COMPARATIVE ENFORCEMENT MECHANISMS AND PINNING OF LIABILITY IN ENVIRONMENTAL CRIMES IN INDIA AND ASIA PACIFIC REGION

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Abstract: Environmental law practice has forged a limelight for itself over the recent years. Many public-spirited citizens, activities, lawyers, non-governmental organizations, enforcement agencies are now actively engaged in environmental litigation. The advocacy of precautionary and polluter pays principle has brought together two strands of environmental offences. Firstly, activities that pollutes or harms the environment, and secondly, non-compliance in relation to such activity. Further, many countries, have incorporated criminal sanctions in their environmental legislations. However, despite the fact that prosecution for environmental offences has been on the rise, the conviction rates thereof are fairly negligible. As corporate entities are responsible for a significant portion of environmental law crimes committed, it is imperative to evolve stricter regulations to ensure compliance and forbade offenders from evading prosecution. The Authors in this article seek to provide a comparative approach in the realm of environmental protection in India and across Asia Pacific Regions, while critically appraising the procedural challenges in prosecution of environmental offence and addressing the need for dilution of the concept of *mens rea* in environmental crimes.

Key Words: *Environmental Crimes, Environmental Wrongs, Mens Rea, Prosecution, Environmental Offences, Non-Compliance*

INTRODUCTION

The vast body of environmental law that has developed, both internationally and domestically, since the United Nations Conference on Human Environment (UNHCE), 1972, coupled with the active role of judiciary in making environmental rights justiciable has transformed the landscape of legal practice. In recent years, "environmental law practice" has emerged as a specialised area of legal practice similar to Intellectual Property Law, Company Law &

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Taxation Law. It sees active involvement of many lawyers, public-spirited citizens, activities, lawyers, non-governmental organizations, enforcement agencies. A critical sub-area in environmental law practice is related to prosecution of offenders for environmental crimes.

However, for many years, environmental law practice remained largely civil in nature attracting only civil liability. But, the increasing environmental challenges and damage caused to the environment has changed global perceptions.[1] Many countries have now prescribed a plethora of offences in their environmental legislations. Although, the term environmental crime does not have a universal definition, it is generally understood as a collective term[2] that covers a wide range of statutory offences such as illegal trade in endangered species, illegal mining, pollution, discharge of dangerous substances, etc. These environmental offences can be broadly categorized into two types: (i) those that are committed against the environment which results in environmental harm such as pollution, discharge of effluents, wildlife crimes such as poaching etc; and (ii) those that relate to non-compliance of certain procedural requirements e.g., carrying out activities without licenses, or appropriate clearance certificates etc.

In recent times, the reporting of environmental crimes have risen exponentially. For instance, India alone witnessed a 78% increase in environmental law crimes in 2020 having recorded 61,767 in 2020.[3] However, despite the increase in the cases related to environmental crimes, securing a conviction remains a major challenge. For Instance, in India, from 2019-2021 out of 1,737 environmental law crime cases that were tried only 39 resulted in successful convictions.[4] To address this situation, governments are exploring ways to strengthen their environmental law regimes by relaxing the standards required to impose environmental criminal liability. One of the solutions that is being evaluated is further dilution of the doctrine of *mens rea* (guilty mind), in its application to environmental crimes. The doctrine of *mens rea* emerging from the Latin maxim "*Actus non facit reum nisi mens sit rea"* (translated as an act itself does not make anyone guilty unless accompanied by a guilty mind) is globally regarded as, "golden thread of criminal liability". In order to determine culpability, this doctrine

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[1] Anna Alvazzi del Frate & Jennifer Norberry, *Rounding Up: Themes & Issues*, in ENVIRONMENTAL CRIME, SANCTIONING STRATEGIES AND SUSTAINABLE DEVELOPMENT 1 (1993).

[2] C NELLEMANN EL AL, THE RISE OF ENVIRONMENTAL CRIME – A GROWING THREAT TO NATURAL RESOURCES, PEACE, DEVELOPMENT AND SECURITY (UNEP, 2016).

[3] Richard Mahapatra, *Environment-related Offences Recorded 78% Increase in 2020*, Down to Earth (Sept. 15, 2021), https://www.downtoearth.org.in/news/environment/environment-related-offences-recorded-78-increase-in-2020-79041.

[4] *Govt Says 1,737 Criminal Cases Filed, 39 Convicted in 3 years for Violating Environmental Laws*, THE ECONOMIC TIMES (Aug. 01, 2022), https://economictimes.indiatimes.com/news/india/govt-says-1737-criminal-cases-filed-39-convicted-in-3-years-for-violating-environmental-laws/articleshow/93281223.cms.

mandates a proof of subjective dimension i.e. blameworthy state of mind. It can take the form of intention, knowledge, negligence, recklessness etc. However, there are some exceptions where this doctrine does not apply or has limited application. Strict liability offences such as those related to narcotics, smuggling, crimes against state are some of the well-recognised exceptions of this doctrine.

At this juncture it is important to understand that environmental law regime is largely recognised as a strict liability regime. As such, the application of doctrine of *mens rea* already has a diluted application in relation to environmental crimes as compared to general crimes. Still, there are many environmental offences in which it is open for the defendant to prove that he did not intend the harm that has been caused or that he did not act recklessly in causing it. However, there is increasing support to further dilute the application of *mens rea* in pinning environmental liability in order to strengthen environmental law enforcement. In this regard, *Duff* argues that this presupposition (guilty state of mind is necessary for imposing criminal liability) has come under increasing pressure in recent years as legislatures create more offences in which this golden thread seems to be frayed, if not completely broken.[5] The proposition for further dilution of *mens rea* finds even more support owing to prevailing scientific uncertainty and administrative intricacies due to which the interpretation of environmental offences has built up constant discontent regarding the manner in which environmental laws are interpreted and implemented. One way to achieve this by strengthening "deemed guilty provisions" in environmental law statues which relaxes the burden of the prosecuting agency and puts the burden on the defendant to establish his innocence. Another way is to shift criminal liability, in environmental crimes, uniformly from imprisonment to stringent monetary penalties which can be imposed in accordance with absolute liability principle.

In this context, the authors in the present article, firstly, examines the evolution of environmental law enforcement standards in India. Secondly, the authors provide an overview of the some of the key legislative provisions and judicial decisions which have been pivotal in developing the jurisprudence with respect to environmental liability in India. Secondly, the authors undertake a comparative study of few Asian and South-Asian countries to understand the enforcement standards adopted by them. Jurisdictions that are covered in this study are Australia, Japan, Pakistan, Nepal, Sri Lanka, Malaysia, Bangladesh & Bhutan. Lastly, the

[5] R.A Duff, *Offences, Defences and the Presumption of Innocence*, *in* ANSWERING FOR CRIME: RESPONSIBILITY AND LIABILITY IN THE CRIMINAL LAW 228 (Hart Publishing, 2007).

authors conclude by providing a few suggestions that can guide reforms in pinning environmental criminal liability and strengthening enforcement of environmental law.

ENFORCEMENT STANDARDS FOR ENVIRONMENTAL PROTECTION IN INDIA

Enforcement standards deployed in most developing countries are largely administrative, civil or criminal in nature. Owing to multitude of factors, environmental offences do not evoke a greater ordeal, which leaves several countries attempting innovative and deployable techniques of prosecution. For the prosecution of environment-related offences to be successful, it is essential that procedural processes are simple, undemanding, and comprehensive. The intricacies of environmental crimes create challenges to criminal justice and law enforcement as environmental offences comprise of circumstances of illegal and legal actions that are harmful or simply anti-social in actions that require a concerted effort.[6]

Foundations of modern criminal law cast a moral obligation on the State to protect its citizens and requires it to determine the guilt of the individual committing such crimes. However, since most environmental crimes are committed by corporate entities, it may be contended that it would have nothing to do with culpability, as the entities inherently lack a mind. But the laws have evolved to ensure accountability and liability through the concept of vicarious responsibility and imposition of sanction on the persons in control of such corporate entity. It is of concern that environmental crimes suffer a palpable number in the conviction rate, largely owing to the ability of such actions to go undetected or untraceable and the lacunae that the prosecution faces in determination of liability. Among those that get booked, the entire process is marred by a huge pendency rate resulting in protracted court trials. Towards determination of guilt in connection with environmental offences, the study of two industrial accidents that occurred in India, decades apart, are of relevance. This analysis allows us to understand the difficulties of criminal prosecution in connection with environmental offences.

