Chapter - II

INDIAN LEGAL SETTING

Having examined the genesis of the environmental problems facing the world today and some of the emerging international legal norms for the protection of environment, it is worthwhile examining the existing legal mechanism for water pollution control in India. For a better appreciation of the legal setting, it is necessary first to consider the basic law of the land. As such, the relevant provisions of the Constitution of India merit immediate attention.

I. Constitutional Provisions

The Constitution of India is one of the few in the world, having specific provisions for the protection of environment. These provisions came to be incorporated in the Constitution in the post-Stockholm\(^1\) period. A Constitution Amendment,\(^2\) for the first time, inserted relevant provisions in Part IV (Directive Principles) and Part IV A (Fundamental Duties) of the Constitution.

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Directive Principles:

Environmental problems are, normally, dealt with at the legislative level by enacting a relevant law for the purpose. India has, however, taken a lead in giving a constitutional status to environmental concerns. As the supreme law of the land, the Constitution is binding on the citizens and non-citizens, apart from the state. 3

The Directive Principles of State Policy (Articles 36-51) are enshrined in Part IV of the Constitution. Article 47 provides for the improvement of public health as one of the primary duties of the state. Article 48A states:

The State shall endeavour to protect and improve the environment and to safeguard the forests and wild life of the country. (4)

3 Article 12 of the Constitution of India defines "State" as: In this Part (Part III, Fundamental Rights), 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.

4 Inserted on 3 January 1977. It is interesting to compare this Article with Article 24(1) of the Constitution of Greece, which came into force on 11 June 1975. It states: "The protection of the natural and cultural environment constitutes a duty of the State. The State is bound to adopt special preventive or repressive measures for the preservation of the environment".
This article uses the word "environment" in a wider sense. It means an aggregate of all the external conditions and influences affecting life and development of organs of human beings, animals and plants. It needs to be underlined that the directive of Article 48A requires the state not only to adopt a protectionist policy but also to provide for the improvement of polluted environment. Therefore, the state may impose restrictions on the use of factors affecting life and development of body of human beings, animals and plants. It may, in addition, take necessary measures for the improvement of environment.

In order to understand the true import of Article 48A, however, it is necessary to appreciate the nature of the Directive Principles of State Policy. It has been made amply clear in the Constitution itself that:

The provisions contained in this Part (Part IV of the Constitution) shall not be enforceable by any court, but the principles therein laid down are, nevertheless, fundamental in the governance of the country and it shall be the duty of the State to apply these principles in making laws.(5)

The Directive Principles embody the object of the State

5 Article 37.

6 'State' under Part IV of the Constitution of India has the same meaning as in Part III (Fundamental Rights) of the Constitution. This means that not only the Union and the State authorities but also local authorities have a moral obligation to follow these Directives.
under the republican Constitution, namely a 'welfare state'. These Directives, in most cases, aim at the establishment of a economic and social democracy pledged in the Preamble to the Constitution of India.

The Directive Principles, in essence, are in the nature of "instruments of instruction" to the government of the day to do certain things and to achieve certain ends by their actions. They are, however, required to be implemented by legislation. Accordingly, so long as there is no law carrying out the policy laid down in a Directive, neither the state nor an individual can violate any existing law under the colour of following a Directive. Furthermore, the Directives are not enforceable in the courts (not justiciable).

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7 The Directives emphasise that the goal of the Indian policy is not laissez faire, but a welfare state - where the state has a positive duty to ensure to its citizens social and economic justice and dignity of the individual. It would serve as an instrument of instructions for all future governments. The 'socialistic goal' has been further emphasised by the 42nd and 44th Amendments.

8 Article 36.


10 The Directives are not cognisable by the courts and if the government of the day fails to carry out these objectives no court can make the Government ensure them. Nevertheless, the sanction behind them is, in fact political. As Ambedkar observed in the Constituent Assembly, "if any Government ignores them, they will certainly have to answer for them before the electorate at the election time". [VII C.A.D., 41, p.476.]
They do not create any justiciable right in favour of the individual.\textsuperscript{11} Conflicting views\textsuperscript{12} exist about their incorporation in the Constitution.

It is important to note that, in many a case, the state's efforts to implement the Directive Principles were thwarted mainly on the ground that they were violative of the Fundamental Rights. Article 31(c), which saves laws

\begin{itemize}
  \item \textsuperscript{11} See n.9.
  \item \textsuperscript{12} For instance, Ivor Jennings characterised them as 'pious aspiration', and also questioned the utility of importing into India of the 19th century English philosophy of 'Fabian socialism without the socialism' \cite[Jennings, Some Characteristics of the Indian Constitution (1963), pp.31-33]{Jennings}. Calling the Directives as 'paragraphs of generalities', Wheare observed: "if the Constitution is to be taken seriously, the interpretation and fulfilment of these general objects of policy will raise great difficulties for legislatures and these difficulties will bring the Constitution, the courts and the legislature into conflict and disrepute. If these declarations are, however, to be treated as 'words' they will bring discredit upon the Constitution also". \cite[Wheare, Modern Constitution, p.47]{Wheare}. On the other hand, Sir B.N.Rau, who advised the division of individual rights into enforceable rights (Fundamental Rights) and non-enforceable rights (Directive Principles) stated that the Directives were intended as "moral precepts for the authorities of the State...they have at least an educative value". Granville Austin considers these Directives to be "aimed at furthering the goals of the social revolution or ... to foster this revolution by establishing the conditions necessary for its 'achievement' \cite[Granville Austin, The Indian Constitution, pp.50-52]{Austin}".
\end{itemize}
giving effect to certain Directive Principles, was amended to cover all or any of the principles laid down in Part IV of the Constitution from the operation of Articles 14 and 19. As a consequence, a law enacted by the state to implement the principle in Article 48A, namely, "to protect and improve the environment and to safeguard the forests and wild life," was not to be subject to judicial scrutiny for violation of Article 14 and 19.

This position, however, now appears to have been changed, in view of the recent decision of the Supreme Court in the Minerawa Mills case (1980). It has restored the status quo ante of the 42nd Amendment in Article 31(C), under which only a law seeking to give effect to the Directive Principles contained in Article 39(b) and (c) shall not be void, if

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13 Article 31(C), as amended by the Constitution (Forty-fourth Amendment) Act 1978, Section 8, was as follows: Notwithstanding anything contained in Article 19, no law giving effect to the policy of the State towards securing all or any of the principles laid down in Part IV shall be deemed to be void on the ground that it is inconsistent with or takes away or abridges any of the rights conferred by Article 14 or Article 19.

14 Fundamental Rights contained in Article 14 provides for the right to equality and Article 19 provides for the right to freedom.

15 Article 39 provides: The State shall, in particular, direct its policy towards securing - (b) that the ownership and control of the material resources of the community are so distributed as best to subserve the common good; (c) that the operation of the economic system does not result in the concentration of wealth and means of production to the common detriment.
it is inconsistent with or takes away or abridges any of the rights conferred by Article 14 or Article 19.

**Fundamental Duties**

Apart from the Directive to the State "to protect and improve the environment", a special provision is enshrined in Part IVA\(^{16}\) of the Constitution of India. In this Part, the newly inserted Article 51A provides for certain fundamental duties of the citizen of India. Article 51(A)(g) specifically deals with the fundamental duty with respect to environment. It states:

> It shall be the duty of every citizen of India - (t)o protect and improve the natural environment including forests, lakes, rivers and wild life, and to have compassion for living creatures.

