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THE ALLOCATION AND THE DISTRIBUTION OF ENVIRONMENTAL COMPETENCES: SOME GENERAL REFLECTION AND SOME LESSONS FROM THE UNITED KINGDOM

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INTRODUCTION

The principal aim of the discussion which follows is to offer a number of suggestions of a fairly general and essentially non-jurisdictionally specific nature on the issue of the distribution and allocation of environmental competences. Some of the points made will be illustrated by reference to arrangements within the United Kingdom. It is hoped that the discussion will serve to stimulate some further discussion and debate on the general questions considered.

In the discussion which follows a good deal of attention will be devoted to the quite general question: whether it may be possible to identify a range of factors, or range of considerations, which may be of some special relevance when it comes to devising suitable arrangements for the allocation and distribution of environmental competences? The discussion will not be bold, or ambitious, as to seek to suggest what any such ideal allocation or distribution should be. However, it may secure some slight advancement in discussion and debate on these matters - it may provide a step in the right direction - if we can try to begin to identify the question which should be addressed and considered when we seek the most acceptable solutions on this matter.

Before embarking on that task, it seems appropriate to take the opportunity to offer a few words as regards the *importance* of the subject under general discussion; and also to say a few words as regards the *inevitable complexity* of the schemes we should expect fo find when we come to investigate arrangements which a system of law and government has put in place as regards environmental competences.

ENVIRONMENTAL COMPETENCES - IMPORTANCE FOR DISCUSSION?

It will probably provoke little controversy to suggest that the chief concern of environmental lawyers is with substantive rules. For environmental lawyers the most significant questions are likely to be ones such as: what are, or what should be, the substantive obligations imposed by the law in order best to seek to protect and preserve the environment in each and all of its various facets?

And if we may sometimes think that environmental lawyers possess a preoccupation with such substantive rules this is perhaps unsurprising. After all, rules are the principal devices by which lawyers and law-makers seek to achieve their objectives. One therefore raises no objection to this aspect of environmental law being afforded very substantial importance. Indeed it may be suggested to be a feature of the degree of advancement attained by any system of environmental law that discussion and debate may have moved from the development of somewhat abstract, and generally therefore uncontroversial, *general principles of environmental law and policy* to the much trickier (but more crucially important) matter of the determination of the precise details of the legal rules which should be imposed (along with the allied issue: upon whom should those rules be imposed?).

Perhaps it is an exaggeration to state that the concern which environmental lawyers have with detailed substantive rules is a "preoccupation". Certainly, many environmental lawyers, and especially those with a public law background, may argue that they are equally concerned with matters of *procedure* and *administrative process,* and also with allied matters such as opportunities for appeal and judicial review. By way of illustration such persons may point to the fact that a very common substantive rule of environmental law is that one may not engage in a particular activity without having successfully obtained an appropriate permit. Moreover, once obtained, the activity so authorised may only lawfully be conducted provided this is in accordance with the terms or conditions of that authorisation. Of concern to environmental lawyers will be the substantive laws about when, and when not, a permit is required; the penalties for acting without, or in non-compliance with, a permit; and the rules which govern the terms or conditions of the permit. However, associated procedures and processes may be considered of equal importance. How does one apply for a permit? What procedures are associated with the authorising body's decision-making process? What third party participation may be provided for in advance of that decision? What right of appeal may lie once an official decision on the application has been taken? What opportunities may exist for judicial review? For whose benefit may such appellate and judicial review opportunities exist?

It may, then, be agreed that environmental lawyers display a concern for rules of primary obligation and also for matters relating to administrative procedures and process. No objection, of course, can or should be taken to this. However, this discussion makes a plea that concentration on these substantive and procedural matter alone should be regarded as significantly inadequate.

This may be demonstrated in the following way. One may devise rules of environmental law which may impose absolutely the right primary legal obligations. One may accompany those rules with procedures and processes which display a keen regard to issues of administrative justice and administrative fairness. Yet all this good work may come to little if inapt associated decisions

have been taken as regard the bodies in whom are to be vested the broad variety of environmental functions which the law entrusts to government.

None of these statements should prompt controversy. It is likely that readers, from wherever they may have closest knowledge, will be able to point to examples from within their own experiences of situations where some aspect of their system of environmental law has worked less well than was hoped for the reason, just described, of the misplacement of environmental competence in the matter in question. Nevertheless, the essential point may all too easily be forgotten. The present writer has over the past few years been involved, in a quite limited way, in advisory work in a number of countries which are seeking to develop comprehensive systems of environmental law comparable with those which have developed (let us always remember, in quite recent years only) in the more developed countries of North America, Western Europe and some parts elsewhere. On each occasion when such advice has been sought, and the countries in question have been visited, there has been found within Environment Ministries to be a very keen interest to learn about, and be gently guided as regards, general principles of environmental policy and also detailed rules on particular subject-areas within environmental law. Less initial interest has been found to exist as regards administrative processes and procedures: although once such matters have been raised for discussion their significance has generally been quickly and readily appreciated and understood. However, when it comes to questions of *institutional arrangements* – to questions of environmental competence – it has proven rather more difficult to secure an interested response.

ENVIRONMENTAL COMPETENCES – INEVITABLE COMPLEXITY?

The *complexity* which has been referred to would seem inevitable for two principal reasons. The first relates to the broad variety of *functions* of government which may properly be described as "environmental". The second relates to the very breadth of the adjective *environmental.* Each of these reasons may repay a little elaboration and explanation.

THE BROAD VARIETY OF ENVIRONMENTAL FUNCTIONS.