Firstly, the Bhopal Gas Tragedy[7], shook the national consciousness, and thereby the legal and regulatory framework in India on environmental crimes started taking a better shape.[8] The courts in India have thence set a benchmark for pinning of liability for environmental crimes, applying the principle of absolute liability, which have been resonated in other common

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[6] See, G. Pink & R. White R., *Collaboration in Combating Environmental Crime – Making it Matter*, *in* G. PINK & R. WHITE (EDS.), ENVIRONMENTAL CRIME AND COLLABORATIVE STATE INTERVENTION 3-19 (2016).

[7] The Bhopal Gas Tragedy is referred to the incident that occurred in Bhopal, Madhya Pradesh, where reportedly, between December 2- December 3, 1984 there was a leakage of about 40 tonnes of Methyl isocyanate, from the factory of the Union Carbide India Limited pesticide plant. This industrial accident caused the death and critical health issues to over 20,000 people in the long-run.

[8] S.M. Bhattam per se, Lok Sabha Debates, Second Session, (Eighth Lok Sabha) at 261.

law jurisdictions. The *Bhopal Gas Leak Tragedy* that occurred in December 1984 remains a bleak streak when it is looked upon in terms of criminal prosecution, particularly owing to the practical challenges in securing the arrest of the offenders. However, the Supreme Court of India made its stance unequivocally clear, setting aside its earlier order that quashed all criminal proceedings by placing its reliance on the contentions that the erstwhile order was bad being violative of settled principles guiding withdrawal of prosecutions and by observing that the grounds for such quashing of the criminal proceedings were not available in the matter.[9]

The Hon'ble Court in a subsequent curative petition filed under Article 137 of the Constitution of India, remarked that, "*the judgment dated 13-9-1996*[10] *therefore resulted in perpetuation of irremediable injustice necessitating filing of the curative petitions seeking recall*" of the same.[11] It is to be noted that in connection with the Bhopal Gas Leak, several of the accused involved in the management of Union Carbide Corporation were, as on June 7, 2010, sentenced for a term of two years' imprisonment by the Chief Judicial Magistrate, Bhopal under Sections 304-A, 336, 337, 338 read with Section 35 of the Indian Penal Code, 1860.[12] It is also pertinent to note that a horrific subsequent incident viz. the LG Polymer Gas Leak,[13] that occurred in 2020 has also attained extreme scrutiny, which is an ongoing criminal process in FIR Crime No. 213 of 2020 under sections 278 (Making atmosphere noxious to health) 284 (Negligent conduct with respect to poisonous substance) 285 (Negligent conduct with respect to fire or combustible matter) 337 (Whoever causes hurt to any person by doing any act so rashly or negligently as to endanger human life) 338 (causing grievous hurt by act of endangering human life or personal safety) and 304 (ii) (culpable homicide not amounting to murder) of the Indian Penal Code, 1860 registered at Gopalapatnam Police Station.[14] Styrene Gas LG Polymers is enlisted in the the Manufacture Storage and Import of Hazardous Chemical Rules, 1989.[15]

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[9] Union Carbide Corporation and Ors. v. Union of India (UOI) and Ors., MANU/SC/0058/1992.
[10] (1996) 6 SCC 129.
[11] (2011) 6 SCC 216.
[12] See, matter of record in Criminal Case No. 1104 of 1984 Chief Judicial Magistrate, Bhopal.
[13] The LG Polymer Gas Leak refers to another Industrial Accident that occurred in the morning of morning of May 7, 2020, wherein there was a leakage of the toxic styrene gas from the plant of LG Polymers India Private Limited situated at Vishakhapatnam, Andhra Pradesh. This industrial accident left hundreds of locals hospitalised and claimed several lives. The leakage occurred in the midst of the nationwide lockdown imposed in the wake of the global corona virus pandemic when the plant was re-starting operations after lockdown restrictions were eased. To know more, See, https://ceerapub.nls.ac.in/lg-polymer-gas-leak-an-inquiry-into-the-application-of-domestic-international-legal-obligations-revolving-chemical-accidents/
[14] See, Order dated 04.08.2020 in CP Nos. 2885,2884,2837,2844, 2838,2842,2843,2882,2841, 2845, 2881 and 2883 of 2020.
[15] Manufacture Storage and Import of Hazardous Chemical Rules 1989, Schedule I Part II Entry 583.

It may be noted that the rules provide for detailed precautions to be adopted by the occupiers of industrial activity that handle hazardous chemicals, which also extend to the preparation of emergency plans, notification of major accidents, etc. The said Rules is a delegated legislation formulated under the Environment (Protection) Act, 1986, and as such the penal provisions under the Environment Protection Act[16] may also be applied. Section 15 of the Environment (Protection) Act, 1986 provides for a liability of imprisonment for a period of 5 years or fine which extends up to INR (Indian Rupees) 100,000/- and where there is a continuing offence, fines up to INR 5,000 may be imposed for each day and where such continuity exceeds a duration of one year then the imprisonment may be extended up to seven years. It is relevant to also note that the Environment Protection Act, provides for vicarious liability against the persons responsible in a company and every person who, at the time of the offence was committed, was directly in charge of, and was responsible to, the company for the conduct of its business as well as the company may be held liable and punished, if found guilty.[17] The matter is *sub judice* and only time would tell the contours of law and the procedures of trial would lead to determination of guilt in the LG Polymer Case, but it is relevant to note that the LG Polymer case may be different from the manner in which the Bhopal Gas case was handled, owing to the developments that have undertaken since the 1984 incident.

As may be seen from the two industrial accidents discussed hereinabove, the challenge lies in exercising a choice between strict vis-à-vis Absolute Liability standards. Liability is held to be strict where there is no requirement for proof of *mens rea* as an element of the offence: and where *mens rea* must be proved as to some elements in the offence, it need not be proved to such extensity and also where liability can be averted showing the lack of *mens rea* and in all other cases the liability may be said to be absolute.[18]

In the context of environmental crimes, it is appropriate to distinguish criminal responsibility from criminal liability. More often than not, the two terminologies are confused to be one and the same.[19] As has been observed by Hart, "*When legal rules require men to act or abstain from action, one who breaks the law is usually liable, according to other legal rules, to*

[16] The Environment Protection Act, 1986, § 15.
[17] The Environment Protection Act, 1986, § 16.
[18] *See*, R.A. Duff, *Strict Liability and Strict Responsibility*, *in* ANSWERING FOR CRIME: RESPONSIBILITY AND LIABILITY IN THE CRIMINAL LAW 232 (Hart Publishing, 2007).
[19] R.A. Duff, *Responsibility and Liability*, *in* ANSWERING FOR CRIME: RESPONSIBILITY AND LIABILITY IN THE CRIMINAL LAW. LONDON 19, 20 (Hart Publishing, 2007).

punishment for his misdeeds, or to make compensation to persons injured thereby, and very often he is liable to both punishment and enforced compensation."[20]

OVERVIEW ENVIRONMENTAL OFFENCES & THEIR ENFORCEMENT IN INDIA

Statutory Framework

India has created a catena of legislations, rules and regulations that have arrayed down several offences in connection with the Environment.[21] The Pollution Control Boards are entrusted with the powers and functions contained under the Water (Prevention and Control of Pollution) Act, 1974 and the Air (Prevention and Control of Pollution) Act, 1981 and its associated rules. Along the lines of the Water Act, 1974, the Air Act envisions a two-tiered system[22] of regulatory bodies consisting of the Central Pollution Control Board ("CPCB"/ "Central Board") at the Central Level and in the Union Territories[23] and the State Pollution Control Boards ("SPCBs"/ "State Boards") at the State Level.[24] The main function of the Central Board is to improve the quality of air/water and to prevent, control or abate pollution in the country.[25] Apart from this, the Central Board may also perform related functions such as advising the Central Government on matters relating to prevention and control of air pollution, coordination of activities of State Boards and resolution of disputes between them, providing technical assistance to State Boards, information dissemination and planning and execution of nation-wide programmes for prevention, control and abatement of air pollution.[26]

The State Boards have similar functions as the Central Board and in addition to these, have certain other specific functions such as the inspection of air pollution control areas at such intervals as they may deem necessary, inspection of any control equipment, industrial plant or manufacturing process and to give by order, such directions to such persons as they may consider necessary to take steps for the prevention, control or abatement of air and water pollution.[27]

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[20] H. L. A. HART, PUNISHMENT AND RESPONSIBILITY ESSAYS IN THE PHILOSOPHY OF LAW (Oxford University Press, 2008).