It is important to note that Article 51(A)(g) imposes a fundamental duty "to protect and improve the natural environment" only on the "citizens" of India. This may be construed as imposing no obligation on "non-citizens" for the purpose. Ironically, the Article does not mention any enforcement mechanism for compliance with the Fundamental Duties.\(^{17}\)

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16 Inserted by the Constitution (Forty-Second Amendment) Act 1976, S.11, (w.e.f. 3 January 1977).

17 It needs to be noted here that, the Sardar Swaran Singh Committee recommended that Parliament be empowered to enact legislation imposing penalties or punishment to enforce Article 51(A)(g). This recommendation was, however, deleted from the final amendment.
Article 51(A)(g) is also not comprehensive enough to cover all forms of environmental pollution. It specifically lays stress on air and water pollution by referring to forests, lakes, rivers, etc. However, more recently, noise, light, radioactive and hazardous wastes, etc. are also found to be responsible for causing environmental pollution. Accordingly, the scope of the provision appears to be quite limited.

Another notable feature of the fundamental duties is their non-justiciable character. There is no provision in Part IVA of the Constitution for direct enforcement of any of these Duties nor does it provide any sanction to prevent their breach. The very fact that the Fundamental Duties have been placed after Part IV (Directive Principles) and not after Part III (Fundamental Rights), speaks for itself. The placement of the Fundamental Duties, coupled with absence of sanction behind them, makes it clear that the drafters of the 42nd Amendment intended to give them a status no more than that of the Directive Principles. In the absence of any law giving effect to them, the Fundamental Duties remain, like the Directive Principles, mere "pious homilies". Nevertheless, the need for providing sanction for the enforcement of the Fundamental Duties has recently come to the fore in view of the judgement of the Supreme Court of India in the National Anthem case, wherein it

18 The Supreme Court reversed the judgement of the Kerala High Court in Bijoe Emmanuel and Others V. State of Kerala and Others, AIR 1986 Ker.32.
upheld the contention of the Jehova's Witnesses (a Christian sect in Kerala) that they need not sing the National Anthem as it hurt their religious feelings. The Union government, however, appears to be quite apprehensive of the repercussions of the judgement and may resort to back up the Fundamental Duties with necessary sanction. A review petition, moved by the Attorney-General of India in this respect is pending with the Constitution Bench of the Supreme Court.

At present, the Fundamental Duties are regarded as moral precepts. Nevertheless, it may also be expected that while determining the constitutional validity of any law, if a Court finds that it seeks to give effect to any of the Duties, it may consider such law to be "reasonable" in relation to Article 14 and 19 and, thus, save such a law.

19 Article 51(A)(a) lays down the Fundamental Duty "to abide by the Constitution and respect the National Flag and the National Anthem".

20 On 2 December 1986, the Prime Minister, Mr. Rajiv Gandhi, intervening in a special discussion on the need to preserve the sanctity and dignity of the national symbols, told the Lok Sabha that his government did not accept the Supreme Court judgement in the National Anthem case. While turning down the demand for amending the Prevention of Insults to National Honour Act (1971), for this purpose, Mr. Gandhi emphatically declared: We don't accept the Supreme Court judgement. We shall ensure that the true and correct position is not only stated but also enforced. We shall use all the legal means available and if the legal means do not work, we will use constitutional means for the purpose. See, The Times of India (New Delhi), 3 December 1986.
from unconstitutionality. 21 Going by this interpretation, a legislation for environmental protection may provide for necessary sanction to enforce the Fundamental Duty enshrined in Article 51(A)(g).

**Legislative Powers**

The Constitution of India had adopted, from the Government of India Act 1935, a three-fold distribution of legislative powers between the Union and the states. 22 The environmental legislative powers are available under all the three lists, 23 namely the Union List, the State list and the Concurrent list.

Although the Union government can enact laws on any of the items in the Union list and Concurrent list, in certain cases 24 it can also enact laws on items in the State list too. In fact, the Union government, however, has been conferred with sweeping powers for the purpose, which has

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22 By virtue of Article 246 of the Constitution of India.
23 They are as follows: List I (Union List) - Entry 52, 53, 54, 55 and 57; List II (State List) - Entry 6, 14, 17, 18, 21, 24 and 25; and List III (Concurrent List) - Entry 17A, 17B and 20.
24 For example, see Articles 249, 250 and 252 of the Constitution of India.
so far remained unused. It is contained in Article 253, which provides:

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 countries or any decision made at any international conference, association or other body. (25)

Accordingly, this article empowers the Parliament to make law for implementing any "treaty", "agreement", "convention" or international "decision". One can deduce the necessary mandate for this purpose from the Directive Principle in Article 51(c)26 as well as entries 13 and 1427 in the Union list. Putting together all these, the Parliament appears to have a comprehensive power under Article 253 to enact laws on any of the entries in the state list. The Union government can, in fact, legislate on any of the items in the State list, even though there is no prima facie

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26 Ibid., Article 51(C) (Part IV) provides: The State shall endeavour to foster respect for international law and treaty obligations in the dealings of organised peoples with one another.

27 Ibid., Seventh Schedule, List I: Entry 13 - Participation in international conferences, associations and other bodies and implementing of decisions made there-at. Entry 14 - Entering into treaties and agreements with foreign countries and implementing of treaties, agreements and conventions with foreign countries.
international obligation (*vide*, the reference to decisions made at any international conference). Robert B. Looper\(^{28}\) has underscored this point:

In India... Parliament has power to make laws for implementing not only international obligations of the Union arising out of treaties, agreements and conventions but also decisions of any international conference, association, or other body, although such decisions are not legally binding upon India (emphasis original)\(^{29}\)

In scope of Article 253 remains to be tested, yet it is feared that it might lead to an:

(I) inevitable and irresistible invasion of the state list by the Parliament (because of) the vast range of subjects covered by the conventions, treaties, agreements and recommendations of various specialised agencies and international conferences (to which India belonged) \(^{30}\)

As Article 253, empowers the Parliament to encroach on the state list for environmental protection, it might be a good idea to explore the potential of this article through judicial examination.


\(^{29}\) For the view that decisions of international conferences, associations and other bodies are not legal obligations, see Oppenheim, *International Law*, vol. I, 8th ed. by (H. Lauterpacht 1955), 513 b.

\(^{30}\) See, n. 28, p. 306.
II. Water Pollution Control Law

With this brief constitutional setting on environmental protection, it would be appropriate to examine the water pollution control in India.

As early as 1962, the Ministry of Health had appointed an expert committee on water pollution. The committee recommended that Union as well as state laws on the subject be enacted. In 1963, the Central Council of Local Self-Government recommended the enactment of a single law by Parliament. However, the subject of self-government is covered in Entries 6 and 17 of the state list. The Parliament has no power to make laws with respect to such matters, except as provided in Articles 249, 250 and 252 of the Constitution. Hence, a draft bill was circulated to all state governments in 1965, with the request to pass


32 Entry 6 and 17 of List II are as follows: Entry-6: Public health and sanitation; hospitals and dispensaries; Entry-17: Water, that is say, water supplies, irrigation and canals, drainage and embankment, water storage and water power subject to the provisions of Entry 56 of List I.
enabling resolutions, as required in Article 252(1), authorising the Parliament to enact such a law on their behalf.

