBs are under-resourced,⁶⁶ and given the range of regulatory tasks they are expected to undertake (and not just under the Air Act), they have to inevitably prioritise the use of available resources. Consent granting functions take up a significant part of the SPCBs' time and resources, leaving much less for monitoring and enforcement functions. With an enormous workload, crippling staff crunch, and not much political will, pursuing convictions in court may not be considered worth the Boards' time and resources.

2.3) The NCT Act does not provide complete relief

While the Boards now have the option of approaching the National Green Tribunal⁶⁷ under Section 15 of the NCT Act as an aggrieved person⁶⁸ for restitution of damage to the environment and for claiming compensation, it only addresses a part of the problem. The Tribunal's jurisdiction over air pollution though wide, is restricted to civil adjudication. The Tribunal cannot determine criminal liability and

⁶⁵ AIR 2000 SC 1456.

⁶⁶ Centre for Science and Environment, TURNAROUND: REFORM AGENDA FOR INDIA'S ENVIRONMENTAL REGULATORS (New Delhi: Centre for Science and Environment, 2009), <http://www.cseindia.org/sites/default/files/report.pdf> (last visited: 17 June 2015); Geetanjay Sahu, ENVIRONMENTAL REGULATORY AUTHORITIES IN INDIA: AN ASSESSMENT OF STATE POLLUTION CONTROL BOARDS (Mumbai, Centre for Science, Technology & Society, School of Habitat Studies, Tata Institute of Social Sciences, 2013, available on file with author).

⁶⁷ The NCT Act, ss. 14 and 15.

⁶⁸ The NCT Act, s. 2(1)(j)(viii) – person includes every artificial juridical person, not falling within any of the other sub-clauses.

cannot impose a punishment of imprisonment or criminal fine. In cases of aggravated pollution, repeated violation of standards, and/or sustained inaction in the face of clear evidence of adverse environmental impacts, civil liability may not be a sufficient response. Criminal conviction resulting in jail time and reputational damage may – in some cases – be a necessary legal outcome to suitably punish the offender and at the same time prevent polluting activities in future.

Limited jurisdiction apart, judicial recourse is not a viable long-term mechanism for protecting the quality of the country's air (or any other environmental issue for that matter). Controlling air pollution requires, *inter alia*, appropriate policies on regulating sources of pollution such as transportation, construction and industries; putting in place proper monitoring and enforcement mechanisms; and extensive inter-agency cooperation. These functions are mostly outside the jurisdictional mandate of the Indian judiciary including the National Green Tribunal. No doubt in India, the judiciary has played a very active role in environmental governance – but mainly because the executive remains indifferent to blatant transgressions of the law. The judiciary does not have the time and capacity to formulate environmental policies that adequately address local, regional and global environmental problems, and then effectively monitor their implementation. The Tribunal may be better placed than the regular courts to determine environmental conflicts and to monitor implementation of its orders, but its orders remain problematic when they venture into policy making. Such orders not only raise questions about enforceability and effectiveness of judicial orders⁶⁹ but also about judicial decision making processes.⁷⁰

If one of the primary objectives of the law is to punish offenders and deter future ones, it is certainly not being achieved by the current legal regime. It is perhaps time to reconsider the nature of liability being imposed and the enforcement action envisaged in the law.

⁶⁹ See, Dinesh Mohan, *Dealing with pollution in our cities*, BUSINESS STANDARD, 4 April 2015, http://www.business-standard.com/article/opinion/dinesh-mohan-dealing-with-pollution-in-our-cities-115040400713_1.html (last visited: 17 June 2015).

⁷⁰ In the matter relating to air pollution in the Rohtang Pass region, the taxi operators union that was directly affected by the order of the National Green Tribunal, approached the Supreme Court, *inter alia* claiming that it was not heard by the Tribunal before the order was passed. The Supreme Court vide its order dated 26 May 2015 in Him Aanchal Taxi Operators Union v. State of Himachal Pradesh CA No. 4864/2015 directed the Union and other appellants to place before the Tribunal facts and issues which it had not considered before passing the impugned order.

