Chapter -8

TRADITIONAL REMEDIES: CHANGING TRENDS

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Traditional law remedies provide vibrant mechanism for combating air pollution and air quality deterioration. Traditional law regards the problem of air pollution mostly as a nuisance and provides speedy, cheap and flexible method of redressal of the grievances arising therefrom. Under this, a citizen has a choice from among the three civil remedies against pollution. Those remedies are, (i) a common law tort action against the polluter; (ii) a writ petition to compel the agency to enforce the law; (iii) a citizen's suit, when admissible, to enforce statutory compliance. The importance of traditional law remedy in the Indian legal system rests on the footing that India is a pollution loving nation.

In the midst of disturbing trends affecting air quality, traditional law remedies provide an important tool of access to justice for the common man. In these circumstances, this Chapter examines the origin and development of traditional law remedies and considers the extent to which the concept has changed over the last 150 years. It is concerned about whether a significant overhaul is needed if traditional remedies are to continue in this century as an effective

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2 Prof. Paras Diwan beautifully sums up the position as follows: “We pollute air by bursting crackers on Dussehra, Diwali and on the occasions of marriages and other festivals...we are equally fond of noise pollution. Godman’s voice must be heard by all, day and night, and our Ratjagas, Akhandpaths and Azan must use loudspeakers and amplifiers; no one should be deprived from hearing God’s and Godman’s voice and Gods too are far away beyond the hell and heaven. Our voice must reach them, otherwise, our spiritual needs remain unministered. We are not less noisy in our secular matters. Our marriage and burial processions must be accompanied by bands, twists and Bhangras”. For reference, see Paras Diwan, “Environmental Protection: Issues and Problems”, in Paras Diwan (Ed.) Environmental Protection: Problems, Policy Administration, Law, Deep & Deep, New Delhi(1987),p.11.
tool for protecting public health and air quality. This issue has become more pertinent since traditional law remedies are still the frequently used and well-understood tool employed by the common man, though its role has been restricted by the judiciary over the last few decades by according a narrow interpretation, a position that is mirrored especially in the decisions concerning nuisance.3

Ancient Scriptures in the Development of Traditional Law Remedies

Vedas, Upanishads, Smritis and other scriptures have sufficiently highlighted on the close relationship between nature including air and human beings. Ancient literatures stressed that man lived in complete harmony with nature4. Worshiping of nature, including air arose from deep reverence shown to the forces of nature, which sustained and preserved human life on the planet5. The idea of legal protection of ecology and environment are also found in Kautilya’s Arthasastra6 and in the writings about the system of governance adopted by Ashoka7.

In about 200 BC, Caraka wrote about vikrti (pollution) and diseases wherein he mentioned air pollution specifically as a cause of many diseases. He thus observed:

“The polluted air is mixed with bad elements. The air is uncharacteristic of the season, full of moisture, stormy,

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6 The basic issues of today’s environmental awareness for environmental preservation and prevention of its degradation are discernible in a number of Sutras in Arthasastra, written in 4th century BC, also revealed in the form of injunctions. The socio-political and philosophical aspects of Kautilya’s thought also sets forth as code of civil and criminal procedure. For details, see Sunil Sen Sarma, "Contemporaneity of the Perception on Environment in Kautilya’s Arthasastra", 33(1) Indian Journal of History of Science(1998)37; see also Kangle, R.P., Kautilya Arthasastra, tr.3 vols., Laurier Books, Motilal, New Delhi(1997), p.112.
hard to breathe, icy, cool, hot and dry, harmful, roaring, coming at the same time from all directions, bad smelling, oily, full of dirt, sand, steam, creating diseases in the body and is considered polluted.

In the ancient period, religion controlled the activities of individuals and the Dharma of environment formed part of the religious preaching motivating and alerting people to protect the environment from pollution. It also urged the individuals to allow the natural objects to remain in the natural state. It is from this concept that the traditional law remedies emerged and it provided various statutory provisions, specific legislations and application of common law principles with the object of protecting the environment from pollution arising from human activities.

**Common Law as an Abatement Tool against Pollution**

Common law is the body of customary law of England which is based on judicial decisions. Common law is a living system of law, reacting to new circumstances and new ideas. In fact, environmental law is an amalgam of common law and statutory law. In view of Article 372(1) of the Constitution, the codified principles of common law still survive in India, in so far as it is not altered, modified or repealed by the statutory law. The basis of its application is “justice, equity and good conscience”. However, it is only that part of the common law which is suited to the genius of the country that is accepted by the courts.

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Common law has been administered by the common law courts of England since the middle ages. Common law remedies against air pollution and other environmental hazards are available under the law of torts. A right to bring an action in common law jurisdiction with consequent right to damages is invariably present where a tort is committed. This was gradually applied to abate all kinds of pollution including air pollution.

The liability of the polluter under the law of torts is regarded as the major traditional legal remedy to abate pollution. The Indian Courts evolved a blend of tort law adapted to Indian conditions. Accordingly, the tortious liability for pollution mainly operates under nuisance, trespass, negligence and strict liability. The contribution of the case law to air quality preservation and air pollution control and the influence of that law, particularly with regard to statutory nuisance, negligence, strict liability is of immense importance. As far as air pollution is concerned, the remedy against it under the traditional law considered it mostly under nuisance.

(i) Nuisance

Modern environmental law has its roots in the common law principles of nuisance. The substantive law for the protection of the citizen’s right to clean air and environment is basically that of common law relating to nuisance. It is also said that all nuisances are environmental since they may potentially affect an indefinite number of property owners. Ordinarily speaking, nuisance means...
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anything which annoys, hurts or that which is offensive in nature\textsuperscript{18}. Nuisance as a tort means 'an unlawful interference with a person's use or enjoyment of land or some right over, or in connection with it'\textsuperscript{19}. Therefore, acts interfering with the comfort, health or safety comes under nuisance. Under the common law principle, nuisance is concerned with the unlawful interference with the person's right over wholesomeness of land or of some right over or in connection with it.

There are two categories of nuisances, private and public. Public nuisance is a crime, though it can also be a tort in certain circumstances. But Private nuisance is always tortuous.

(a) Public Nuisance

Public nuisance can be regarded as unreasonable interference with a right common to general public, which means, an act or omission which materially affects the reasonable comfort, convenience, health, safety or quality of life of a class\textsuperscript{20} of persons. There are various types of activities which results in air pollution or air quality degradation that can be regarded as public nuisance. The carrying of trades causing offensive smells\textsuperscript{21} intolerable noises\textsuperscript{22}, dust, vibrations\textsuperscript{23}, practice of harmful lifestyles like smoking, household burning, incineration, combustion of fuel or anything that affects the health or habitat of a locality can be regarded as public nuisance. Therefore, it is said that the law of public nuisance has a predominant connection with environmental law\textsuperscript{24}.

