MNCs and Environmental Hazards: Indian Context
“Economists see a world economy that has grown by leaps and bounds over the last half – century but ecologist see growth based on the burning of vast quantities of cheap fossil fuels which is destabilizing the climate” Lester – R Brown

Multinational Corporation (MNCs) has their origin in industrial societies governed by democratic and decentralized institutions. They constitute a major source of Environmental Pollution not only in developing countries but also in developed countries. Recently, in India, itself, it is very common to just dispose of the waste by-products of industry (include MNCs) without a thought for the detrimental impact on our environment. It causes (1) health problem - by affecting human health and lives, (2) economic problems - by affecting (the value of) human property and materials” (3) ecological problems - by disturbing a balanced ecosystem, interfering with the conservation of natural resources and threatening the mere existence of some species; and (4) aesthetic problems - by generally affecting human senses. One just has to think back to the Bhopal tragedy to realize how dangerous such lapses can be caused by industries particularly, Multinational Corporation (MNCs). Indeed, the Bhopal disaster and its aftermath threw challenge to the Indian legal system.

Soon after the passage of the Industrial Policy Resolution of 1948 by the Indian Parliament, MNCs were permitted to operates in India. Certain rules and regulations were framed to treat both the indigenous and the foreign business at par. MNCs were allowed to operate within defined premises. However, through their various methods of operations, they posed a formidable challenge to India’s basic problems. Globalization has its dark side - eg., Multinational Corporations (MNCs) committing large - scale environmental torts on foreign soil through their

* President , The Worldwatch Institute
1 Eric Gabus Multinational Companies, the External Relation in Gerard Curzon and Victoria Curzon The Multinational Enterprises in a Hostile World 1977at p. 132.
3 Krishnan Kannan Fundamentals of Environmental Pollution, 1995at p. 2.
4 Madhumita Dhar Sarkar Contribution of Indian Judiciary Towards the Development of Environmental Jurisprudence AIR 2005 at p. 301.
subsidiary operations. Some government policies also have been disastrous for the environment. Victims in developing countries have few means of redressing these torts. To better understand this issue, we would do well to understand the essentials of Environmental Law and its impact on defaulters. Most countries including India have anti-pollution legislation.

The Department of Environment, established by the Central Government is a controlling agency for all the environmental issues in India. It has already sponsored innumerable projects on different aspects of environment, studying various problems and suggesting appropriate measures to rectify the deficiencies. Full attention has to be paid for maintaining the environmental qualities. The impact of industrial activity and reaction of other economic activities including social activities towards industrial development have to be studied interdependently to avoid the environmental catastrophe.

According to the Preamble of the Constitution, India is a welfare state and being a developing country, economic progress is essential at the same time, care has to be taken of the environment. The protection of the environment is an absolute necessity. There is no doubt whatsoever that we cannot pollute or deplete the finite resources of the earth. Concerted attempts are being made to conserve these resources. How much more odious, then, is the crime of pollution of these fast-depleting resources? Hence, Development of a sound legal mechanism is a sin qua-non to protect our environment. Effective environmental protection and improvement is a matter of legal rights and duties.

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6 Robert W. Hahn *Toward a New Environmental Paradigm* 012 YALE L.J. 1756 (1993).
10 Justice B.N. Kirpal *M.C. Bhandari Memorial Lecture, Environmental Justice in India* (2002) 7SCC at p.6
11 The categories of pollution. The first two, “pollution as any alteration of the existing environment” and “Pollution as the right of the territorial sovereign.” The other three, “Pollution as damage”, “pollution as interference with other uses of the environment,” and “Pollution as exceeding the assimilative capacity of the environment”.
In fact, India like other countries of the world enacted many direct as well as indirect legislations as a means of control of environmental pollution. In India, bolstered by recent legislative, administrative and judicial initiatives environmental regulation bristles with new and interesting features. Until the mid-eighties regulating system was relatively dull. Some of the provisions of the different Acts, and Specific Legislations for controlling the environmental pollution are prevalent in India. These provisions and specific legislations also apply to the environmental activities of the Multinational Corporations (MNCs).

4.1 LAW ON MNCs AND ITS OPERATIONS

In common parlance, “Company” means an association of persons formed for some common object or objects such as the economic gain of its members. In the terms of the Indian Companies Act, 2013 “Company means a company formed and registered under the Companies Act or under any previous Company Law. Previous Company Law means any of the Law specified under section 2(67) of Companies Act, 2013. The companies Act is also not exhaustive of the hole of Company Law. It only amends and consolidates certain portions of Company Law. The Multinational Corporations (MNCs) in India, mainly in two ways:

1. Through the establishment of a place of business according to the Indian Companies Act, 2013; and
2. Through an Indian subsidiary.

4.2 LEGAL REGULATION OF MNCs

Due to emergence of Multinational Companies (MNCs) as a very important entity at the International stage, a number of legal issues have come up, with which the International agencies as well as National institutions of almost all countries have been grappling for some time. However, the national regulations of

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14 Supra Note 12.
17 No. 1 of 1956 or under any of the preceding Acts.
18 Section 2(20) or under any previous law of Companies Act, 2013.
19 According to Section 379 of the Indian Companies Act, 2013.
20 According to Section 2(87) of the Indian Companies Act, 2013.
Multinational Corporations in India broadly classified under the following three heads:-\(^21\)

1. **Regulation of Multinational Corporations through Company Law:**

   The Companies Act, 2013 which is the prevailing Law of Companies in this country. This Act, 2013, has replaced the Companies Act, 1956. The Act has 470 Sections and 7 Schedules. Under this Act Sections from 379 to 392 deals about foreign Companies. “Companies incorporated outside India”, that is foreign Companies as defined in Section 379. For the purpose of Section 379, it means a Company which, though incorporated outside India, has a plays of business in India, whether by itself or through an agent, physically or through electronic mode, and conducts any business activity in India in any other manner\(^22\).

2. **Regulation of Multinational Corporations through Taxation Law:**

   In the Indian Income Tax Act, 1961\(^23\) a “Foreign Company” has been defined under Section 8-B-A Company which is not a domestic company, or a domestic company has been defined as an Indian company or any other company which in respect of its income is liable to tax under the Income Tax Act and has made the prescribed arrangements for the declaration and payment within India of the dividends payable out of such income.

   The important change that the Finance Act, 1976 introduced into the law regarding taxation of Multinational Corporation in India, was effected by the insertion of two sections, namely Sections 44-C and 44-D of Income Tax Act, 1961. Sections 57 and 58 (3) were also inserted by the Finance Act, 1976 with effect from 1\(^{st}\) June, 1976. They disallow or limit in the case of foreign companies expenditure, which is otherwise deductible as being wholly for the purpose of business or of earning income.\(^24\) In India, Sections 92 and 93 of the Income Tax Act, 1961 deals with the practices of Multinational Corporations in regard to transfer pricing.

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21 Ibid
22 According to Section 2 (42) of the Companies Act, 2013.
23 Act No. 43 of 1961.
24 The basic changes introduced by the Finance Act, 1976 is regarding Multinational Corporations as introduced by Section 115-A into the Income Tax Act, 1961.
3. **Regulation of Multinational Corporations through foreign Exchange Regulation Act, 1973.**

Among the many provisions of the FERA, 1973 which attempted at regulating Multinational Corporations the more notable one are sections 26, 27, 28 and 29.

- Section 27 deals with restrictions on persons resident in India associating themselves with or participating in concerns outside India.
- Section 28 deals with restrictions on the appointment of certain persons and companies as agents or Technical or Management advisers in India.
- Section 29 deals with restriction on establishment of place of business in India.\(^{25}\)

4. **Other Relevant Regulating Provisions.**

**Customs Law:** Under the Customs Law of India a countervailing duty imposed on all imported goods if goods of like kind and quality are manufactured and subject to excise duty. This can be imposed on Multinational Corporations activities.\(^{26}\)

**Corporate Tax:** Corporate Taxation in India all companies whether Indian or Foreign share to pay corporate tax on the profit arrived at in accordance with the provisions of the Income Tax Act, 1961 and are further subject to a company profit Sur-tax under the company Profits. (Sur – Tax) Act 1964.

4.3 **CONSTITUTION OF INDIA**

India is one of the few countries of the world that have made specific reference in the Constitution to the need for environmental protection and improvement within five years from 1972 U.N. Conference on Human

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\(^{25}\) Section 29 gives very wide powers to the Reserve Bank of India in regard o regulation of MNCs, further the elaborate guidelines have been framed by the Government of India for administering section 29 of the FERA, 1973. These guidelines will apply to Indian companies having more than 40% foreign holding and branches of foreign companies operating in India while seeking approval for carrying on any activity of a trading commercial or industrial nature or for starting fresh activities. Branch of foreign companies seeking approval under the FERA will be asked to convert themselves into Indian Companies as per policy of Government.

\(^{26}\) Supra Note. 22 at p. 53.
Environment at Stockholm, the Constitution of India was amended among other things to include protection of the Environment as a Constitutional mandate. 27

Originally, the term environment does not find place as a subject on the Union, State or Concurrent List on the 7th Schedule of the Constitution of India. 28 Strictly speaking no constitution deals with a matter of such as environmental protection. Because, basically any constitution contains only the rules of law in relation to the power structure, allocation, and manner of exercise. Besides, Indian Constitution is already a bulky document and brevity is the character of an ideal Constitution. Hence from the point of view of the principles of the constitutional law as well as, the length of the Constitution it was impossible to have any such provision safeguarding the healthy environment. Therefore till the subsequent amendments the constitutional text of India was without any specific provision for the protection and promotion of the environment. However, some indirect provisions have been found under Articles 39, 42, 47, 48 and 49 of the constitution of India empower the Parliament of India and State legislatures for providing terms for environmental protection. 29

The Constitution (forty Second Amendment) Act 1976 explicitly incorporated environmental protection and improvement as part of state policy. The Forty - Second Amendment to the Constitution, enacted in 1978 after environmental consciousness got momentum at the global level, tailored certain significant concepts into the fundamental law of the country. 30 The obligation to improve the environment and to safeguard the forest and wildlife has been imposed on the State by laying down the same in the chapter on Directive Principles which the State has to observe in its policy making and action programmes. 31

29 Krushna Chandra Jena *Environmental Pollution and its Legal Control in India* AIR 2000 at p. 181.  
30 To comply with the principles of the Stockholm Declarations adopted by the International Conference on Human Environment in 1972, the Government of India, by the Constitution 42nd Amendment Act, 1976 made the express provision for the protection and promotion of the environment, by the introduction of Articles 48-A and 51-A (g) which form the part of Directive Principles of State Policy and the Fundamental Duties respectively.  
31 Constitution of India, Article 48A.
In Charan Lal Sahu v. Union of India, Justice K.N. Singh made valuable observations. He observed that in context of India’s national dimensions of human right, right to life, liberty, pollution free air and water is guaranteed by the Constitution under Articles 21, 48 and 51 (g) and therefore it is the duty of the State to take effective step to protect the guaranteed Constitutional rights. These rights must be integrated and illuminated by the evolving international dimensions and standards, having regard to India’s sovereignty, as highlighted by clause 9 and is of the U.N Code of Conduct of Transnational Corporations (TNCs).

A fundamental duty was imposed on every citizen for improving and protecting environment. In protecting the natural environment Articles 48-A and 51 (g) are of immense importance today. However, these Articles under the Directive Principle of State Policy under the Constitution of India cannot be enforced by any Court of Law. But these articles have become very handy to be quoted in many Public Interest Litigations (PILs) and Court orders.

Parallel to the generation of these ideas from the provisions of the forty – second amendment relating to environment, there was a tide of judicial activism extending to new dimensions, concepts, ‘the right to life’ and procedure established by law’ in Article 21. The judicial enthusiasm went to the extent of finding out the right to a clean environment in the right to life in Article 21. Thus the absence of a specific provision in the constitution recognizing the fundamental right to environment has also been set off by judicial innovation. In Chheriya Pardushan Mukti Sangharsh Samiti v. state of U.P. the Supreme Court has again affirmed that every citizen has a fundamental right to have the enjoyment of quality of life and living as contemplated by Article 21 Constitution of India. Anything which endangers or impairs, by conduct of anybody either in violation or in derogation of laws, that quality of life and living is entitled to be taken

32 AIR 1990 SC 1480
33 Constitution of India. Article 51A (g). The provision says that it shall be the duty of every citizen of India “to protect and improve the natural environment including forest, lakes, rivers and wildlife and to have compassion for living creatures”.
34 Supra Note 52.
35 Constitution of India, Article 21. Protection of life and personal liberty – No person shall be deprived of his life or personal liberty except according to procedure established by law.
recourse of Article 32 of the Constitution. 37 However, here, the violated party must be state as provided under Article 12 of the Constitution of India. Private companies are not treating as State, so majority of the environmentally polluting MNCs are escaping.

Now, a good environment is a Constitutional right of the Indian Citizen. Environmental Protection has been given the Constitutional Status. Directive Principles of State Policy states that, it is the duty of the state to ‘protect and improve the environment and to safeguard the forests and wildlife of the country’. It imposes fundamental duty on every citizen to ‘protect and improve the natural environment including forests, lakes rivers and wildlife’.

Despite these Constitutional provisions, pollution continues unabated. Industrial pollution cannot be separated from this problem. In this regard Multinational Corporations (MNCs) also having a dominant share in the environmental pollution. Now the question is the provisions of the Constitution of India which are applicable to public companies in India for environmental protection is allocable to Multinational Corporations (MNCs) or not? With this aim, the following paras discussing constitutional provisions like fundamental rights, Directive Principles and other areas of the Constitution of India and their interpretation of the Indian Apex Courts are dealt with.

The fundamental rights defined under Articles 12-35 of the Constitution of India which are guaranteed against state action. 38 The State cannot make any law which takes away or abridges any of the rights guaranteed in the Part III of the Constitution. If it passes such a law it may be declared unconstitutional by the courts. In case of violation of such rights by private person, the person aggrieved must seek his remedies under the general law. But where the claim of a private person is support by a State act, executive or legislative the person aggrieved may challenge to constitutionality of the state act which support the private claim. 39

It is interesting to examine the relationship between fundamental rights and a company. As per the part III (Articles 12-35) of the Constitution of India

37 (1990) 4 SCC 452.
certain fundamental rights conferred on “persons” and certain on “citizens”. So, Company as a legal person\textsuperscript{40} will have certain fundamental rights against the state\textsuperscript{41} and company as a State \textsuperscript{42} should not violate the fundamental rights of others.