The Prevention of Water Pollution Bill, 1969, was introduced in the Rajya Sabha, after six states had adopted the required enabling resolutions. In August 1970, the Rajya Sabha decided to refer the Bill to a joint committee, which modified it in many respects and then presented it to the Parliament in 1972. The Bill was passed by the parliament in 1974, which took the form of the Water (Prevention and Control of Pollution) Act, 1974 (hereafter, the Water Act).

33 Article 252(1) states: If it appears to the legislatures of two or more states to be desirable that any of the matters with respect to which parliament has no power to make laws for the states except as provided in Articles 249 and 250 should be regulated in such states by parliament by law, and if resolutions to that effect are passed by all the Houses of Legislatures of those states, it shall be lawful for parliament to pass an Act for regulating that matter accordingly and any Act so passed shall apply to such states and to any other state by which it is adopted afterwards by resolution passed in that behalf by the House or, where there are two Houses, by each of the Houses of the legislature of that state.

34 See CSE, n.14.

35 The Act 6 of 1974 received the assent of the President of India on 23 March 1974. It is now adopted by almost all the states in India.
The Water Act is the statute par excellence on water pollution control in India. It seeks to maintain or restore "wholesomeness of water". The Statement of Objects and Reasons of the Act states that the problem of pollution of rivers and streams has assumed considerable importance and urgency. It seeks to ensure that, the domestic and industrial effluents are not allowed to be discharged into water courses without adequate treatment. The Act is quite comprehensive in its coverage of various types of waters. For the purposes of the Act, a "stream" includes river, water course (whether flowing or for the time being dry), inland water (whether natural or artificial), subterranean waters and sea or tidal waters to the extent specified in notification in the Official Gazette.

36 Two State enactments preceding this central law were: the Orissa River Pollution Prevention Act, 1953 and the Maharashtra Prevention of Water Pollution Act, 1969.

37 Section 2(e) defines "pollution" as: Such contamination of water or such alteration of the physical, chemical or biological properties of water or such discharge of any sewage or trade effluent or of any other liquid, gaseous or solid substance into water (whether directly or indirectly) as may, or is likely to, create a nuisance or render such water, harmful or injurious to public health or safety, or to domestic, commercial, industrial, agricultural or other legitimate uses or to the life and health of animals or plants or of aquatic organisms.

38 See, section 2(j).
Machinery

For the purpose of carrying out the objectives of the Water Act, a set of machinery, both for the Union as well as the state levels has been laid down in it. Accordingly, a Central Board for the Prevention and Control of Water Pollution (CBPCWP) has been set up by the Central Government. The Central Board consists of seventeen members nominated by the Union government. These include a full-time chairman, five officers to represent the Union government, five officers from among the members of the State Water Pollution Control Boards, three non-officials to represent the interests of agriculture, fisheries, industry or trade or any other interest and two persons to represent the companies or corporations owned, managed or controlled by the Union government. Besides, a full-time Member-Secretary qualified in public health engineering and having administrative experience, is also appointed by the Union government in the Board. The Central Board is a legal entity, having perpetual succession and a common seal.

39 The Central Board was constituted in September 1974 under the Water Act 1974 (Act 6 of 1974) which came into being on 23 March 1974.

40 Section 3(2).

41 Ibid., sub-section (3).
Board is to act as a State Board for the Union Territories too. 42

The main functions of the Central Board are to promote cleanliness of streams and wells in different areas of the states. The Central Board, without prejudice to the generality of this function, performs all or any of the following functions:

(a) advice the Central Government on any matter concerning the prevention and control of water pollution;

(b) co-ordinate the activities of the State Boards and resolve disputes among them;

(c) provide technical assistance and guidance to the State Boards, carry out and sponsor investigations and research relating to problems of water pollution and prevention, control and abatement of water pollution;

(d) plan and organise the training of persons engaged or to be engaged in programmes for the prevention, control or abatement of water pollution on such terms and conditions as the Central Board may specify;

(e) organise through mass media a comprehensive programme regarding the prevention and control of water pollution;

(f) collect, compile and publish technical and statistical data relating to water pollution and the measures devised for its effective prevention and control and prepare manuals, codes or guides relating to treatment and disposal of sewage and trade effluents and disseminate information connected therewith;

42 section 2(4).
(g) lay down, modify or annul, in consultation with the state government concerned the standards for a stream or well;

provided that different standards may be laid down for the same stream or well or for different streams or wells, having regard to the quality of water flow characteristics of the stream or well and the nature of the use of the water in such stream or well or streams or wells;

(h) plan and cause to be executed a nationwide programme for the prevention, control or abatement of water pollution;

(i) perform such other functions as may be prescribed.\(^43\)

The Central Board has laid down a six-pronged strategy\(^44\) to achieve its objectives under the Water Act. More recently,

\[^43\] Section 16(2).

\[^44\] This strategy is as follows: (1) control of pollution at the source to the minimum extent possible with due regard to techno-economic feasibility by prescribing Minimal National Standards (MINAS) for liquid effluents and also such specific standards and guidelines as may be required in a particular situation, for abatement and control of water pollution; (2) control of City Sewage from pouring into natural waters, by advocating speedy introduction of primary to secondary level of treatment facilities at sewage outfall points; (3) maximisation of reuse/recycle of sewage and trade effluents on land for irrigation and for industrial purposes after appropriate renovation; (4) utilisation of assimilative capacities of the natural waters to minimise investments in pollution control at sources; (5) minimisation of pollution control requirements by judicious location of new industries and relocation of existing industries whenever necessary; (6) it also seeks to introduce long term programme of pollution control either river basin-wide or region-wise by preparing water use maps, water quality maps, assessing pollution potential within the basin areas. See, CBPCNP Annual Report 1982-83, p.3
the Central Board is also conferred with an additional responsibility to improve the quality of air and to prevent, control or abate air pollution in the country.45

The Water Act also provides for separate pollution control boards for the states in India.46 The composition of the State Boards is more or less on the same lines of the Central Board.47 The members of these Boards, including the Chairman, hold office for a period of three years during which they cannot be removed unless they incur certain disqualifications. Their decisions cannot be questioned by the governments without going through a judicial appellate provision. The government can over-rule the Boards only after this appellate provision is exhausted and only by calling the papers and giving an opportunity to the Boards to explain their points of view. One of the main functions of the State Board is to plan and to execute a comprehensive


46 See, section 4 of the Water Act.

47 The Water Act, as originally enacted, prescribed for a full-time chairman of the State Board. But in 1978, by an amendment (Act 44 of 1978), the word 'full-time' was omitted from section 4(2)(a) of the Water Act, so that the chairman could even be part-time. The Air Act [Section 5(2)] also provides in a proviso that the chairman of a State Board could either be whole-time or part-time.
programme for the prevention, control or abatement of pollution of streams and wells in the state. At present there are 18 State Water Pollution Control Boards in India. However, no State Board is to be constituted in a Union Territory, for which the Central Board is to function as a State Board. The Central Board may delegate all or any of its powers and functions to such person or body of persons, as specified by the Union government. There is also a provision for setting up of a joint Board by an agreement between two or more state governments or by the Union government (for one or more Union Territories) and one or more state governments. It is, however, necessary that in case of such joint Boards, the participating states as Union Territories should be contiguous to each other. But so far, no such joint Board has been constituted. It is also important to note that, the Central Board as well as the state Boards are to be bound by the directions issued to them in writing by the Union government and the Union or state government respectively. In case of any

48 The state Boards are as follows: Assam, Andhra Pradesh, Bihar, Gujarat, Haryana, Himachal Pradesh, Jammu & Kashmir, Karnataka, Kerala, Maharashtra, Madhya Pradesh, Meghalaya, Orissa, Punjab, Rajasthan Uttar Pradesh, Tamil Nadu and West Bengal.