\textsuperscript{19} Rogers,(Ed.)Winfield and Jolowicz on Tort, Sweet & Maxwell, London (17\textsuperscript{th} edn., 2006), p.380.
\textsuperscript{20} What constitutes a class is not certain. Certainly it is less than the entire population of the nation and more than just a handful of individuals. Nevertheless, a class must be a definite section of the public in the area affected by the alleged nuisance. See Ratan Lal, R. and Dhiraj Lal, K.T., The Law of Torts, Wadhwa (1992), p.463.
\textsuperscript{21} Malton Board of Health v. Malton Manure Co., (1879), 4 Ex. 302.
\textsuperscript{22} Soltau v. De Held(1851), 2 Sim NS 133.
\textsuperscript{24} Leelakrishnan, P., Environmental Law in India, LexisNexis Butterworths (2\textsuperscript{nd} edn., 2005), p.57.
The legal remedies for a public nuisance are either a criminal prosecution for the offence of causing a public nuisance, or a criminal proceeding before a Magistrate for removing a public nuisance, and in certain cases, a civil action by Advocate General or by two or more members of the public with the permission of the court, for a Declaration, an Injunction or both. Normally, public nuisance does not create a civil cause of action for any person unless he proves particular or special damage beyond that suffered by all the other persons affected by the nuisance. This rule is intended to avoid multiplicity of litigation.

(b) Private Nuisance

Private nuisance means the using or authorizing the use of one's property or of anything done under one's control, so as to injuriously affect an owner or occupier of property by physically injuring his property or by interfering materially with his health, comfort or convenience. In short, private nuisance is an unlawful interference with a person's use or enjoyment of land or some right over, or in connection with it. Therefore, it is the unreasonable and unnecessary inconvenience caused by the use of defendant's land that constitutes the basis of an action under nuisance. Reasonableness of the defendants conduct is usually the pivotal question in nuisance cases.

In determining 'reasonableness', courts are generally guided by the ordinary standard of comfort prevailing in the neighbourhood and that minor discomforts that are common in crowded cities or urban centers are not viewed as nuisance by the courts. To be a nuisance, the act complained of must arise outside the plaintiff's land and then

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25 Indian Penal Code, 1860, S.286.
28 Rattan Lal, supra, n.20 at p.465.
29 Winfield and Jolowicz, supra, n. 19 at p.380.
31 See Rattan Lal, supra, n. 20 at pp.468-470.
proceed to affect that land or its use, must be a continuing wrong, and the damage suffered must be real or sensible and measurable in some way. Private nuisance is only a ground for a civil action for injunction and damages in as much as it is only an act affecting some particular individual or individuals as distinguished from the public at large.

The operation of nuisance in relation to pollution is rather broad and that it covers a wide range of interferences with the use and enjoyment of one's land or property arising from pollution of air, noise, smells, etc. The law of easement also guarantees beneficial enjoyment of land free from pollution\(^{32}\) and aggrieved party can move for relief under Section 9 of the Code of Civil Procedure. In cases of environmental harms amounting to private nuisance, this provision can be invoked.

Air pollution may amount to an actionable nuisance, though its existence may, sometimes be difficult to establish. If smoke, vapour, gases, fumes, dust, etc. are communicated to the air which surrounds and enters plaintiff's premises so as to cause inconvenience to the occupier thereof and renders the premises less comfortable, the act will be nuisance. Based on this principle, creation of stenches\(^{33}\), causing smoke or noxious fumes to pass over the plaintiff's property\(^{34}\), rising of clouds of coal dust\(^{35}\) have all been held actionable nuisance under common law. Where the nuisance causes only personal discomfort, the nature of the locality has to be considered to determine whether action should lie. Under common law, a land owner is entitled to have air untainted and unpolluted by acts of his neighbours. This means that breathing air must be compatible with physically comfortable human existence, though air

\(^{32}\) The Indian Easement Act, 1882, S.7, Illu. (b)-(f) and (h).
\(^{33}\) Walter v. Selfe (1951) 4 De G & Son 315.
\(^{34}\) Shott Iron Co. v. English (1882), 7 App Cas 518; Wood v. Conway Corporation (1914) 2 Ch. 47.
\(^{35}\) Pwllbach Colliery Co. Ltd. v. Woodman (1915) AC 634.
may not be as pure and fresh as when the plaintiff's house was built\textsuperscript{36}.

**Indian Legal Scenario on Nuisance Action**

In India, voluntarily vitiating the atmosphere so as to make it noxious to public health is indictable as a criminal offence\textsuperscript{37}. Control of air pollution amounting to private nuisance, is, however, possible only by instituting a civil remedial action. The civil remedy against air pollution has been in vogue even in the pre-industrial period. Thus, in *J.C. Galstaum v. Dunia Lal Seal*,\textsuperscript{38} the Calcutta High Court held that a person cannot claim a right to foul municipal drain by discharging into it what it was not intended to carry off and then throw on the municipal authorities or other persons, an obligation to alter the drain in order to remedy the nuisance that he has produced.

It is increasingly recognized that no proprietor has an absolute right to create noise upon his own land, because any right which the law gives is qualified by the condition that it must not be exercised to the nuisance of his neighbours or the public\textsuperscript{39}. As to what amount of noise or annoyance from noise will be sufficient to sustain an action of nuisance, there is no definite legal rule or measure. It is a question of fact in each case. However, the assessment of whether noise constitutes an actionable nuisance will depend on factors such as the nature of the locality, the time when noise was created, the duration of the noise, mode of committing it, the nature and the desirability of the defendant's action, the nature of the harm suffered by the plaintiff and the defendant's state of mind, though not all of these factors will be equally relevant in any given case\textsuperscript{40}.

\textsuperscript{36} *Sturges v. Bridgman* (1879) 11Ch. D. 852.
\textsuperscript{37} The Indian Penal Code, 1860, S. 273.
\textsuperscript{38} (1905) 9 CWN 612. The decision is also analyzed under the injunction remedy in this Chapter.
\textsuperscript{40} *Bambford v. Turnley* (1860) 3 B & S 62 at p.72.
Noise becomes actionable nuisance only if it materially interferes with the ordinary comfort of life, judged by ordinary, plain and simple notions. The standard of judging actionable noise is according to that of man of ordinary habits and not of man of fastidious tastes or of over-sensitive nature. Noise nuisances include producing noise by tom-tom, cymbal during the performance of ceremony, or from machine long after people would ordinarily go to sleep, running a flour mill in a noisy locality which causes additional noise and vibrations and materially interferes with the physical comfort of the plaintiffs, deliberately making loud noises and shrieks so as to disrupt an activity, ringing of church bells to the annoyance of people in the neighbourhood and the plaintiff, etc.

Even though the tort of nuisance as a common law remedy has been successful to a certain extent in combating air pollution and air quality degeneration, still it has to be noticed that there are certain drawbacks associated with this remedy. The central focus of nuisance action lies on reasonableness of defendant’s conduct, which is usually determined by the court by weighing its utility against the gravity of the harm to the plaintiff, as the unreasonableness on the part of the defendant is often difficult to prove. This standard, if
applied, means that in cases where the major polluters are large industrial firms, it is difficult to prove unreasonableness in the conduct of their business having regard to their high economic and social status\(^\text{48}\). Further, in certain matters like noise pollution the applicable standard with regard to nuisance varies from place to place and that there is no such uniform standard like that of a 'reasonable man' as existing in the case of negligence.