If a company is victim of state action / state law it can avail of a constitutional remedy of a fundamental rights in India. Sometimes fundamental rights can be enforced against a company which is an instrumentality of State as defined under Article 12 of the constitution of India. \textsuperscript{43}\textsuperscript{4} Here the term “others” may include any person or persons or citizens. E.g. employees, consumers, dealers or distributors, contractors, and in many other diverse capacities.

As per the definition of Article 12 of the Constitution, the State includes not only the Legislative and Executive wings of the Central and State Governments but also all local or other authorities within the territory of India or under the control of the Government of India. The Supreme Court by its innovative interpretation of number of cases has given a comprehensive meaning to the term. “Other Authority” and has held that it included Corporations, companies which functioned as mere surrogates of the government even though in law they might have a separate and independent existence. The logic applied has been that the directive principles visualized a welfare state with increased and manifold functions and the state could perform these additional functions either departmentally or by creating independent entities and the government could not be allowed to violate the fundamental rights of the people by merely transferring its functions to other bodies. These other bodies were merely agencies or instrumentalities of the government and as such they were subject to the

\textsuperscript{40} Salmon v. Salmon & Company (1897) AC 22.
\textsuperscript{41} Chiranjital Chowdury v. union of India, AIR 1951 SC 41; See AIR 1963 SC 1811; AIR 1968 Cal. 1.
\textsuperscript{43} Article 12 reads: In this part, unless the context otherwise requires, ‘the State’ includes the Government and parliament of India and the Government and the Legislature of each of the States and all local or other authorities within the territory of India or under the control of the Government of India.
fundamental rights of the other people to the same extent and in the same manner as the Government. 44

Now the question is whether “all companies in India” particularly MNCs / TNCs can be termed as instrumentality or agency of state? If there is violation of fundamental rights of others by the activities of MNCs / TNCs with regard to the environmental pollution. Can the victim/ aggrieved person go to the court of law for enforcement of fundamental rights against MNCs under the above stated environmental problems? The cardinal rule for the enforcement of the fundamental rights the opposite party must be “state”45 under Article 12of the Constitution of India. So, for the enforcement of fundamental rights of the others against the company (incase of MNCs), the company must be state, otherwise, they cannot enforce their fundamental rights against the company.

Classification of a private entity as a State actor deems that the entity serves as a State. 46 The private party performs State functions and thereby assumes the accompanying public obligations. Both roles subject the party to constitutional liability.47 For example, State owned companies are considered as State actors48 Whereas private corporations generally are not owned by the State nor discharge a primarily public mandate. The latter are not part of the state, and lack constitutional liability. Nonetheless, a dichotomy arises if a private company is under the “functional control” of the State49 and does an activity that is hazardous to the health and safety of the community.50 The company’s conduct has two effects. Its industrial role makes an economic contribution to the

45 Kartick Chandranand v. West Bengal Small industries Corporation Ltd., AIR 1967 Cal. 231.
47 Ibid p. 25
49 Ibid.
50 Ibid.
The creation of trade, technological and employment opportunities results in the company performing a public interest like that of a public corporation. However, the lethal nature of the industrial activity has the potential of violating human rights of individuals. Hence the company should incur the constitutional limits of the State. This argument applies to TNCs/ MNCs. MNCs may engage in commercial activity so as to act effectively as the host state. The characterization of TNCs as governmental or state actors is then implied.

The Supreme Court of India have ruled that the State action may exist where private individuals or groups performs functions governmental in nature. The Indian Supreme Court initially furthered the state action doctrine in the context of public corporations. This reasoning derives from the interpretation of Articles 12 and 21 of the Indian Constitution. It particularly relevant since it reflects the social, economic and legal policies and concerns of developing nations – which are generally the host countries of TNC subsidiaries.

The court first delineated the concept of a ‘State’ by defining “authorities” and “other authorities” under Article 12. In Rajasthan State Electricity Board Jaipur v. Mohan Lal it classified the commercial role of the State. It held that Article 12 allowed for the formation of bodies to promote the economic interest of the people since Article 298 provided the State with the right to carry on trade and business. An “authority” was a public administrative agency or company it had quasi governmental powers and was authorized as revenue producing public enterprise. “Other authorities” encompassed all Constitutional authorities on which the law conferred powers. Two main factors of authority were the power to give directions – violation of which was punishable as a criminal offence – and the power to make an issue rules or regulations. The Rajasthan State Electricity Board had the right to administer rules and regulations and to enforce compliance under the Electricity Supply Act. This was a State actor under Article 12.

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51 Ibid p.3.
52 Ibid pp. 2-3
53 Ibid p. 32
54 Ibid p. 24
56 AIR 1967 SC 1857.
In *Sukhdev Singh v. Bhagatram*\(^{57}\) the supreme court of India by 4:1 majority held that Oil and Natural Gas Commission, Life Insurance Corporation and Industrial Finance Corporation are authorities within meaning of Article 12 of the constitution and therefore they are ‘State’ because all these three statutory corporations have power to make regulations under the statute. Mathew J. in a separate but concurring judgment preferred a broader test that if the functions of the corporation are of public importance and closely related to governmental functions it should be treated as agency or instrumentality of government and hence a ‘State within the ambit of Article 12 of the Constitution. The effect of this decision was that the ‘authorities’ not created by the Constitution or by a statue could not be treated as instrumentality or agency of the state within the meaning of Article 12 of the Constitution. Thus, this was a very restrictive interpretation of the expression instrumentality or agency of the State.

The analysis acknowledges the commercial and administrative realities of public companies. However, it exempts examination of private entities like MNCs. Justice Mathew did not discuss whether private corporation are a manifestation of the State within Article 12, although private sector policies are capable or violating fundamental rights. Nonetheless, the contribution of private companies to State industry – and thereby revenues may also equate with performing governmental duties in the national interest. Similarly, TNCs that promote Foreign Direct Investment (FDI) in host states discharge a financial and governmental function subsidiary companies are formed to conduct business of public significance or business that is vital to the life of the people.

The Indian Supreme Court further examined the State action doctrine in *Ramana D. Shetty v. International Airport Authority*.\(^{58}\) It officially included public corporations as adherent to Article 12 and fundamental rights. The Supreme Court in *Ajay Hasia v. Khalid Mujib*\(^{59}\) addressed the separate entity doctrine in the context of Article 12. It confirmed that a corporation was an ‘authority’. If it was a Government agent or instrument. The test did not emphasis the genesis origin of

\(^{57}\) AIR 1975 SC 1331.
\(^{58}\) AIR 1979 SC 1628.
\(^{59}\) AIR 1981 SC 486.
the company. Therefore, a corporation could derive by statute or the Companies Act. The Court reasoned:

“It is undoubtedly true that the corporation is a distinct juristic entity with a corporate structure of its own and it carries on its functions on business principles with a certain amount of autonomy which is necessary as well as useful from the point of view of effective business management, but behind the formal ownership, which is cast in the corporate mould, the reality is very much the deeply pervasive presence of the Government. It is really the Government which acts through the instrumentality or agency of the corporation and the juristic veil of corporate personality worn for the purpose of convenience and management and administration cannot be allowed obliterate the true nature of the reality behind which is the Government.

Again this argument applies to TNCs/ MNCs that are sought by host state for investment roles. Furthermore the Court’s conclusion that even a company formed under the Companies Act may be considered as a state implies that private companies (subsidiaries) could be deemed State action and under constitutional requirements.

The court next considered if a private corporation that did ultrahazardous operations was a governmental actor. In the Oleum Gas Leak Case, it posited significant human rights policies and arguments suggesting the constitutional accountability of private entities, but did not transpose these theories into law. The court did not frame the issue as to whether private corporations were ‘authorities’ under Article 12. However, the majority’s reasoning holds grounds for a future ratio that private companies – and hence TNCs – are State creations and due to constitutional constraints.

The Supreme court did not expand Article 12 and 21 to include private actors / MNCs. Yet another sense is that the Court did extend the Constitution’s

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60 Indian Companies Act, 2013.
61 Ibid. p. 493, para 7 Emphasis added.
62 M.C Mehta v. Union India, AIR 1987 SC 965 [Hereinafter the oleum Gas Leak Case -1].
63 M.C. Mehta v. union of India AIR 1987 SC 1086 [Hereinafter the Oleum Gas leak case II or the Shriram decision.]
application of private companies for human rights duties, even if not formally declaring private corporations as State authorities. The principles and arguments concerning public sector entities in the *Oleum Gas Leak cases* currently form obiter dicta for private corporations. However, they are the legal grounds for a precedent if and when the Supreme Court takes this approach.

Some of the Multinational Corporations (MNCs) are engaged in manufacture of hazardous products. The industries engaged in manufacture of hazardous products must be consider the environmental protection in their industrial activities. Third world countries are peculiarly vulnerable to the *danse ghoulish* of MNCs, and, learning from the Bhopal carnage, let the parliament and central government, under the lead of the Supreme Court, produce a code for multinationals consistent with Articles 14, 19 and 21 of the Constitution, sensitized by the backward conditions and illiteracies of the people and the social realism of growth with justice.

In India, not only the Apex Court but also the High Court who have shown dynamism in evolving the right to environment in India. The burning example of judicial activism is *Ratlam Municipality Case*. The Court held that the State would realize that Article 47 make it a paramount principle of governance that steps are taken for the improvement of public health amongst its primary duties. And human right has to be respected regardless of budgetary provision.

Article 48A, a Directive of State Policy, provides that: “The State shall Endeavour to protect and improve the environment and safeguard the forests and wildlife of the country. Moreover, article 51A (g) imposes a similar responsibility on every citizen ‘to protect and improve the natural environment including forests, takes, rivers and wildlife, and to have compassion for living creatures …..’ Thus the Indian Constitution makes two fold provision.

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(a) On the one hand it gives directive to the State for the protection and improvement of environment.
(b) On the other hand the citizens owe a constitutional duty to protect and improve natural environment.

As a residuary subject, the union government has power to enact laws on environment. A regulatory mechanism for the prevention of environmental degradation through writ process is provided for in Constitution under Articles 32 and 226 the Supreme Court and High Court respectively possess a wide latitude to grant relief and prevent environmental damage by issuing directions, orders or writs. As now the Supreme Court has accorded judicial recognition to the right to a wholesome environment as being implicit in Article 21 of the Constitution of India.

4.4 INDIAN TORT LAW

The ordinary law of torts is judge-made law, by and large, and is complex, casuistic and fluctuates from court to court. In theory, tort law should allow an injured party to bring an action against a tortfeasor who has caused damage to the environment so that the costs of the degradation can be quantified and reflected in an award of monetary compensation. Other remedies - such as declaratory relief and injunctions - may also be available, but it is the promise of monetary compensation that offers the strongest attraction from an economist’s point of view. If the compensation is properly assessed and awarded, then the following benefits should accrue. First, the injured party is compensated directly for injury while funds can be made available for environmental remediation. Second, the

\[\text{Madhav Chandra Shah} \quad \text{Man and Environment} \quad 2001, \text{p. 232.}\]
\[\text{Validity of this argument is often simply assumed on the basis of economic theory. For a more balanced assessment in the context of actual legal institutions, See A.I. Ogus & G.M. Richardson, Economics and the Environment: A study of Private Nuisance, 36 Cambridge L.J. 284 (1977).}\]
tortfeasor is forced to make payment for the environmentally degrading activities, thereby incorporating negative externalities directly into the costs of conducting the polluting or degrading activity. Third, the award of damages should send out what are effectively price signals to deter or discourage similar polluting or degrading activities by other actors in the market. This last benefit offers the prospect of a systemic effect that should help to protect of a systemic effect that should help to protect the environment by fulfilling the same function as regulation.

The particular advantage of using tort law in an environmental case is not just that it offers to restore a welfare-maximizing economic rationality, but also that it is relies upon private parties to initiate legal action that will have a regulatory effect. Private actors may have better information about environmental damage, and be able to bring pressure to bear in cases of state failure. For this reasons, many environmental policy analysts have emphasized an enhanced role for individuals and community groups in bringing legal claims, including tort claims, precisely to make environmental management systems both more flexible and more effective. In this way, private litigators contribute to larger regulatory system, thereby producing a public good while pursuing their private aims.

This argument takes on an important significance in the transnational context since there is likely to be a state regulatory failure at both the home state and host state locations. The home state in unlikely to regulate the parent company because the environmental damage is not on its territory, even though any accrual of profits to the parent will occur on its territory. On the other hand the host state is frequently unwilling or unable to exercise effective regulation due to low administrative capacity, fear of driving away foreign investment, or collusion with the MNC. Where these conditions pertain, action by the affected community may be the only legal recourse available. Unfortunately, legal action in the local courts is often ineffective, suffering from the defects of an inadequate liability regime, procedural obstacles, or a judiciary unwilling to rule against a powerful multinational. In these circumstances a tort action in the home country may be the only effective avenue for pursuing the private actions so favored by policy-makers.
Apart from the generally unsatisfactory position of tort liability in assessing the quantum of damages in negligence cases in India, environmental damages present special problems of Multinational Corporations (MNCs). The very Bhopal tragedy, the worst ever “industrial assault” on environment in human history is in point.\(^{72}\) Compensation to the victims of Bhopal disaster raised an enigma in Indian Tort Law which had its origin in English Common Law and sustained its existence through various statutes generating semblance of tort actions. Chief Justice R.N. Mishra expressed the judicial concern in the aforesaid industrial accident as ‘Judges of this court are men and their hearts also bleed when calamities like Bhopal gas incident occur.’\(^{73}\)

In one sense the Union Carbide factory as well as the governmental authorities who allowed the factory to continue its functioning in that dangerous condition in spite of warning is blameworthy equally. Both failed in their duty to avoid damage to the neighbouring people. The neighbours are entitled to seek in court the annulment of a permit granted to the operator of the polluting plant on the ground that the plant causes unlawful air pollution or molestation by noise.\(^{74}\) But the legal gymnastics that followed only allowed the real culprits to escape from criminal liability and avoid civil consequences by prolonging the litigation in Bhopal Case. An inadequacy of the legal system is ironically pleaded by the Government itself.\(^{75}\) In the absence of effective civil remedy on the basis of definite standard of tortuous liability, criminal liability assumes more significance.\(^{76}\)

### 4.5 INDIAN CRIMINAL LAW

In Chinese history of using the criminal law to protect the environment began at least 3000 years ago, when the Yin dynasty (circa 1800 to 1200 BC) made a law declaring that “anyone who litters on public thoroughfares shall have

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\(^{72}\) G.Sadasivan Nair *Environmental Offences – Crimes Against Humanity and the Environment* [1987] CULR 1 p. 66.