In presenting any picture of environmental competences the task, very broadly, will be to seek to describe who has responsibility (either alone, or – as will often be the case – in combination with some other body or bodies) for the exercise of the following important governmental environmental activities:

- Who has responsibility for developing basic environmental policies within a particular country? We may, perhaps, refer to this as the *policy development* function of government.

- Who has responsibility for drafting and then securing the enactment into law of the large body of detailed legal rules which will be needed in order to seek to implement and achieve the objectives sought by the general environmental policies referred to above. This second broad function can be referred to as the *law-making* function.

- In whom should be vested the very important powers of regulatory control conferred by systems of environmental permitting? Who should be the environmental regulators, exercising what may be referred to as the *regulatory* environmental functions of government?

- On whom should be conferred the task of monitoring compliance (or otherwise) with obligations imposed by general environmental laws and permit conditions? These functions of monitoring, inspection and enforcement may, perhaps, be described collectively as the *policing* environmental function of government.

This list and description of the variety of different kinds of environmental function which must be distributed and allocated within any modern system of environmental law has grown long enough for at least one conclusion to be drawn. This is that it would be a matter of some very great surprise were the conclusion to be drawn that all (or even that most of several) of those various functions should best be performed by or within a single, multi-functional, governmental organisation. It might even be argued – the point will not be developed here – that there should, as a matter of principle, be maintained some institutional separation as regards the allocation of certain at least of the various functions which have been described.

The other of the two broad reasons for such complexity lies, it is suggested, in the fact that the adjective *"environmental"* is a word which itself encompasses quite diverse subject-matters. This will need little demonstration and can be illustrated quite simply. It may suffice to remember that functions which may properly be labelled "environmental" may relate to subject-matters as contrasting as, on the one hand, the regulation of radioactive substances and the nuclear industry; and, on the other hand, controls over noise, odours and other relatively simple nuisances as between neighbours. The general conclusion to be drawn will be, once again, that it should be no surprise if it should be found that any particular environmental function (for example, the permitting function) should attach to different institutions or branches of government from one environmental subject-matter to another.

The conclusion to be offered from this discussion is that a fair degree of complexity in the allocation or distribution of environmental competences is to be regarded as a practical inevitability in any reasonably sophisticated system of environmental law. This is not a subject upon which simple statements or simple solutions can ever suffice.

THE DISTRIBUTION OF ENVIRONMENTAL COMPETENCES - FACTORS OF GENEREAL RELEVANCE

It is time to offer some suggestions as regards the factors which may be considered to be generally relevant to the decisions to be taken as regards such allocation of functions.

The first task will be simply to seek to *identify* the factors or considerations which should be taken into account as being likely to exert some proper influence over such decisions. In any comprehensive discussion of this matter this task would serve only as preliminary to other substantially more difficult and demanding (and controversial) areas of investigation: consideration of the *weight* to attach to each of the factors regarded as of significance, and to suggest what concrete conclusions should properly follow, having gone through the process of having considered and assessed in each particular context each of the various relevant factors. This larger task is one of very much greater difficulty than that of formulating a non-controversial list of factors of relevance. Indeed, the latter of the tasks is almost certainly one upon which no generally agreed conclusions are ever likely to emerge. There may well be legitimated reasons why reasonable persons (even reasonable environmental lawyers) may hold substantially differing opinions as regards the weight to be afforded, generally or in a particular context,to any or all of the factors shortly to be described. Ultimately, the *conclusions* to be reached in the allocation or distribution of environmental functions are policy (or political) decisions. All that may be done, which may secure general support, is to argue for rationally defensible decisions (that is, decisions for which reasons can be offered which a reasonable person may accept) taken in the light of a due consideration of all relevant factors.

For the moment at least, however, let us be content to identify and to list the more significant issues which should arise for consideration.

RELEVANT FACTORS

- Presence or absence of constitutional limitations or restrictions upon freedom of choice as regards environmental competences;

- Presence or absence of need in the particular context to secure the incorporation of good quality scientific and technical knowledge and understanding into policy-making, law-making or regulatory control;

- Whether the determination and implementation of environmental policies should rest with elected politicians, or in some way be removed from the political arena;

- Where it is appropriate for environmental functions to be placed (directly or indirectly) in the hands of elected politicians, should these be politicians elected

to the national Government or to local government (or, if such exists, regional government)?

- To what extent is national uniformity a factor of importance as regards environmental policies, rules and regulation? To what extent may local or regional variation be a matter positively to be supported?

- To what extent, and in what particular ways, should public opinion influence the formulation and implementation of environmental policies and decisions? To the extent that such opinion *should* be integrated into the exercise of environmental functions, are we to be concerned with opinion which is most local to the matters in question, or opinion as assessed on a national basis (or something in between)?

It is anticipated that the mere listing of these half-dozen factors or relevance to the allocation of environmental competences and the design of environmental procedures will have triggered many thoughts in the minds of readers about arrangements, exemplary or in need of some reform, in the systems of environmental law with which each is most familiar. The remainder of this brief dicussion will comprise an appraisal of certain arrangements to be found in the United Kingdom from the point of view of these various considerations.

CONSTITUTIONAL LIMITATIONS

This matter can be considered quite briefly. The United Kingdom is a unitary State. There is, therefore, no special body of environmental constitutional law dividing up environmental competences between federal and other spheres of government, as will be the case in a federal system of government.