49 See, section 13(1).

50 Section 18.
inconsistency between the directions given by the state government and the Central Board, the matter is to be referred for decision of the Union government.

Restricting Application of the Act:

The Act seeks to ensure the best use of available resources to deal with the problem of water pollution. As a result, although the Act is to be applicable in the whole of India, it empowers the state government, in consultation with or on the recommendation of the state Board, to restrict the application of the Act to a particular area, by declaring it as water pollution prevention and control area. The prima facie rationale behind this appears to be to concentrate attention on critical areas of pollution, in view of the limited financial resources.

51 Section 1(3) of the Act provides that: It shall come into force, at once in the States of Assam, Bihar, Gujarat, Haryana, Himachal Pradesh, Rajasthan, Tripura and West Bengal and in the Union territories in any State when adopts this Act under clause (1) of article 252 of the Constitution on the date of such adoption and any reference in this Act to commencement of this Act shall, in relation to any State or Union territory, mean the date on which this Act comes into force in such state or Union territory.

52 See, section 19(1), which states: Notwithstanding anything contained in this Act, if the State Government, after consultation with or on the recommendation of the State Board, is of opinion that the provisions of this Act need not apply to the entire State, it may, by notification in the Official Gazette, Restrict the application of this Act to such area or areas as may be declared therein as water pollution, prevention and control area or areas and thereupon the provision of this Act shall apply only to such area or areas.
The exercise of this power by the state governments has, often, become controversial. The power to restrict application of the Act to a particular area of the state, came to be challenged before the Rajasthan High Court recently. In a group of writ petitions, section 19 of the Water Act was challenged as unconstitutional and void, as being violative of Article 14 of the Constitution. It was contended by the petitioners that the section conferred an arbitrary and unguided direction on the state government to pick out any particular area in the state, for declaring it as water pollution prevention and control area and apply the provisions of the Act to the said area. However, the Rajasthan High Court held that the power given under section 19 to the state government has to be exercised with a view to fulfilling the objects sought to be achieved by the Act, as set out in the Preamble to the Act. Moreover, the exercise of the power is also conditioned by the requirement of consultation with the state Board. Hence, the High Court ruled that section 19 of the Water Act was not violative of Article 14 of the Constitution.

53 These writ petitions No.1375, 1376 and 1377/1980 were filed under Article 226 of the Constitution, before the Rajasthan High Court (Jaipur Bench), by M/s. Agarwal Textiles Industries, M/s. Bheron Textiles Industries and M/s. Phoenix Dyeing and Printing Industry.
Despite this interpretation given by the Rajasthan High Court, the exercise of the discretion of the state government, although to be exercised in consultation with the state Board, may not remain completely free from doubt. The reasonableness of the need for singling out a particular area, as water pollution prevention and control area, warrants some specific criteria to be laid down in the enabling section itself.

Setting Standards:

For the purpose of prevention and control of water pollution, fixing of standards is a prerequisite. The factors which are to be taken into account in fixing standards are technical and variable, requiring a delicate balancing of these factors. The Act specifically prohibits any poisonous, noxious or polluting matter in excess of predetermined standards from entering into any stream or well. However, the state government may, in consultation

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54 Section 2(4) makes provision in this regard as follows: Subject to the provisions of this section -- (a) no person shall knowingly cause or permit any poisonous, noxious or polluting matter determined in accordance with such standards as may be laid down by the State Board to enter (whether directly or indirectly) into any stream or well; or (b) no person shall knowingly cause or permit to enter into any stream any other matter which may tend, either directly or in combination with similar matters, to impede the proper flow of the water of the stream in a manner leading or likely to lead to a substantial aggravation of pollution due to other causes or its consequences.
with or on the recommendation of the state Board, give an exemption to a person, if necessary, subject to some conditions, from the operation of sub-section (1) of section 24. The Act also provides for penalty of minimum imprisonment of six months (which may extend to six years, with fine) for violation of section 24.

The constitutional validity of section 24(1) was challenged, in cases referred to earlier, on the ground that, read with Section 24(3), it was violative of Article 14 of the Constitution. It was argued by the petitioners that sub-section (3) gave an arbitrary and unguided power to the state government to exempt any person from the operation of sub-section (1). The Rajasthan High Court, however, upheld Section 24, on the ground that similar provisions have been upheld by the Supreme Court.

55 Ibid, sub-section (3).
56 See, section 43.
57 See, n.53.
58 Section 24(3) states: The State Government may, after consultation with, or on the recommendation of the State Board, exempt by notification in this Official Gazette, any person from the operation of sub-section (1) subject to such conditions, if any, as may be specified in the notification and any condition so specified may by a like notification be altered, varied or amended.
High Court observed that the prohibition contained in Section 24 cannot be held to be dependent on the discharge of the various functions which have been entrusted to the state Board under Section 17 of the Act. It was further held that for the application of Section 24, all that is required was that the state Board should lay down the standards of effluents. The prohibition contained in Section 24 would come into operation as soon as the Board lays down such standards.

Consent Orders:

After the commencement of the Water Act in 1974, a "new or altered outlet" for the discharge of sewage or trade effluent into a stream or well or sewer or on land could be brought into existence only with the previous consent of the state Board. Similarly, for any new discharge of sewage or trade effluent into a stream or well or sewer or on land, the same requirement is to be fulfilled. The expressions "new or altered outlet" and "new discharge"

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60 The words "stream or well" were substituted in section 25(1), by the words "stream or well or sewer on land" by section 12 of the Water (Prevention and Control of Pollution) Amendment Act 1978.
are defined in section 25 itself. 61

The system of consent orders is based on the principle that there could not be fixed or rigid standards for putting polluted matter in the streams and that the problem of each industry may be peculiar and variable from time to time. 62 In granting consent orders the Board may lay down conditions as to the quality of effluent discharged, etc. The application for consent of the state Board is to contain particulars regarding the proposed construction, installation or operation of the industrial or commercial establishment or of any treatment and disposal system or of any extension or addition to them. 63 The state Board may give its consent after making inquiry in the prescribed manner. 64

61 Sub-section (8) of section 25 provides: (a) the expression "new or altered outlet" means any outlet which is wholly or partly constructed on or after the commencement of this Act or which (whether constructed or not) is substantially altered after such commencement; (b) the expression "new discharge" means a discharge which is not, as respects the nature and composition, temperature, volume and rate of discharge of the effluent substantially a continuation of a discharge made within the preceding twelve months (whether by the same or a different outlet), so however that a discharge which is in other respects a continuation of previous discharge made as aforesaid shall not be deemed to be a new discharge by reason of any reduction of the temperature or volume or rate of discharge of the effluent as compared with the previous discharge.

62 S.N. Jain, "Legal Controls of Water Pollution in India", in S.L. Agarwal (ed.), Legal Controls of Environmental Pollution (Tripathi, Bombay, 1980), p.28.