\(^{73}\) Supra Note 4.


\(^{75}\) P. Leela Krishnan *Law and Environment* at pp. 185-186.

\(^{76}\) Ibid p. 186.
his hand cut off”\textsuperscript{77} In the modern business world, companies both national and Multinational Corporations (MNCs) are criminally liable for the environmental pollution caused by them. One of the main objects of the corporate criminal liability is to ensure that companies improve their work practices. If no individual who has committed a crime can be identified and no mechanism for corporate prosecution was to exist, the harmful practices would continue unabated. Companies should be prosecuted and convicted for the same general rules for the construction of criminal liability.

In fact, companies faced with prosecution by governments for breaches of regulations have often admitted responsibility and received nominal punishment. In many cases, these settlements are private and unrecorded.\textsuperscript{78} The law should recognize and give effect to the widely held public perceptions that companies have an existence of their own and can commit crimes as entities distinct from the personnel comprising the company. Perception of companies, particularly when accompanied by media attention, can commit crimes as entities distinct from the personal comprising the company. Prosecution of companies, particularly when accompanied by media attention, can provide a significant impetus to companies to improve their practices or can prompt law reform to improve safety standards.

The doctrinal roots of modern environmental law could be based on the law of nuisance: nuisance actions could challenge every major industrial and municipal activity which is today a subject of comprehensive environmental legislation.\textsuperscript{79} The law of nuisance can be divided into public nuisance and private nuisance, which could encompass most environmental issues, falls mainly in the purview of the criminal law.

In India the offence of public nuisance is contained in Chapter XIV of the Indian Penal Code of 1860.\textsuperscript{80} Specific provisions prescribing punishment for

\begin{itemize}
\item\textsuperscript{79} William H. Rodgers, Jr. \textit{Handbook of Environmental Law} (1977) p.100.
\item\textsuperscript{80} Act No. XLV of 1860.
\end{itemize}
fouling water and air are contained in sections 277 and 278. These Provisions also applies to the Multinational corporations (MNCs) along with the local industries in India. The supreme Court of India in *Ratlam case* clarifies that public nuisance, because of pollution being discharged by big factories to the detriment of the poor sections, is a challenge to the social justice component of rule of law.

A class action against public nuisance can be brought under Section 91 of the Code of Civil Procedure and Section 133 of the Code of Criminal Procedure. An inquisitive researcher may perhaps be disappointed when he sets out to inquire how for an environmental problem had been directly dealt with under the former provision. The latter provision was also not frequently used for environmental matters in early stages. But of late courts found Section 133 of the Code of Criminal Procedure as a useful weapon for the protection of environment.

Under Section 133 of the Code of Criminal Procedure an Executive Magistrate can be approached for orders for removal of public nuisance. Such nuisance may be caused by pollution arising from substances like domestic, urban

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81 S. 277 of the Indian Penal Code 1860 reads as follows: “whoever voluntarily corrupts or fouls the water of any public spring or reservoir, so as to render it less fit for the purpose for which it is ordinarily used, shall be punished with imprisonment of either description for a term which may extend to three months, or with a fine which may extend to 500/- Rupees or with both.” Section 278 is as follows: “Whoever voluntarily vitiates the atmosphere in any place so as to make it nonxious to the health of persons in general dwelling or carrying on business in the neighborhood or passing along a public way, shall be punished with fine which may extent to 500/- Rupees”.

82 *Ratlam Municipality v Vardhi Chand* AIR 1980 SC 1622.

83 The relevant portion of section reads: “In the case of public nuisance of other wrongful act affecting or likely to affect the public, a suit for declaration and injunction or for such other relief as may be appropriate in the circumstance of the case, may be instituted (a) by the Advocate General or (b) with the leave of the court, by two or more persons, even though no special damage has been caused to such persons by reason of such nuisance or other wrongful act”.

84 Section 133 of the Code empowers the District Magistrate or Sub-Divisional Magistrate or other Executive Magistrate, specially empowered in this behalf, to make order for the removal of nuisance on receiving the report of a police-officer or other information and on taking such evidences as he think fit. If he considers among other things – (a) that any unlawful obstruction or nuisance should be removed from any public place or from any way, river or channel which is or may be lawfully used by the public, or (b) that the conduct of any trade or occupation, or the keeping of any goods or merchandise, is injurious to the health or regulated or such goods or merchandise should be removed or the keeping thereof regulated such Magistrate may make a conditional order to remove such nuisance or obstruction or to desist from carrying on, or to remove or regulate, in such manner as may be directed, such trade or obstruction.
or industrial waste or even by an instrument, device or installation like a plant in a factory. The provision remained unused for a long time for removing nuisance arising from environmental pollution. Of late the Supreme Court revitalized this provision. The public duty of the Magistrate to come to the rescue of citizens in such cases was emphasized. *Gobind Singh v. Shanti Sarup*[^85] is a notable instance. The complaint was against public nuisance created by an oven and a chimney constructed for the business of the respondent as a baker. The Magistrate made a conditional order for demolition of the oven and the chimney within a period of ten days and asked the respondent to show cause why the order should not be confirmed. After revision and a further reference to the High Court, the matter finally reached the Supreme Court in appeal by special leave. The Supreme Court said:

> “We are of the opinion that in a matter of this nature where what is involved is not merely the right of a private individual but the health, safety and convenience of the public at large, the safer course be to accept the view of the learned Magistrate who saw for himself the hazard resulting from the working of the bakery.”[^86]

An affected party may find it difficult to prosecute the offender. Invoking Section 133 of the Code, corporate bodies like companies and public corporations can be made accountable for violation of emission standards and for causing nuisance by way of pollution.

A single person can give a complaint against a company under section 133 of the Criminal Procedure Code as a Public Nuisance. *Krishna Gopal v. State of M.P.*[^87] is a notable case where the provision in Section 133 of the Code was effectively made use of. In this case the complaint was against noise and air pollution from a glucose saline manufacturing company. It was installed in a residential locality under licence granted by the appropriate authorities. A lady resident of the locality complained that her husband, a heart patient, had been

[^85]: (1979) 2 SCC 267; 1979 SCC (Cri) 444; AIR 1979 SC 143.

[^86]: *Ibid* at p. 145, per Chief Justice Chandrachud. The court, however, modified the order of the Magistrate because he had gone beyond the terms of the conditional order in requiring the respondent to desist from the trade of a baker at the site instead of ordering the demolition of the oven and the chimney which caused pollution.

[^87]: 1986 Cri. LJ 396 (MP)
disturbed in his sleep every night due to the booming noise produced by the boiler in the factory. The question before the High Court were whether the alleged nuisance could be said to be a public nuisance and whether an order of removal of the boiler and factory could be made on a complaint by a single person. The Court observed.

“It is not the intent of law that the community as a whole or large number of complainants come forward to lodge their complaint or protest against the nuisance that does not require any particular number of complainants. A mere reading of Section 133 (1) would go to show that the jurisdiction of Sub -Divisional Magistrate can be invoked on receiving a report of a police-officer or other information, and on taking such evidence if any, as he thinks fit. These words are important. Even on information received the Sub-Divisional Magistrate is empowered to take action in this behalf for either removal or regularizing a public nuisance”. 88

In *Tata Tea Ltd. v. State of Kerala* 89 the court tried to distinguish the two jurisdictions - one by the Executive Magistrate under the Code and the other by the Board and the Judicial Magistrate under the Water Act against a Company. The Court said:

“While under Section 133 of the code it is open to a citizen to directly approach an Executive Magistrate, he is unable to approach directly a Judicial Magistrate under the provisions of the [Water] Act. But, that would make no difference since under the provisions of the Act, it is open to the citizen concerned to approach the State Board with his grievance and it is open to the State Board to take such measures as are contemplated in the Act including filing petition before a Judicial Magistrate. All the remedies which could be provided by

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88 1986 Cri LJ 396 (MP) at p. 399per V.D. Gyani, J. The Court also highlighted the growing menace of environmental crimes which really dwarfs other crimes. It was remarked: “The society is shocked when a single murder takes place but air, water and atmospheric pollution is merely read as a news without slightest perturbation till people take ill go blind or die in distress on account of pollution and that too resulting in the filling of a few”, p. 400.

89 1984 KLT 645.
It is often asserted that companies themselves cannot commit crimes; they cannot think or have intentions. Only the people within a company can commit a crime. However, once one accepts that the entire notion of corporate personality is a fiction - but a well-established and highly useful one - there seems no reason why the law should not develop a concomitant corporate mens rea fiction. Most of the other doctrines-identification, aggregation etc., - involve fictitious imputations of responsibility. The real question is not whether the notion of a corporate mens rea involves a fiction, but whether, of all the fictions, it is the one that most closely approximates modern-day corporate reality and perceptions. While this inevitably will raise problems of how to assess reality and perceptions. While this inevitably will raise problems of how to assess policies and procedures to ascertain whether they reflect the requisite culpability, such a task is not impossible. The answers might not be easy, but at least this approach involves asking the right questions. It is often argued in opposition to corporate criminal liability that the imposition of fines provides no guarantee that delinquent conduct will be deterred. The fines imposed on corporations are often minimal in comparison with the devastating effects of their wrongful acts, and virtually amount of a cost of doing business. But there is also a concern that excessive fines can have perverse effects that may have to be borne by innocent shareholders, creditors, employees or consumers. But it should be remembered that the punishment of companies decreases there overall wealth. Accordingly, shareholders and employees have an incentive to encourage and monitor better corporate practices. Costs can only be passed on the public to the extent that the company remains competitive. Arguments that shareholders and employees need protection must be outweighed by the greater social interest in ensuring the safety of employees, the public and the environment.

Recently, in Bhopal disaster case, the verdict in the State of Madhya Pradesh v Warren Anderson and Others was delivered by the Chief Judicial Magistrate on 7th June 2010. The court convicted eight persons including the then

\[90\] Ibid at p. 648
chairman of Union Carbide India Ltd. (UCIL) and other senior officers for offences under section 304A of the Indian Penal code (IPC) and imposed the maximum penalty of two years.\(^{91}\) As originally filed, the principal charge of the criminal case was culpable homicide not amounting to murder under section 304 of the IPC, specifically para 2 which deals with the accused having knowledge that the act would cause death. This carried maximum penalty of 10 years. On a plea by UCIL, a two – judge bench of the Supreme Court held in 1996 that the offence under section 304 was not made out, and the accused could only be charged under Section 304A, the offence of causing death by rash or negligent act, carrying a maximum punishment of two years.\(^{92}\)

However, for controlling and regulating Industrial environmental practices, there should be a distinct part of the Indian Penal code expressly covering big industries like Multinational Corporations (MNCs) is essential in the modern corporate world. Criminal sanctions are appropriate only if it is in fact the organization, its modes of operation and its deficient structures that are singled out where they produce unacceptable consequence that could have been avoided given the resources and information at the corporation’s disposal.

### 4.6 INDIAN FACTORIES ACT, 1948

After the Independence the Factories Act, 1948 first came into force which dealt with industrial safety, discharge of pollutants and the occupational health of workers employed in factories.\(^{93}\) This Act contains various provisions relating to health and safety of employees.\(^{94}\)

The occupier of a factory is required to make effective arrangements for the treatment of wastes and effluents due to manufacturing process carried on therein so as to render them innocuous and for their disposal in accordance with

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92 Ibid at p.11
93 Supra Note 53 at p. 184.
the rules framed by the State Government. 95 In every factory effective methods to keep the work rooms free from dust and fume should be adopted. 96

The Factories (amendment) Act, 1987 added some of the provisions relating to hazardous processes. The first and second schedule inserted by this Act will provide a list of industries involving hazardous process and the permissible levels of certain chemical substances in work environment respectively. The state government may appoint a ‘site appraisal Committee’ to consider application for grant of permission for the initial location of factory involving a hazardous process or for the expansion of any such factory. This committee will examine the impact of hazardous process on employees’ health, safety and environment. The occupier 97 of every factory involving a hazardous process shall disclose all information regarding dangers, including health hazards and measures to ever come such hazards, to the workers employed in the factory, the chief inspector, the local authority within whose jurisdiction the factory is located, and the general public in the vicinity. He will also draw up an on-site emergency plan and detailed disaster control measures. He should maintain accurate and up-to-date health records of the workers in the factory who are exposed to any chemical, toxic or any other harmful substances which are manufactured, stored, handled or transported. The Central Government may, in the event of the occurrence of an extraordinary situation involving a factory engaged in hazardous process, appoint an inquiry committee to inquire into the standards of health and safety observed in the factory.98

One of the most critical lessons from Bhopal case is the importance of transparency and public participation in decisions relating to the location and operation of hazardous industries. It needs no emphasis that secrecy breeds a lack of accountability. Recognizing the right to know and enforcing transparency, i.e., the obligation to inform, is critical also because knowledge brings with it a greater sense of responsibility on all sides – the public, the regulatory authorities and of course the corporation itself. In response to the Bhopal disaster and its

95 Section 12 of the Factories Act, 1948.
96 Section 14 of the Act deals with dust and fumes.
97 The Factories Act after its 1987 amendment defines occupier as a senior level manager. Such person is held responsible for non-compliance with the Act.
98 Supra Note 95 at p. 199.
consequences, and influenced by the creation of Absolute Liability Principle in *Oleum Gas Leak Case*, question of safety and liability were addressed.

In December 1985, when *Oleum Gas Wafted* into the atmosphere from the *Shriram Foods and Fertilisers factory* in Delhi, the Supreme Court seized upon it to expound principles of absolute liability, enterprise liability, deterrence, personal liability of directors and managers of safety, and worker’s right to participate in safety management. The prescription of relocation of industries was mooted as a facet of safety. In 1987, this resulted in an amendment to the Factories Act 1948, and a chapter IV A was introduced to account for hazardous processes. Disaster preparedness and disaster management were enunciated in a context where it was acknowledged that disasters were likely to affect persons living in the vicinity of a factory, and that they, and the local authority, ought to be alerted to what they need to do in the event of a disaster. This is in the letter of the law there is little evidence that it has been translated into practice.

There are also provisions for compulsory disclosure of information about the dangers, including health hazards, that could arise from exposure to the materials in the factory or handling the materials during manufacture, transportation, storage or other processes. The compulsory disclosure of information is not only to the inspector under the Act, but also to the local authority and to the ‘general public in the vicinity’ of the factory, which is an acknowledgement of the nearness of people at large to the risk of disaster.