The United Kingdom possesses a Parliament which is subject to no internal constitutional limitations as regards its legislative capacity (the limitations imposed by membership of the European Union need not concern us here). It follows that Parliament may devise, and subsequently alter, arrangements as regard governmental competences in whatever ways it may at any time think fit. In particular it may allocate, and re-allocate, functions as between central and local government as it thinks fit; and it may allocate functions to bodies with some independence of government, and take such matters back into close governmental control, as it thinks fit. Further, given the majority of votes which the national Government will, by definition, control within the national Parliament, when we talk about Parliament deciding upon the allocation or re-allocation of functions we are, in truth, referring to exercises of the will of the elected executive Government of the day.

GOOD SCIENCE: TECHNICAL PROFICIENCY

This factor needs to be separated into two distinct issues fo the purpose of further discussion. The first is to ask how one can seek to design institutional arrangements which may offer the best chance for the integration of good scientific understanding of environmental problems, their causes and their resolution, into fundamental environmental policy formulation? The second is to ask how one should seek to ensure that regulatory functions, in the environmental context, are performed by persons and institutions with an adequate and appropriate level of technical understanding and expertise?

The first of these ideals – the integration of good science into environmental policy formulation – is an aspect of a wider concern that governmental policy formulation more broadly should be based upon proper understanding and appreciation of scientific and technical matters. In the particular field of environmental policy formulation the importance of recourse by government to good science is heightened by the attachment of environmentalists, and indeed environmental lawyers, to the precautionary principle of environmental policy. Stated quite simply this salutary principle ordains that where a link between an activity and potential environmental harm is suspected it will be appropriate for government to put in place precautionary measures. Such measures should be immediate: they should not be deferred, pending fuller (let alone, full) scientific investigation and understanding of the environmental issues. As a matter of (very) general principle the precautionary approach has much to recommend it. As a matter of general principle it makes very good sense. It is in the application, or in the more precise definition, of the precautionary principle that differences and disagreements are apt to arise. For example, when, in the application of the principle, should one consider that the condition that "a link is suspected" is satisfied? In particular, whose suspicion are we here referring to? Presumably connections between activities and environmental problems which may seem plausible only to the "man in the street" (and perhaps we should add, the popular press) should receive relatively little credence and not result in a sense of obligation to act under this principle. Rather, the precautionary principle should be founded on suspicions possessed by persons with some scientific or technical credentials relevant to the matter in hand. This is not to suggest that a consensus amongst such persons should be considered necessary. Quite the opposite: the precautionary principle, if it is to have meaning and utility, must demand action well before any such consensus of expert opinion is (if ever) achieved. That is, after all, the very nature of the principle. The compromise necessary in a sensible understanding of the principle may be to say that the principle should be regarded as demanding governmental precautionary action in cases where a body of respectable minority scientific opinion (perhaps small: but something more than the voice of some lone maverick) suggests a connection between a sphere of activity and a form of environmental harm. Where this is the case the

precautionary principle presumably "demands" that policy and law-makers assume the worst (assume the connection truly to exist) and reach whatever policy or legal decisions appear, in all the circumstances (weighing environmental and other considerations), to be appropriate.

Much may depend on the particular circumstances of a specific problem. There is a world of difference in how one might expect to apply the precautionary principle, depending on factors such as the magnitude and reversibility of the perceived environmental consequences of an activity, the value placed upon that activity, and the kinds of measures proposed in order to regulate that activity (maybe involving its prohibition). Very often the hard consequenses of the precautionary principle may be avoided by suggesting quite moderate or modest precautionary measures: measures which may, indeed secure other quite separate benefits. Examples are legion of reluctant sectors of industry having been required to upgrade plant, for environmental reasons, and subsequently benefiting from enhanced production quality, energy efficiency and other gains deriving from the enforced purchase of more modern production equipment. In this situation the precautionary principle may have been applied and – whatever may be the results of subsequent scientific investigation – all come out as winners.

But not all contexts where a pollution link is suspected are susceptible to such a happy set of conclusions. In these situations there may be a need for government to come to a decision with only hard consequences for those whose activities have come under suspicion. Here it would seem of the greatest importance that governmental decisions be taken on the basis of scientific and technical advice; and that that advice should have been readily attainable, of the highest quality, and have been presented openly and publicly to government (in order to secure confidence and full understanding as regards the basis of decisions taken).

How, one is bound to ask, may this best be achieved? It is not a practical option for government to seek to recruit and retain as full-time salaried officials the very substantial corps of scientific advisers it would need for this purpose. Far too many different scientific disciplines need to be consulted in the context of apparent environment problems for such advice to be available "in-house" to be a practical possibility. In any event, and notwithstanding questions of practicability, such internal scientific advisory arrangements would seem to lack the important characteristics of openness and transparency to which receipt of such expert advice should aspire. In other words we should regard it as important that government should be *seen* to be advised on matters such as these by persons with expertise from *outside* the government machine. This is not, however, to argue that government should employ no individuals who have been selected on the basis of their understanding of the science relevant to environmental policy. Indeed, the employment of some such persons will probably be thought to be essential if government is properly to understand, intepret and apply the advice which it should receive from the external and independent scientific community.

The time has come to move from this quite general discussion and ask: how, and how successfully, is this objective – the incorporation of good science into environmental policy development – achieved in the United Kingdom. A substantial part of the answer lies in noting the benefit which has flowed, in terms of assistance to government policy formulation, over the past twenty-five years, by the continuing existence and activity of the United Kingdom's Royal Commission on Environmental Pollution. The Royal Commission on Environmental Pollution is a committee of experts – mostly scientific, but including an eminent environmental lawyer – with a permanent existence and freedom to select for itself the environmental subject-matters which it should investigate and upon which it should subsequently produce and publicise reports. Such reports, being based upon a close evaluation and assessment of evidence presented to the Commission (and where necessary commissioned by the Commission), have proven to be quite influential in bringing particular environmental problems into the political agenda, and informing government as regards appropriate policy options. In a good many instances a policy proposal may include a need for the introduction of new environmental legislation, or the amendment of existing provisions. It is a common feature of Royal Commission Reports for recommendations to be informed by a rewiew of policies and laws operating within a variety of countries outside the United Kingdom. This international outlook of the Commission is exhibited also in connections which have developed between itself and comparable independent advisory bodies elsewhere in Europe.