[21] See, Indian Forest Act, 1927; Prevention of Cruelty to Animals Act, 1960, Wildlife Protection Act, 1972; Environment Protection Act, 1986; Air (Prevention and Control of Pollution) Act, 1981, § 17(1); Water (Prevention and Control of Pollution) Act, 1974, etc.

[22] Before the passing of the Air Act, 1981, the Pollution Control Boards were referred to as the 'Water Pollution Control Boards'. However, with the passing of the Air Act, the Boards constituted under the erstwhile Water Act, 1974 were granted an extension of powers under the Air Act as well.

[23] Air (Prevention and Control of Pollution) Act, 1981, § 3.

[24] Air (Prevention and Control of Pollution) Act, 1981, § 4.

[25] Air (Prevention and Control of Pollution) Act, 1981, § 15.

[26] Air (Prevention and Control of Pollution) Act, 1981, § 16.

[27] Air (Prevention and Control of Pollution) Act, 1981, § 17(1); Water (Prevention and Control of Pollution) Act, 1974, § 24.

The largest drawback in the dealing with environmental offences by the Pollution Control Boards is on account of multiplicity of environment pollution control standards for the same type of industries, which, despite the zonal classification within each district and designation of officers therein, is burdensome owing to the administrative workload on the Pollution Control Boards.

In connection with forest forests and forest-produce, the Indian Forest Act, 1927, enumerates the acts and omissions that would amount to forest-offences and prescribes the penalties assigned to each of them. For instance, activities such as making clearings, setting fire, trespassing and quarrying are prohibited in reserved forests, village forests and protected forests.[28] When any such forest offence is believed to have been committed, a Forest officer or a Police officer can seize all the property which has been used in the commission of the offence.[29] The seizure of property used in commission of offences has to be reported by the officer to such Magistrate. On receiving the report, the Magistrate can proceed with measures necessary for ensuring the arrest and trial of the accused.[30] If the forest produce with respect to which an offence has been committed is not owned by the Government, the forest produce along with all the tools used for committing the offence can be confiscated by the Forest officer.[31] It is pertinent to note that this power of confiscation vested on Forest officers is exercisable independently and notwithstanding any parallel criminal proceedings that have been initiated against an offender.[32]

Similarly, under the Wildlife Protection Act, 1972 provisions are made for the appointment of officers such as Directors, Wild Life Wardens and other officers.[33] Authorities such as the National Board for Wildlife, the Central Zoo Authority, the National Tiger Conservation Authority and enabling provisions for the establishment of the Wildlife Crime Control Bureau were introduced into the Act by the Wildlife (Protection) Amendment Act, 2006,[34] and the Tiger and Other Endangered Species Crime Control Bureau to be known as the Wildlife Crime Control Bureau became operational in the year 2008. The Bureau has five regional offices at Delhi, Kolkata, Mumbai, Chennai and Jabalpur; three sub-regional offices at Guwahati, Amritsar and Cochin; and five border units at Ramanathapuram, Gorakhpur,

[28] The Indian Forest Act, 1927, §§ 26, 28 and 33.
[29] *Id.*, § 52.
[30] *Id.*, § 54.
[31] *Id.*, § 55.
[32] Divisional Forest Officer v. G. V Sudhakar Rao, AIR 1986 SC 328.
[33]The Wildlife (Protection) Act, 1972, Chapter II.
[34] The Government notified the constitution of the Tiger and Other Endangered Species Crime Control Bureau to be known as the Wildlife Crime Control Bureau vide Order No. S.O. 918 (E) dated 6th June 2007.

Motihari, Nathula and Moreh.[35] The Wildlife Crime Control Bureau is designated as the nodal agency for the purposes of the Convention on International Trade in Endangered Species of Wild Fauna and Flora.[36] The Wildlife (Protection) Act makes it obligatory for the WCCB to assist foreign authorities and international organisations to facilitate coordination and universal action for control on wildlife crime, assist state governments in prosecutions of wildlife crimes and advise the Government of India in matters relating to national and international wildlife crimes, suggest relevant policy and law and assist the Custom authorities in inspection of animal and plant consignments.[37] It may be observed that for effective implementation, a common definition of Authorised Officer has to be incorporated so as to do away with inconsistencies in the applicability or interpretation of the Act and to ensure that the purposes for which the Act has been promulgated are realised.

The National Biodiversity Authority and the State Biodiversity Boards have been constituted under Section 22 of the Biodiversity Act, 2002 for offences concerned with the implementation of the Act. Pursuant to Regulation 2(2) of the Guidelines on Access to Biological Resources and Associated Knowledge and Benefit Sharing Regulations, 2014 (Regulations of 2014), the Biodiversity Boards are authorized to enter into an ABS agreement which shall be the approval for access of biological resources by the entities carrying out any activity mentioned under Section 7 of the Act. The bifurcation of roles between the State Biodiversity Boards and the National Biodiversity Authority are well-defined. Under Section 24(1) of the Biodiversity Act, it has been provided that the State Biodiversity Board is required to regulate any person, who is a citizen of India or a body corporate, association or organization which is registered in India, intending to undertake any activity referred to in Section 7, has to give prior intimation to the State Biodiversity Board in such form as may be prescribed by the State Government, and accordingly Section 55(2) of the Act prescribes penalties for the contravention or attempt to contravene or abetment of contravention of the provisions of Section 7 and 24(1) of the Act.

Judicial Pronouncements

The statutory framework and regulatory practice allows for prosecution of persons in charge of the corporate entities and government bodies. In *U.P. Pollution Control Board v.*

[35]Wildlife Crime Control Bureau, About Us, http://wccb.gov.in/index.aspx (last visited September 10, 2022).
[36]Wildlife Crime Control Bureau, Legal Framework for International Trade in Fauna & Flora, http://wccb.gov.in/WriteReadData/userfiles/file/Trade%20Facilitation/Legal%20framework%20ITC%20HS(1).pdf. (last visited Feb. 25, 2021).
[37]PRESS INFORMATION BUREAU AND MINISTRY OF ENVIRONMENT, FOREST AND CLIMATE CHANGE, Not all animals migrate by choice' Campaign launched to raise awareness on illegal wildlife trade, May, 20, 2019, https://pib.gov.in/newsite/PrintRelease.aspx?relid=190050.

Modi Distillery and Ors.[38] the primordial question before the Hon'ble Supreme Court was whether criminal prosecution may be initiated on the Chairman, Vice-chairman Managing Director and members of the Board of Directors of any company in case of a purported offence. This was answered in the affirmative, thereby clearly breaking the ambiguity to initiate criminal proceedings against corporate entities.

Similarly, in connection as to whether Commissioner of City Municipal Council and Chief Officers of City Municipal Council can be prosecuted under Section 48 of the Water (Prevention and Control of Pollution) Act, 1974, the Court categorically upheld the actions of the Pollution Control board, where it initiated criminal prosecution against Shri B. Heera Naik, who was working as the Commissioner, City Municipal Council, Krishnarajapuram, Bangalore, holding that, "*looking to the purpose and object of Act, 1974, are of the opinion that Section 47 can be resorted to for offences by body corporate and Karnataka State Pollution Control Board by filing a complaint before the Magistrate for taking cognizance of offence Under Section 49 did not commit an error."*[39]

It is of relevance to note that the Karnataka State Pollution Control Board filed a complaint under section 200 of the Code of Criminal Procedure, 1973 seeking action against Town Panchayat, T. Narasipura and Mr. V. T. Wilson, Chief Officer of the Town Panchayat alleging discharge of untreated sewage resulting in pollution of river water adversely affecting the public health. It was noted that the allegations in the complaint extended to the role of the Town Panchayat who has knowingly permitted the pollutants to enter into the Kabini river thereby making out contravention of sections 24 and 25 of the Water Act, and on that count authorised the Complaint to be proceeded therewith and dismissed the Criminal Revision Petition filed by the Petitioner.[40] However, it is imperative that this impetus be maintained throughout the criminal proceedings, which unfortunately is lost somewhere in the intricate procedures of proving *mens rea* and the requirement of burden of proof.