A disaster Management Plan is to be drawn up even before a factory may commence activity. For the first time, workers are statutorily accorded the right to be principal participants in safety management. Liability of the Occupier: Under the amended Act, the person held accountable is the ‘occupier’ Before 1987 amendment, it was common to appoint a relatively lowly employee as the occupier who would take the rap if infractions were detected in the factory. After 1987, in the case of a company, the occupier has to be a director of the company-a statutory prescription that has been quite categorically endorsed by the Supreme Court in 1996.
There is a very dangerous provision that was inserted in the Act as Section 7(5)B. This section\(^99\) spells virtual absolution for the manufacturer, designer, importer or supplier of plant and machinery. Where the user of such plant or machinery gives a written undertaking ‘to take the steps specified in such undertaking to ensure, so far as it reasonably practicable, that the article will be safe without risks to the health of the workers when properly used, it shall have the effect of relieving” the designer, manufacture et al from what is otherwise prescribed as a duty to care for the safety and health of the workers.

This is a transfer of technology agreement could now relieve the Union Carbides, the Du points and other chemical giants of answerability for the effects of the technology they transfer into India. In the unequal world of transferred technologies, this provision only serves to place the company controlling the technology beyond the reach of the law. This definitely makes the MNC a supranational power. If this provision is not repealed, another such disaster may find a transnational offender disappearing through this provision to impunity.

The law has, for some time now, been protective of the right against disclosure about matters connected with industry. Unfortunately the 1987 amendments to the Factories Act rather than change this only reinforced non-transparency and secrecy. While Chapter IV A of the Act emphasized transparency the punishment for any ‘un authorized’ disclosure was actually enhanced substantially. Similarly s. 118 which places further restrictions on disclosure was also allowed to remain unchanged.

What is, however, most startling is that there were no amendments to the Factories Act or any other statute that made it mandatory for industry to disclose all information that may help mitigate the effects of the disaster. “The emphasis on industrial secrecy, and the enforced silences, rest uneasily with the dire need for disclosure and of information sharing witnessed in the days, months, and years following the Bhopal gas disaster.”

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\(^99\) Section 7 (5) B of the Act.
4.7 FOREIGN EXCHANGE REGULATION ACT, 1973

It is well known that East and South Asian countries have received huge and rapidly growing amount of direct investment in recent years. In India, the Government policy confined the foreign investment to the priority areas like high technology and heavy investment sector of national importance and export sectors. Firms which had been established in non-priority areas prior to the implementation of this policy have, however been allowed to continue in those sectors. The Foreign Exchange Regulation Act (FERA), 1973, required the foreign companies in India to dilute the foreign equity holding to 40 per cent (exceptions were allowed in certain case like high technology and export oriented sectors). The passage of FERA could be considered a milestone in the Government of India’s policy towards foreign investments in India.

In Bhopal case there are allegations that the parent company had underinvested in the technologies at the plant. According to the representatives of Bhopal survivors, documents obtained through discovery in cases filed against Union Carbide show that in the early 1970’s in response to the Indian government’s efforts to promote import substitution through the dilution of foreign equity (The Foreign Exchange Regulatory Act-FERA) the company reduced it’s investment in the Bhopal plant from $ 28 million to $ 20.6 million. Despite the total cost of investment in line with FERA, the company retained its 51% share in the UCIL subsidiary by back-integrating the equity formulation for the plant. Under FERA, this reformulation required the transfer of additional technology not currently available in India. In order to prevent the dilution of its ownership Union Carbide transferred substandard technology, which had only had a limited test run because it lowered costs in addition to meeting, on paper at least,

100 A. Vaidyanathan *India’s Economic Reforms and Development* 2003 at p. 89.
the requirements of FERA. 104 In short, faced with losing majority ownership under FERA, it has been alleged that Union Carbide made the overall plant cheaper to build by importing inferior technology, thus putting Bhopal at risk from the plant’s inception.

4.8 WORKMEN’S COMPENSATION ACT, 1923

Workmen’s Compensation laws as means by which industry shares part of the burden of the human toll incident to the cost of production are reaching the maturity of their development. The adoption of such laws has been wide. 105

The workmen’s Compensation Act, 1923 was passed with a main object of providing for the payment of compensation by certain classes of employers to their workmen for injury by accident. The growing complexity of industry in this country, with the increasing use of machinery and consequent danger to workmen themselves, renders it advisable that they should be protected, as far as possible, from hardship from accidents. The general principle followed in the Act is that compensation should ordinarily be given to workmen who sustain personal injuries by accidents arising out of and in the course of their employment. Compensation is also given for certain occupational diseases. 106

The object of the Act:

“The provision for compensation is not the only benefit flowing from workmen’s compensation legislation it has important effects in furthering work on the prevention of accidents, in giving workmen greater freedom from anxiety, and in rendering industry more attractive.” 107 Thus it provides social security to workmen and is a humanitarian measure. Further, it seeks to avoid the possibilities of industrial accidents by stressing the theme ‘prevention is always better than cure.

104 Ibid.
105 Stanley Law Sabel The Uncompensated Industrial Injury 36 MICH L. REV. 935 (1937-38).
106 Supra Note 95 at p. 200.
Industrial accidents may result in disablement. Disablement implies loss of capacity to work or to move. It may be partial or total permanent or temporary. 108 Workers employed in certain occupations are exposed to certain diseases which are inherent in those occupation. If the employment is a contributory cause or has accelerated the death of a workman or if the death was due not only to the disease but to the disease coupled with the employment, then it could be said that the death arose out of the employment. 109

The workmen’s Compensation Act is an instance in point. A schedule or table may be prescribed by the legislation stating the amount payable by way of compensation if one limb or more limbs are lost. If one eye is lost, if two eyes are lost, if death ensues, if uprooting of a family is caused, if lungs are affected, or genetic damage inflicted, flat sums and slabs can be fixed by way of compensation. This will eliminate fussy litigation and evidentiary profusion which are the bane of tort litigation. In Bhopal Case, the American lawyers have said that the Indian judges are miserly in awarding compensation. If parliament fixes liberal sums in the table, to be incorporated in the code, the courts must carry them out and generous compensation to the endangered victims will be judicially assured.

The accident benefits provided under the Employee’s State Insurance Act, 1948 are much more liberal than those available to a workman under the Workmen’s Compensation Act, 1923. According to ESI Act, 1948 employment injury means a personal injury to an employee caused by accident or an occupational disease arising out of and in the course of his employment, being an insurable employment, whether the accident occurs or the occupational disease is contracted within or outside the territorial limits of India. The definition of ‘employment injury’ in the ESI Act is wide enough and covers all ‘occupational diseases’ and accidents and occupational diseases are not statutorily defined and will assume the popular meaning. This Act provides two forms of accident benefits-disablement benefit and dependant’s benefits. Disablement benefit will be paid to an insured person suffering from disablement as a result of an employment injury, whereas, if an insured person dies as a result of an

108 Schedule I of the workmen’s compensation Act, 1923 provides a list of injuries deemed to result in permanent total disablement and permanent partial disablement.
109 A list of occupational diseases is contained in Schedule III to the Act.
employment injury sustained as an employee, his dependents who are entitled to compensation under the Act, shall be entitled to periodical payments referred to as dependants’ benefit.  

4.9 INDIAN ENVIRONMENTAL LAWS

Environmental law is one of the major tools for effecting environmental management. Almost all countries have now adopted at least one piece of environmental legislation that controls the domestic production of environmental externalities. The main objective of many environmental laws is to protect the environment against damage resulting from industrial (of course, MNCs also) and individual activity.

Environmental law as it is known today is an amalgam of common law and statutory principles. Its usefulness and importance may even be equal to those of environmental management itself. Even before specific laws came into force, there were certain common law remedies against pollution. Common law is the body of customary law of England based upon judicial decisions and is embodied in the reports of decided cases. Common law had been administered by the common law courts of England since the middle ages. It is introduced into India by the British continues to apply here by virtue of Article 372 (1) of the Constitution unless it has been modified or changed by legislation in India. The common law aspects of Environmental law in India are Nuisance, Trespass, Negligence and Strict Liability.

In pre-independence era, environment pollution was regulated by general law viz: Indian Penal Code, 1860, Code of Criminal Procedure, 1898 and Police Act, 1861 having relevant provisions dealing with control of water, air, noise

110 Supra Note 95 at pp. 201-202.
115 Supra Note 53.
As no pollution control laws were in existence in early 1960s, industries in India did not have adequate attention on the control of pollution menace. After Bhopal incident, the governments of host countries have in their turn responded by promulgating new environmental legislation or by making more stringent the already existing legislation. Of course, they do not single out the MNCs but generally make the regime stricter than before. 117

Generally, law is an instrument for translating policy formulation into practice. 118 At present, there are around thirty three different environmental statutes, rules and notifications that are in force in India. 119 These environmental laws in India engage criminal sanctions for ensuring their effective enforcement. They include the Water (prevention and Control of Pollution) Act, 1974, the Air (Prevention and Control of pollution) Act, 1981 and the Environment (Protection) Act,1986 etc. 120 All these enactments incorporate provisions dealing with penalties and procedure.

An environmental offence by companies especially Multinational companies (MNCs) is comparatively is of a recent origin. Indeed, MNCs having share in the environmental pollution along with the local industries in India. If the public suffers damage on account of pollution, liability may be imposed on a polluting company. One study reveals that 70 percent water of Indian rivers is polluted because many big industries are situated on the banks of famous rivers for water resources. 121

It is important to know for the protection of environment against a company (MNCs) who will be held liable for pollution under the Water Act, Air Act the Environment Protection Act. Case laws suggest that, where an offence on

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116 Ibid at p. 184.
118 Bondi D. Ogolla Role of Environmental Law in Development JILI [Vol. 29:2, 1987’], Number 2, at p. 189.
119 V.S. Datey Taxmann Students ’ Guide to Economic Laws 203, at p.1
121 Anjana Jain, Industrial Development Knocking at the Door of Environmental Destruction, in S. Murthy Economic Growth and Environment 1998 at p. 139.
the part of the Company is alleged, the Managing Director, as the Chief Executive, would necessarily have to be cited as an accused. In cases of extent of liability concerning the employees of the polluting company or firm, case laws suggest that the withdrawal of prosecution against the proprietors of the firm is not a ground for dropping the proceedings against the manager of the firm. These provisions spell out a deeming fiction of vicarious liability and a rule of Evidence, laying the burden of proof on person in charge of and responsible to the company for the conduct of its business. It is very difficult in case of Multinational Companies (MNCs).

**4.9.1 THE WATER (PREVENTION AND CONTROL OF POLLUTION) ACT, 1974:**

This Act was enacted under Article 252(1) of the constitution which empowers the Union Government to legislate on matters of State list, where two or more State legislatures consent to a central law for water happens to be a state subject under State list of the Constitution. This Act came into force in 1974 which has three objects: - i) To prevent and control water pollution and also maintain and restore the wholesomeness of water (in the streams or wells or sewer or on land); (ii) To establish Central and State Boards with a view to carrying out the objectives of the legislation; (iii) For conferring on and assigning to such Boards, powers and functions relating thereto and matters connected therewith.  

The Water (Prevention and control of Pollution) Act, 1974 prescribes punishment up to three months imprisonment or fine up to ten thousand rupees or both with an additional fine which may extend up to five thousand rupees per day of continuance for failure to comply with any direction given under Section 20. The Penalties have been enhanced, vide the Water (Prevention and Control of Pollution) Amendments Act, 1988 (No. 53 of 1988).

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122 Krushna Chandra Jena *Environmental Pollution and its Legal Control in India* AIR 2000 at p. 184
123 The Penalties have been enhanced, vide the Water (Prevention and Control of Pollution) Amendments Act, 1988 (No. 53 of 1988).
punishment prescribed was till recently six month’s imprisonment which could be extended up to six years and with fine.\textsuperscript{124} The minimum punishment has since been raised to one year and six months by the Water (Prevention and Control of Pollution) Amendment Act, 1988.\textsuperscript{125} The maximum of six years and fine have been retained. Section 45 provides for the enhancement of penalty for repeating non-compliance with Sections 24, 25 and 26. The minimum punishment, prescribed is two years’, imprisonment which could be extended up to seven years with fine.

Section 45-A which runs: “Whoever contravenes any of the provisions of this Act or fails to comply with any order or direction given under this Act, for which no penalty has been elsewhere provided in this act, shall be punishable with imprisonment which may extend to three months or with fine which may extend to ten thousand rupees or with both, and in the case of a continuing contravention or failure, with an additional fine, which may extend to five thousand rupees for every day during which such contravention or failure continues after conviction for the first such contravention or failure.\textsuperscript{126}

Section 46 incorporated a new punishment for repetition of the violations. The court is empowered to publish the name and address of the offender at his cost if he is convicted a second time for the same offence. Section 47 and 48 details the responsibility of the Corporations and Government departments.

Cognizance of the offences under the Act could be taken by the court by or with the previous sanction of the Pollution Control Board. Cognizance could also be taken on a compliant by a person who has given notice of not less than sixty days of his intention to make a compliant to the Board.

The amendments to various provisions made in the Water (Prevention and Control of Pollution) Amendment Act, 1988 have indeed strengthened the Pollution Control Board in several ways. And the punishments prescribed in various sections have also been increased. However, it may be noted that the

\begin{footnotesize}
\item[124] See Revised Section 41.
\item[125] See Section 23 of the Amendment Act which raised the minimum punishment prescribed in Ss. 43 and 44 to 1 year and six months.
\item[126] The Amendment Act of 1988 has introduced a new provision in Section 45-A.
\end{footnotesize}
enhancement of sanctions would not in any way add to the effectiveness of the Act in as much as the inhibitions to employ them would be more when they become harsh.

4.9.2 AIR (PREVENTION AND CONTROL OF POLLUTION) ACT, 1981

Air pollution is widespread in the industrialized areas and in large cities. It is considered to be one of the most dangerous and common kind of environmental pollution. In the recent times, the foreign companies like MNCs with their high technological developments cause the rapid change of environment. Bhopal incident is an example of the air pollution caused by Multinational Company in India. According to WHO, air pollution may be defined as follows:

"Substances but into air by the activity of mankind into concentration sufficient to cause harmful effect to his health, vegetables, property or to interfere with the enjoyment of his property".