The accumulated, and still accumulating, record of the Royal Commission is impressive and has been influential. A quite considerable number of its reports have been reflected later in government policy and in law. In cases where no such action has followed, the Commission has sometimes chosen to return to an issues in order to renew and bolster its advice and recommendations for change.

It is time now to move to a consideration of the second aspect of this first general issue: the aim that regulatory controls should be exercised by individuals and bodies possessing an adequate level of technical understanding and competence. As we move, rightly or wrongly, into an era of technology-driven environmental standards it would seem that the technical expertise required of the various environmental regulators is becoming ever greater. A consequence may be that certain functions which have traditionally been exercised at the local authority level of government may, in some situations, be becoming somewhat too technically complex to be left at that institutional level with any real confidence that controls will be exercised by all the individual regulators in all those empowered local authorities with proper competence.

In the United Kingdom this concern has been in large part the reason for having quite recently (1996) moved waste regulatory functions from our county councils (not, it may be noted, the lowest tier of local government) to the newly established, national, Environment Agency. At the time, some twenty-five years

ago, when waste regulatory functions were first established it seemed quite natural for this new function to be conferred upon local authorities. It was a local government function to collect waste and to dispose of it. No doubt they could be entrusted safely with the none-too-complex task of licensing and monitoring landfill operations. The regulation of landfill operations was perceived, even as recently as this, as largely a matter of securing the avoidance of neighbour nuisances by the proper conduct of filling operations, and the adherence to essentially quite basic technical specifications set out in the licence conditions. In the course of time, however, concerns about landfill gas, leachage migration and the pollution of groundwater and adjacent surface water, made evident that landfill operations required quite sophisticated technical regulation and monitoring, at any rate as regards sites receiving other than entirely inert waste. At the same time legislative developments (the Environmental Protection Act 1990, Part II) broadened the range or variety of waste activities which became subject to licensing control, to include not only the disposal of waste but also its storage and its treatment. It is an exaggeration, but not a great exaggeration, to suggest that waste regulation changed from being regarded in the early 1970s as the licensing and monitoring of the filling of holes in the ground, to the regulation of an activity requiring technical skills ranging from geomorphology and hydrology through to liquid and gaseous chemistry.

It would be unfair and wrong to suggest that county councils waste regulatory authorities did not develop, either by appointments made or by the training of staff in post, these new skills. Certain waste authorities, in particular those with regular dealings with waste producers, waste recyclers and waste disposal companies did develop teams of staff possessing (individually or collectively) quite high levels of technical expertise and experience. The problem was seen, however, to be that there could be no assurance that such expertise existed in each and very local authority charged with waste regulatory functions. Moreover, to seek to secure such expertise in each and every such authority seemed economically inefficient. Better by far, it appeared, to restructure waste regulation so that it became a function of the new Environment Agency, established, in April 1996 (under the Environment Act 1995) as a national environmental regulatory body possessing a measure of independence from government. Of course, waste personnel within the new Agency are essentially the same people as had immediately earlier been employed by local waste regulatory authorities. It is also to be noted that the Environment Agency, although a national agency, is organised on a regional basis. The change is, therefore perhaps best viewed as a move from this function being exercised by several dozen local waste regulatory authorities (with little in the way of central coordination) to a nationally organised and coordinated system, albeit one structured on a quite small number of geographical regions.

This change of institutional competence in the context of waste regulation seems to have been broadly welcomed. In contrast another development in the

United Kingdom would seem, in this respect, to give rise to some legitimate cause for concern.

The Environment Act 1995 has enacted statutory provisions – not, it should be noted, yet implemented – designed to establish a special statutory regime to secure the identification and remediation of contaminated land. The substantive details of the scheme need not here be a matter of concern. Indeed until such time as the United Kingdom Government produces final statutory guidance documents, the substantive details of the scheme provided for in the Act of 1995 cannot be fully described. The 1995 Act has enacted a basic scheme for contaminated site identification but has left it the most critical decisions as regards any set of rules on contaminated land for subsequent consultation and ministerial decision; a process which unsurprisingly has proved by no means strightforward. Indeed, satisfactory guidance supplementing the bare statements in the primary legislation as regards the characterisation of a site as contaminated, the degree of remediation to be required, and, most problematically, the distribution of remediation costs as between the Act's various categories of potentially responsible parties, is proving more difficult to draft than was the relatively bare structure contained in the 1995 Act itself.

Nevertheless, on certain matters the provisions of the Act give some reliable indications as regards the scheme which, as and when introduced, will provide for the first time in the United Kingdom a set of rules and procedures designed specifically to deal with the matter of contaminated land. The question which should concern us here is this: upon whom has the United Kingdom legislation chosen to confer the various powers and duties which will come into operation as and when this part of the 1995 may eventually come into force?