Under the Forest Act 1927, although it is easier to set the criminal law into motion in the case of forest offences as they lead to immediate arrests[41] it is not easy to secure concomitant conviction. Section 64 empowers Forest officers and Police officers to arrest any person if there is a 'reasonable suspicion' of the involvement of any person in a forest offence, without obtaining the orders of a Magistrate. Once an arrest has been made on the grounds of

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[38] U.P. Pollution Control Board v. Modi Distillery and Ors, MANU/SC/0912/1987.
[39] *See*, Karnataka State Pollution Control Board v. B. Heera Naik and Ors., MANU/SC/1702/2019, ¶ 29.
[40] Order dated 06.09.2019, Criminal Petition No.5314 OF 2016, High Court of Karnataka at Bengaluru.
[41] Sudha Vatsan, *In the Name of Law: Legality, Illegality and Practice in Jharkhand Forests*, 40 ECON. & POL. WKLY 4449 (2005).

such reasonable suspicion, it is upon the accused to proffer an explanation. The law entails that the prosecution shall prove the factual ingredients which can establish the occurrence of an offence described under the statute.[42] As soon as the prosecution is able to prove beyond reasonable doubts the factual ingredients constituting an offence, the burden of proof is shifted to the offender, who has to prove that he has not committed the offence.[43] On the one hand, the courts have reiterated that proof beyond reasonable doubt and *mens rea* does not have much relevance in confiscation proceedings conducted by Forest officers as they are quasi-judicial and are not criminal proceedings per se.[44]

For instance, in *State of West Bengal and Anr. v. Mahua Sarkar,*[45] the Supreme Court observed that when a vehicle carrying illicitly obtained timber is confiscated, its owner has to prove to the concerned officer that neither he nor his agent had any knowledge of the vehicle being used for carrying timber and that there was no connivance on their part. This has to be proved on the basis of furnishing sufficient material to the satisfaction of the Forest officer. However, this burden of proof is distinct from the standards that are used in a usual criminal proceeding as confiscation is not a judicial proceeding.[46] Based on the premise of the presumption under Section 69 of the Forest Act, 1927 that a confiscated property shall belong to the government also raises a query as to whether it attaches a reverse burden of proof on the accused. This question was addressed by the Supreme Court recently in *Bharat Booshan Aggarwal v. State of Kerala,*[47] where it was vehemently observed that the presumption under Section 69 of the Act is merely a presumption with respect to title over confiscated forest produce. It was elucidated that the provision does not envisage a presumption as to a culpable or conscious mental state on the part of the accused.

Based on such *dicta* the Court went on to note that the burden of proof subsisted on the prosecution to establish the foundational facts about recovering the possession of the forest produce from the accused beyond reasonable doubt as is done in every criminal proceeding. Thereafter alone, the burden of proof shifts to the accused. The Court categorically stated that the mere fact that the seized goods bore the label of the accused person's firm or that the accused was unable to furnish a transport license at the time of seizure would not be sufficient to discharge the burden placed on the prosecution as it had to prove the element of illicit

[42] FIONA DARROCH & PETER HARRISON, ENVIRONMENTAL CRIMES 330 (1999).
[43] Rathinam v. Forest Range Officer, Salem, MANU / TN / 1042 / 1999.
[44] Kailash Chand v. State of Madhya Pradesh, AIR 1999 MP 1.
[45] State of West Bengal and Anr v. Mahua Sarkar, 2008 (12) SCC 763.
[46] Kailash Chand v. State of Madhya Pradesh, AIR 1999 MP 1.
[47] Bharat Booshan Aggarwal v. State of Kerala, MANU/SC/0798/2021.

removal of forest produce having been done 'knowingly' by the accused. The onus on the prosecution to prove beyond reasonable doubt that the accused had acted with the necessary *mens rea* in the commission of the forest offence for which he was apprehended, is necessitated by the Courts. It is only after the State is able to establish that there is a strong and concrete case against the accused that the burden of proof shifts to the accused.

The Wild Life (Protection) Act, 1972 is a curious scenario, comprising of provisions for several offences connected with wildlife. For instance, hunting is strictly prohibited[48] and its definition has been carefully drafted so as to include within its ambit all forms of tricks used by hunters to capture various kinds of animals.[49] There is an absolute bar on the trade of animal articles and trophies,[50] the only exception being a licence, although the same attracts various conditions. Another peculiar aspect of this Act is that the burden of proof lies on the accused instead of the Prosecution.[51] However, despite the presence of such prohibitions the Wild Life Act has not been very successful in curbing the crimes against animals who form part of the natural habitat. The conviction rate in wildlife crimes is abysmal. For instance, in Maharashtra, the success rate for conviction against wildlife crimes reached only 11.56% in the year 2015, out of 147 court orders, there have been only 17 convictions.[52] Further, in India, few animals have a cultural and religious sanctity. Owing to the same, one such instance involved the killing of Black Buck, revered by the Bishnoi Community in 1998, this took a glaring 20 years to beget a conviction in the court of first instance in April 2018.[53]

The lack of an eyewitness in environmental crimes withers down the ability of the prosecution to prove beyond reasonable doubt the commission of such offences. Similarly, the

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[48] The Wildlife (Protection), Act, 1972, § 9 (Prohibition of hunting – No person shall hunt any wild animal specified in Schedules I, II, III and IV except as provided under section 11 and section 12).

[49] The Wildlife (Protection) Act, 1972, § 2(16) (hunting – with its grammatical variations and cognate expressions, includes, —

(a) killing or poisoning of any wild animal or captive animal and every attempt to do so;

(b) capturing, coursing, snaring, trapping, driving or baiting any wild or captive animal and every attempt to do so;

(c) injuring or destroying or taking any part of the body of any such animal or, in the case of wild birds or reptiles, damaging the eggs of such birds or reptiles, or disturbing the eggs or nests of such birds or reptiles).

[50] The Wild Life (Protection) Act, 1972, § 44.

[51] *Id.*, § 57 (Presumption to be made in certain cases – Where, in any prosecution for an offence against this Act, it is established that a person is in possession, custody or control of any captive animal, animal article, meat, [trophy, uncured trophy, specified plant, or part or derivative thereof]it shall be presumed, until the contrary is proved, the burden of proving which shall lie on the accused, that such person is in unlawful possession, custody or control of such captive animal, animal article, meat, [trophy, uncured trophy, specified plant, or part or derivative thereof]).

[52] Vijay Pinjarkar, *State's Conviction Rate in Wildlife Cases Dismal 11.56%,* THE TIMES OF INDIA, https://timesofindia.indiatimes.com/city/nagpur/states-conviction-rate-in-wildlife-cases-dismal-11-56/articleshow/46179630.cms (last accessed on September 03, 2022).

[53] See, State v. Salman Khan & Ors. [FIR/Crime No. 93/1998].

manner in which evidence is recorded and the delay and laches in the prosecution, clearly allow an offender to go scott-free. It is pertinent to observe that in one of the cases that involving the alleged killing of a deer,[54] the prosecution relied on the statement of one Mr. Harish Dulani, a local resident from Jodhpur, who went on to corroborate on the guilt of Salman Khan, a popular actor in India, while exonerating all other local residents who were with the said accused. The prosecution failed to prove that the offence was committed by the accused, on account of the loose chain of evidence, which included the fact that the said Mr. Harish Dulani, was never made available for cross examination by the accused, which was determined as unreasonable under Section 33 of the Evidence Act. Furthermore, on account of the controversy surrounding the eyewitness, the case came to be dealt with circumstantial evidence alone, thereby making it extremely difficult for the prosecution to array the offenders.