In India, the law relating to the air pollution i.e., The air (Prevention and Control of Pollution) Act 1981 was passed by the Parliament of India to implement the decisions taken at the United Nations Conference on the Human Environment held at Stockholm in June 1972 under Article 253 of the Constitution to which India was a party. The Act deals exclusively with the preservation of air quality and the control of pollution. The special features of the Air Act are as follows:

127 Nimmagadda Rama Krishna Role of Law in Environmental Protection (1995) 1 SCJ at p. 77.
128 Ibid.
129 The Stockholm Conference 1972 urged States to initiate measures to maintain clean and wholesome environment as also purity of air and to take measures for preservation of natural resources of the earth which among other things include the preservation of the quality of air and control of air pollution. See Air (Prevention and Control of Pollution) Act 1981, the Habendum clause.
130 Article 253 of the Constitution empowers parliament of make laws implementing India’s international obligations as well as any decision made at an international conference. It reads: “Notwithstanding anything in the foregoing provisions of this chapter, Parliament has power to make any law for the whole or any part of the territory of India for implementing any treaty, agreement or convention with any other country or other body” In view of the broad range of issues addresses at international conference or treaty etc., Article 53 apparently gives Parliament wide power to enact laws on virtually any entry in the State list.
131 Supra Note 128.
1. It is a central legislation but a duty is imposed upon the States to set up the Boards under the Act in contrast to the Water Pollution Act. Under Air Act, it is compulsory to establish Air Pollution Control Board and the Act envisages that even in States Where no Water Pollution Board exists, the State Government shall establish a separate Pollution Control Board.

2. Under Air Act, no industry as per the classification and the schedule will be able to escape air pollution control law and therefore in real sense it will be applicable. Uniformly to all the industries in the entire country. This has been highlighted in Section 3, 4 and 5 of the Act. Section 17 of the Act spells out the functions of State Boards in preventing Air Pollution.

For the control of industrial pollution (MNCs also), the Act prohibits the operation or establishment of any industrial plant in an air pollution control area by any person without the previous consent of the State Board. Therefore industrial operators are required to obtain a permit consent order from the State Board for the operation of an existing industry or for an industry yet to be established. Though the Air Act is comprehensive in its contents relating to prevention and control of air pollution from industrial pollutants, yet its scope even after major amendments in 1987 remains limited and narrow.\footnote{132}{Supra Note 53 at p. 185}

The Amendment of the Air Act 1981 makes it obligatory on the part of a person to obtain the consent of the relevant pollution Control Board while establishing an industrial plant.\footnote{133}{Section 21 of the Air (Preventive and Control of Pollution) Act 1987.} and the punishment for the contravention of the Act has also been enhanced.\footnote{134}{Section 39 of the Act, 1987.} The amendment also enables the public to start litigation against an industry of which is guilty of pollution.\footnote{135}{Section 43 of the Act, 1987.}

4.9.3 THE ENVIRONMENT (PROTECTION) ACT, 1986

Realizing the inadequacy of existing legislation regulating the environmental pollution, the Government of India enacted a new Act known as Environment (Protection) Act, 1986 which not only protects and improves the environment in general but also prevents the hazards to human beings, other living
creatures, plants and property. It contains 26 sections. Chapter - II deals with the Central Government Powers to take measures to protect and improve the environment. Chapter – III deals with prevention, control and abatement of environmental pollution. The purpose of this Act is to implement the decisions of the United Nations Conference on the Human Environment of 1972 held at Stockholm.

This Act passed in Parliament during 1986 under the Article 253 of the Constitution. Prevention, control and abetment of pollution is the main aim of this Act. This Act is the first Act dealing with the issue of environment as a composite whole. It takes a comprehensive view of pollution dealing simultaneously with air, water and noise pollution as also regulating the treatment of hazardous materials by industries.

Environment (Protection) Act 1986 is only a skeleton legislation. But it provides an umbrella for a plethora of activities generated through the mechanics of delegated legislation and delegation of powers. The Environment Act did not repeal any prior law in environment or pollution control. It acts as a veritable supplement. Legislation which authorizes the Central Government to protect and improve environmental quality, control and reduce pollution from all sources, and prohibit or restrict the setting and prohibit or restrict the setting and/or operation of any industrial facility on environmental grounds.

According to the Act, the term “environment” includes water, air and land and the interrelationship which exists among and between water, air and land, and human beings other living creatures, plants, micro-organism and property. Under the Act, the Central Government shall have the power to take all such measures as it deems necessary or expedient for the purpose of protecting and improving the

136 Supra Note 53 at p. 185.
137 Supra Note 128 at p. 78.
138 R.N. Iyengar and R.K. Verma Environmental Pollution in B.P. Chaurasia Environmental Pollution Perception and Awareness, 1992 at p. 408.
140 Section 3 of the Environment (Protection) Act 1986.
quality of environment and preventing, controlling and abating environmental pollution.  

The Environment Act specifically confers on the Central Government, among other things, powers to take measures to coordinate the actions of State Governments,\(^\text{142}\) to plan and execute a nation-wide programme for the prevention, control and abatement of environmental pollution\(^\text{143}\) to lay down standards for the quality of environment\(^\text{144}\) and standards for emission and discharge of environmental pollutions,\(^\text{145}\) to examine process, materials and substances which cause environmental pollution,\(^\text{146}\) to inspect premises, plant and the like and to give directions to take steps for prevention, control and abatement of pollution,\(^\text{147}\) to establish laboratories,\(^\text{148}\) to collect and disseminate information on pollution,\(^\text{149}\) and prepare manuals, codes and guides relating to prevention, control and abatement of pollution.\(^\text{150}\) Similar powers were conferred on the Boards and not on the Central Government under the Water and Air Acts.\(^\text{151}\) The powers of entry and inspection were conferred on the State Board under the Air Act\(^\text{152}\) and the Water Act.\(^\text{153}\) The Environment Act confers the right of entry and inspection on a person empowered by the Central Government.\(^\text{154}\) The power to take samples for analysis was conferred on the State Board under the Water Act\(^\text{155}\) and the Air Act.\(^\text{156}\) The Environment Act confers this power on the Central Government.\(^\text{157}\)

The Environment Act contains certain novel provision which confer power on the Central Government, the parallels of which are not found in the Water Act

\(^{141}\) Section 3 (1) of the Environment (Protection) Act 1986.
\(^{142}\) Section 3 (2) (i)
\(^{143}\) Section 3 (2) (ii)
\(^{144}\) Section 3 (2) (iii)
\(^{145}\) Section 3 (2) (iv)
\(^{146}\) Section 3 (2) (viii)
\(^{147}\) Section 3 (2) (x)
\(^{148}\) Section 3 (2) (xi)
\(^{149}\) Section 3 (2) (xii)
\(^{150}\) Section 3 (2) (xiii)
\(^{151}\) Section 16 and 17 of the Water Act, Section 16 and 17 of the Air Act.
\(^{152}\) Section 24.
\(^{153}\) Section 24.
\(^{154}\) Section 10 of the Environment Act.
\(^{155}\) Section 21 of the Water Act
\(^{156}\) Section 26 of the Air Act.
\(^{157}\) Section 11 of the Environment Act.
or the Air Act. The Environment Act authorizes the Central Government to lay down procedures and safeguards for the prevention of accidents which may cause environmental pollution and the remedial measures for such accidents.\textsuperscript{158} The Central Government is authorized to lay down procedures and safeguards for the handling of hazardous substances.\textsuperscript{159} The Environment Act confers on the Central Government power to issue directions not merely to any authority but even to a person or officer.\textsuperscript{160} Such direction may amount to an order directing the closure, prohibition or regulation of any industry, operation or process or stoppage or regulation of the supply of electricity, water or any other service.\textsuperscript{161} The Central Government has been given the power, among other things, to empower a person to entry any if such seizure is necessary to prevent or mitigate environmental pollution.\textsuperscript{162} The Central Government has the power to call for reports, returns, statistics and other information from any person, officer State Government or other authority. The prior enactments conferred the power in the Central Governments to call for such information from the Central Board and State Boards respectively.\textsuperscript{163}

In the Environment (Protection) Act, 1986 the Central Government is authorized to issue directions for the performance of its functions under the Act.\textsuperscript{164} Non-compliance with these directions has been made punishable with imprisonment for a term which may extend to five years or with fine which may extend to one lakh rupees, or with both. Continued non-compliance will be visited with additional fine which may extend to five thousand rupees for every day. If the failure to comply with the directions continues beyond a period of one year after date of conviction of offender shall be punishable with imprisonment for a term which may extend to seven years.\textsuperscript{165} Cognizance of offences under this Act can be taken by the Central Government or any person who has given notice

\textsuperscript{158} Section 3 (2) (vi) read with Section 9 of the Environment Act.
\textsuperscript{159} Section 3 (2) (vii) read with Section 8 of the Environment Act.
\textsuperscript{160} Section 18 of the Water Act; Section 18 of the Air Act.
\textsuperscript{161} Ibid. Similar provisions were subsequently incorporated in the Air and Water Acts. See Air Act, Section 31 – A and Water Act, Section 33-A, incorporated by the Air (Prevention and Control Pollution) (Amendment) Act, 1988, Section 18 respectively.
\textsuperscript{162} Ibid. Section 10 (1) (c).
\textsuperscript{163} Water Act, Section 57 and Air Act, Section 45.
\textsuperscript{164} Section 5 of the Environment (Protection) Act, 1986.
\textsuperscript{165} Section 15 of the Environment (Protection) Act, 1986.
of not less than sixty days of the offence and of his intention to make a complaint to the Central Governments. 166

It is also provided that if an offender is found guilty of an offence both under this Act and under another Act, he shall be punished under the other Act rather than under the Environment (Protection) Act, 1986. 167 Indeed the punishment prescribed is high when compared to that prescribed in the Water Act and the Air Act. The chances for its imposition are remote though.

The Environment Act thus confers a wide range of powers on the Central Government. The Central Government may constitute an authority for exercising these powers and functions, subject to its supervision and control.168 The Central Government is also authorized to appoint officers subject to its general control and supervision and entrust them with these powers and functions.169 The Central Government may also delegate its powers and functions to any officer, State Government or other authority. 170 The reason behind the enactments of these provisions seems to be the strong legislative desire to control pollution. This, however, requires the legislature to declare violations of some of the provisions as offences so that the violators may be subjected to the ignominy of being punished as criminals. But there are some inherent lacunas and weaknesses in these Acts.171

**Central Pollution Control Board:** The Central Pollution Control Board (CPCB) has developed National Standards for Effluents and Emission under the statutory powers of the Water (Prevention and Control of Pollution) Act, 1974 and the Air (Prevention and Control of Pollution) Act, 1981. These standards have been approved and notified by the Government of India, Ministry of Environment & Forests, Under Section 25 of the Environmental (Protection) Act, 1986. Besides, standards for ambient air quality, ambient noise, automobile and fuels quality specifications for petrol and diesel. Guidelines have also been developed

166 Section 19 of the Environment (Protection) Act, 1986.
168 Section 3 (3) of the Environment Act.
171 Supra Note 2 at p. 22
separately for hospital waste management. The functions of the Central Board are:

1. To advise the central government on any matter concerning the improvement of the quality of air and the prevention, control or abatement of air pollution.
2. To plan and cause to executed a nation-wide programme for the prevention, control or abatement of air pollution.
3. To coordinate the activities of the State Boards and resolve disputes between them.
4. To provide technical assistance and guidance to the State Boards to carry out and sponsor investigations and research relating to problems of air pollution and prevention, control or abatement of air pollution.
5. To plan and organize the training of persons engaged, or to be engaged in programmes for prevention, control or abatement of air pollution on such terms and conditions as the Central Board may specify.
6. To organize through mass media a comprehensive programme regarding the prevention, control and abatement of air pollution.
7. To collect, compile and publish technical and statistical data relating to air pollution and the measure devised for its effective prevention, control or abatement and to prepare manuals, codes or guides relating to prevention, control or abatement of air pollution.
8. To lay down standards for the quality of air.
9. To collect and disseminate information concerning matters relating to air pollution.
10. To perform other prescribed functions.

Further, for controlling the environmental pollution caused by mighty MNCs state intervention is necessary. It was realized by the welfare and third world economists that limited state intervention will not work and full intervention is necessary for the following reason. Steady increase in the divergence between private cost and social cost: Private enterprises are concerned only with private cost of production and the existing laws are not enough to control the social cost (i.e., Ganga cleaning project cost Rs. 9000 Crores, Bhopal Gas Tragedy ran again

into thousands of crores). Therefore the introduction of a number of laws to protect environmental pollution (air, water, and sound) has become necessary. Further, implementation of pollution control laws should be more techno-legally oriented instead merely legally. It is, therefore, necessary for the implementing authority to provide rationale and basis for the plans and programmes intended for pollution control.

**4.10 THE RIGHT TO INFORMATION ACT, 2005**

With the heightened awareness of the environmental aspects, the developing countries, now require the full disclosure of information regarding the various aspects of investment on the technology, and the nature of the end products etc., Information may have to be supplied concerning the characteristics of the products or services which may be injurious, to the health and safety of consumers including experimental uses, prohibitions, restrictions, warnings or other regulatory measures imposed on them in the other countries on these products, the contents and known hazardous effects of the products etc. Information might be required not only after a plant is set up, but even before the investment is made, since they need to make a cost benefit estimate and know the value of natural resources including the land and water that the project would use.

Likewise, a true democracy cannot exist unless all citizens have a right to participate in the affairs of the policy of the country is meaningless unless the citizens are well informed on all sides of the issues in respect of which they are called upon to express their views. Most of the countries have realized through experiences that greater access of the citizens to information enhances the responsiveness of the government to community needs.

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174 *Supra Note* 173.
In India, the long and much awaited this right obtained by the enactment of the Right To Information Act, 2005\textsuperscript{176} (RTI) This Act became effective from October 12, 2005. The basic concept and philosophy behind RTI is that transparency and accountability is essential to the proper working of every public authority. In the Indian case of \textit{Bombay Environmental Action Group. v Pune Cantonment Board}\textsuperscript{177} for instance the court held that the concept of an open Government is the direct emanation from the right to know which seems to be implicit in the right of free speech and expression.