The answer can be stated reasonably simply. The duty to scrutinise areas for sites which may be contaminated, within the meaning of the Act and guidance, is placed upon local authorities. Moreover, the duty is placed not (as was formerly the case with waste regulation) on the local authorities operating on a county-wide basis: rather, the duty is to be conferred upon the very much more numerous and geographically confined *district* councils. Each such district council will be expected to devise an appropriate strategy for the systematic review of its geographical area in order to identify sites in respect of which the various remedial provisions of the Act may apply. Each local authority will, it appears, be expected to be proactive in this matter. It will not, in law at least, suffice simply to await concerns communicated to the authority by outsiders as regards the condition of particular sites.

Once it appears that a site falls within the scheme of the Act a series of provisions will become applicable. Various categories of persons will have an entitlement to be served a notice alerting them to the fact of such suspicion. A period for discussion and negotiation will then ensue: a feature of the Act is to permit, indeed to encourage, such parties to suggest and devise appropriate remediation strategies. Only where no such proposals, of acceptable form, are

received will the responsible authority proceed to the stage of issuance of a formal remediation notice. This notice will impose obligations on recipients as regards the remediation activities which will be required for the site and will indicate how the burden of cost is to be distributed (in cases where, as is often likely to be the case, a site is one in respect of which there may be several parties with remediation liability under the Act).

The 1995 Act acknowledges that it will not be appropriate for these decisions to be taken in respect of all sites by district councils. There will be some sites which may require particular expertise and/or experience on the part of the regulatory body. This may be because of the nature of the site contamination, or because of the particular configuration of the site and its proximity to especially sensitive or vulnerable subject: or, very likely, for a combination of these reasons.

Where sites are perceived to be not ordinary contaminated sites but what the Act describes as "special sites" the remediation discussions and, if necessary, the setting and monitoring of remediation requirements, will be a matter not for the local district council but for the national Environment Agency. The basic procedure will be for the district council to determine whether a site is an ordinary or a special contaminated site, and in the latter situation to refer the matter to the Environment Agency.

These basic arrangements within the 1995 Act display a sensitivity to the need, stressed earlier, that in devising environmental legislative controls the chosen controlling agency should possess appropriate credentials for the particular tasks in terms of both technical expertise and practical experience.

Whether the arrangements will, when eventually brought into operation, work well remains to be seen. Much will depend on the precise form of the statutory guidance to be issued by government, giving a more clear description of the characteristics of sites which will fall into the category of being "special", and so coming within the remit of the Environment Agency. On this matter nothing very reliable can yet be stated. We must await the issuance of final statutory guidance. Nevertheless, it may reasonably be assumed that "special" sites will be sites which are in some way exceptional, and that ordinary contaminated sites will remain within the jurisdiction of the district councils. Immediately one is bound to wonder whether this tier of local government is suited to this important task; and to ask whether this tier of local government was chosen, by those who formulated the provisions of the Act, following a process of careful thought and reflection. Moreover, if such thought was given to this important issue of environmental competence, was the final decision reached for reasons of environmental expertise or reached for other and broader political reasons (within the often contentious world of central-local government relations)?

The answers to these questions are, unfortunately, not a matter of public record, and the present writer possesses no special knowledge. Nevertheless, it would seem fair to speculate that district councils were selected as the institutions upon which to confer functions in relation to ordinary sites because of the formal (procedural)

similarities, much stressed by government, between the new contaminated land procedures and the long-existent statutory procedures for dealing with a broad variety of neighbour nuisances: what are called "statutory nuisances". It is the district councils which have for long exercised functions with regard to such statutory nuisances. It may have seemed, therefore, irresistible to confer the new contaminated land powers and duties, modelled as they are on the statutory nuisance procedures, upon the same investigating and enforcing agency.

Such a decision may be readily understandable. Whether it is a decision which should be regarded as sound in principle, and which is likely to work well in practice, may, however, be doubted. It is true, as the United Kingdom Government has proclaimed, that there is an essential procedural similarity between the new contaminated land provisions and those, with which district councils will indeed be quite familiar, dealing with statutory nuisances. Nevertheless, important differences between the two subject-matters for control (statutory nuisances and contaminated sites) exist, and these may be sufficient to prompt reflection upon the allocation of these new powers to the district councils.

The differences may be described as follows. First, the statutory procedures may be broadly similar in form: the new was certainly modelled on the old. Nevertheless, important differences exist; and, undeniably, the new arrangements are formally very much more complex than the traditional statutory nuisance arrangements. Second, the fact, even if it were the case, of *formal* and *procedural* similarities, should not disguise the very substantial differences as regards the *substance* – the subject-matter – of what is under control. Most matters giving rise to statutory nuisances (typically, noise, smells, vermin, litter, dust) are technically relatively simple. Land contamination and site remediation is a more scientifically and technically complex matter: and all the more so in a regulatory system, such as does and will continue to exist within the United Kingdom, in which the very definition of contamination will be based on a sites's assessed potential for harm; and the degree of cleanup to be required will depend on the hazard presented by anticipated future uses of the land. Furthermore, a substantial difference may be highlighted as between ordinary statutory nuisance and contaminated site remediation in terms of the implications in terms of the sheer financial magnitude of decisions to be reached. Although statutory nuisance procedures are in some cases hotly contested by those to whom they are directed, such careful scrutiny of the local authority's decision (and associated procedures) is likely to be the standard approach of those in respect of whom the contaminated land "liability" provisions may apply. In the initial stage where the onus, as explained earlier, is upon seeking to achieve a volunteered acceptable cleanup, there would seem to be a danger of there being a scientific and technical imbalance between government and the governed. Some district councils will possess appropriate expertise to engage in such discussions on equal terms. However, it would seem foolish to assume that all, or even maybe most, of the several hundred district councils will be so equipped in terms of skilled and experienced personnel. When we move,

having failed to have secured agreement to an acceptable voluntary programme of cleanup, to the imposition by the district council (or Environment Agency) of the statutory remediation obligations it may fairly be assumed that those who may be likely to be subjected to what may be very costly remediation obligations will call upon their lawyers to subject the actions and the decisions of the local authority to the closest possible scrutiny. There will be every incentive to mount all possible challenges, by way of appeal or judicial review: to seek to alter or have set aside the obligations imposed. Even where prospects of ultimate success may seem slim, the possibility of securing some delay as regards the onset of the obligations may itself possess financial advantage.