3) CONCLUSION AND THE WAY FORWARD

The current liability regime is not capable of tackling the scale of air pollution that the country is witnessing, and is likely to experience in the near future. There is evidently need to introduce reform. An opportunity to explore potential reform measures arose when the Government of India set up a High level Committee in August 2014 to review the implementation of six environmental laws including the Air Act and suggest amendments.⁷¹ Unfortunately, besides certain observations on the need to check vehicular emissions,⁷² the Committee's report does not consider other issues pertaining to the implementation of the Air Act. It finds merit in bringing the Air Act (and the Water Act) within the ambit of an amended Environment (Protection) Act 1986⁷³ – but there is little deliberation on what ails the current regulatory regime, and what merging of laws would resolve. However, the Committee made a very pertinent finding in its report that resonates with the discussion above:

All the Acts under review of this Committee fail the litmus test. Either penal provisions are lacking, or not sufficient, or not proportionate; or the criminal justice system is not appropriately aligned.

The Committee notes the tardy implementation of even the current penal provisions, which is by itself a catastrophe.⁷⁴

Air quality governance in India has to improve radically in many ways. But reforming regulatory mechanisms is not a modest ask. It is particularly complicated if it is a three decades old law in question, that requires several agencies – at the Centre and state-level – to function effectively in coordination and independently, and affects a vast multitude of stakeholders. As the government considers tougher penalties to check environmental violations,⁷⁵ along with measures to deal with specific sources of pollution,⁷⁶ it is perhaps worthwhile to consider a more broad-based reform agenda that enhances the

⁷¹ REPORT OF THE HIGH LEVEL COMMITTEE TO REVIEW VARIOUS ACTS ADMINISTERED BY THE MINISTRY OF ENVIRONMENT, FORESTS & CLIMATE CHANGE (2014), http://www.moef.nic.in/sites/default/files/press-releases/Final_Report_of_HLC.pdf (last visited: 3 June 2015).

⁷² *Id.* at 91.

⁷³ *Id.* at 12.

⁷⁴ *Id.* at 9.

⁷⁵ Amitabh Sinha and Liz Mathew, *Tougher pollution laws soon, vows Environment Minister Prakash Javadekar*, THE INDIAN EXPRESS, 5 May 2015, <http://indianexpress.com/article/india/politics/tougher-pollution-laws-soon-vows-environment-minister-prakash-javadekar/99/> (last visited: 21 June 2015).

⁷⁶ Vidya Venkat, *Three months for fixing Delhi's pollution*, THE HINDU, 14 April 2015, <http://www.thehindu.com/news/cities/Delhi/environment-ministry-announces-measures-to-address-delhis-air-pollution/article7102033.ece> (last visited: 21 June 2015).

enforcement capabilities of the SPCBs, as they are the first line of regulatory defence in the law. A situation where citizens of the country consider a judicial forum such as the National Green Tribunal to be the first port of call is unfortunate, and undesirable. A competent and accountable regulatory agency (and therefore, presumably, less susceptible to corrupt practices) with access to adequate resources (technical, human and financial) is far better equipped to formulate and enforce environmental standards than the judiciary.

It is proposed that the law be amended to empower the SPCBs with a regulatory tool box containing a mix of policy instruments at their disposal. Currently the SPCBs have the power to issue show cause notices to defaulting units, and if dissatisfied with the response, follow them with closure notices or directions regulating power and water supply. The SPCBs may also revoke a consent or refuse to renew a consent. However, they cannot impose fines or damages that are commensurate with the environmental damage caused by the unit to initiate urgent and immediate remedial measures. The existing enforcement powers need to be complemented with powers to impose administrative fines, revoke bank guarantees, and levy of environmental damages that could facilitate timely and effective deterrent action. Power to impose financial penalties for causing environmental damage is not unprecedented. The SPCBs have the power to impose financial penalties for the violation of rules relating to hazardous waste management.⁷⁷ Criminal prosecution would remain as an option; but resorted to only in a small percentage of cases – for instance, when other enforcement actions fail to produce the desired result or the environmentally harmful actions were of extremely grievous nature.