According to Section 4 (1) “Every public authority\textsuperscript{178} shall –

(a) Maintain all its records duly catalogued and indexed in a manner and the form which facilities the right to information\textsuperscript{179} under this Act\textsuperscript{180} and ensure that all records that are appropriate to be computerized are, within a reasonable time and subject to availability of resources, computerized and connected through a network all over country on different systems so that access to such records is facilitated;

Thus, Indian people, now have the Right to Information Act to seek information from public authorities. But this law does not apply to the private sector (including MNCs). Indeed, the present conditions call for more public

\textsuperscript{176} Act No. 22 of 2005.
\textsuperscript{177} Bombay High Court, A.S Writ Petition No. 2733 of 1986.
\textsuperscript{178} “Public authority” means any authority or body or institution of self-government established or constituted.
\textsuperscript{179} According to Section 2 (f) of RTI Act, “Information” means any material in any form including records, documents memos, e-mails, opinions, advices, press releases, circulars, orders, logbooks, contracts, reports, papers, samples, models, data material held in any electronic form and information relating to any private body which can be accessed by a public authority under any other law for the time being in force; according to section 2(j) “right to information” means the right to information accessible under this Act which is held by or under the control of any public authority and includes the right to—(i) inspection of work, documents, records; (ii) taking notes, extracts or certified copies of documents or records; (iii) taking certified samples of material; (iv) obtaining information in the form of diskettes, floppies, tapes, video cassettes or in any other electronic mode or through printouts where such information is stored in a computer or in any other device.
\textsuperscript{180} RTI Act, 2005.
disclosure, more transparency, and more accountability on the part of the companies also, particularly in environmental aspects. Without information, local communities live in the dark, employees unknowingly work in hazardous ways, and shareholders make uninformed investments. In order to exercise democratic rights in a meaningful manner, citizens should have access to information about the proposed action of Government and its agencies. Apart from this aspect, public participation has advantages of its own. 181

For example in Bhopal case, the Multinational Company (UCIL) decided to store huge quantities of the ‘ultra-hazardous’ Mythyl Isocyanate (MIC) in the Bhopal plant in bulk, but did not equip the plant with the corresponding processing or safety capacity. On the night of the gas leak, crucial safety systems were not functional. After the leak, UCC maintained that MIC was nothing more than tear gas, even though the company’s own manuals clearly said that MIC was a fatal poison. Till date UCC has refused to identify the reaction products released, and relate toxicological information of the products that leaked. This has prevented doctors from developing an appropriate treatment protocol for victims. Later UCC also claimed that the leak was an act of sabotage caused by a disgruntled employee, whom it has since refused to name. In 1994, the Indian Council for Medical Research (ICMR) stopped all further research on the medical effects of the Bhopal disaster without any explanation.

Undoubtedly, the single biggest factor in the Bhopal disaster—beyond the dangerous process in use—was the failure of Union Carbide to adequately inform the Indian government, its workers, and the surrounding community of the dangers. Equally disturbing is the fact that what happened in Bhopal is not unique. In recent times, in many other cases around the country demonstrate the urgency of providing critical information about a company’s operations, in order to protect the environment and the lives and human rights of local communities and workers. Under the earlier Seveso directive182 industry has to provide full information to “competent authorities” specified by national laws, and the information selectively made available by these authorities to the public.

181 For detailed and illuminating discussion on this aspects, E. Gelhorn, Public Participation in Administrative Proceedings 81 YALE L.J. (1971) 359.
Our governments have a prime responsibility to address outstanding problems of health care, safe water, cleaning up the site, compensation and rehabilitation. However, there is no substitute for taking steps to regulate the activities of corporation. Laws must be developed and enforced to allow governments and local communities to control the activities of companies operating in their territory. Ensuring public participation and transparency in decisions relating to the location, operational safety and waste disposal of industries using hazardous materials and technology is an essential step to heighten risk awareness and responsible behavior, as well as to ensure better preparedness to prevent and deal with the consequences of environmental disasters like Bhopal by applying this Act to the private companies also.

There is thus a strong case for the application of the Right to Information in the private sector. Information disclosure standards on environmental impacts (data on toxic releases and health risks to the local community), labour standards (information on worker’s exposure to dangerous chemicals, and basic labour practices including child labour), business practices (terms of agreements between the company and the government) and community relocation (information on displacement, compensation and rehabilitation) should constitute the core of it.

4.11 INDUSTRIAL ACCIDENTS BY MNCs

Industrial accidents are not a new phenomenon. We deliberately pretend that they are not scandal. On an average working day in India, seven to eight workers die, and over 5000 are injured seriously enough to lose three or more days from work. In certain industries, deaths do not merely occur consequent to accidents but the working conditions prevalent ensure that workers catch the worst of diseases.\textsuperscript{183} Major contributing factors to industrial accidents may be found in employees’ characteristics and in the relationship between the work environment and employees’ abilities. Studies have revealed that the major employee characteristics associated with accident proneness include ignorance, lack of

\textsuperscript{183} Gopal Bhargava \textit{Pollution and its Control; With Special Reference to Physical, Chemical and Industrial Environment} 1992, at. P. 5.
neuro-muscular coordination and inattention. Further the work environment often interacts with employee deficiencies to produce an accident. 184

Economic costs associated with industrial accidents are briefly outlined below:185

1. Cost of lost time of injured employee.
2. An industrial accident will also hamper the work of other workers for the simple reason that they stop performing the work out of curiosity, sympathy and to assist the injured employee.
3. It will also consume lot of time of the supervisors and other executives who may have to assist the injured employee, arrange a substitute to carryout the work of the injured selecting, training and allotting a work to new employee in replacement of the injured, investigating the causes of accident and preparing and submitting accident reports to the authorities under the Factories Act of 1948.
4. Cost due to damage to the machine, equipments tools or to the spoilage of material.
5. Cost to the employer in the form of accident compensation and other employee schemes.
6. Cost of reduced efficiency of the injured even after recovery.

An act of negligence or human error in certain industrial establishments is now capable of wiping out the life completely from the earth. This was best demonstrated by the Bhopal gas leak tragedy (December 2-3, 1984) and the accident at the Chernobyl Atomic Power Station (April 21, 1986). While the former involved only intra-national injury, in the latter incident, the radiation had crossed the geographical frontiers of the USSR and polluted the environment of may Scandinavian counties. 186

In India, Bhopal disaster can be treated as worst industrial disaster by Multinational Corporation (MNC). On the fateful night of December 3, just after midnight of December, a poisonous gas MIC (Methyl Iso Cyanate) - more

184 Supra Note 95 at pp. 193-194.
185 Ibid at pp. 192-193
186 S. Sumitra Bases and Extent of State Responsibility / Liability in International Law for Environmental pollution October –December, 1987, vol. 27, No. 4, at p. 385, IJIL.
powerful than the gas Hitler used to kill Jews - coupled with a few others more or less lethal in nature, leaked from a E-610 tank of the pesticide making factory of Union Carbide Corporation (UCC) and found its way into the most densely populated areas of the city, killing thousands and injuring hundreds of thousands.

Bhopal incident has dramatized the human cost of carelessness in industrial development.\(^{187}\) An accident is really an unexpected occurrence that interrupts the regular progress of an activity. It is a negative or unfortunate event. It results from unsafe acts (human), unsafe conditions (mechanical or physical hazards) or a combination of unsafe and unsafe conditions. The real cause of an accident may not come to the surface with a simple analysis.\(^{188}\) It is described as another Hiroshima of the Chemical Industry, one of the worst commercial industrial disasters in history, while Krishna Iyer preferred to call it Bhoposhima. In the same manner, the tragedy was described in different terms such as: accident, disaster, catastrophe crisis and also as sabotage, conspiracy, massacre, and experiment, whichever best suited the arguments that would help to pin the ‘blame’ on somebody.

The Bhopal disaster which killed several thousand people and people suffered grave injuries and losses\(^{189}\) in the space of few hours, Constitutes a watershed in the history of the chemical industry. The Indian council of Agricultural Research [ICAR] has issued a preliminary report on damage to crops, vegetables, animals and fish from the accidents, but these offer few conclusive findings since they were reported in the early stages after the disaster. This report however, did indicate that the impact of whatever toxic substances emerged from the Carbide plant was highly lethal on exposed animals. Large number of cattle (estimates range as high as 4,000), as well as dogs, cats, and birds were killed.

\(^{187}\) Gopal Bhargava *Pollution and its Control; With Special Reference to Physical, Chemical and Industrial Environment*, 1992, at p.5.

\(^{188}\) *Supra Note* at pp. 192-193.

\(^{189}\) Madhumita Dhar Sarkar *Contribution of Indian Judiciary Towards the Development of Environmental Jurisprudence* AIR 2005 at p. 301.
Plant life was also severely damaged by exposure to the gas. There was also widespread defoliation of trees, especially in low lying areas.  

Exposure to MIC has resulted in damage to the eyes and lungs and has caused respiratory ailments such as chronic bronchitis and emphysema, gastrointestinal problems like hyperacidity and chronic gastritis, ophthalmic problems like chronic conjunctivitis and early cataracts, vision problems, neurological disorders such as memory and motor skills, psychiatric problems, of various types including varying grades of anxiety and depression, musculoskeletal problems and gynaecological problems among the victims. It is estimated that newborn babies in Bhopal after the disaster face twice the risk of dying as do children elsewhere, partly because parents cannot care for them adequately. Surprisingly enough, despite the serious health problems and the deaths that have occurred, Union Carbide claims that the MIC is merely a ‘mild throat and ear irritant’.  

There appear to be serious communication problems and management gaps between Union Carbide and its Indian Operation. This failure to communicate hazards was the result of the parent companies hands-off approach to its overseas operation, and can be traced to cross-cultural barriers. These can possibly be related to “disruptions and flaws which appear in multinational operations because of “the absence of common values, norms and expectations among managers in different nations, from tendencies towards ethnocentric attitudes, from psychological impediments to cross-cultural companies hands off approach to its overseas operation and can cross-cultural understanding, and from obstructions and deficiencies in the flow of information within the transnational system attributable to distance and shared ownership. The fact that the operating manuals at Bhopal were printed only in English is an emblematic examples of these problems.  


The incident and its outcome will affect relationship of Multinational Corporations (MNCs) with host affect the relationship of Multinational Corporations (MNCs) with host countries, especially the developing countries, who feel the need to allow them to operate in their countries but view their activities with suspicion (due to a variety of real and perceived grievances). It has the potential for changing Indian, American and Other countries’ laws with respect to multinationals, chemical companies, and industrial safety. The whole world’s attitude about uses, production and storage of hazardous materials is being altered as a result of this incident, and chemical companies have been put on notice that the world is watching. Totally, it was the result of a combination of legal, technological, organizational and human errors.\textsuperscript{193}

**Compensation:**

The world’s worst industrial disaster led to the beigest ever resort to litigation for damages. Immediately after the disaster more than 145 cases were brought against UCC by American lawyers in different courts in the United States on behalf of thousands of victims. These cases were joined and assigned to the District Court of the southern district of New York, where the individual complaints were superseded by a consolidated complaint. The Union of India filed a separate complaint before that Court on 29 June 1985 pursuant to the Bhopal Act,\textsuperscript{194} which provided it with the right to represent the Indian plaintiffs.

On 12 May 1986 United States District Judge John F. Keenan dismissed the American actions on the ground that a United States Court was not an appropriate forum for the determination of the legal issues involved. He based his decision to dismiss the case on the grounds of forum non conveniences upon the United States.

Supreme Court’s decisions in *Gilbert*\textsuperscript{195} and *Piper Aircraft case*.\textsuperscript{196} The Court also favoured dismissal of the case on public interest concerns, such as

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\textsuperscript{193} Supra Note 192.
\textsuperscript{194} Bhopal Gas Leak Disaster (Processing of Claims) Act 1985.
\textsuperscript{196} Piper Aircraft co. Reyno 454 U.S. 235 (1981)
administrative difficulties, the interest of India and the United States, and the applicable law. The following conditions however were laid down.197

1. Union Carbide must consent to submit to the jurisdiction of the courts of India and shall continue to waive defences based upon the statute of limitations.

2. Union Carbide must agree to satisfy any judgment rendered by an Indian Court, and if applicable, upheld by an Appellate Court in that country, where such judgment and affirmance confirm with minimal requirements of due process.

3. Union Carbide must be subject to discovery under the model of the US Federal Rules of Civil Procedure after an appropriate demand by plaintiffs.

This decision was then affirmed198 by the United States Court of Appeals before the Second Circuit. Later, on 5 October 1987 the Supreme Court denied writs of certiorari, against the Court of Appeals on petitions by the Union of India and others. The Supreme Court’s Reports do not show the reasons for the decision.199

After this legal drama the case moved back to India. The Union of India brought the case before the Madhya Pradesh District Court in Bhopal pursuant to the Bhopal Act, which gave exclusive rights to the Union to represent all claims against UCC. This action stayed all proceedings in about 800 cases which had already been filed pending further proceedings. The District Judge of Bhopal, M.W. Deo, introduced an unprecedented legal development when he made an order for interim relief of 3,500 million rupees (equivalent to US$270 million) on 17 December 1987. Judge Deo’s order made unpredicted use of the courts’ inherent power to render justice. The Judge based his decision entirely on the

199 Union of India, Petitioners v. Union Carbide Corporation, et al. US Supreme Court Reports 98 L.Ed. 2d 150.
exercise of the court’s jurisdiction under section 151 of the Code of Civil Procedure,200 taken together with section 94 (e) of the Code.201

A Civil Revision Petition was filed by UCC against the order of the District Judge, before the Madhya Pradesh High Court. On 4th April 1988 Judge Seth of the High Court partly allowed the revision by reducing the amount of the interim payment. But he nonetheless upheld the liability of the defendant UCC to make interim payment of the plaintiff, the Union of India.202 In his elaborate order, he held that the payment was not a payment of interim relief without reference to the merits of the case, as held by the Trial Court, but was a payment as interim damages under the substantive law of torts on the basis of a more than prima facie case having been made out a favour of the plaintiff to receive such payment from the defendant. The amount of interim payment was reduced from the 3,500 million rupees ordered by the District Court to 2,500 rupees (about US$ 195 million). The High Court’s Order for interim payment of damages appeared to settle the issue, and seemed to leave little scope for further prevarication.