In another instance, the High Court of Kerala quashed the conviction on the basis of a report by a veterinary surgeon that the poached reptile is in essence "Indian Flap Shell Turtle (*Lissemys puntata*)" as against "Indian Soft-shelled Turtle (*Lissemys punctata punctata*)", the latter of which is enumerated under Schedule I of Part II of the Wild Life (Protection) Act, 1972. It was a case where the accused was apprehended for being in possession of a protected species, which to the contrary was identified in a report of the veterinary doctor as a non-protected species. The non-availability of the carcass or the live reptile for verification during the criminal trial allowed the accused in the case, to cast a reasonable doubt and obtain an acquittal thereof.[55]

The challenges with respect to implementation of the mandates under the Water Act, Air Act and Environment Protection Act in India are considerably exacerbated by the standard of proof that is required for a successful prosecution, besides the very premise on the validity of the criminal proceedings initiated. In a matter concerning discharge of untreated sewage into the Kabini River, prosecution was initiated against the local body and its Chief officer, the Court fervently determined that the prosecution is valid. But however, in spur of determination as to the initiation of proceedings in 2012, a time span of seven years is lost.[56] Amidst these challenges in prosecution, lies a case of discharge of untreated effluents. In June 2000, from when the prosecution has been in process in the courts of law for about seventeen years, until April 2017 where there was a conviction of the accused, a partner in a sweet and savoury, who categorically admitted that the laws were violated for business gains, but as soon as prosecution

[54] See, Salman Khan v. State of Rajasthan, MANU/RH/0507/2016.
[55] Titty alias George Kurian v. Deputy Range Forest Officer, 2020 SCC Online SC 1013.
[56] V. T. Wilson v. Karnataka State Pollution Control Board, 2019 Kar HC.

was initiated, the necessary treatment facilities were installed to prevent further non-compliance. The Learned ACMM awarded a sentence of imprisonment for three years and a fine of one lakh rupees, which on appeal before the Special CBI Judge, Delhi was revised for two years of imprisonment and a fine of rupees two lakh and fifty thousand to be contributed to the Prime Minister's Relief Fund. The matter was thereafter preferred by a Revision Petition before the Hon'ble High Court of Delhi, which in turn saw a sudden change of wind where the matter was amicably settled with issuance of a bank guarantee for 3 years for continued compliance to the Delhi Pollution Control Committee (DPCC), and payment of rupees seven lakh and fifty thousand to DPCC, besides the obligation to plant 100 trees as a step for making Delhi city more green and environmentally healthy.[57]

COMPARABLE SOUTH ASIAN JURISDICTIONAL FRAMEWORKS IN DEALING WITH ENVIRONMENTAL OFFENCES

AUSTRALIA

Under the Australian Constitution, environment is a subject matter of concurrent list. The federal law on environment is primarily contained in the Environment Protection and Biodiversity Conservation Act, 1999. It imposes criminal liability for various environmental offences. The offences are based on the principal of strict liability and the burden of proof is on the defendant to adduce evidence in favor of his innocence.[58] This law is supplemented by State laws on environment. For instance, in New South Wales, deemed guilty provision is incorporated under Section 169 of the Protection of the Environment Operations Act, 1996.[59] Further, environmental offences in New South Wales are classified into three tiers: (i) Tier 1 offences require *mens rea*, and include offences such as willful or negligent disposal of waste, causing a substance to leak, and emitting ozone depleting substances;[60] (ii) Tier 2 offences are based on the principles of strict liability and include offences such as land pollution, water pollution, unlawful transporting or depositing of waste etc.[61] (iii) Tier 3 offences are based absolute liability offences and include those offences that are dealt by way of penalty notices.[62]

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[57] See, Vikash Bansal v. Delhi Pollution Control Committee, 2018 SCC OnLine Del 12523.
[58] *See* Environment Protection and Biodiversity Conservation Act, 1999.
[59] *See* Justice Brian J Preston, *Enforcement of Environmental and Planning Laws in New South Wales*, THE LAW AND SUSTAINABILITY SYMPOSIUM (2011).
[60] The Protection of the Environment Operations Act, 1997, §§ 115-117 (New South Wales).
[61] The Protection of the Environment Operations Act, 1997, §§ 120(1), 142A and 143 (New South Wales).
[62] The Protection of the Environment Operations Act, 1997 §114 (New South Wales).

Australia does not have an overarching federal law for wildlife as it is a residuary subject under the Australian Constitution and hence it is regulated through State Legislations.[63] The provisions of directors and executive management for environmental crime in New South Wales underwent significant reforms in the year 2012 with the enactment of the Miscellaneous Act Amendment (Directors' Liability) Act 2012.[64] Under Section 169 of the Act of 2012, a person who is a director of the corporation or who is concerned in the management of the corporation is deemed guilty, unless accused is able to establish a defense[65] that either the accused was not in a position to influence the conduct of the corporation or the person used all due diligence to prevent the contravention.[66]

Among the State legislations, there is a considerable difference between States regarding deemed guilty provisions in relation to wildlife crimes.[67] Some States have strong deemed guilty provisions covering a wide range of activities and are readily enforced, while some States have weaker deemed guilty provisions which covers a limited set of activities and are not readily enforced.[68] For instance in South Australia, the National Parks and Wildlife Act, 1974 contains strong deemed guilty provisions. It reverses the burden of proof in many activities for e.g. the burden is on the accused to establish that wildlife was not illegally acquired, the illegal device found in possession of the accused was not meant to be used to take protected animals.[69] The Wildlife Act, 1975 of Victoria and the National Parks and Wildlife Act, 1974 of New South Wales also contains similar strong deemed guilty provisions.[70] Whereas, Queensland does not have strong deemed guilty provisions under the Nature Conservation Act, 1992. Further, Section 90A of the Nature Conservation Act, 1992 permits the accused to defend his case by establishing that he had no reasonable grounds for suspecting that the wildlife was taken unlawfully.[71]

Further, the Magistrates in Queensland are reluctant to enforce deemed guilty provisions and the prosecution is required to establish the guilt of the accused as mandated by *Legislative*

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[63] Rochelle Morton et al, *Assessing the Uniformity in Australian Animal Protection Law: A Statutory Comparison*, 11 ANIMALS 35 (2021).
[64] The Miscellaneous Acts Amendment (Directors' Liability) Act 2012 (New South Wales).
[65] *See* Zada Lipman, *An Evaluation of Compliance and Enforcement Mechanisms in the Environment Protection Act and Biodiversity Conservation Act 1999 and their Application by the Commonwealth,* 27 ENVIRONMENTAL AND PLANNING LAW JOURNAL 98 (2010).
[66] The Protection of the Environment Operations Act, 1997, § 169 (New South Wales).
[67] BORONIA HALSTEAD, WILDLIFE LEGISLATIONS IN AUSTRALIA: TRAFFICKING PROVISIONS 11-12 (Australian Institute of Criminology 1994).
[68] *Id.*
[69] *See* The National Parks and Wildlife Act, 1974, §§ 47, 48A, 60, 68A, 68B & 75. (South Australia).
[70] *See* the Wildlife Act, 1975, §68 (Victoria) & the
[71] The Nature Conservation Act, 1992 § 90A.

Standards Act, 1992.[72] It is of utmost importance to note that where defense of necessity was taken by Sydney Water Corporation,[73] in connection with charges levelled against them for their inability to operate a valve that would have diverted sewage from the pumping station on the site to the Liverpool Treatment Plant, which thereby resulted in polluting a nearby Prospect Creek. It was contended by the Prosecution that there were suitable alternative steps which could have been taken by the Corporation and failing which it caused harm to the local environment and waterway. The Court negated the defense of necessity the Corporation and held the Statutory Authority to be guilty of the charges.

MALAYSIA

Malaysia is also second to none when it comes to statutory provisions for combatting environmental crimes, such as the Environmental Quality Act, 1974 is most significant as it allowed for the plugging of loopholes such as scattered provisions in a variety of statutes, administered by diverse government agencies. Further, offences structured with low penalties and little enforcement that haunted the Water Enactments, 1920; the F.M.S. Forest Enactment in 1934; the Merchant Shipping Ordinance, 1952; the Land Conservation Act, 1960; the Fisheries Act, 1963; and the Factories and Machinery Act, 1967, etc. The enactment of the 1974 legislation made the laws more reactive against offences providing a strict penalty of a maximum of RM 10,000 to RM 100,000 for pollution offences, and RM 500,000 for more serious offences.

Section 43 of the 1974 Act incorporates a deemed guilty provision, providing that: *"where an offence against this Act or any regulations made thereunder has been committed by a company, firm, society or other body of persons, any person who at the time of the commission of the offence was a director, chief executive officer, manager, or other similar officer or a partner of the company, firm, society or other body of persons or was purporting to act in such capacity, shall be deemed to be guilty of that offence unless he proves that the offence was committed without his consent or connivance and that he had exercised all such diligence as to prevent the commission of the offence as he ought to have exercised, having regard to the nature of his functions in that capacity and to all the circumstances"*.

The prosecution is initiated generally by the Director General of the Department of Environment to investigate environmental offences as provided by section 3 of the

[72] The Legislative Standards Act, 1992 (Queensland); *See also*, BORONIA HALSTEAD, WILDLIFE LEGISLATIONS IN AUSTRALIA: TRAFFICKING PROVISIONS 12 (Australian Institute of Criminology 1994).
[73] [2022] NSWLEC 100.