Consequently, a disturbance will be a nuisance in a peaceful area, whereas a similar disturbance may not be so in a noisy locality. The boiler of a factory generating excessive noise and located in the industrial area may not amount to nuisance, but on the other hand, the same boiler if situated in the residential area and if it causes excessive noise would bring the action within the classification of nuisance. To overcome the same, it is important that the reasonableness or unreasonableness of the interference must be judged by looking at the damage caused by the alleged nuisance to the plaintiff\(^\text{49}\).

In *Ram Baj Singh v. Babu Lal*\(^\text{50}\), a person built a brick grinding machine in front of the consulting chamber of a medical practitioner. The machine was generating lot of dust and noise which polluted the surrounding atmosphere and entered the consulting chamber of the medical practitioner and caused severe physical inconvenience to him as well as to his patients. Justice S.J.Hyder of the Allahabad High Court judged the issue as amounting to private nuisance, on the reasoning that the action complained of cause injury, discomfort and annoyance to the persons.

Together with the difficulties faced in the determination of unreasonableness, lack of 'standing' to sue is also responsible for


\(^{50}\) A.I.R.1982 All.285.
making the nuisance law inadequate to control the growing air pollution. For a private action on public nuisance to be successful, 'special injury' has to be proved which must be different in kind from that suffered by the general public and not merely different in degree. This burdens nuisance action by private persons against air pollution by requiring the plaintiff to establish the casual link between the pollutant and the injury and makes the remedy ineffective. Yet another difficulty encountered in the process is the burden of proving the material harm attributable to unreasonable conduct of the defendant, since in many cases it is rather impossible to point out any particular polluter responsible for the poor air quality.

(ii) Trespass

Though closely related to nuisance, tort of trespass is a distinct legal remedy invoked restrictively in pollution cases. Trespass means intentional or negligent invasion of the plaintiff's interest in the exclusive possession of property without lawful excuse and such invasion may be direct or through some tangible object. The tort of trespass is per se actionable and there is no need to show damage as a result of trespass. Thus, emission of gas or invisible fumes, constitute tort of trespass. The distinction between trespass and nuisance is that while trespass is actionable per se, nuisance is actionable only on the proof of damage.

The tendency of the court to consider environmental harm within the ambit of trespass action is now mounting. Such an approach is seen reflected in Martin v. Reynolds Metal Co. wherein the Court deviated from the traditional definition of trespass to bring industrial pollution within the ambit of liability. In so doing, the court

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51 Rosencranz, supra, n.1 at p. 88.
52 Id., p.113.
53 MacDonald v. Associate Fuels (1954) 3 DLR 775.
54 Martin v. Reynolds Metal Co. (1959) 221 Ore. 86.
55 This is because in trespass cases injury is direct, whereas in nuisance, injury is only consequential.
56 Martin, supra, n.54.
stretched the definition of actionable trespass as meaning the 'invasion of land owner's right to exclusive possession, whether by visible or invisible substance' and held that mere setting of fluoride deposits upon the plaintiff's land was sufficient to constitute actionable trespass$^{57}$.

It may be pointed out that trespass remedy, despite its wide scope, is inadequate to control air pollution. The difficulties lie in identifying the definite source of pollution, high litigation cost and unwillingness on the part of the people to resort to the said remedy. These factors make the remedy unpopular and unappealing. That apart, trespass action requires some direct physical interference by one against the person or property of another whereas air quality degradation cases generally tends to be indirect in its nature and effect. Therefore, this remedy is of little importance to combat air pollution, as much of the forms of air pollution subsist in the form of indirect interference with the personal and proprietary rights.

(iii) Negligence

Negligence is another specific tort on which a common law action to prevent air pollution and air quality degradation can be instituted. Negligence is based on the principle of fault. Negligence as a tort is the breach of a legal duty to take care which results in damage, undesired by the defendant, to the plaintiff$^{58}$. It applies to situations when there is a duty to take care and that care is not taken which results in some harm to another person.

What is reasonable care in a given situation is dependent on the surrounding circumstances, facts of the case and varies according to the magnitude or risk involved, the utility of the defendant's action, the burden of taking adequate precaution to


$^{58}$ Winfield et al., supra, n.19 at p.69.
eliminate the risk and magnitude of prospective injury\textsuperscript{59} and consequential damage which must have been factually caused by breach of duty and must be the reasonably foreseeable consequence of the breach. Once the above elements are satisfactorily proved, a prima facie case of negligence is made out and thereupon it becomes the duty of the defendant to come forward with evidence to show that the act was not negligent.

The common law action for nuisance has been of limited success to get damages in air pollution cases\textsuperscript{60}. The greatest difficulty confronted in negligence cases is the proof of defendant's fault. Breach is nowadays conceived as an unreasonable failure to achieve the standard of care required by law or to conform to the general and approved practices of the particular sphere of activity. In such a situation, conformation with general policy and associate standards including generally accepted trade or professional practices are the usual ways to defeat the allegations of negligence and are good defenses available to the defendants.

In \textit{Pearson v. North Western Gas Board}\textsuperscript{61} the plaintiff and her husband were injured and their house was destroyed as a result of an explosion of gas which had escaped from a gas main. The gas had been able to escape because of movements in the soil consequent to severe frost that fractured the main. The action of plaintiff failed due to his inability to adduce expert evidence to prove negligence on the part of the defendants. The defendants, however, through expert evidence testified that the main was dug sufficiently deep, and the metal of the main was in good condition which was found as sufficient justifiable defence to rebut the case of negligence leveled against them.


\textsuperscript{60} \textit{James E. Krier, supra, n.57 at pp.154, 169-171.}

\textsuperscript{61} [1968] 2 All E.R. 669, \textit{per Rees, Manchester Winter Assizes.}
In *Budden v. B.P. Oil Ltd.*, a group of parents in London brought an action for negligence against the defendants on behalf of their children alleging damage to health due to the presence of lead in petrol. The Court of Appeal found that the Oil Companies had complied with regulations made by the Secretary of State for the purpose of controlling pollution. The Court held that where Parliament has sanctioned a general policy and associated standards after due enquiry, it is not for the courts to make decisions which might have the effect of requiring compliance with a different and inconsistent policy.

In *Naresh Dutt Tyagi v. State of U.P.*, chemical pesticides were stored in a godown in residential area. Fumes emanating from the pesticides leaked to the contiguous property through ventilators which resulted in death of three children and an infant in the womb of the mother. It was held that this was a clear case of negligence and the relief was granted by the court.

In air pollution cases, the tort of negligence is seen utilized when other torts of nuisance or trespass are not available. However, at times, it may prove difficult to establish the casual connection between the negligent act and the plaintiff's injury, particularly, in situations when the effects of the injury remain latent over long periods of time and can be attributed to factors other than known pollutants, or to the polluters other than the defendant. Though prospective damages can be claimed in such cases, they may become unclaimable due to operation of *res judicata* in the event of their having been not claimed in the earlier suit. Notwithstanding such difficulties, it has to be stated that the tort of negligence is an effective tool in the armory of common law to control air pollution. But law of negligence can progress only by the formulation of very

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63 Id., p.379.
64 (1995) Suppl.(3) S.C.C. 144, per Venkatachaliah and Mohan, JJ.
65 Rosencrantz, A., supra. n.1 at p. 89.
broad general statements qualified and adapted in the light of experience.