There are two reasons to support the introduction of additional enforcement powers. First, regulatory pluralism has been considered to be a superior alternative to a single strategy approach.⁷⁸ Power to impose administrative fines would give the SPCBs the necessary flexibility to customise their responses to environmentally harmful activities based on various (pre-determined) criteria. These criteria could be relevant policy goals, nature and gravity of offence, track record of defaulter, social and economic implications of alternative policy instruments, etc. To deal with the same regulated entity, the SPCB could adopt different policy instruments with escalating levels of severity depending on the entity's compliance

⁷⁷ The Hazardous Wastes (Management, Handling and Transboundary Movement) Rules 2008, r. 25(2).

⁷⁸ Neil Cunningham and Darren Sinclair, *Regulatory Pluralism: Designing Policy Mixes for Environmental Protection*, 21(1) LAW AND POLICY 49 (1999).

behaviour over time. Enforcement actions that are not as harsh as closure notices, and are quicker to implement than long drawn criminal prosecution, are likely to be imposed more often. If the probability of an enforcement action increases, regulated entities are more likely to be deterred from violating the law, thereby increasing the rate of regulatory compliance. One of the main reasons why the current criminal liability regime has failed is that the overwhelming pendency in the courts, and the procedural hurdles of proving a case beyond reasonable doubt negated any fear of penal action. Non-compliance does not come at a very high cost; and regulated entities are willing to take the (minuscule) risk. This tendency needs to be reversed.

Second, polluter pays principle is part of Indian environmental jurisprudence. The Supreme Court of India in several judgments has applied the principle to award damages.⁷⁹ Delayed and inadequate action (or no action at all) against polluting units violates this principle. The liability regime for air quality needs to reflect this cardinal principle of Indian environmental jurisprudence, and uphold the ‘right to pollution free air’.

There have been some positive developments in empowering the SPCBs. The National Green Tribunal has upheld the power of the SPCBs to require the furnishing of bank guarantees as a condition in a consent and eventual revocation of such guarantees as compensation for environmental damage.⁸⁰ The Maharashtra State Pollution Control Board in its Enforcement Policy 2014 has recognised the difficulties in securing compliance, and decided to implement a bank guarantee scheme, with the Board contemplating extreme measures (approaching a court of law or issuing closure licenses) only in five percent of the cases.⁸¹ Furthermore, the High-level Committee reviewing environmental laws has suggested the promulgation of a new law – Environmental Laws (Management) Act 2014 – that, *inter alia*, encourages gradation of fines based on severity of offence.⁸²

⁷⁹ Indian Council for Enviro-Legal Action v. Union of India and Others (*Bicchri case*) (1996) 3 SCC 212; and Sterlite Industries (India) Ltd v. Union of India and Others (2013) 4 SCC 575.

⁸⁰ See, State Pollution Control Board, Odisha v. M/s Swastik Ispat Pvt. Ltd. & Others, Appeal No. 68/2012, Order dated 9 January 2014 of the National Green Tribunal, Principal Bench. The Tribunal distinguished the case before it from the fact situation in the Delhi Pollution Control Committee case, *supra* n 9, by stating that an amount imposed as a compensation for environmental restoration was permissible, and that imposed as a penalty was not as only courts could impose any penalty under the Air Act.

⁸¹ Maharashtra Pollution Control Board, *Enforcement Policy*, http://mpcb.gov.in/images/pdf/Enforcement_Policy2014_legal.pdf (last visited: 21 June 2015).

⁸² REPORT OF THE HIGH LEVEL COMMITTEE, *supra* n 71, at 72 (Clause 8.2).

A note of caution may be recorded at this point. Any effort to empower the SPCBs must be accompanied by efforts to strengthen the SPCBs institutionally, make them financially independent and secure, and increase transparency in their functioning. Power to impose administrative fines etc. would only increase the width of discretionary powers that they currently enjoy. Efforts would have to be made to curtail the potential for abuse of these powers by putting in place appropriate monitoring and accountability mechanisms. While the modest reforms suggested in this essay are not without their own risks and costs, it is clear that maintaining the *status quo* is no longer an option.