UCC challenged this order before the Supreme Court of India, While fresh negotiations began for a settlement. While the matter was before the supreme court of India, UCC and the Union of India agreed a settlement figure of US$ 470 million (about 7,150 million rupees) by way of full compensation. On 14 and 15 February 1989 the Supreme Court of India made order for payment of this amount.203 The court took into consideration the different proposals that UCC and Union of India has offered for a settlement and found the case pre-eminently fit for an overall settlement solely because of the “enormity of human suffering” occasioned by the disaster and the pressing urgency to provide immediate and substantial relief to the victims. On the basis of the Court held it ‘just, equitable

200 S. 151 of the code of Civil Procedure 1976 says that nothing in the Code shall be deemed to limit or otherwise affect the inherent powers of the court to make orders necessary for the ends of justice.
201 S. 94 CPC Provides for making such interlocutory order as may be just and convenient.
202 Union Carbide Corporation v. Union of India, in the Madhya Pradesh High Court , Civil Revision Petition No. 26 of 1988.
203 Union Carbide corporation v. Union of India (1989) 1 SCC 674.
and reasonable” to order UCC to pay that sum in full settlement of all claims including the quashing of all criminal proceedings. 204

However, the Supreme Court seems to have deliberately missed an opportunity to develop new principles in relation to Multinational Corporations (MNCs) operating with inherently dangerous technologies in the developing countries. 205 As the court itself said, 206 it would have examined various dimensions of this problem like the protection of the environment, the permissibility of ultra hazardous technology, standards of disaster liability for multinationals operating in developing countries, impact of exploitation of cheap labor and of captive markets and the legal and constitutional safeguards against such exploitation. The court did not proceed to deal with these issues as the need for immediate relief to the victims of the tragedy could not wait till these questions are elaborately examined and decided. 207

Several petitions were filed before the Supreme Court to review the settlement. The Supreme Court of India then ordered that both UCC and the Union of India would continue to be subject to the jurisdiction of the courts in India until further orders. 208 On 22 December 1989 the Supreme Court held the Bhopal Act 209 constitutionally valid. 210 The Court heard this challenge only after giving orders for a full and final settlement, which meant that an invalidation of the Act would unsettle the earlier settlement.

The Supreme Court, on May 4, 1989 gave the reasoning for its orders of 14 and 15 February 1989, reiterating the compelling duty, both judicial and

204 Ibid at pp. 674-675.
205 Pointing out the inadequacy of private litigation and the possibility of surrendering to a compromise in order to avoid delay and protracted litigation when MNCs are involved, it has been suggested that an international compensation fund be created. See generally, Muchlinksi, op, cit, See also views of the same author in The Bhopal Case: Controlling Ultra Hazardous Industrial Activities Undertaken by Foreign Investors, (1987) 50 MLR 545.
207 Ibid, p. 284. The court observed “But in the present case, the compulsion of the need for immediate relief to tens of thousands of suffering victims could not in our opinion, wait till these questions, vital though they be, are resolved in the due course of judicial proceedings”.
humane, to secure immediate relief to the victims. And directed that 84 per cent of the amount be disbursed as compensation in 3,000 cases of death and 1,02,000 cases under four different categories of injuries, ranging from simple ones to those of utmost severity, and 16 percent be set aside to compensate those who had lost property and livestock.

The U.S. based Union Carbide Company, now owned by Dow Chemical Company paid $470 million in compensation to victims in 1989. But distribution of most of that money was held by bureaucratic disputes over the categorization of victims. While by the terms of the Indian Bhopal Gas Disaster Relief Act, the settlement resolves all claims of survivors for injuries resulting from the disaster, according to survivor’s organizations today the amount of the settlement was based on estimations that have proved far too low, whether quantifying the dead, the injured or the property lost. It also never accounted for future medical claims. As a result, say the survivor’s organizations, the $470 million dollars has proved to be inadequate even to satisfy the claims of the acknowledged victims of the disaster. The balance of the amount (approx. $340 million) remaining in the fund is committed to compensation of victims, and cannot be used for the many other needs of the community – not the public health and economic devastation resulting from the disaster, and not for remediation of the contamination left behind by Union Carbide. TNCs have also employed a number of strategies, some unabashedly illegal, to avoid paying the required compensation.212

On July 19, 2004, the Supreme Court directed the Welfare Commissioner of Bhopal to disburse the unspent amount of Rs. 1,503 crore in the Settlement Fund on a pro-rata basis to all the (5,70,000 – odd) victims who had been awarded compensation for death and injury. The court also allowed the petitioners, the Bhopal Gas Peedith Mahila Udyog Sanghathan (BGPMUS) and the Bhopal Gas Peedith Sangharsh Sahayog Samiti (BGPSSS), the option of filing an application for augmentation of the compensation amount in proportion to the magnitude of the disaster (which turned out to be five times greater than...

211 Supra Note 207.
what was assessed at the time of the settlement). But the court dismissed on May 4, 2007, an application they filed seeking enhancement of the compensation by a factor of five, stating that the task of determination of facts was that of the Welfare Commissioner, Bhopal. Both the Welfare Commissioner and the Madhya Pradesh High Court later rejected their plea on flimsy technical grounds.

However, as per the report of the Office of the Welfare Commissioner, as on December 31, 2008, not less than 5,74,367 gas victims were actually awarded compensation, which works out to an average of Rs. 12,410 a victim at the 1989 value of the rupee. In the order dated May 4, 1989, the Supreme Court had assured the victim groups that if the total number of dead and injured turned out to be more than the number on which the settlement was based, the settlement was liable to be reopened.

The Supreme Court did not expect the number of claimants to rise by five times and had asked the Centre rather than UCC to meet the shortfall in the compensation amount, if any. However, the genetic damage caused by the disaster meant that the children of the victims and their descendants also medically suffered the impact of the tragedy in one way or the other and would add to the number of claimants substantially. The gas victims were also denied interest for the period of undue delay in the adjudication and award of compensation - a process that stretched from 1992 to 2004.

4.11.1 BHOPAL GAS LEAK DISASTER (PROCESSING OF CLAIMS) ACT, 1985

Apart from the early statutory modification brought about in the field of personal injury law, a major legislative breakthrough was achieved through the Bhopal Act 1985. The Bhopal Act was an immediate legislative reaction to the Bhopal disaster. The Act replaced an earlier Ordinance that had been promulgated as an urgent measure to meet an unprecedented situation created by the filing of individual suits by American lawyers. Under the Bhopal Act the
government of India assumed the role of parens patriae, which gave to the Union Government considerable powers to deal with the legal and administrative problems created by the disaster. The Bhopal Act was initially assessed by many as an executive manoeuvre that not only enabled the Government to participate in the United States litigation but also avoided any litigation in India.

The main object of the passing of the Bhopal Gas Leak Disaster (Processing of Claims) Act, 1985 was the nature and extent of the damage to the victims of the accident were so large and diffuse that quick decision by a court on the question of compensation was not easy. It was felt that steps should be taken to ensure that the claims arising out of the Bhopal disaster were “dealt with speedily, effectively, equitably and to the best advantage of the claimants.”

Initially fears were expressed over the constitutionality of this statute, until it was upheld by the Indian Supreme Court. Individual plaintiffs challenged the constitutionally of the Bhopal Act and the adequacy of the settlement to provide just compensation. In Charanlal Sahu v. Union of India. The Supreme Court of India upheld the sole right of the Indian Government to represent the victims under the Preamble and Section 3 of the Act. It recognized that Section 3 (3) applied the right of all courts before the Act was enacted. Section 3 offered self-representation to petitioners who had filed suits only after the Act was passed if the Foreign Court approved.

See S. 3 of the Bhopal Act, which gave the Central Government “the exclusive right to represent and act in place of whether [within or outside India] every person who has made, or is entitled to make a claim for all purposes connected with such claim in the same manner and to the same effect as such persons”.


The Act 21 of 1985

Supra Note 215 at Preamble

Supra Note 211.

AIR 1990 SC 1480.


Section 3 (3) of the Bhopal Act, 1985 provided that in case of any such or other proceeding with respect to any claim pending immediately before the commencement of this Act in or before any court for other authority outside India, the Central Government shall represent and act in place of, or along with, such claimant if such claimant if such court or other authority so permits.
The Court held that the Act excluded the criminal liability of the defendants.\textsuperscript{223} It restricted the scope of “any other claim” under Section 2 (b) (iv) (Section 2 (b) (iv) of the Bhopal Act, 1985 provided that any other claim\textsuperscript{224} arising out of or connected with, the disaster.) to loss of business/employment or ‘flaura and fauna,’ although the latter was not termed in the statue. However, in \textit{Union Carbide Corp. v. Union of India}\textsuperscript{225} the Court reversed the other against criminal proceedings. It found that although criminal liability was not the subject matter of the Act this did not mean that the Act could curtail any right of criminal prosecution.

Section 3 offered self-representation to petitioners who had filed suits only after the Act was passed if the Foreign Court approved\textsuperscript{226} Judge Keenan approved the Sahu ruling of the Indian Supreme Court to retain exclusive standing for the Indian Government. The planitiffs could seek permission of foreign courts only for suits after the Bhopal Act came into effect.\textsuperscript{227}

Under this Bhopal Act the Central Government of India, appoint a Welfare Commissioner and other staff and to discharge duties connected with hearing of the claims and distribution of compensation and formulated a scheme known as the Bhopal Gas Leak Disaster Scheme, for the registration, processing, and determination of compensation to each claim and appeals arising from thereon.\textsuperscript{228} The Bhopal Act represents further evidence of the ability of the Indian legal system to respond effectively to the new challenges posed by mass disasters of the kind that occurred in Bhopal.\textsuperscript{229}

\textbf{4.11.2 PUBLIC LIABILITY INSURANCE ACT, 1991:}

In this industrial age, many companies are manufacturing and transporting hazardous substances to populated areas. Ordinary citizens cannot hope to understand the nature of such dangerous activities going on in their

\begin{itemize}
\item \textsuperscript{223} \textit{Ibid. Charan Lal Sahu} p. 1529.
\item \textsuperscript{224} Including any claim by way of loss of business or employment
\item \textsuperscript{225} \textit{Charanlal Sahu. v. Union of India}, (1990), \textit{AIR} 1990 SCI 1504.
\item \textsuperscript{227} Supra Note 192.
\item \textsuperscript{228} V.S. Deshpand, \textit{The Bhopal Gas Leak Disaster Act, 1985} 27 (1985) IJIL 23.
\end{itemize}
neighbourhood. Who will be liable to pay compensation if an accident occurs? Parliament had passed the Public Liabilities Insurance Act (PLIA) in 1991 to provide for such industrial accidents and to provide for interim compensation on a no-fault basis.

In fact, this Act was enacted by the Government of India, after realizing the disabilities of the Indian Legal system in the Bhopal Accident caused by the Multinational Corporation (MNC) and also some of the local industries like Oleum Gas Leak Disaster etc. Although the Judiciary could not give effective relief victim of the Bhopal Disaster, there was criticism for the delay in proceedings and granting reliefs to victims. However, the case had resolved some important aspects like the “Industrial Disaster Fund”. It also initiated legislative activism and the Public Liability Insurance Act, 1991 came into being, to provide insurance of public liability and immediate relief to victim of an accident, which occurred while handling hazardous substance. 230

The Act, 1991 is one such measure which provides some monetary compensation under a scheme of insurance covering the risks such as death and/or injury to human beings and damage to private or public properties due to hazardous industrial activities, processes and operations. 231 As has been mentioned in the Statement of Objects and Reasons for the enactment of this Act,

“Very often, the majorities of the people affected by such accidents are from the economically weaker sections and suffer great hardships because of delayed relief and compensation. While workers and employees of hazardous installations are protected under separate laws, member of the public are not assured of any relief except through long legal processes. Industrial units seldom have the willingness to readily compensate the victims of accidents and the only remedy now available for the victims to go through prolonged litigation in a court of Law. Some units may not have the financial resources to provide even minimum relief.” 232

230 Supra Note 4 at p. 302.
232 Ibid.
That means, public liability insurance is for providing immediate relief to the persons affected by accidents, and that such accidents must occur while handling any hazardous substance. Thus, there is need to understand the terms “accident”, “handling” and “hazardous substance” as provided under this Act. According to this Act, the term “accidents" reads as follows: “Accident means an accident involving a fortuitous or sudden or unintended occurrence while handling any hazardous substance resulting in continuous or intermittent or repeated exposure to death of, or injury to, any person or damage to any property but does not include an accident by reason only of war or radio-activity."

The accident does not include an accident caused by reason only of war or radioactivity. That means, if the accident is caused by reason not only of a war but also or radioactivity, is covered by the term within the meaning of Section 2 (a).

The Act imposes a duty on the owner to take out Insurance Policies before he starts handling of hazardous substances. Such a policy may be one or there may be more than one providing for contracts of insurance against the liability to give relief in case of death or injury of any person under Section 3 (1) of the Act. The owner permits renewal of the Insurance Policy from time to time before the expiry of the validity period so as to keep the Insurance Policy remain in force throughout the period during which such handling continues.

Further, the Act empowers the Central Government to establish a fund known as the Environmental Relief Fund. The relief fund shall be utilized for the payment of relief under the award made by the Collector under Section 7 in accordance with the provisions of the Act and the claim made under sub-section (3) of Section 7-A. This sub-section empowers the Central Government to make a scheme specifying the authority in which the Relief Fund shall vest, the manner in which the Relief Fund shall be administered, the form and the manner in which

233 Section 2 (a) of the Act., 1991.
234 Section 4 of the Act.
235 The relief for the payment of which the owner is liable for Reimbursement of medical expenses and for loss of wages due to temporary partial disability which reduces the earning capacity of the victim etc. under Section 3 (1) of the Act.
236 Section 4 (2) of the Act.
237 Section 7 –A of the Act.
money shall be drawn from the Relief Fund and for all other matters connected with or incidental to the administration of the Relief Fund and the payment of relief there from.

The PLIA was an attempt to use insurance as a risk spreading exercise which would enable the immediate payment of minimal amounts as an interim measure. This would cover not only Bhopal-like incident but the multitude of mini-Bhopals that are a regular occurrence. There is little evidence, however, that this account under the PLIA is being drawn upon—not very good news for present or future victims of industrial disasters. In 1992 this was amended because insurance companies were unwilling to insure hazardous companies for a sum without an overall ceiling.

4.11.3 NATIONAL ENVIRONMENTAL TRIBUNAL ACT, 1995:

The National Environment Tribunal Act 238 (N.E.T Act), 1995 is a comprehensive piece of legislation dealing with the disposal of compensation petition by the valiant victims of environmental catastrophe. Five Chapters and 31 Sections broadly envelope rubrics of glossaries liability to pay compensation and its procedure composition of tribunal jurisdiction penalties and other miscellaneous provisions. 239

The National Environment Tribunal Act, 1995 was passed to meet need of risk and hazard 240 and also to provide a forum for speedy redress in the nature of interim, and final, compensation to those who fall victim to hazardous accidents. The objectives of the Act modesty confined itself to provide “strict liability” for damages arising out of handling of hazardous substances. 241

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To set up tribunals, exclusively to deal with the determination and disbursement of compensation is the main aim of the enactment of this Act. The Tribunal is not obliged to follow the procedure under the Code of Civil Procedure. It is guided more by principle of natural justice. The Tribunal is empowered to take up suo moto claims for compensation. The Act exclude workmen from the purview. The law, however, is yet to come into force. There is also a proposal under discussion to merge these tribunals with the Environment Appellate Authority (EAA) which was set up by a 1997 law to ‘hear appeals with respect to restriction of areas in which any industry’s operations or process….’ Shall not be carried out…. The merger apparently is being mooted because both these forums or being underutilized-paradox given the ever increasing multitude of conflicts around location of industrial projects and increasing number of accidents involving hazardous substances.