Environmental Quality Act, 1974. By means of Environmental Quality (Delegation of Powers on Marine Pollution Control) Order, 1993 and the Environmental Quality (Delegation of Powers on Marine Pollution Control) Order, 1994, powers of investigation have been delegated to port officers, fisheries officers, any officer commanding a vessel of the Royal Malaysian Navy, and any officer of Customs commanding a vessel of the Customs and Excise Department. And any police officer commanding a vessel, or appointed police officer, or the Royal Malaysia Police.

In August 2022, a Wildlife Crime Bureau that would operate under the Internal Security and Public Order Department. It is pertinent to note that environmental offences in Malaysia are generally registered in the manner of a summons case and are initiated by the specialized Public Prosecutors from the environmental departments, with the same procedures as followed in any other criminal matter. The Government of Malaysia has been proactive in enacting laws such as the Public Cleansing Management Act, 2007, International Trade of Endangered Species Act, 2008 and Wild Conservation Act, 2010. The combatting of haze is one of the underlying challenges in Malaysia, which requires to be addressed.

It may be observed that wide powers to impose stringent penalty is provided for under the environmental legislations, however, the requirement of authority to bring about a prosecution has been ever maintained. In *Ketua Pengarah Jabatan Alam Sekitar & Anor. v. Kajing Tubek & Ors*.[74] is a matter that arose from a High Court on a complaint relating to the Bakun Hydroelectric Project, the Court of Appeals observed the inherent requirement of *locus standi to* initiate proceedings for a penal sanction, and disallowed the action initiated by three natives of the lands over which a Project was being constructed.

The judiciary in Malaysia, like many other jurisdictions, has been benevolent while determining the sentence for environmental offences. In *Public Prosecutor v. Jafa bin Daud*[75] it has been expressed that *"A 'sentence according to law' means that the sentence must not only be within the ambit of the punishable section, but it must also be assessed and passed in accordance with established judicial principles".* Owing to this principle, the punishments imposed have taken into consideration the conduct of the parties to environmental offences. Summing up in the succinct words of the *Royal Highness Raja Azlan Shah J* in *Liow Siow Long v. Public Prosecutor* [1969] 1 LNS 98, *"It is not in doubt that the right measure of punishment*

[74] Ketua Pengarah Jabatan Alam Sekitar & Anor. v. Kajing Tubek & Ors, [1997] 3 MLJ 23.
[75] Public Prosecutor v. Jafa bin Daud, [1981] 1 LNS 28.

for an offence is a matter in which no hard and fast rules can be laid down and it is to be determined by a consideration of a variety of circumstances. In assessing sentence, the primary consideration is the character and magnitude of the offence, but the court cannot lose sight of the proportion which must be maintained between the offence and the penalty and the extenuating circumstances which might exist in the case."

The plea of guilty on these reasons have been accepted as a mitigating factor for sentencing. This leniency has been overlooked in environmental offences, particularly in an instance, where a company under investigation was found to carry out recycling activity through ill-equipped machinery without air pollution control systems specified by the authorities in Malaysia. The Court categorically held that public interest in prosecution for environmental offences is a paramount factor. It was noted that these offences are committed owing to lack of environmental consciousness and in some cases a deliberate intent to breach the legal framework for personal gains. With these observations the court sentenced the Company to a fine of RM 30,000.00, in default thereof 12 months imprisonment on each charge, totalling a fine of RM 60,000.00, in default thereof 24 months imprisonment.[76]

PAKISTAN

The Pakistan Environmental Protection Act, 1997 is the umbrella legislation that governs environmental matters in the country. The Director General of the Federal Environmental Protection Agency, established under the Act is the primary authority for the administration and implementation of the provisions of the Act.[77] For offences related to violating the prescribed mandates on discharge or emission of pollutants, environmental impact assessment, hazardous wastes and environmental protection orders, the Environmental Tribunal has an exclusive jurisdiction.[78] If the offence pertains to handling of hazardous substances or regulation of motor vehicles, the Environment Magistrates have exclusive jurisdiction.[79] The Environmental Tribunal has been vested with the power to exercise criminal jurisdiction where it can exercise all powers that have been conferred on the court of sessions under the Code of Criminal Procedure in Pakistan.[80]

Section 21(7) empowers the Environmental Tribunal to issue bailable arrest warrant against a person if there is a 'reasonable suspicion' of his involvement in committing an

[76] Public Prosecutor v. Megatrax Plastic Industries Sdn Bhd, [2021] MLJU 1817.
[77] The Pakistan Environmental Protection Act, 1997, §§ 5, 6.
[78] *Id.*, §§ 17(1) and 21.
[79] *Id.*, §§ 17(2) and 24.
[80] *Id.*, § 21.

environmental offence. Thus, the Director General of the Federal Agency or a Provincial Agency will have to establish the foundational facts which have led them to believe that a person is reasonably suspected to have indulged in an environmental offence. It is when the tribunal is satisfied that this burden on the prosecution has been discharged satisfactorily that it proceeds to criminal prosecution. Therefore, the primary onus is on the State to prove the existence of factual matrix that leads to a criminal case beyond reasonable doubt following which the burden shifts to the accused to prove his innocence.

Section 18 of the Act provides that officers such as the director, partner, manager or secretary or any other officer of a body corporate shall be deemed guilty of an offence committed by the body corporate if it is proven that it was with their consent or connivance the offence took place. Similarly, the head of a government agency, local authority or local council can also be held liable for offences committed by a government agency if their consent, connivance or negligence can be proven.[81] Hence, provision has also been made for the prosecutions involving body corporates and government agencies, where the burden of proving foundational facts and that the offence was committed with the requisite state of mind by an officer of the company is on the prosecution.

SRI LANKA

In Sri Lanka, the National Environment Protection Act, 1980 is the principal legislation governing environmental matters with separate legislations having been enacted for the purpose of conservation of forests, soil, coastal areas and prevention of marine pollution. Section 31 of the Act of 1980 lays down the penalty that would be attracted when any person is convicted of an offence by the Magistrate. Part IV B of the Act contains stipulations which prohibit acts affecting environmental quality such as pollution of inland waters and atmospheric, soil and noise pollution.

The Director-General of the Central Environmental Authority is the principal authority charged with the implementation of the Act.[82] Section 23X of the Act provides that a certificate issued by the Director-General stating that pollution has been caused to the environment is considered as admissible evidence in prosecutions related to any offence and that it shall constitute a 'prima facie' proof. What follows from this is that the State's onus to prove the commission of an environmental offence can be discharged by furnishing the Director-

[81] *Id.*, Section 19.
[82] The National Environment Protection Act, 1980, § 13.

General's certificate which would establish that pollution of the nature described therein has been committed and that the acts which led to the causing of the pollution can be attributable to the accused. The onus would thereafter be on the accused to prove that he has not caused the pollution.

Under the Forests Ordinance, 1907 of Sri Lanka, it has been provided that if a person is found to be in possession of a forged permit or a counterfeit or unauthorised marking hammer it is presumed to be forged document or a counterfeit marking hammer unless proved to the contrary.[83] Thus, if the State produces a certificate from a Government Analyst that the permit recovered from the possession of the accused is forged or that the marking hammer is counterfeit, then the onus is shifted to the accused to prove that it is an authorised permit or marking hammer. Similarly, the Coastal Conservation Act, 1981 provides that if a person is found guilty of transporting or storing seashells or sand, violating the mandates of the Act, then the onus shall lie on the person to prove that the sea shells or sand have been obtained lawfully.[84]

The Courts in Sri Lanka have been conservative on the process of environmental litigations. While environmental litigation requires reliance on scientific reports and expert testimony, the courts have been critical in dealing with matters relating to criminal prosecution. In *Solicitor-General v. Podisira*[85] it has been observed that when scientific experts are roped in as witnesses, the burden is on the prosecution to provide relevant material to satisfy the court that the witness is specially skilled or is an expert in the domain. The prosecution for Environmental Offences appears to be weak on account of the involvement of persons with power, as per news reports,[86] especially in the case of the illegal gem mining faced across Sri Lanka.