(iv) Strict Liability

The rule of strict liability was evolved in the year 1868 by Blackburn, J. in Rylands v. Fletcher. It is another form of private law action against air pollution hazards. However, due to its highly technical nature, the role of this form of liability in enforcement of actions has been very limited in India. This rule laid down a principle of liability that if a person who brings on to his land and collects and keeps there anything likely to do harm and such thing escapes and does damage to another he is liable to compensate for the damages caused. The liability under this rule is strict and it is of no defence that things escaped without that person's wilful act, default or neglect or even that he had no knowledge of its existence. However, the blown up exceptions to 'strict liability' have considerably reduced the scope of its operation.

The doctrine of strict liability is very useful in cases of air pollution, particularly, in cases where the harm is caused by the leakage of hazardous substances. The rule of strict liability has been applied to a variety of circumstances wherein damage has resulted due to fire, gas, explosions, oil, noxious fumes, colliery spoil, vibrations etc.

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67 (1868) LR 3 HL 330.
68 But the rule of strict liability is subject to exceptions such as act of god (e.g., flood or earthquake), the act of third party (e.g., sabotage), the plaintiff's own fault, the plaintiff's consent, the natural use of the land by the defendant, and statutory authority.
69 Rainhan Chemical Works Ltd. v. Belvedere Fish Guano Co., (1921) 2 AC 465. In India, this is also applied in situations of causing mischief by fire. For details, see M.Madappa v. K. Kariapa, A.I.R. 1964 Mys. 80.
The rule of strict liability was evolved in the 19th century when the development of science and technology had not taken place. However, with the thundering and wondering developments in the field of science and technology in the wake of the 21st century, strict liability rule cannot afford any permanent guidance or lasting solution for evolving any standard of liability in air pollution mischiefs, consistent with the constitutional norms and the needs of the present day economy and social structure. Law cannot remain static. In the midst of new situations emerging, law has to be evolved in order to meet the challenges of the new situations. At the same time, the approach of the law should also take into account the phenomenal economic developments taking place in the country.

**Strict Liability Giving Way to Absolute Liability**

When the legislature failed to bring out legislation laying down new standards for determination of liability in the midst of fast changing and growing trends in the economic scenario, Indian judiciary aptly intervened and evolved the principle of absolute liability in *M.C. Mehta v. Union of India*75. In the above case, Supreme Court felt that a stage reached to evolve new principles and to lay down new norms of liability which could adequately deal with new problems that arise in highly industrialized economy. Thus the court evolved the new principle of absolute liability76. The principle of absolute liability was explained by the Supreme Court in the following words:

"Where an enterprise is engaged in a hazardous or inherently dangerous activity resulting for example, in the escape of toxic gas, the enterprise is strictly and absolutely liable to compensate all those who are affected by the accident and such

76 Hoare and Co. v. McAlpine (1923) 1 Ch. 167.
78 However, the English Courts have not undertaken such progressive interpretations.
liability is not subject to any of the exceptions which operate vis-à-vis to tortious principle of strict liability...”

A Liability not Subject to Exceptions

The main difference between strict liability and absolute liability is that whereas in the case of strict liability, the same is subject to certain exceptions which do not fasten liability, in the case of absolute liability, the liability is absolute and non-delegable and the same is not subject to any exceptions. The Court also pointed out that the measure of compensation must be co-related to the magnitude and capacity of the enterprise because such compensation must have deterrent effects. Going by the above legal yardstick, the larger and more prosperous the enterprise, greater must be the amount of compensation payable by it for the harm caused on account of or in connection with the carrying on of the hazardous or inherently dangerous activity by the enterprise.

The principle of absolute liability was emphatically reiterated once again by the Supreme Court in Indian Council for Enviro-Legal Action v. Union of India, wherein the Court held that the Rylands principle which is subject to certain exceptions is not suitable for Indian conditions and hence not applicable.

From the above analysis of the factual scenario, it becomes self-evident that under the common law remedies, there is a potential for evolving new principles suiting the present day or emerging new socio-economic conditions. It also establishes that whenever there is a tort action, the plaintiff can sue either for damages or injunction.

78 Ibid.
Statutory Nuisance: A Vibrant Mechanism to Address Air Quality Challenges

Statutory nuisance took its wings as the rule of strict liability was found to be unsuited to combat environmental pollution. Statutory nuisance procedure is a useful method to address the localized environmental problems such as smoke, smells, noise, etc. affecting air quality in the vicinity. It is a convenient route to resolution to which most people affected by problems of the breathing air are likely to turn. Its roots can be traced to the cholera outbreak in England, when Nuisances and Contagious Diseases Bill, 1848 was mooted. While opening the debate on the stage of second reading, Marquess of Lansdowne remarked about the spread of cholera as follows:

"This was epidemic only, and not contagious... that its causes were atmospheric; that it was influenced by the currents of air, and certain meteoric changes and vicissitudes; that the disturbing causes which prompted the disorder resided principally, if not altogether, in the atmosphere."

Further, the 'miasma' theory of infection that prevailed in 1870s also conveyed the idea that disease was caused by the transmission of minute faecal particles suspended in droplets of breath. These events led to the necessity to provide legal measures to prevent and control atmospheric pollution.

The earliest legislation in England specifically incorporating statutory nuisance was the Nuisances Removal Act, 1855 which was

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82 To combat the serious outbreak of cholera, the earliest attempt was in the form of sanitary legislation.
subsequently consolidated in the form of Public Health Act, 1875, and further re-enacted as Public Health Act, 1936. Noise Abatement Act, 1960 also contained provisions to curb health problems arising from noise nuisance. Later, Environmental Protection Act, 1990 came into existence and Part III of the Act envisaged a scheme on statutory nuisance.

There are two routes which an individual may pursue through the umbrella of statutory nuisance—one is to approach the local authority to serve abatement notice on the perpetrator and the other is to serve a letter on the perpetrator intending to apply to a Magistrate Court for an abatement order85.

There is a growing trend in England to include new categories of pollution within the penumbra of statutory nuisance. The Clean Neighbourhoods and Environment Act, 2005 provides that light pollution should be included as a statutory nuisance86. The Act further provides that ‘insects emanating from relevant industrial, trade or business premises’ and being ‘prejudicial to health or a nuisance’ is a statutory nuisance87.

**Nuisance Remedy: A Critique of the Judicial Approach**

Freedom from nuisance and adverse health effects are not, and have never been fixed entities. Health aspirations in modern industrialized societies go beyond preventing the spread of infectious and contagious diseases, but also include the right to clean air, protection from excessive noise88, or unpleasant smells.