DETERMINATION OF ENVIRONMENTAL POLICY – THE ROLE OF ELECTED POLITICIANS

Put very simply, the issues for discussion here may be described in the form of two basic questions. First, how far should the determination of environmental policy be regarded as a matter within the competence of elected politicians? Second, if there may be doubts about elected politicians being afforded such competence, what scope may there be for de-politicising decision-making on matters of environmental policy?

It may seem to the reader to be strange to be asking these questions. In a democratic State it might be thought that, of course, questions of fundamental environmental policy should be a matter for the elected politicians of the day. Such questions involve the balancing of environmental and other considerations, and may be regarded by elected Government as very much a part of its governing "brief": as very much a matter upon which it should possess powers of decision and action, and upon which it should submit itself, in due course, to further electoral judgment.

In short it may be argued that environmental policy is simply one aspect of the broad range of politicial matters which we should, as good democrats, entrust to elected government. This is not, it should be emphasised, to suggest that the elected politicians should not be properly scrutinised, by political and legal processes, as regards the manner in which they exercise this branch of the powers entrusted to them. As with other spheres of governmental policy formulation and execution it is important in a democracy for there to be ongoing political and public debate about options available and the strengths and weaknesses of governmental proposals. When we say that the determination of environmental policy should be a matter for elected politicians we should perhaps describe this process as one in which politicians are permitted to determine policy as they feel electorally appropriate in the light of the public debate and general publicity attendant upon the decisions which they may reach. To this extent it is important that there should be those who will speak up in such discussion and debate for "the environment", so that in reaching final political decisions its voice may be

heard and weighed alongside other and broader economic and social considerations.

As indicated earlier the tradition in the United Kingdom has been and remains one of Government empowered to determine environmental policy unrestrained by constitutional limitations. Familiarity in the United Kingdom with this tradition means that questions as regards the possibilities and merits of seeking to some degree to de-politicise environmental policy decision-making are not frequently discussed. And yet in the environmental context there may be particularly strong arguments for seeking to limit the competence of the present-day politicians. The argument would, it seems, run broadly as follows. Politicians have, quite understandably, principal concern with matters of the short-term. Maybe statesmen look further to the future; but the statesman who has too little eye to the present and immediate future may stay in government for too short a period of time to achieve much that is worthwhile. Politicians must inevitably be sensitive to the mood of their electorates and electorates tend to vote on the basis of immediate rather than medium, let alone long term, benefits which a Government may have sought to provide. To move to the familiar language of environmental policy, it is now (it seems) axiomatic that good environmental policy should reflect the requirements of inter-generational equity: that each generation should bestow to the next the same measure of environmental capital as that with which it was itself blessed.The difficulty faced by even the most environmentally enlightened politicians is that it is this generation and not future generation which will form the judge and jury of the electorate when next the democratic judgment of the voters is sought.

For the moment, then, let us accept that there may be good arguments for seeking to some degree to take the matter of environmental policy determination away from the relatively short-term concentration of elected politicians. At once, however, readers may wonder what practical value there may be in such argumentation. It is, it might be argued, rather unlikely that the present incumbents will be persuaded to divest themselves of such powers. To make any such plea to government might be thought to be so much a waste of breath.

Such a view, it is suggested may be unduly pessimistic. There would seem to be some reason to think that some degree of de-politicisation of environmental decision-making may be by no means an impossibility. Two facets of recent United Kingdom experience may be described briefly in order to seek to support this broad contention.

The first aspect of recent United Kingdom political experience which deserves mention is quite unrelated to the environmental context. It is mentioned simply as a recent example of Government making a choice, for medium and longer term benefit, to remove a matter from its own broad portfolio of governmental powers. For this example we need to focus on the instruments by which the United Kingdom Government has traditionally sought to secure direction of the economy. Unlike the many countries with a truly independent central bank the

Government of the United Kingdom has reserved to itself the power to moderate central bank interest rates as a lever of Governmental economic policy. Such power has been wielded by Government finance ministers as one of their various weapons by which to direct the economy. The difference between a system where central bank interest rates are set by that bank on the basis of exclusively economic criteria, and the British system where the rates have been changed on the basis of politico-economic judgment by the responsible Government politician raises very similar questions to the ones with which we have been concerned in previous paragraphs. Is this power a proper one for the Government of the day, and for which it should be electorally accountable; or is the inevitable preoccupation of Government with the short-term a reason for conferring this power upon an independent group of persons who may be trusted to take decisions on the basis, exclusively or predominantly, of longer term economic considerations? In most developed countries it seems that it is the latter view which has come to prevail. The purpose here of referring to this example of Governmental competence outside the environmental context is two-fold. To draw attention to a situation which may be valuable for consideration in terms of the drawing of analogies. But, perhaps more significantly, to report that one of the first acts of the Blair Government on coming to office in May 1997 was for the finance minister to relinquish this particular power over central bank interest rates. Since that time in the United Kingdom such interest rates are changed or left alone as a consequence of monthly deliberations on the part of a committee of independent advisers to the central bank. To those who might have ruled out any prospect of Government voluntarily giving up any one of its broad panoply of powers this may be offer a degree of hope.