63 Section 25(2).

64 Ibid, sub-section (3).
The consent granted by the state Board may be conditional. It may grant its consent subject to conditions:

(a) in case of a new or altered outlet, conditions to the point of discharge into the stream or well or sewer or on land or construction of the outlet or as to the use of that outlet or any other outlet for sewage or trade effluent from the same land or premises; and

(b) in the case of a new discharge, conditions as to the nature and composition, temperature, volume, rate of discharge of the effluent from the land or premises from which the new discharge is to be made.(65)

For reasons to be specified, these conditions could be varied subsequently. If the conditions prescribed by the Board are not fulfilled, it may either refuse or withdraw the consent already given. 66 Every Board is required to maintain a register containing conditions imposed while granting consent orders. The conditions so contained in such register shall be "conclusive proof" that the consent was granted subject to such conditions. 67 For violation of the provisions of section 25 (obtaining consent and conditions imposed) the Act prescribes the minimum imprisonment of six months 68 (which may extend to six years, with fine).

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65 Section 25(4), as amended in 1978.
66 See, section 27.
67 Section 25(6).
68 See section 44.
Thus "consent" relatable to sections 25 and 26 is the central theme of the Act. If an industry obtains the consent, and so long as the said industry functions within the framework of the said consent, the Board cannot proceed against the industry discharging effluent into the river, stream, well, etc. either under section 33 or any other penal provisions in the Act. In such cases, the Board can make reasonable variation of the conditions or revoke the conditions after notice to the grantee of the consent. However, it needs to be noted that, the consent procedure does not provide for public hearing. The Act does not specifically provide for public participation in the implementation of the Act, as "citizen suits" as such are not contemplated in it.

**Emergency Measures**

Apart from prescribing conditions and laying down standards, for prevention of water pollution, the Act empowers the state Board to take emergency measures, when any poisonous, noxious or polluting matter is present in any stream or well. This is also applicable where, due to any accident or other unforeseen act or event any such matter has entered into that stream or well.

69 Section 32.
In case of such an emergency, the Board may, if it is necessary or expedient to take immediate action, carry out necessary operation for:

(a) removing that matter from the stream or well and disposing it of in such manner as the Board considers appropriate;

(b) remedying or mitigating any pollution caused by its presence in the stream or well;

(c) issuing orders immediately restraining or prohibiting the person concerned from discharging any poisonous, noxious or polluting matter into the stream or well or from making insanitary use of the stream or well.(70)

Section 32 empowers the Board itself to take measures to remove pollution which is already present in a stream or well. However, in case of an apprehended pollution,71 the Board is given preventive powers, only to be exercised through an order of a court. Therefore, for taking any action for restraining the person causing such pollution, the Board is to make an application to the court, not inferior to that of a Presidency Magistrate or a Magistrate

70 Ibid, sub-section (1).

71 Section 33(1) runs as: where it is apprehended by a Board that the water in any stream or well is likely to be polluted by reason of the disposal of any matter therein or of any likely disposal of any matter therein, or otherwise, the Board may make an application to a Court, not inferior to that of a Presidency Magistrate or a Magistrate of the first class for restraining the person who is likely to cause pollution from so causing.
of the First Class. Thus for prevention of apprehended pollution, the Board cannot initiate any action, in the absence of a specific court order to that effect. While making an order the court may:

(i) direct the person who is likely to cause or has caused the pollution of the water in the stream or well, to desist from taking such action as is likely to cause pollution or as the case may be, to remove from such stream or well, such matter, and

(ii) authorise the Board, if the direction under clause (i) (being a direction for the removal of any matter from such stream or well) is not complied with by the person to whom such direction is issued, to undertake the removal and disposal of the matter in such matter as may be specified by court. (72)

The expenses incurred by the Board in removing any matter in pursuance of the authorisation of the court or in the disposal of any such matter may be defrayed out of the money obtained by the Board from such disposal. The outstanding balance, if any, is to be recovered from the person concerned, as arrears of land revenue or of public demand. 73

The exercise of the power for prevention of apprehended pollution has become a matter of controversy too.

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72 Ibid., sub-section (3).
73 Ibid., sub-section (4).
In a recent prosecution, by the Central Board against M/s. Delhi Cloth Mills, the Chief Metropolitan Magistrate of Delhi directed the industry to install an effluent treatment plant and to discharge its trade effluent after conforming to the standards laid down in the consent order of the Board. Further, a case launched against M/s. Pondicherry Paper Mills (Pondicherry) also needs special mention here. The industry filed a writ petition before the Madras High Court, challenging the order of the Sub-divisional Magistrate, Pondicherry, who had earlier issued an injunction to the industry from carrying on business. Dismissing the petition, the High Court accepted the contention of the Board and held that the remedy under section 33 is independent of the rights of the Boards under section 25 of the Act.

Penalties and Procedures:

The Water Act engages criminal sanctions for ensuring its effective enforcement. It contains a separate chapter.

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74 See, CBPCWP Annual Report 1982-83, p.42. Several other prosecutions have been launched by the Central Board under the section against M/s. Delhi Milk Scheme; M/s. Anglo-French Textiles Ltd., Pondicherry; M/s. Bharti Mill, Pondicherry, etc.

75 Ibid, 1979-80, p.23.

76 Chapter VII on penalties and procedures.
for the purpose. The Act prescribed an imprisonment for a term which may extend to three months or fine which may extend to five thousand rupees upon conviction, for failure to comply with any direction given by the Board under section 20(2) or (3) or any order issued under section 32(1)(c). In case the failure continues, an additional fine which may extend to one thousand rupees per day will be levied. Similarly, punishment is also prescribed for failure to comply with any direction issued by a court under section 33(2). In cases of obstructing the functioning of the Pollution Control Board, an imprisonment for a term which may extend to three months or fine upto one thousand rupees or both have been provided. It may be noted that both of these sections do not provide for any minimum mandatory punishment, unlike other provisions in Chapter VII.

The Act prescribes strict punishment for violations of sections 24, 25 and 26. The minimum punishment prescribed

77 Section 20(2) and (3) are concerning power of the Board to obtain information.
78 See, section 41(1).
79 Ibid, sub-section (2).
80 See, section 42.
81 For text of section 24, see n.35. Section 25 deals with restrictions on new outlets and discharges whereas section 26 spells out the arrangement which should be made with reference to the existing discharge of sewage or trade effluent.
is six month's imprisonment which may be extended up to six years and with fine.82 In case a person is again found guilty for violations of section 24, 25 and 26, the Act provides for enhanced penalty for every subsequent conviction, punishable with minimum imprisonment of one year which may be extended to seven years and with fine.83 However, for this purpose, the Act forbids taking cognizance of any conviction two years prior to the commission of the offence which is being punished.

It is also important to note that the Act provides for penalty only if the violation is done "knowingly".84

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82 Sections 43 and 44 provide for a punishment of imprisonment for a term which shall not be less than six months but which may extend to six years and with fine for contravening section 24 and sections 25 and 26 respectively.

83 Section 45 runs as: If any person who has been convicted of any offence under Section 24 or Section 25 or Section 26 is again found guilty of an offence involving a contravention of the same provision, he shall, on the second and on every subsequent conviction, be punishable with imprisonment for a term which shall not be less than one year but which may extend to seven years and with fine. Provided that for the purpose of this section no cognizance shall be taken of any conviction made more than two years before the commission of the offence which is being punished.