Today, freedom from disease together with promotion of the quality of life is considered to fall within the human rights

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86 S. 102.
framework, which places quality of life issues at central stage and has raised expectations about environmental protection. For this, interpretation of statutory nuisance should be updated meeting modern expectations and the needs of a modern public health paradigm. However, courts are preventing its expansion in the twenty-first century. Judiciary is not recognizing that statutory nuisance regime affords an effective means for local government to deal with problems as well as providing an accessible remedy for private individuals aggrieved by the nuisances of their neighbours. Courts fail to notice that local authority is a local and familiar administrative body to residents and that accessibility and accountability at the local level are important mechanisms for promoting effective environmental rights.

**Private Law Remedies**

Under the civil law, a person injured by an air pollution activity can claim damages for his loss as well as cessation of the questioned activity by seeking injunctive relief.

**(a) Damages**

Damages are the principal remedy for the loss or injury suffered. Damages in law are the monetary compensation payable for the commission of a tort. In cases of air pollution or other environmental harms, the damages are generally claimed whenever there is a tort of negligence or in cases which are covered by the principles of strict and absolute liability.

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90 Environmental Protection Act, 1990, S. 82 permits a 'person aggrieved' to apply to the Magistrate Court for an abatement order in respect of a nuisance falling within the list in Section 79.

91 Damages can be substantial or exemplary. Substantial damages are paid to compensate for the injury or loss caused due to some tort action. Exemplary damages are generally granted against the wrongdoer to have deterrent effect.
In *Mukesh Textiles Mills (P) Ltd. v. H.R. Subramanya Sastry*, the appellant had a sugar factory adjacent to the cultivated land of the respondent. The appellant used to store molasses, a by-product in the manufacture of sugar, in three tanks in the premises of the factory. One of the tanks was close to the respondent's land and was separated only by a water channel. Due to burrowing activity of the rodents, the said tank containing 8000 tonnes of molasses collapsed and molasses emptied themselves into the water channel and through it spread over to the respondent's land damaging the standing paddy and sugar crop. The respondent filed a suit for damages of Rs. 35,000/-. On the other hand, the appellant defended the suit contending that it was an 'Act of God' as he could not have seen this burrowing by rodents and thus pleaded that he was not liable.

The lower Court held that the damage suffered by the respondent was attributable to actionable negligence on the part of the appellant. Accordingly, the lower Court awarded Rs.14,700/- as damages. In Appeal, the High Court relied on the rule of strict liability in *Rylands* and held that the appellant was liable for damages. However, the High Court reduced the damages to Rs. 12,200/- as the crops had not been ready for harvest and the lower Court had taken into account the gross value of the crops in calculating the damages.

The House of Lords in *Rookes v. Banard*, classified three categories of cases wherein exemplary damages can be allowed. The first category is oppressive, arbitrary or unconstitutional action of the Government or its servants. Cases in the second category are those in which the defendant's conduct has been calculated by him to make a profit for himself which may well exceed the compensation payable to the plaintiff. Third category consists of cases in which exemplary damages are expressly authorized by Statute. The Supreme Court of

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92 A.I.R. 1987 Kant. 87, per M.N.Venkatachaliah and S.R.Rajasekhara Murthy, JJ.
93 (1964) AC 1129(HL).
India in *Shriram Gas Leak Case*\(^{94}\) has added yet another category, viz., harm resulting from hazardous or inherently dangerous activities.

Prospective damages can also be awarded in respect of future loss resulting from the same cause of action in the same suit. The determination of prospective damages in environmental cases is hard to quantify in some cases and may remain unawarded on account of difficulty involved in their being proved.

Damages are the principal relief in a tort action. But such a relief suffers from inherent drawbacks. Firstly, damages awarded in tort actions in India are very low. Protracted litigation and depreciation in the value of damages awarded at the end of litigation owing to chronic inflation make such a relief of little value to a successful plaintiff\(^{95}\).

**Compensatory Remedy against Ultra-Hazardous Activities**

The remedy of restitution or compensation is a legal enforcement measure to penalize and deter polluters or potential polluters. Liability to compensate arises when a lawful but dangerous or ultra-hazardous activity give rise to disastrous consequences\(^{96}\). Emissions into the atmosphere affecting the breathing air quality is a ground for fixing liability \(^{97}\). The imposition of liability reduces the potentiality of its harm\(^{98}\). Liabilities imposed compel polluters to compensate the victims of pollution\(^{99}\). It is therefore, an incentive to control pollution. Liability for tort stands used extensively for combating air pollution. The damages are measured according to

\(^{94}\) M.C. Mehta, supra, n.75.

\(^{95}\) It is pointed out that such relief does not have any deterrent effect on the polluter and is not effective in meeting air pollution issues.


\(^{97}\) Such as damage caused by emission affecting air quality.


what the plaintiff has lost\textsuperscript{100}. The principle of strict liability got strong footing for dealing with environmental harms primarily because, reasonable foreseeability test is applied in determining liability for nuisance \textsuperscript{101}. The difficulty in establishing liability of the violators of environmental quality and of quantifying the damages compelled environmentalists and pollution victims to change their remedies from tort to writs\textsuperscript{102}.

The liability to pay compensation for violation of the fundamental right to live do exist side by side with the common law remedy and is used extensively by the higher courts. Environmental legislation deal with criminal liability\textsuperscript{103}. It is deterrent in nature and is in the form of sanctions for violation of laws. Thus liability under municipal law is a civil liability for damages under common law or a liability towards the society in the public interest or a statutory criminal liability.

(b) Injunction

The remedy of injunction is very useful in cases of trespass and nuisance. Injunction is a judicial process by which the person causing or likely to cause pollution is prohibited from doing so. It is therefore, an order of a court restraining the commission, repetition or continuation of a wrongful act of the defendant and it is awarded at the discretion of the Court. Injunction is of two types, i.e., temporary and perpetual. A temporary injunction is regulated by Sections 94 and 95 and Order 39 of the Code of Civil Procedure, 1908, whereas perpetual injunctions are governed by Sections 37 to 42 of the Specific Relief Act, 1963. For the grant of temporary


\textsuperscript{101} Beenakumari, \textit{supra}, n.48 at p.103.

\textsuperscript{102} Sadasivan Nair, G., "Environmental Offences: Crime against Humanity", in Leelakishnan, P. \textit{et al.}, (Eds.) \textit{Law and Environment}, Eastern Book Co., Lucknow(1992)p.186; See also Chandrasekharan Pillai, K.N., "Criminal Sanctions and Enforcement of Environmental Legislation", in Leelakrishnan, P. \textit{et al.}, \textit{Id.}, p.175.

\textsuperscript{103} Air (Prevention and Control of Pollution) Act, 1981, Ch. VI, Ss. 37-46.
injunction, there should be existence of a prima facie case; likelihood of irreparable loss or injury; and balance of convenience leaning towards the grant of injunction. Perpetual or permanent injunction is awarded by the courts to permanently restrain the person from doing tortious act. A perpetual injunction will be generally granted where a strong probability of grave damage to plaintiff accrues and where damages would not be an adequate remedy. The test of 'balance of convenience' also applies to in the award of permanent injunctions.