The second aspect of United Kingdom experience to be reported here may be introduced as follows. When it is argued that the powers of Government in respect of some aspect of environmental decision-making should be curtailed it is not necessary for the argument to be taken so far as to seek the removal of all such decision-making power from Government. A compromise position may be possible, and indeed may be desirable. An exemple of such compromise is where a power of initial decision is afforded to some decision-maker whose decision can be informed by longer-term considerations than might be likely to weigh with most prominence in the mind of Government. Following such initial – independent – decision there may exist a power in Government to modify or even reverse that decision if in the broad political judgement of the Government a different decision, policy or course of action is necessary. This kind of compromise preserves the ultimate power of decision in Government: something which Government may quite understandably be reluctant too readily to relinquish. At the same time there may be attractions to Government that the function of initial decision-making is afforded to some other body. In terms of an electorally controversial decision or policy it may well serve the interests of a Government to be able to point to the fact that the decision or policy was that

of an expert and independent body (with whose decision it feels it is inappropriate to interfere) rather than for the Government to elect to take full and sole political and electoral responsibility for that decision.

The establishment in 1996 of the United Kingdom's Environment Agency provides a good example of a compromise of this kind. The Environment Act 1995 contains a number of sections which establish the guiding environmental (and other) principles which should influence and inform the Agency in the exercise of its numerous statutory functions. The Act also requires that the Agency develops a range of broad directing policies of its own. These take effect upon central government approval. It is within this framework of principles and guidelines that the Agency is required to exercise its functions. As such the Agency cannot be considered a fully autonomous agency. It acts in accordance with a general mission stated in Act under which it was established, and the principles and policies which it develops are generally subject to some form of Governmental approval. Nevertheless, this arrangement is very different from one in which the various functions which the Agency performs are exercised by mere divisions of a central Ministry, and under close and full political scrutinising and direction. Another reason why the Agency cannot be described as an autonomous body is that it is typical of the 1995 Act (as indeed it is a very typical arrangement generally within British government) for decision taken by the Agency to be subject to a right of appeal to the central Ministry. Again, the comment may be offered that this arrangement may secure a degree of de-politicisation of environmental decision-making, and may allow Government to pursue what may be controversial policies under the guise of simply not overturning the decisions of the specialist and expert organisation.

WHICH POLITICIANS? - NATIONAL UNIFORMITY VERSUS LOCAL DIVERGENCE - PUBLIC INVOLVEMENT IN DECISION-MAKING.

We may begin, as before, by raising some important questions. So, we may ask, first: if ultimately we are to leave environmental decisions of various kinds to politicians, do we mean by "politicians" those who have been elected to national government or do we mean, rather, those who have been elected to state or local government? Of course, this is simply a manifestation in the environmental context of a much broader debate or discussion about the optimum allocation of governmental functions between the national and the more local political level. Moreover, the matter is more complex than the initial statement of the question would suggest. For exemple, the discussion above will have drawn attention to the fact that functions which are in the United Kingdom devolved to local government may be devolved to one or other of two broad levels of local authority: to the several hundred district councils, or to the rather less numerous county councils.

A second group of questions relate to the competence to be afforded to "the public" in terms of environmental decision-making. What voice should the people be given in the arrangements prescribed by which competent bodies reach environmental decision? And who, it must be asked, do we mean by "the people", whose voices we may think should inform, to some degree, any decision eventually reached? Do we mean the people most locally affected by the decision; or do we mean people nationally who may have strong feelings on the issues in question; or do we mean the public generally (many of whom may regard many considerations of a political, economic and social nature to be rather more important than the specifically environmental factors relevant to the decision to be taken)?

The significance of these factors, and also ones earlier considered, may be illustrated by reference to a simple example. Suppose that in an economically poor region an old industrial plant is having difficulty meeting ever-tightening environmental permit standards. Let us assume that the plant is causing certain kinds of harm to the local environmental and causes a degreee of personal discomfort to affluent residents down-wind some miles away. The factory is, however, the main employer of labour in its immediate vicinity. Those employees and the most immediate local community are strongly opposed to the imposition of permit standards which are likely to lead to the closure of the factory. A further element of complication may be added if we suggest that the factory is the country's sole producer of a product in respect of which there is a strategic national importance in maintaining some degree of domestic production.

It will be evident from this example that the decision ultimately reached may depend on whether final decision-making authority is afforded to an independent environmental agency, to the most local level of local government, to a higher level of local government (with a wider geographical constituency), or to the national government. If it is felt that public opinion is important it may be significant whether those whose opinions are consulted are the most local residents, residents living a little more distantly, or the wider national population. From each of these various perspectives the various relevant considerations to a rational decision may be judged with different weightings, leading to a variety of different final decisions.

How best can be summarised the United Kingdom's approach to these matters? The discussion of the Environment Agency in the previous section provides one clue. Much environmental decision-making has been conferred upon this Agency, which possesses, as described earlier, some degree of policy development and operational independence. To the extent that functions have been afforded to the Agency the issue of the appropriate tier of local government does not come into play. Nevertheless, issues remain as regards the extent to which public opinion – whatever that may mean – may inform Agency decisions. The conclusion here may be that the Agency operates somewhat below the gaze of local and national interest groups seeking to represent the public voice.