BANGLADESH

Over the years, Bangladesh has developed a new environmental regime comprising of Environmental Conservation Act, 1995 (which was significantly amended by the Environmental Conservation (Amendment) Act, 2010) and the Environment Court Act, 2010. These legislations are supported and supplemented by constitutional provisions and a host of other legislations such as the Bangladesh Water Act, 2013, the Water Resource Plan Act, 1992,

[83] Forests Ordinance, 1907, § 31E.
[84] The Coastal Conservation Act, 1981, § 31E.
[85] Solicitor-General v. Podisira, 67 NLR 502.
[86] See, https://biodiversitysrilanka.org/large-scale-illegal-gem-mining-in-matale/ ; Also See, https://www.dailymirror.lk/expose/Focus-on-Laggala-Gem-mining-big-shots-bigger-than-the-law/333-223283

the National River Protection Commission Act, 2013, etc. This new system was developed as a response to various international conventions, treaties and protocols which Bangladesh is a party to.[87]

The range of environmental crimes in Bangladesh has been classified into 'soft' and 'hard' crimes.[88] Soft environmental crimes include the behavioral practices of citizen that harm the environment such as throwing random garbage without segregation and throwing plastic bottles for which there is no stringent enforcement. Hard environmental crimes include vehicular and industrial emissions, untreated waste dumping, encroachment and wildlife crimes for which strict penalties and punishment are accorded in the law.[89] The primary legislation concerning protection of environment in Bangladesh is the Environment Conservation Act, 1995.[90] The primary responsibility for enforcement of environmental law is vested on the Department of Environment (established under the Environment Conservation Act, 1995)[91] and the Bangladesh Police who work in cooperation and coordination with Bangladesh Customs, Bangladesh Border Guards (BGB), Wildlife Crime Control Unit (WCCU) and the Bangladesh Forest Department.[92]

The responsibility of initiating prosecution for environmental offences in Bangladesh is that of the Department of Environment. Section 17 of the Environment Conservation Act, 1997 provides that the cognizance of offences under the Act can only be taken upon the submission of written report of an Inspector of Department of Environment.[93] The Inspector or the authorized person by the Director General can institute cases in special magistrate courts or environmental courts or can lodge an FIR in local police stations for commission of offences under environment law.[94]

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[87] See generally A. AL FARUQUE, ENVIRONMENTAL LAW: GLOBAL AND BANGLADESH CONTEXT (2017); Md Ershadul Karim & Fowzul Azim, B. Bangladesh, 27 YEARBOOK OF INTERNATIONAL ENVIRONMENTAL LAW, 346 (2016); M.Z. Ashraful, *Application of the Principles of International Environmental Law in the Domestic Legal System of Bangladesh: A Critical Study on the Legal Framework and the Position of Judiciary*, 19 JOURNAL OF HUMANITIES AND SOCIAL SCIENCE 18, 19 (2014).

[88] Sherajul Mustajib Sharif & Md. Kamal Uddin, *Environmental Crimes and Green Criminology in Bangladesh*, CRIMINOLOGY & CRIMINAL JUSTICE 1 (2021).

[89] Id.

[90] The Environment Conservation Act, 1995 (Bangladesh).

[91] The Environment Conservation Act, 1995 § 3 (Bangladesh).

[92] Sarkar Farooque & Nigel South, *Law-Enforcement Challenges, Responses and Collaborations Concerning Environmental Crimes & Harms in Bangladesh*, 66 INTERNATIONAL JOURNAL OF OFFENDER THERAPY AND COMPARATIVE CRIMINOLOGY 389 (2020).

[93] The Environment Conservation Act, 1995 § 17 (this responsibility can be delegated to any other person authorized by the Director General).

[94] Md. Sefat Ullah, *Greening Justice in Bangladesh: A Road to Successful Environmental Court*, 3 GREEN UNIVERSITY REVIEW OF SOCIAL SCIENCES 101 (2017).

In similar lines with Malaysia, cognizance of an environmental offence can be taken on the basis of a report of the Inspector of the Department of Environment as per the Environment Conservation Act 1997. The prosecution and trial for environmental offences in Bangladesh is carried out in the Environment Courts (or special magistrate Courts for minor environmental offences) which are specialized courts established under the Environment Courts Act, 2010 for the protection of environment and trial of offences pertaining to environmental law.[95]

These Environment Courts have both criminal and civil jurisdictions and can pass sentences up to 10 years of imprisonment or fine/compensation up to 1 Million Taka.[96] As these courts follow the regular Bangladeshi Code of Civil Procedure,[97] Code of Criminal Procedure[98] and Evidence Act,[99] the general burden of proving violation of environmental law and bringing evidence in support is on the Department of Environment.[100] However an exception is made in case of offences committed by companies. If a notice of non-compliance has been issued against a company, Section 16 of the Act mandates that the owner, director, manager, secretary or any other officer or agent would be "deemed" to have violated environmental provisions.[101]

Thus, the burden of proof is casted on the company to establish that they have not committed any violation. However, if the aforementioned persons prove lack of knowledge and exercise of due diligence to prevent the alleged violation or failure, then the deemed guilty provision does not apply and the burden is on the Department of Environment, which has to prove the violation of environmental law.[102] A recent trend that has been highlighted in Bangladesh is the increasing level of preference on executive action where instead of prosecuting the violators in Courts, the Department of Environment is exercising its powers primarily to impose fine.[103]

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[95] Sherajul Mustajib Sharif & Md. Kamal Uddin, *Environmental Crimes and Green Criminology in Bangladesh*, CRIMINOLOGY & CRIMINAL JUSTICE 1 (2021).
[96] Farjana Afruj Khan Alin, *The Effectiveness of Environment Courts*, THE DAILY STAR (Apr. 16, 2019), https://www.thedailystar.net/law-our-rights/news/the-effectiveness-environment-courts-1730299.
[97] The Code of Civil Procedure, 1908 (Bangladesh).
[98] The Code of Criminal Procedure, 1898 (Bangladesh).
[99] The Evidence Act, 1872 (Bangladesh).
[100] Imitiaz Ahmed Sajal, *Common People's Access to The Environment Courts of Bangladesh*, BANGLADESH LAW DIGEST (July 16, 2015). https://bdlawdigest.org/environment-court-act-2010.html.
[101] The Environment Conservation Act, 1995 § 16.
[102] Id.
[103] *See e.g.*, Abul Hasnat, *Environmental Courts in Enforcement: The Role of Law in Environmental Justice in Bangladesh*, 21 AUSTRALIAN JOURNAL OF ASIAN LAW 85 (2021); Md. Zakir Hossain, *Revisiting Enforcement of Environment Courts Act 2010*, DAILY SUN (Editorial March 01, 2020), https://www.daily-sun.com/printversion/details/465878/Revisiting-Enforcement-of--Environment-Court-Act-2010.

BHUTAN

The Kingdom of Bhutan has a unique regulatory feature, wherein environmental offences are graded based on the severity as a petty misdemeanour or a misdemeanour on Felonies of first degree, second degree, third degree and fourth degree[104] Similarly the Waste Prevention and Management Act, 2009 categorizes the offences that relate to handling of hazardous waste in the nature of felonies of various degrees to be punishable under the Penal Code of Bhutan 2004. In connection with offences relating to Forest and Wildlife, Bhutan offers the Forest and Nature Conservation Act of Bhutan, 1995 wherein Forest Officers are empowered with powers to even apprehend and arrest any person whom he suspects of having committed an offence under this Act. However, there is also a power to compound[105] offences under the said Act. The penalties are stringent where the offences relate to the killing or injury of wildlife, the penalties extend up to a period of five years.[106]

The Environmental Assessment Act, 2000 envisages an Environmental Compensation mechanism through a vicarious liability approach. Further, where the offence is committed by any governmental authority, administrative sanction is provided for under the Environmental Assessment Act, 2000, and where such offender is an entity, the Managing Director or the Owner may be held severally liable for the said offence thereof. The Water Act of Bhutan 2011 makes the abstraction of water without an Environmental Clearance a punishable offence.[107] However, abstraction of water for domestic use, public health, small scale water supply and irrigation; and other customary practices including running small water mills, water grinders or prayer wheels, are permitted to be carried out without the Environmental Clearance.