In *J.C.Galstaum*\(^{104}\), the cause of action for the suit related to refuse let into municipal drain from defendant's shellac factory emitting foul smell noxious to health and resulting in damage to the comfort and the market-value of plaintiff's garden property. Lower Court granted perpetual injunction to abate the nuisance and also awarded Rs.1000/- as damages. Sustaining the order of injunction and damages awarded by the lower court, the Calcutta High Court in appeal held that the appellant/defendant was not at liberty to discharge the refuse of the aforesaid character\(^ {105}\). The above ruling equally applies in respect of air pollution matters where as a result of an activity undertaken by a person as part of business or for personal gain, a nuisance is caused to the neighbourhood. It is of equal application to industrial emissions, dust and fumes, poisonous gases, household burning, noise etc. which are nuisances. The Court in the instant case proceeded by treating the foul smell emitted from the discharge of factory refuse as nuisance and accordingly applied the private law remedies of injunction and damages as methods for abating the nuisance. Although the judgment is century old, the manner in which court approached the problem and the principles laid down therein have increasing application in the present day context when as a result of industrialization, urbanization and exploitation of natural resources, great threat is posed to the air

\(^{104}\) Supra, n.38.

\(^{105}\) In this context, it is pertinent to note that the amount of Rs.1000/- awarded as damages was a huge amount at that time and thus it could be termed as 'special damages' which the court had awarded.
environment due to human activities, some or most of which amounts to instances of nuisance, for abatement of which the private law remedies of injunction and special damages can be pressed into operation.

In *B. Venkatappa v. B. Louis*\(^{106}\), the appellant had constructed a chimney with its holes projecting towards the respondent's side. The respondent complained that the smoke and fumes from the chimney was causing injury to his health and discomfort in the enjoyment of the property. The Court directed the appellant to close the holes in the chimney facing the respondent's side and thus issued mandatory injunction. In appeal the appellant contended before the Andhra Pradesh High Court that without any proof of an injury of discomfort to the plaintiff on account of emanation of smoke from the chimney, there was no cause of action for the respondent to lay action seeking mandatory injunction.

Justice Ramaswamy of the Andhra Pradesh High Court rejected the contention of the appellant and observed that it was common knowledge that when the smoke emanates, it would also pass through the holes of the chimney and when the smoke is thus spreading in the atmosphere, it causes and would be injurious to the health of the neighbours. Therefore, the court concluded that it would cause discomfort in the enjoyment of the property and become injurious to the health as well. An evaluation of the above decisions would make it abundantly clear that the remedy of injunction is more effective in tackling air pollution problems, than the remedy of damages.

**(c) Self-Help**

Self-help is another private law remedy in the hands of an occupier to abate air pollution nuisance, when an occupier is

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\(^{106}\) A.I.R. 1986 A.P. 239.
detrimentially affected by it. Under this remedy, an occupier can abate
nuisance without the intervention of the court, provided while doing
so, he does not commit any unnecessary damage and that there is an
emergency in the sense that the nuisance threatens to cause
immediate harm$^{107}$.

From the above exposition, it is submitted that the tort
remedies constitute an important part of the Indian legal system
aimed at the prevention, control and abatement of air pollution and
for seeking relief for the consequent harm. The tort remedies are,
however, subject to a number of drawbacks which lessen their utility.
Firstly, tort action is a costly and lengthy affair. Secondly, people in
India lack perception that air pollution issues can be brought to court
under litigation based on law of torts. Thirdly, tort actions are fraught
with problems such as that of proof, in cases of pollution where the
victims lack access to technological information and knowhow
placing them in a psychologically disadvantageous position further
aggravated by the fear of confrontation and the size of the population
which makes proof of damage always difficult.

**Impact of Treaties and Obligations on Common Law**

Unincorporated treaties and obligations arising under
customary international law have a bearing on the process of
development of the common law$^{108}$. A treaty may provide a
perspective or a formulation of values capable of informing the
general assessment of justice which the courts struggle to achieve
when seeking a direction for development of the common law$^{109}$. It is
becoming recognized that if and to the extent development of the
common law is called for, such development should ordinarily be in
harmony with the international obligations$^{110}$. The courts are under a

$^{108}$ *Lyons* [2002] UKHL 44, per Lord Bingham.
$^{109}$ *D v East Berkshire Community National Hospitals Trust* [2005] 2 A.C. 373.
$^{110}$ *A v Secretary of State for the Home Department (No.2)* [2006] 2 A.C. 221 at p.227.
duty to interpret the common law in accordance with the international law obligations of the State. Hence, treaties can be used to resolve the uncertainties in the common law. But common law cannot be used to achieve a “backdoor incorporation” of international treaties.

Treaties also form important sources of authority for determining transboundary problems causing environmental damages. Initially, the international liability of States for transboundary pollution issues was based on the principle of good neighbourliness. Now it is the responsibility of the State of origin to exercise due diligence to assure that the activities within their territories are carried out in conformity with internationally accepted safety standards, and that lack of ability to control pollution is not an excuse in such cases.

Common Law Remedies and Judicial Approaches: A Critical Appraisal

The primary actors involved in ensuring compliance with environmental law obligations are public authorities. In Europe, Environmental Liability Directive regulates almost exclusively the claims brought by public authorities. It explicitly states in Article 3(3) that the Directive shall not give private parties a right of compensation as a consequence of environmental damage or of an imminent threat of such damage. In common law countries, notably

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111 Att-Gen v Guardian Newspapers (No. 2) [1990] I A.C. 109 at p.238.
113 A v Secretary of State for the Home Department [2005] I W.L.R. 414 at p.434.
115 This is stressed by the Arbitral Tribunal in Trail Smelter Case as early as in 1935, For details, see Trail Smelter Arbitration Decisions, 35 A.J.I.L.(1941)684.
in the United States, access to private law remedies by public authorities is now widely invoked\textsuperscript{117}.

In England, although little was heard of \textit{Rylands} in the decades that followed, more recently two decisions of the House of Lords, \textit{Cambridge Water Co. Ltd. v Eastern Counties Leather Plc.}\textsuperscript{118} and \textit{Transco v. Stockport MBC}\textsuperscript{119} have once again focused attention on the strict liability rule, subject to the fact that there should be a rationale of strict liability which is that the defendant had been engaged in a peculiarly dangerous activity, i.e., an ultra-hazardous activity. Thus, rule although not abolished, Court has imposed severe constraints on the rule's application\textsuperscript{120}.

In future, courts may develop the common law in the perceived interests of justice, although they must act within the confines of the doctrine of precedent and the change so made must be seen as a development, usually a very modest development, of existing principle and so can take its place as a congruent part of the common law web as a whole\textsuperscript{121}. In the above background, the present trends, if continued, would provide better scope for the invocation of common law remedies in meeting public health and air quality challenges.

\textbf{Remedy under Criminal Procedure Code}

The provisions of the Criminal Procedure Code, 1973 envisage urgent measures to abate the nuisance of air pollution\textsuperscript{122}. But this remedy is not taken seriously by the public due to ignorance and illiteracy. The remedy under Section 133 of Cr.P.C.\textsuperscript{123} can be used


\textsuperscript{118} (1994) 2 A.C. 264.

\textsuperscript{119} (2003) 2 A.C.1.


\textsuperscript{121} \textit{Kleinwort Benson v Lincoln City Council} [1999] 2 A.C. 349 at pp.377-378.