It is important, however, not to think of the Environment Agency as having taken over all environmental functions. This is far from being the case. Although many environmental functions have been conferred upon the Agency (in the contexts of waste, water and air) there remain a substantial number and variety of environmental functions vested in local authorities: as the discussion above of the provisions of the Environment Act 1995 on contaminated land will have partially demonstrated. Indeed, if we regard environmental decision-making quite broadly so as to include decisions as regards land-use planning the role of local authorities becomes very significant. Moreover, to include land-use planning decision-making in this discussion would seem to be important. It is, after all, the environmental permitting context which gives rise to the most controversy between the various interested parties: local residents, the broader public, local government, national government, the environmental lobby, and other lobbyists.

Land use planning decision-making in the United Kingdom provides a good illustration of a balance being struck between the various considerations under review in this section – and a balance which has been struck in a way which is generally considered to operate broadly satisfactorily. To present a full picture of planning decision-making in just a few words is not possible. However, a general outline may be presented which, at the expense of some accuracy, may present the more significant features.

The starting-point is to stress that in the United Kingdom decisions as regard land-use permits („planning permissions") are fundamentally political decisions. The United Kingdom does not operate a system based upon zoning, under which legal entitlements may follow from the fact that a piece of land may fall within a particular kind of zone. Certainly, there is a process, which takes up much time and effort in local (and in central) government, whereby plans are developed which seek to produce an appropriate strategy indicating the permissible and impermissible development of areas of land (the production of "Development Plans"). Moreover such development plans have in recent years been afforded a degree of presumptive force when it comes to particular applications for planning permission. Nevertheless, although ordinarily planning decisions should be reached in accordance with the development plan (where this provides clear guidance) the development plan is not prescriptive and a planning authority (usually the district council), or on appeal the minister, may consider there are good reasons for a departure from development expectations which the development plan may have afforded.

Although development plans are somewhat different in legal effect from the zoning systems to be found in other countries, they are nevertheless fundamentally important documents. Their production is somewhat tortuous, involving input from district councils, county councils, and central government as well as the public. They are produced in the light of a substantial quantity of general quidance produced by the central ministry (for example, to ensure national needs are met, and that there is an element of consistency within particular broad

regions); and the plans produced by local government must ultimately be in form acceptable to the central ministry. In this, as so often in British public administration, the apparent independence of local government is somewhat misleading: one should always be aware that that independence is exercised in the looming presence of the central ministry (whose influence may be exerted, as the case may be, in a right to examine and disapprove a course of local authority action, or in the course of appeals to the ministry from local decisions).

Decisions on individual planning applications are generally taken by district councils. There are important provisions about public notification of applications for permission, provisions which may allow objectors to make the nature of their objections known prior to the local authority coming to its decision. If a developer is refused planning permission (or if permission is granted subject to conditions with which he or she is unhappy) and appeal lies to the ministry. This brings into operation a procedure by which an official convenes a local public inquiry into the planning application. The developer, the planning authority and those who lodged objections to the applications will here have an opportunity to present their cases and also to seek to undermine those of their opponents. Following this local public inquiry the inspector will either make a recommendation to the central ministry or, as is very commonly the case, will himself or herself have authority to reach a final decision on the appeal. In addition to such appellate rights within the public administration, there exist also right of appeal on points of law to the courts. Added to this there exist certain opportunities by way of judicial review to seek to impugn the "legality" of planning decisions or appeal procedures.

CONCLUSIONS

It is hoped that thus essay may have gone some way to achieving two reasonably modest aims. First, to have persuaded readers of the importance of the subject under discussion and stimulated some interest in its various ramifications. Second, to have drawn attention to what may be thought to be the principal features of the arrangements which exist within the United Kingdom. If the chapter should prompt others to attempt a more elaborate and sophisticated treatment of the subject-matter its essential purposes will have been achieved.

DĚLBA PŮSOBNOSTÍ V OCHRANĚ ŽIVOTNÍHO PROSTŘEDÍ: OBECNÉ ZAMYŠLENÍ A ZKUŠENOSTI ZE SPOJENÉHO KRÁLOVSTVÍ

Resumé

Příspěvek se zabývá otázkou dělby kompetencí v ochraně životního prostředí mezi jednotlivými státními orgány. Vychází z předpokladu, že sebedokonalejší hmotněprávní a procesní úprava není dostatečnou zárukou pro ochranu životního prostředí, nejsou-li racionálně distribuovány environmentální kompetence státu. Nutnost jejich rozdělení je dána jednak rozsahem environmentálních funkcí státu, mezi které lze zahrnout tvorbu environmentální politiky, legislativní činnost, čin-

nost regulační a kontrolní. Rovněž rozsah regulovaných činností v rámci ochrany životního prostředí je velmi široký a zahrnuje činnosti velmi odlišné povahy.

Hlavním tématem příspěvku je diskuse o povaze a významu nejdůležitějších faktorů, které mohou mít vliv a je nutné je brát při rozhodování o dělbě kompetencí v úvahu. Mezi tyto základní faktory řadíme ústavou zaručená a daná pravidla pro dělbu environmentálních kompetencí, potřebu zajistit implementaci vědeckých poznatků a zaručit jejich znalost příslušnými státními orgány, úlohu volených zástupců při formování a prosazování ekologické politiky, úlohu a postavení veřejnosti při tvorbě a prosazování environmentální politiky a v neposlední řadě otázku, zda ochrana životního prostředí by měla být realizována jednotně na centrální úrovni nebo ponechána na místní či regionální úrovni, respektive v jakém rozsahu se jednotlivé úrovně mají na její realizaci podílet.

Klíčová slova: dělba kompetencí, ochrana životního prostředí, základní faktory, environmentální funkce státu.