84 For example see, section 24(1).
It is not provided for "negligence". The fines imposed lack deterrence value, as they are very small as compared to the harm caused to the public. Moreover, imprisonment, as a punishment is not mandatory in all cases. Furthermore, the onus of proof and the quantum of evidence required for conviction are not clearly provided in the Act.

Publication of Offenders Names:

In order to give a deterrent effect by publicity, the Act provides for publication of the names of offenders under certain circumstances, such as a person convicted of an offence (under the Act), commits a similar offence on a subsequent occasion. The court before which the subsequent conviction takes place, is empowered to cause the offender's name and place of residence, the offence and the penalty

85 Here the US Rivers and Harbours Act (1899) may be used for comparison, Section 13 of this Act makes discharge of any pollutant by any person, unless justified under the Act, unlawful. The prohibition against any refuse matter into the navigable waters should be read as precluding any man-induced alteration of natural water quality. The absence of words like negligently, recklessly, purposely, etc., suggests that the statute condemns conduct without regard to the state of mind of the offender. In US Vs. Standard Oil Co. (1966) 384 US 224, the US Supreme Court sustained a conviction for accidently discharging valuable aviation fuel in the St. John's river.

86 See, section 46.
imposed to be published at the offender's cost. It may be published in such newspapers or in such other manner as the court may direct. The expenses of such publication shall be deemed to be part of the cost attending the conviction and shall be recoverable as a fine.

Liabilities of Companies and Govt. Departments:

In case, an offence under the Act is committed by a company or any Department of Government, the Act adopts rather a cautious approach. It holds the person in charge of the company or the Head of the Department responsible for such an offence and the penalties subject to certain reservations. A major excuse is provided to such persons on the ground that the offence was committed without his knowledge or he exercised due diligence to prevent the commission of such an offence.

Cognizance of Offences:

It is important to note that under the Water Act, cognizance of offences can be taken only by or with the

87 Section 47.
88 Section 48.
previous sanction in writing of the state Board. Moreover, no court inferior to that of a Presidency Magistrate or a Magistrate of the first class can try offences under the Act. Thus, unless the matter of commission of an offence is taken up by the Board or by any person having sanction of the Board to that effect, the court does not take suo moto cognizance of the offences. The Water Act is also lacking in not providing locus standi to a citizen to move the court of law for enforcing provisions of the Act. As a result of all this, no industrialist has so far been sent to jail or fined.

III. Indian Penal Code

In addition to the provisions of the Water Act, the Pollution Control Boards have often invoked the provisions of the Indian Penal Code, 1860, against persons responsible for causing defilement of water. It is interesting to note that the problem was anticipated at the time of drafting of the IPC and it was brought under offences affecting the

89 Section 49 runs as: (1) No court shall take cognizance of any offence under this Act except on a complaint made by or with the previous sanction in writing of the State Board, and no court inferior to that of a Presidency Magistrate or a Magistrate of the first class shall try any offence punishable under this Act. (2) Notwithstanding anything contained in section 32 of the Code of Criminal Procedure, 1898 (5 of 1898), it shall be lawful for any Magistrate of the first class or for any Presidency Magistrate to pass a sentence of imprisonment for a term exceeding two years or fine exceeding two thousand rupees on any person convicted of an offence punishable under this Act.
public health and safety. The IPC makes a specific provision as regards fouling water of public spring or reservoir:

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 fine which may extend to five hundred rupees or with both. (90)

To constitute an offence under this section there must be some physical act of defiling water. This provision, however, is very limited in scope. It applies only to a "public spring" or "reservoir". It has been held that the term "public spring" does not include "a public river" or "water flowing in a continuous stream in a river bed". (91)

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90 Section 277 of the Indian Penal Code (1860).

91 See, Emperor v. Nana Ram (1904) 6 Bom. L.R. 52. In this case the accused and 9 others were charged under section 277 of the IPC, with the offence of fouling water of a river and rendering it unfit for drinking purposes by steeping therein aloe plants with a view to extracting fibres therefrom. They were convicted and sentenced to pay a fine of eight annas each. The District Magistrate of Poona held that the conviction was bad in law and referred it to High Court. The court referred to earlier decisions, especially in Queen v. Vittalchakkan, I.L.R. 4, Mad. 229 (wherein it was held that the public spring contemplated in section 227 of the IPC did not include continuous stream of water running along the bed of a river). Hence, upholding the decision of District Magistrate, Poona, the Bombay High Court held; "Fouling of the water of river running in a continuous stream is not an offence under Section 277 of the IPC. But yet it may be an offence under Section 290, if the evidence shows that the act was such as to cause common injury or danger to the public."
On the same analogy a canal or any other running water will not be covered by the term. However, a well is regarded as a "spring". A reservoir may be natural or artificial. It includes a lake. The punishment prescribed under section 277 against a water polluter is meagre and as old as the IPC itself. In the modern context it needs to be revised as has been done in some foreign countries, to make it more of a deterrent.

The IPC also makes a provision for pollution of waters other than springs and reservoirs as follows:

Whoever commits a public nuisance in any case not otherwise punishable by this Code, shall be punished with fine which may extend to two hundred rupees. (94)

92 See Gour, II Penal Law of India 1939 (1972).

93 For example the penal Law of German Democratic Republic (by a 1977 amendment) provides for a punishment of imprisonment upto two years. In April 1970, the Soviet Union announced a comprehensive programme to curb industrial pollution by a combination of administrative and criminal sanctions. In May 1970, the US Federal Water Quality Administration issued, orders against all industries on the bank of Lake Michigan. In Japan, an Act known as Punishment of Environmental Pollution Crimes Relating to Human Health (1970), was amended to enhance punishment upto two years imprisonment and fine of two million yen. Similarly, in Sweden the Nature Conservancy Act seeks to solve the litter problem by deterring potential offenders and reducing the quantum of existing litter.

94 Section 290 of the IPC.
As pollution of a public stream is a public nuisance, it should be punished under this section. However, the quantum of punishment is extremely meagre and outdated.

A case of causing pollution of water can also be dealt with as a "mischief" under the IPC. It is defined as:

Whoever, with intent to cause, or knowing that he is likely to cause, wrongful loss or damage to the public or to any person, causes the destruction of any property, or any such change in any property or in the situation thereof as destroys or diminishes its value or utility or affects it injuriously commits "mischief". (96)

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95 See, section 268, which defines public nuisance as: A person is guilty of a public nuisance who does any act or is guilty of an illegal omission which causes any common injury, danger or annoyance to the public or to the people in general who dwell or occupy property in the vicinity, or which must necessarily cause injury, obstruction, danger or annoyance to persons who may have occasion to use any public right. A common nuisance is not excused on the ground that it causes some convenience or advantage. It is apparent from this provision that the IPC is concerned with public nuisance and not private nuisance. As a general rule, these are acts which seriously interfere with the health, safety, comfort or convenience of the public generally or which tend to degrade public morals.

96 Section 425 of the IPC.
In order to determine the offence of mischief, it is necessary to have some direct act on the part of the mischief-doer either personally or through someone else which leads to any of the results enumerated in the section. Therefore, if a person intentionally fouls waters of a well or lake or river for causing health hazards to the people residing in the vicinity, he can be prosecuted for the offence of mischief.