\textsuperscript{122} See Code of Criminal Procedure, 1973, Ss. 133 to 144.

\textsuperscript{123} Under Section 133 of the Cr.P.C, the District Magistrate or Sub-Divisional Magistrate or Executive Magistrate, if he is so empowered by the State Government, on the receipt of report from police officer or other information, may make conditional order to remove the public nuisance causing pollution. The conditional order may be made absolute and if the person concerned fails to carry it
even against statutory bodies like Municipalities, Corporations and other Government bodies if their action or inaction leads to public nuisance and environmental pollution\textsuperscript{124}. The decisions in \textit{Govind Singh} \textsuperscript{125}, \textit{P.C.Cherian} \textsuperscript{126}, \textit{Krishna Gopal} \textsuperscript{127}, \textit{Ajeet Mehta} \textsuperscript{128} speaks in volume of the activist role played by the Courts in India towards protection of the air environment by positively interpreting the provision under Section 133 of the Criminal Procedure Code\textsuperscript{129}. The said approach continues, as discernible from the landmark decision of the Kerala High Court in \textit{Cheruchi} \textsuperscript{130} wherein the court has taken the view that right to live peacefully and in a healthy atmosphere free from all kinds of pollution is coming under the fundamental rights guaranteed to the citizens. Justice V.K.Mohanan observed:

"In this changed society, the right of the common people to have a peaceful life, protection from endanger to life, security and a healthy and pollution free life cannot be subsided for the profit motivated trade or business. It is the duty of the State to ensure the above right of the common people. In order to ensure such constitutional right and to prevent violation of such right or misuse of the same, the State can enact law or rule or procedure as preventive and remedial measures by which State can control, regulate or prevent any action either under the guise of business or trade or any subject covered by Section 133 of Cr. P.C. Chapter X and the powers therein are incorporated in the Code of Criminal Procedure so as to enable the State to move its machinery to prevent any such act and to take remedial measures and thereby to protect the larger interest of general public"\textsuperscript{131}.

\textsuperscript{125} A.I.R. 1979 S.C. 143.
\textsuperscript{127} (1986)Cri. LJ. 396.
\textsuperscript{128} (1990) Cri.LJ.1596, per A.K.Mathur, J.
\textsuperscript{129} Description and analysis of the above cases are made in Chapter-V, supra.
\textsuperscript{130} \textit{Cheruchi v. State of Kerala, 2009 (1) K.H.C.49. This was a case in which Sub Divisional Magistrate initially passed an order under S.133(1) of Cr.P.C. to stop the functioning of the quarry, as it was injurious to public interest. Later, the Sub Divisional Magistrate stayed his own proceedings initiated under S.133(1) and permitted the functioning of the quarry after fulfilling certain conditions stipulated in the order. The High Court held that Sub Divisional Magistrate has no power to stay his own proceedings initiated under S.133(1) Cr.P.C. and that thereafter he can pass only final order under S.138(2) of the Code.
\textsuperscript{131} Id., p.55.
However, the path of development of magisterial law was attempted to be curtailed by the courts itself by adopting narrow interpretations embarking upon the principle of ‘implied repeal’ and theory of ‘imminent danger accompanying public nuisance’.

Tata Tea: A Passive Approach of the Kerala High Court

The view taken by the Kerala High Court in Tata Tea Ltd. holding that the provisions of the special statute like the Air Act or the Water Act has impliedly repealed Section 133 of Cr. P.C. has substantially affected the power of the executive Magistrate to provide quick relieves in the case of continuing nuisance affecting the air quality. Though the decision is an instance of judicial oversight, the mistake committed by the court while construing the scope of Section 133 was carried further to other subsequent cases also. In Tata Tea Ltd., it was alleged in the complaint that the owners of the tea factory were discharging its effluents into the river thereby polluting the water in the river which was used as drinking water by the people. The Sub-Divisional Magistrate passed an order under Section

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132 For further details on the theory of ‘imminent danger’ accompanying public nuisance, see the decision of the Supreme Court in Kachruul Bhagirath Agrawal v State of Maharashtra, 2004 Cri. L.J.4634, per Arijit Pasayat and C.K.Thakker, JJ. In this case, the allegation related to storage, loading and unloading of red chillies in a godown situated in a residential locality which amounted to public nuisance. According to the complainants, the business resulted in many residents suffering from sneezing, coughing, asthma, irritation of the skin and burning sensation. The Sub-Divisional Magistrate passed a conditional order which was confirmed by the Sessions Court and the High Court. But in appeal, the Supreme Court expressed view about the jurisdiction under S.133 that unless there is imminent danger to health or the physical comfort of the community, an order under S.133 cannot be passed. Thus, the decision left confusion on whether a danger happening in the immediate future is a ground for interference, though it may be a potential nuisance with an imminent danger, thus defeating the scope and object of S.133 as a legal measure to give urgent relief in nuisance cases.


134 See Abdul Hamid V. Gwalior Rayon Silk Mfg. (Wvg) Co. Ltd., 1989 Cri. L.J. 2013 (MP), per K.L.Srivastava, J. In this case, petitioner filed an application before the SDM, Khachrod under Section 133 of the Cr.P.C alleging that the respondents were creating nuisance by factory emissions polluting the air environment of the surrounding area. Respondents defended the application before the SDM by taking the plea that the acts complained of were specific offences under the Air Act and therefore, the previous sanction of the State Board was a pre-requisite for their prosecution. The SDM accepted the above contention and dismissed the application filed seeking action under Section 133 Cr.P.C. Aggrieved by the above order of the SDM, the petitioner approached the Madhya Pradesh High Court, which dismissed the revision petition and agreed with the reasoning of the SDM that one cannot approach the SDM under Section 133 of the Cr.P.C for acts covered by the Air Act.
133 of Cr. P.C. directing the owners of the factory to make suitable arrangements, for the passage and storage of effluents from the factory in such a manner as to prevent the same from passing into the river.

It was contended on behalf of the owners of the factory that it had obtained sanction under the Water (Prevention and Control of Pollution) Act, 1974, for the discharge of effluents. It was further contended that the said Act was a complete code relating to prevention and control of water pollution and, therefore, in this regard the Magistrate had no power under Section 133 of the Cr. P.C. and in so far it related to water pollution, it must be deemed to have been repealed.

The High Court accepting the contentions of the petitioner took the view that with the enactment of the environmental legislation, there has been an implied repeal of Section 133 of the Code. It was further held that the establishment of the institutional control mechanism, namely the Pollution Control Board has curtailed the powers of the executive magistrate under Section 133.