The Tribunal Under Section 3 of the National Environment Tribunal Act, 1995 has been empowered to issue directions for payment of compensation for death of, or injury to a person and damage to property and environment. The liability to pay compensation in certain cases fastened on the principles of no fault. Under Section 3(1) of the Act, the compensation for damages may be claimed under the following heads:

a) Death
b) Permanent, temporary, total or partial disability or other injury or sickness;
c) Loss of wages due to total or partial disability or permanent or temporary disability.
d) Medical expenses incurred for treatment of injuries or sickness;
e) Damages to private property
f) Expenses incurred by the Government or any Local Authority in providing relief, aid and rehabilitation to the affected person;

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242 Ibid.
243 M.G. Chitkara *Encyclopaedia of Ecology, Environment and Pollution* 1997 p.10
g) Expenses incurred by Government for any administrative or legal action or to cope with any harm of damage, including compensation for environmental degradation and restoration of the quality of environment.

h) Loss to Government or local authority arising out of, or connected with the activity causing any damage;

i) Claims on account of any harm, damage or destruction to flora including milch and draught animals and aquatic fauna;

j) Claims on account of any harm, damage or destruction to flora including aquatic flora, crops, vegetables, trees and orchards;

k) Claims including cost of restoration on account of any harm or damage to environment including pollution of soil, air, water, land and ecosystem;

l) Loss and destruction of any property other than private property;

m) Loss of business of employment or both.

n) Any other claim arising out of, or connected with, an activity of handling of hazardous substance.

For the sustenance of claim of compensation for death and injury to person and damage to property and environment two types of proofs are required. Firstly, the death, injury and damages has resulted out of accident while handling hazardous substances. Secondly, such death injury and damages should fall under all or any of the hands specified in the schedule.\textsuperscript{244} The ground stated under the schedule broadly covers the pecuniary and non-pecuniary damages mitigation of loss to private and non-private properties, reimbursement of relief, aid, rehabilitation litigation expenses of Government and preservation of biological diversity. For claiming such compensation, the petition is not required to plead and establish that the death injury and damage was due to wrongful act, neglect or default of any person.\textsuperscript{245}

The Tribunal being a Civil Court, will be primarily guided by the Code of Civil Procedure of 1908, the provisions of this Act and above all the principle of ‘natural justice.’\textsuperscript{246} It may also award interim relief in exceptional circumstances.

\textsuperscript{244} Section 3 (3) of the Act.
\textsuperscript{245} Section 3 (1).
\textsuperscript{246} Section 4 (5) of the Act.
to mitigate losses and damages. 247 The penal provision derives its substance from the principle of strict liability. Failure to comply the orders of the tribunal invites imprisonment of three years and a fine of ten lakhs rupees. 248 The typology of the penal provisions enumerated under Air, Water and Environment Act prescribing separate punishment for different offences do not find a favour in the present enactment.

4.11.4 CIVIL NUCLEAR LIABILITY BILL, 2010

Throughout the human history the foundations of civilizations have rested heavily on their energy supplies. Ancient Egypt under the Pharoahs, Athenian Greece under democracy, and the American South before the civil war depended on human slaves as a primary energy resources. The nineteenth –century Industrial revolution in Europe and North America was powered with coal, as is the process of industrialization now under way in the People's Republic of China. 249 The dominant form of modern industrial societies, the sprawling metropolis is based on transportation technologies requiring an abundance of petroleum. Moreover, the foundations of future post-industrial societies may well rest on electricity produced from nuclear, and possibly, thermonuclear and solar energy. Among all these energies, nuclear power has become a highly controversial issue throughout the world. 250

Nuclear Energy takes its place as a major source of electricity worldwide on both economic and resource strategy grounds. 251 In recent days, the Indian government has plans for large –scale electricity generation projects, and is moving to allow an increased role for private companies, domestic and foreign, in the nuclear energy industry. The aftermath Bhopal disaster in 1984, India seeks to commercialise its nuclear industry is a big step in the era of globalization. The experience gained from the Bhopal incident becomes increasingly important as India enters the nuclear world. With this aim, the Government of India has decided to introduce a piecemeal legislation called “Nuclear Liability Bill, 2010”.

247   Section 5 of the Act
248   Section 9 (3) (c ); 9 (4) of the Act.
251   M.S. Yadav,  Nuclear Energy and Power: Environmental Impacts and other Effect  2007 p. 33.
The purpose of the Bill is, to enact a legislation which provides for nuclear liability that might arise due to a nuclear incident and also the necessity of joining an appropriate international liability regime.\footnote{Para 7 of the ‘Statement of Objects and Reasons’ of the Bill.}

The Indian Lok Sabha Passed the Civil Liability for Nuclear Damage Bill, 2010 through voice vote and also adopted 18 amendments to the Bill moved by the government. These include raising the liability cap of the operative from 500 crores rupees to 1500 crore rupees.\footnote{http://www.Smarchartoday.com/lok-sahba-passes-civil-nuclear-liability-bill/9993.} The amendments also included the change of language relating to the suppliers’ liability of nuclear installations in case of accidents. The government dropped the word ‘intent’\footnote{In clause 17 of the Bill.} in the Bill. The objective of this bill is to provide quick compensation in the event of a nuclear incident. However, the Bill also limits the time to make claim within 10 years.\footnote{Clause 18 States: “The right to claim compensation for any nuclear damage caused by a nuclear incident shall extinguish if such claim is not made within a period of 10 years from the date of the incident”}

Nuclear power plants are costlier than conventional coal plants.\footnote{Supra Note 251.} Generally, compensation claims from one nuclear accident could be enough to bankrupt a private company even Multinational Corporation (MNC) also. Firms are reluctant to enter the Indian market despite its size until there is some clarity on compensation in case of an accident.\footnote{http://www.Business-standard.com/india/news/what-is-nuclear-liability-bill/106518/on.} Likewise, nuclear energy in India does not make a significant contribution to the national energy pool at present.\footnote{V.S. Mhajan \textit{Energy Development in India: Issues, Trend and Alternative sources} 1983 at pp., 44-45.} So, it is high time to take a cool and dispassionate look at the future role of nuclear power in India.\footnote{Supra Note 251.} To solve this crucial problem, the Government of India introduced the Bill on capping civil nuclear liability in order to pave the way for the Multinational Companies (MNCs) to export their nuclear reactors to India without having to bear the full liability on account of an accident. The important features of the bill are as follows:

\footnotesize{\textsuperscript{252} Para 7 of the ‘Statement of Objects and Reasons’ of the Bill.  
\textsuperscript{254} In clause 17 of the Bill.  
\textsuperscript{255} Clause 18 States: “The right to claim compensation for any nuclear damage caused by a nuclear incident shall extinguish if such claim is not made within a period of 10 years from the date of the incident”  
\textsuperscript{256} Supra Note 251.  
\textsuperscript{259} Supra Note 251.}
• The Civil Liability for Nuclear Damage Bill, 2010 fixes liability\textsuperscript{260} for nuclear damage and specifies procedures for compensating victims.

• The Bill fixes no-fault liability on operators\textsuperscript{261} and gives them a right of recourse against certain persons. It caps the liability of the operator at Rs. 500 crore.\textsuperscript{262} For damage exceeding this amount, and up to 300 million Special Drawing Rights (SDR)\textsuperscript{263}

• All operators (except the central government) need to take insurance or provide financial security to cover their liability.

• For facilities owned by the government, the entire liability up to 300 million SDR will be borne by the government.

• The Bill specifies who can claim compensation\textsuperscript{264} and the authorities who will assess and award compensation for nuclear damage.\textsuperscript{265}

• Those not complying with the provisions of the Bill can be penalized.

Indeed, with respect to energy industries may cause very large damage.\textsuperscript{266} Though, the present bill reflects the engaging private U.S. Companies and in future private Indian Companies in a massive expansion of nuclear power generation,\textsuperscript{267} there is criticism that the Bill is designed specifically keeping the interests of the U.S. Multinational Corporations (MNCs) in mind, not the welfare of the potential victims of the disaster.\textsuperscript{268} Further, the Indian government’s approach presently focuses only on maximalizing the use of nuclear energy through commercialization. Private firms are being added into the equation without any legal framework to deal the eventualities arising policy change

\textsuperscript{260} Clauses 5, 6, and 7 of the Bill.

\textsuperscript{261} Clause 4 of the Bill sys, “The operator of the nuclear installation shall be liable for nuclear damage caused by a nuclear incident.

\textsuperscript{262} Clause 6 (2) of the Bill.

\textsuperscript{263} Clause 6 (1) of the Bill the Central Government will be liable. (Clause 7 (1) of the Bill provides: The Central Government shall be liable for nuclear for damage in respect of a nuclear incident. (a) where liability exceeds the amount of liability of an operator specified under sub-section of section 6; (b) occurring in a nuclear installation owned by it.

\textsuperscript{264} Clause 17 allows only the operator not the victims, to sue manufacturers and suppliers.

\textsuperscript{265} According to the clause 35 “No civil court shall have jurisdiction to entertain any suit or proceedings in respect of any matter which the Claims Commissioner or the Commission, as the case may be, is empowered to adjudicate under this Act and no injunction shall be granted by any court or other authority in respect of any action taken or to be taken in pursuance of any power conferred by or under this Act.”

\textsuperscript{266} Supra Note at p. 146.


regarding the increased use of nuclear energy together with the entry of private companies, both domestic and international. However, nuclear power is and will remain an important energy resource, among the other sources of energies in India.

4.11.5 NATIONAL GREEN TRIBUNAL ACT, 2010:

There still remain complex questions of resolution of disputes in the matters of environmental harm between the MNCs and the host states. There are no International Courts that can exercise jurisdiction in such case as the MNCs have not yet been recognized as full subject of International Law. The Municipal Courts of the host states may not be fully trusted for the possibility that the Court is sympathetic towards the victims of a disease or accident especially when they are national of the state of forum. Moreover, the environmental disputes are so technical in nature that a regular court may not be the most appropriate forum. Hence, as specialized authority needs to establish to tackle the problems of environmental pollution.

The environmental jurisprudence of India crystallizes the need for environmental Tribunals, as the existing civil courts lack in environmental expertise and dispense delayed justice. In *Shriram Food and Fertilizers case* the Court then urged upon the Government of India to get up an ecological science research group consisting of independent professionally competent experts in different branches of science and technology, who would act as an information back for the Court and the government departments and generate new information according to the particular requirements of the Court and the concerned government department. The Court also suggested setting up environmental courts on the regional basis with the professional judge and two experts drawn from the ecological sciences research group keeping in view the nature of the case

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269 http://opendemocracy.net/openindia/v-haridas-and-yash-thomas-manually/  
270 Supra Note 252 at p.40  
271 Supra Note 118 at p. 551.  
273 AIR 1987 SC 965.  
274 Ibid at p. 982.
and the expertise required for its adjudication. 275 Recently, with this aim, the Government of India made a new Act i.e. The National Green Tribunal Act, 2010.

The National Green Tribunal (NGT) that came into being to fulfils a long-felt need. It is a specialized authority that can go into all questions related to pollution of land, air and water. The country’s judicial system, burdened as it is with mounting civil and criminal cases, is hardly in a position to hear cases related to issues of environment which are, essentially, of a technical nature. There are a host of special laws like the Water Act of 1974, the Water Census Act of 1977, the Forest Conservation Act of 1980, the Air Act of 1981, the Environment Protection Act of 1986, the Public Liability Insurance Act of 1991 and the Biological Diversity Act of 2002 that call for specialized hearing and adjudication.

India is the third country after Australia and New Zealand to set up the NGT is indeed commendable. However, efforts in the past to have such a body have not been successful. The failure of the National Environmental Appellate Authority (NEAA), which necessitated the NGT, is a case in point. It will be remembered for singularly dismissing all the appeals. Needless to say, much will depend on those heading the Green Tribunal which will have 20 members, 10 drawn from the judiciary and 10 specialists in environment-related subjects. 276

Meanwhile, in order to skirt uncomfortable questions regarding the non-notification of NETA, the government has come out with another Act, the National Green Tribunal Act, 2010, to replace the 1995 Act in terms of relief to victims of environmental disasters. It limits the locus standi of the complainant before the tribunal, making it impossible for human rights organizations to intervene on behalf of the victims.

Similarly, the Act says no application for grant of compensation will be entertained unless it is made within five years of the occurrence of the alleged cause of action. Both these deadlines are extendable by 60 days if the Tribunal condones the delay. It is pointed out that this is no relief at all as in many cases;

275 Ibid.
276 The Indian Express, 23rd October, 2010, at p.8.
the environmental impact of disasters is felt long after the occurrence of the disaster. While the executive’s concern for absolute liability standards is dubious, the judiciary appears to be wavering on its decade-long commitment to the principle. The quest of the survivors of the gas tragedy for just compensation and the Supreme Court’s reluctance to grant it - in line with its past commitments - form a sad chapter in the history of disaster litigation in India.\(^{277}\)

There are several laws to future legal liabilities of Multinational Corporations (MNCs) in case of industrial accident. There is no dearth of laws what we lack is a comprehensive legal approach to fix the legal liability of MNCs.

The hypothesis that the Law on this subject is not adequate is proved to be correct. Further, International Law is not successful in controlling MNCs causing environmental hazards is proved to be correct.

Effective environmental protection and improvement is a matter of legal rights and duties. Development of a sound legal mechanism is a Sin-qua non to protect our environment. In India, environmental pollution has been regulated by legislative, administrative and judicial activities. India has anti-pollution legislation to protect environment. Some of the provisions of the different Acts, and Specific legislations for controlling environmental pollution are prevalent in India. These provisions and Specific Legislations also apply to the environmental activities of the Multinational – Corporations MNCs such provisions of different Acts, and Specific Legislations such as Constitutional Law, Criminal Law, Tort law, The Workmen’s Compensation Act, Environmental law, The Water (Prevention Act Control of Pollution) Act 1974 Air (Prevention and Control of Pollution) Act 1981 has been discussed in this chapter. The world’s worst industrial disaster of Bhopal disaster its impacts and legal issues have also been discussed in this chapter.