However, it goes without saying that these provisions of the IPC are very outdated to effectively deal with modern problems of water pollution. There is hardly any case law on pollution under the IPC, which exposes the infirmity of the Code for this purpose. In a recent case the directors and manager of the Gwalior Silk Mills were prosecuted under sections 268, 269, 277, 288 and 290 of the IPC, for polluting the Chambal River by putting certain wastes into it from the factory. It was held by

97 It is important to note here that mens rea is one of the essential ingredients of the offence of mischief. If the petitioner honestly believed in good faith that he had a right to do what he did, if he did not in law have that right, he cannot be said to have had necessary intention or knowledge that he was likely to cause wrongful loss or damage. The claim should not, however, be a mere pretence or colourable one, but must be one in assertion of a bonafide right. (See Maheshwar Kar v. Paluni Dihya (1975) 41 C.L.R. 288).

98 See, Babulal V. Ganshyandas Birla, decided by the Madhya Pradesh High Court on 19 May 1976.
the Madhya Pradesh High Court that the directors and other officials could not be prosecuted unless a specific act or omission was attributed to them or there was an overt act done by them and there was \textit{mens rea} on their part.

IV. The \textbf{Factories Act}

This Act, in essence, is a social welfare legislation, intended to secure the health, safety and welfare of the workers employed in factories. In some respects, provisions of this Act may also be used for prevention of water pollution. The Act provides for disposal of waters and effluents by factories:

(1) Effective arrangements shall be made in every factory for the disposal of waters and effluents due to the manufacturing process carried therein.

(2) The State Government may make rules prescribing the arrangements to be made under sub-section(1) or requiring that the agreements made in accordance with sub-section (1) shall be approved by such authority as may be prescribed.

For violations of the above provisions and the rules made thereunder, the punishment provided is an imprisonment for a term which may extend to three months or fine which may extend to five hundred rupees or

\footnote{Section 12 of the Factories Act, 1948.}
This provision as to general penalty applies even for the violation of rules made under the Factories Act. However, it is important to note that no court is to take cognizance of any offence under this Act, except on a complaint by or with the previous sanction of an inspector.

By virtue of the power delegated under Section 12 of the Factories Act, various state governments have made rules thereunder. The Factories Rules have been framed, among others, by the states of Uttar Pradesh (1950), Tamil Nadu (1950), West Bengal (1958), Maharashtra (1963) and Mysore (1969).

The Uttar Pradesh Factories Rules, 1950, provide for the disposal of effluents with the approval of the Effluent Board constituted by the state government. In case of Tamil Nadu, one of the Rules provides:

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100 Section 92 provides for the general penalty for non-observance or non-compliance with the requirement of Section 12. It provides that: "the occupier and manager of the factory shall each be guilty of an offence and punishable with imprisonment for a term which may extend to five hundred rupees or with both and if the contravention is continued after conviction with a further fine which may extend to seventy five rupees for each day on which the contravention is so continued."

101 Section 105. The provision under this section may well be compared with a similar provision contained in Section 49 of the Water Act 1974, wherein a previous sanction in writing of the State Board is required for taking cognizance of the offences under that Act.
In the case of a factory where there are rivers or fisheries at any other water sources in the vicinity, including territorial waters of the sea and these water sources are likely to be affected by the arrangements made for the disposal of the trade-wastes and effluents, prior approval shall be obtained from the Director of Fisheries or such authority as the State Government may appoint in this behalf. (102)

In the West Bengal Factories Rules, it is provided that:

Any open well or reservoir from which drinking water is derived shall be so situated and protected as not to be liable to pollution by organic matter or other impurities. (103)

Further, it is also provided that:

The area around any place where drinking water is supplied to the workers shall be maintained in a clean and drained condition. (104)

In order to prevent pollution of streams, rivers or canals by the trade-wastes and effluents, the Maharashtra Factories Rules contain a provision as:

(1) In the case of a factory where the drainage system is proposed to be connected to the public sewerage system, prior approval of the arrangements made shall be obtained from the local authority;

102 Rule 17(3) of the Tamil Nadu Factories Rules (1950).
103 Rule 34(3) of the West Bengal Factories Rules (1958).
104 Rule 17(4), ibid.
In the case of factories other than those mentioned in sub-rule (1), prior approval of the arrangements made for the disposal of trade-wastes and effluents, shall be obtained from the Health Officer.\(^{105}\)

An analogous rule to this effect also exists under the Mysore Rules. The relevant rule, dealing with the construction and maintenance of drains carrying trade-wastes and sullage water, provides that they:

(1) shall be constructed in masonry or other impermeable material and shall be regularly flushed and the effluent disposed of by connecting such drains with a suitable drainage line.

Provided that where there is no such drainage line, the effluent shall be deordorised and rendered innocuous and then disposed of in a suitable manner to the satisfaction of the Health Officer.\(^{106}\)

The purpose of this provision appears to be to prevent pollution of underground streams from becoming polluted by the effluents or trade-wastes permeating to the ground.

V. Criminal Procedure Code (1973): Section 133 of the Cr.P.C. vests powers on the Magistracy for removal of public nuisance.\(^{107}\) In view of the

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107 For a detailed discussion on "Public Nuisance", see Chapter III on Case Law.
deficiencies in the Water Act (1974) some of the State Pollution Control Boards have, often, succeeded in persuading the Magistrates to use section 133\textsuperscript{108} for water pollution control. Under this section, a magistrate may pass an order to prevent a discharge from a factory into a river, of a noxious effluent which might be injurious to the health of the community which has a right to the use of water in such water.\textsuperscript{109}

VI. The Environment Protection Act (1986)

In view of many lacunae in the existing Indian laws relating to environment protection, a new Environment Protection Act (1986) was enacted.

\textsuperscript{108} It is interesting to distinguish between section 133 (conditional order for removal of public nuisance) and section 144 (urgent cases of nuisance or apprehended danger) of the Cr.P.C. The former expressly directs that the injunction order of the Magistrate should, in cases to which that section applies, be an order \textit{nisi} (i.e. an order accompanied by a condition that it is not to operate, if the party shows cause within a specified time, why the order should not be obeyed); while, on the other hand, section 144 speaks only of an order absolute, without saying that the party is to be afforded an opportunity for showing cause against the order. Orders under the former section are to be directed to, and served on, persons individually; whereas under the latter section, an order may be directed to the public generally, when frequenting or visiting a particular place, to abstain from a certain act. Where proceedings are taken under section 133, no order can be passed under section 144. \textsuperscript{See Ratanlal & Dhirajlal, The Code of Criminal Procedure 1973 (Wadhwa, Nagpur, 1982), pp.106-7.}

\textsuperscript{109} See, \textit{AIR} 1926 Pat. 506 at 507.
(Protection) Bill of 1986\(^{110}\) was passed on 8 May 1986, to overcome some of the problems of coordination, implementation and enforcement. It is also felt that one of the purposes of the new Act was to take care of the conditions stated by the US Judge Keenan in his decision concerning the Bhopal gas accident.\(^{111}\)

The Environment Protection Act (EPA), in essence, is an enabling statute seeking to provide for the protection and improvement of environment. It also aims at implementing the decisions of the United Nations Conference

\(^{110}\) The Act No.29 of 1986 received the assent of the President of India on 23rd May 1986 and published in the Gazette of India (Extraordinary), Part II-Sec. 1, No.34, on 26th May 1986. It came into force on 19 November 1986.