The National Environment Commission, which is headed by the Prime Minister is the highest decision-making authority on matters relating to the environment and its management in Bhutan.[108] The activity of National Environmental Commission is supported by the Secretariat which is responsible for implementing of policies, regulations and directives issued thereof. At the district level, Dzongkhag Environment Committees are constituted as competent authorities which is entrusted with the issuance of Environmental Clearances. It is pertinent to note that the NEC exercises highest formidable power, even over the Environmental Tribunals,

[104] See, Penal Code of Bhutan, 2004, §§ 3, 4 and 409.
[105] The Forest and Nature Conservation Act of Bhutan, 1995, § 33.
[106] *Id.*, § 28.
[107] The Water Act of Bhutan, 2011 §33.
[108] The National Environment Protection Act of Bhutan, 2007, §§ 20, 21.

which get the jurisdiction to hear specific environmental disputes when the NEC decides to not hear the same.[109]

NEPAL

The study of Nepal offers unique insights into how development, implementation and enforcements of environmental law may be hindered, and environmental crisis exacerbated, due to continued political instability, maoist insurgency, and pressing need for development. This makes Nepal one of the most extremely difficult countries to implement environmental law.[110] However, amidst these obstacles, the development of environmental protection regime in Nepal started gaining momentum during the late 1970s as a response to popularization of the findings of the studies conducted by eminent international scholars such as E.P. Ecoholm,[111] J. Gutham,[112] J. Ives & B. Messerli[113] etc.[114] These studies, conducted amidst enormous foreign aid for development projects, popularized the negative impact of development and industrial projects in the Himalayan Region and the need for having a robust environmental law regime.

Nepal has enacted various statues[115] to deal with environmental degradation including the Soil and Watershed Conservation Act, 2039 (1982),[116] Solid Waste (Management and Resource Mobilization) Center Act, 2044 (1987), Nepal Water Supply Corporation Act, 2046 (1989),[117] the Water Resource Act, 2049 (1992), the Environment Protection Act, 2076 (2019), etc. A scrutiny of these legislations indicates that addressing environmental violations in Nepal is heavily centered around imposition of fines rather than imprisonment. For instance, the Environment Protection Act, 2076 contains provisions for imposition of imposition of NR. 5 million in case a project proposal is executed without approval of Environment Impact

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[109] *Id.*, § 48.

[110] Tacking Environmental Problems in Nepal, ENVIRONMENTAL LAW ALLIANCE WORLDWIDE, https://elaw.org/fr/tackling-environmental-problems-in-nepal (last visited Sept. 05, 2022).

[111] E.P. ECOHOLM, LOSING GROUND: ENVIRONMENTAL STRESS AND WORK FOOD PROSPECTS (1976).

[112] J. Gutham, *Representing Crisis: The Theory of Himalayan Environmental Degradation and the Project of Development in Post-Rana Nepal*, 28 DEVELOPMENT & CHANGE 45 (1997).

[113] J. IVES & B. MESSERLI, THE HIMALAYAN DILEMMA: RECONCILING DEVELOPMENT AND CONSERVATION (1989) (Jack Ives, an international scholar recruited by the United Nations University, studied in depth the problem of mountain deforestation and downstream flooding).

[114] The cumulative effect of these studies was to give movement to the Theory that "deforestation in the Nepal Himalayas was not only creating problems in Nepal but was also causing floods in Bangladesh during Monsoons". See Surya B. Subedhi, *Access to Environmental Justice in a Politically Unstable Environment: A Case Study of Nepal,* in HARDING (ED.), ACCESS TO ENVIRONMENTAL JUSTICE: A COMPARATIVE STUDY 157, 158 (2007).

[115] Nepal has its Calendar Year as per the Bikram Sambat Calendar, the year 2079 is the counterpart of the year 2022 as per the Gregorian Calendar.

[116] It prohibits acts of throwing away solid wastes or similar other detritus contaminating the environment.

[117] It prohibits certain acts and provides penalties/punishment for violation.

Assessment (EIA) Report.[118] Further, if the order of the Regulatory Body is not complied with, a fine triple the amount of maximum prescribed fine can be imposed.[119] If further disobedience and non-compliance continues, the violator can be blacklisted.[120] The imposition of these fines is on the lines of no-fault liability and the general safeguards of knowledge and intention, *i.e. mens rea*, has not been provided under the Act.[121]

However, the Environment Protection Act does not contain any provision for personal liability for the directors and other officials of the violating company or agency. On the other hand, Nepal has a comparatively stricter and robust legal regime focused on species conservation and wildlife protection.[122] The National Parks and Wildlife Conservation Act, 2029 (1973) is the primary legislation that deals with wildlife protection and conservation in Nepal. The punishment under the law is very stringent and can be up to 15 years of imprisonment in case of offences related to rhinoceros, tiger, elephants, musk deer, clouded leopard or bison.[123]

The responsibility of investigation and filing cases under the Act is bestowed on the shoulders of Forest Rangers, Non-Gazette First Class Officer or by Police (at least the rank of sub-inspector).[124] The Act does not contain any deemed guilty provision and the offence has to be proved by the prosecution following the regular criminal procedure. However, a striking feature of the law in Nepal is that it does not provide for second appeal if the trial court and first appellate courts have delivered the same verdict in cases where imprisonment is less than 10 years.[125] Widely recognized for its collaboratively-managed community forests, Nepal also has strong enforcement-based responses to illegal wildlife trade of species, wherein nearly 7,000 military personnel are deployed for monitoring protected areas and several operations are carried out by the Central Investigation Bureau and Wildlife Crime Control Bureaus. In few instances, extralegal violence in the name of conservation have also been engaged.[126]

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[118] The Environment Protection Act, 2076 (2019), § 35.
[119] *Id.*
[120] *Id.*
[121] *Id.*
[122] Rupa Basnet Parasai, *Environment Protection Act, 2076: A Green Renaissance?*, 1 YEAR BOOK OF NEPALESE LAWS (2076) (2019).
[123] The National Parks and Wildlife Conservation Act, 2029 (1973) § 26.
[124] *Id.*, § 30.
[125] Tufan Neupane, Nepal's Courts in the Dock over Tiger Crimes, OXPECKERS (Jan 28, 2021), https://oxpeckers.org/2021/01/nepals-tiger-crimes/.
[126] See, Paudel K, Potter GR & Phelps J., *Conservation Enforcement: Insights From People Incarcerated for Wildlife Crimes in Nepal*, CONSERVATION SCIENCE AND PRACTICE 2020.

CONCLUSION

Over the years, the enforcement of environmental crimes have strengthened across the world. India along with jurisdictions from Asia Pacific Region have looked at strengthening criminal law and prosecuting environmental law offenders as a way to ensure environmental law compliance. However, in majority of environmental crimes such as hunting, poaching or other wildlife offences, many jurisdictions have retained the requirement of establishing *mens reas* i.e. the guilty state of mind in the form of intention, or knowledge, or reason to believe. But the standard is not on the same footing as that of general crimes as many jurisdictions do contain deemed guilty provisions in relation to such crimes which require the accused to establish his innocence. This significantly eases the task of prosecuting agencies. However, there are still jurisdictions such as Queensland, in Australia which are reluctant to the incorporate "deemed guilty provisions". Considering the facts that, Asia Pacific Region is a hotspot for illegal trade in wildlife and wildlife related crimes; and that such crimes generally are transboundary in nature, a uniform application of "deemed guilty provisions" across the region will aid in strengthening enforcement mechanisms.

Further, when we peruse the penal sanctions prescribed for environmental law offences committed by companies and other juristic entities, across the Asia Pacific Region, we see presence of largely similar provisions across jurisdictions, which hold the manager or the persons in charge liable for environmental offences. However, they can escape their liability by establishing that they had "no knowledge" or by proving "due diligence" on their part. This is because environmental penalty for such persons can take the form of imprisonment, which is a higher form of punishment and cannot be imposed absolutely. In light of foregoing discussion, if the sanction prescribed for such persons can be revised by eliminating imprisonment and enhancing monetary penalties, which may then be imposed in absolute terms, then the requirement of *mens rea* in environmental offence can be further diluted and they can be convicted on the basis of the principle of absolute liability. Considering that a host of multinational co-operations operate in the Asia-Pacific Region, imposing criminal liability in absolute terms will significantly improve the compliance of environmental law.

Furthermore, this comparative study has shown us that, enforcement of environmental law in all jurisdictions sees involvement of a plethora of state agencies like police, forest departments, public prosecutor, regulators and the like. They do not have always have similar degree of capacity in terms of knowledge of law to assess the case and collect evidence. This many a times leads to discharge of accused due to insufficiency of evidence. Establishing a

specialised and centralised pool of public prosecutors may lead to a creation of better enforcement regime which is well equipped to prosecute offenders successfully.

Lastly, a queue can be taken from Australia, where the environmental crimes have been categorised in tiers. This categorization allows a systematic dilution of mens rea according to the tier of the offence. Tier 1 offences have strong *mens rea* requirement whereas Tier 3 offences are enforced on the basis of absolute lability principle. Such a systematic categorization of environmental law offence is definitely further elaborated by adding more tiers, and based on the needs of the time, offences can be shuffled between tiers to show the perception regarding that offence.