\(^{111}\) See Business India, July 14-27, 1986, p.97. While moving the Environment (Protection) Bill 1986 in the Parliament, the Minister of State for Environment Mr.Z.R.Ansari said: Although there are existing laws dealing directly or indirectly with several environmental matters. It is necessary to have a general legislation for environment protection, which, inter alia, should enable coordination of action of the various regulatory authorities, creation of an authority or authorities with adequate powers for environmental protection, regulation of discharge of environmental pollutants and handling of hazardous substances, speedy response in the event of accidents threatening environment and deterrent punishment to those who endanger human environment, safety and health.
on Human Environment (Stockholm, 1972). The Act has adopted a very wide definition of environment and its pollutants. It specifically gives powers to the Union government "to take all such measures for the purpose of protecting and improving the quality of the environment and preventing, controlling and abating environmental pollution". Accordingly, the Act enumerates a variety of subjects, including quality standards, maximum permissible concentrations of pollutants, and location of industry, which the Union government may regulate for the purpose. The EPA, thus, extends government control beyond air and water pollution to include other possible polluted media too. It specifically defines hazardous...
substances,\textsuperscript{115} as a regulable category as distinguished from ordinary pollutants.

For the purpose of the enforcement of the Act, it authorises the Union government to constitute an authority or authorities.\textsuperscript{116} Although the rules under the Act (by virtue of section 25) have been recently framed\textsuperscript{117} by the Department of Environment of the Government of India, ironically, no authority or authorities to carry out the object and purpose of the Act has so far been set up. As a corollary to the setting up of aspecial authority or authorities, the Act (\textit{a la} the Environment Protection Agency in the United States) empowers the Union government to issue mandatory directions including summary closure,

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\textsuperscript{115} Section 2(e) defines: "hazardous substance" means any substance or preparation which by reason of its chemical or physico-chemical properties or handling, is liable to cause harm to human beings, other living creatures, plants, micro-organism, property or the environment.
\textsuperscript{116} Section 3(3).
\textsuperscript{117} P.R. Gashenka, "Pollution Control: Legislation Not Enough", \textit{The Economic Times} (New Delhi) 7 April, 1987.
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etc., to any person, officer or any authority. \(^{118}\)

It is important to note that power of summary closure etc. conferred on the Union government is \textit{inclusive} in nature and not exclusive. Hence, as per section 5, the Union government may take any other step too for the purpose of carrying out the functions assigned to it under the EPA. Given the necessary will on the part of the Union government, section 5 gives it very sweeping powers to remedy the environmental crisis in India.

Apart from making provision for actual or apprehended\(^{119}\) environmental pollution, powers of entry and inspection\(^{120}\) and to take samples,\(^{121}\) the Act provides for significant increases in penalties for violations. Section 15 lays down that:

\(^{118}\) Section 5 provides: Notwithstanding anything contained in any other law but subject to the provisions of this Act, the Central Government may, in the exercise of its powers and performance of its functions under this Act, issue directions in writing to any person, officer any authority and such person, officer or authority shall be bound to comply with such directions. \textbf{Explanation} - For the avoidance of doubts, it is hereby declared that the powers to issue directions under this Section includes the power to direct - (a) the closure, of prohibition or regulation of any industry, operation or process; or (b) stoppage or regulation of the supply of electricity or water or any other service.

\(^{119}\) Section 9.

\(^{120}\) Section 10.

\(^{121}\) Section 11.
(1) Whoever fails to comply with or contravenes any of the provisions of this Act, or the rules made or orders or directions issued thereunder, shall, in respect of each such failure or contravention, be 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, and in case the failure or contravention continues, with additional fine which may extend to five thousand rupees for every day during which such failure or contravention continues after the conviction for the first such failure or contravention.

(2) If the failure or contravention referred to in sub-section (1) continues beyond a period of one year after the date of conviction, the offender shall be punishable with imprisonment for a term which may extend to seven years. (emphasis added).

Inspite of the substantial penalties prescribed in this section, the Act subsequently almost negates its effect since it says that:

Where any act or omission constitutes an offence punishable under this Act and also under any other Act then the offender found guilty of such offense shall be liable to be punished under the other Act and not under this Act.(122)

Accordingly, if a particular act or omission amounts to an offence under the EPA as well as, say, under the Water Act 1974 or the Air Act 1981, the offender will be subjected to the meagre punishment prescribed under the latter Acts

122 See section 24(2).
and not under the EPA. Thus, section 24(2) leaves a serious flaw in the deterrent value of the EPA. It may, however, be noted that having realised this folly the Department of Environment is now understood to be thinking of amending the Water Act (1974) and the Air Act (1981) in order to enhance the penalties laid down in those Acts.

Another notable improvement in the EPA is in respect of cognizance of offence by the courts. The Act, in addition to empowering the Union government or any authority or officer in its behalf, also permits a private citizen (a la section 80 of the Civil Procedure Code) to file a complaint under the Act after giving a notice of not less than 60 days to the concerned authority.123 Earlier acts reserved the ability to file cases against non-complying factories to the government entities only. However, under the EPA too, the citizen must notify two months in advance to the concerned authority to file its own suit or notify the citizen that it will not file a suit. Only after this a

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123 Section 19 runs as: No court shall take cognizance of any offence under this Act except on a complaint made by - (a) the Central Government or any authority or officer authorised in this behalf by that Government; or (b) any person who has given notice of not less than sixty days, in the manner prescribed, of the alleged offence and if his intention to make a complaint, to the Central Government or the authority or officer authorised as aforesaid.
citizen can file a complaint. The new Act, therefore, makes only a half-hearted effort in conferring *locus standi* to the citizens. That even almost six months after the EPA has come into force, not a single case under it is understood to have been filed by a citizen, goes to explain the maladies in the Act.

Upon examination of the relevant provisions of the various statutes, in addition to the Water Act which is *locus classicus* in the field of water pollution control, it appears that the Indian legal setting is in the process of steady evolution. The latest Environment (Protection) Act (1986) represents this trend.

It goes without saying that, the provisions of the old laws discussed above, which have been casually used for water pollution control, to say the least, are outdated. They provide very meagre punishment for a water polluter which, in practice, amounts to a "licence to pollute" since they lack any deterrent effect. The relevant provisions of these old laws, hence, need a thorough revision. In the specific case of the Water Act (1974), many lacunae need to be bridged in order to make the enforcement more effective. In view of the pathetic performance in the enforcement of this statute hitherto, by various pollution control Boards, it should now be an eye opener
for the environmental policy makers in India. The penalties prescribed under this Act need an urgent upward revision, especially in view of the incongruity that has arisen because of Section 24(2) of the Environment (Protection) Act 1986.

Although the EPA falls far short of becoming a comprehensive umbrella legislation for environment pollution control in India, it does tend to take care of some of the difficulties in the enforcement of the Water Act. It makes half-hearted effort for bringing in "citizen suits". It also refrains from making any provision as regards *suo moto* cognizance by the courts for causing environmental pollution in emergency cases. Above all the EPA needs to be amended forthwith to incorporate some of the emerging principles and norms for environmental pollution control, a la compensation for environmental harm. This has now become the need of the hour, in view of the unanimous judgement of the five-judge Constitution Bench of the (December 1986). Supreme Court in *M.C.Mehta Vs. Union of India*.

The Department of Environment will also be well-advised to constitute the relevant authority or authorities, to speed up enforcement of the EPA. It is also important to ensure proper coordination between the existing machinery and such authority, which will come into being, apart from avoiding overlapping and conflict of jurisdictions.