Similarly, in M/s Executive Apparel, Processors v. Taluka Executive Magistrate and Tahsildar135, the Karnataka High Court adopted the same view expressed in Tata Tea case and held that the Air Act and the Water Act are self-contained special enactments legislated with the avowed object of preventing and controlling pollution and hence the power of the executive magistrate under Section 133 of the Criminal Procedure Code to take action in regard to pollution must, by necessary implication, give way and yield to the superseding statutory power of the Board to tackle the problem of pollution. It is submitted that Tata Tea, Abdul Hamid, Executive Apparel cases failed to appreciate the role and scope of Section 133

Cr.P.C., in preventing pollution, the availability of magistrate in every
district and the sluggish speed of the wheels of the Pollution Control
Board.\(^{136}\)

It is further submitted that the view in *Tata Tea* does not depict
the true legislative intent. Special Statutes like the Air Act or the
Water Act does not in any way oust the jurisdiction of the executive
magistrates under Section 133 Cr.P.C. In fact, both the above
legislations operate simultaneously and are complementary and
supplementary to each other, when issues relating to environmental
wrongs occur.

**A Remedy Completely Different and Wider in Application: High
Courts of Andhra Pradesh, Madras, Kerala and Karnataka**

Quite different from the above view taken in *Tata Tea*, the
Andhra Pradesh High Court in *M/s Nagarjuna Paper Mills Ltd.
case*\(^{137}\), took the view that the Magistrate's power under Section 133
of the Cr.P.C. was completely different in as much as it deals with the
issue of nuisance, whereas under the Air Act, the Pollution Control
Board had wide powers to deal with the problem of air pollution. In
this case, the petitioner was directed by the Sub-Divisional
Magistrate of Patancheru under Section 133 of the Code to stop air
pollution.

Later, in the same year itself, the Madras High Court in
*Ramaswamy's case*\(^{138}\) delivered a judgment concurring with the view
expressed in *Nagarjuna Paper Mills Ltd*. The petitioners in this case
were the owners of two factories functioning for the purpose of
extracting lead content from used and condemned car batteries. The
process involved burning of the batteries, which was sought to be

\(^{136}\) Leelakrishnan, P., "Evolving Environmental Jurisprudence: The Role Played by the Judiciary" in
Leelakrishnan, P. et al., (Eds.) Law and Environment, supra, n.102 at p.126.

\(^{137}\) *M/s Nagarjuna Paper Mills Ltd. v. SDM and RDO, Sangareddy, Medak District, 1987 Cri.L.J. 2071(AP).*

\(^{138}\) *N. Ramaswamy v. SDM, Coimbatore* (1988) 1 Comp. L.J. 169 (Mad.).
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prevented by recourse to Section 133 of the Code. It was alleged that the factories released a tremendous amount of carbon monoxide and caused irritation and a vomiting sensation among the nearby residents. The Executive Magistrate passed an order under Section 133 of the Code, which was challenged before the Sessions Court, Coimbatore in Revision. The Sessions Judge dismissed the Revision, against which they approached the Madras High Court.

The main argument of the petitioners was that there had been implied repeal of Section 133 of the Code, with the enactment of the Air(Prevention and Control Pollution)Act, 1981 and cited the decision of the Kerala High Court in Tata Tea in support of their contention. However, the Madras High Court disagreed with the view taken in Tata Tea and rejected the argument of the petitioners mainly on the reasoning that the analysis of the provision in Section 133 of the Cr.P.C. and the provisions of the Air Act would show that the object, scope, areas of operation, effect, and the powers of the authorities under both the Acts are different. The Court also held that in relation to public nuisance, the provisions of the Code are wider in application and more effective and are primarily intended to remove public nuisance and prevent its recurrence. The Air Act, on the other hand, is limited in its operation to certain areas and to certain kinds of pollutants and it is primarily intended to control certain kinds of pollution on scientific lines and penalize the offender. There is no inconsistency or repugnancy between the two legislations so as to infer an implied repeal of Section 133 of the Code. The Court further opined that the two legislations are complementary to each other and are intended to function side by side in their own parallel channels.

Within a short distance of time, in Krishna Panicker v. Appukuttan Nair\(^\text{139}\), the Kerala High Court overruled its own decision in the Tata Tea case by holding that both Air Act and Section 133 of Cr.P.C. operate in two different fields and demonstrate distinct

\(^{139}\) 1993(1)K.L.T.771, per Sankaran Nair & Mohammed, JJ.
approaches in resolving air pollution issues. The said view was also endorsed by the Karnataka High Court in *Harihar Polyfibers v. The SDM, Haveri, Dharwar District*.

**Mutually Exclusive, Not Parallel and Conflicting: Supreme Court Settles the Conflict**

The question as to whether there is any scope for invoking Section 133 of the Criminal Procedure Code, 1973 in circumstances where the remedy under the Air Act applies assumed significance in view of the conflicting judgments rendered in the matter by the various High Courts. The issue cannot be seen merely as a case of conceptual aberration or functional conflict but rather leads to the presumption of implied repeal of the jurisdiction vested with the executive magistrate under Section 133 of the Criminal Procedure Code, 1973. Such thinking has appeared in view of the wide and sweeping powers conferred upon the Pollution Control Board under the Air Act to deal with situations of air pollution. That apart, when there is already a control mechanism to prevent, control and abate air pollution, is there any necessity for a different mechanism under a different statute to deal with cases of pollution and nuisance to air environment. The jurisdictional conflict cannot be seen lightly as the Air Act was enacted at a later point of time than the Criminal Procedure Code.

The issue has been finally put to rest by the Supreme Court in *State of MP v. Kedia Leather & Liquor Ltd.*. In this case, the specific question before the Supreme Court was as to whether there was an implied repeal of Section 133 of Cr.P.C. with the introduction of the Air and Water Acts. The High Court in this case had taken the

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140 I.L.R. 1997 (Kar.) 1139.
141 It is the rule of interpretation of statutes that a statute dealing with specific matters overrides a statute that is general in nature and that a statute which is enacted by the Parliament at a later point of time overrides a statute enacted at an earlier point of time. Reasoning for this premise is that the statute enacted at a later point of time is the more recent expression of the intention or will of the Parliament.
142 (2003) 7 S.C.C.389, per Doraiswamy Raju and Arijit Pasayath, JJ.
view that Section 133 had been impliedly repealed by the Air and Water Acts. Reversing the above view, the Supreme Court held:

"While the provisions of Section 133 of the Code are in the nature of preventive measures, the provisions contained in the two Acts are not only curative but also preventive and penal. The provisions appear to be mutually exclusive and the question of one replacing the other does not arise. Above being the position, the High Court was not justified in holding that there was any implied repeal of Section 133 of the Code".

Thus, it is submitted that the Supreme Court has rightly interpreted the Air Act in relation to Section 133 of Cr.P.C. by holding that both are mutually exclusive, alleviating the scope of the plea of implied repeal and finally sorted out the confusion that prevailed among various High Courts. By taking the above stand, the Court extended the peoples' right to take recourse to statutory remedies at their discretion, the choice of which largely depends upon situational demands and the facts and circumstances of the case.

However, a close analysis of the criminal law remedy reveals that it is not free from limitations. The punishment provided for violation of any prohibited act is not much and it does not create deterrent effect on the wrongdoer. In some cases when an action is brought against the statutory bodies like Municipalities, these bodies instead of rectifying the wrong try to justify their act or omission and fight the legal battle and take the plea of financial inability. Despite the same, it offers easy access and immediate and lasting solution to the common man.

**Conclusion**

It is an acknowledged fact that air pollution and air quality degradation issues cannot be absolutely tackled by law, though law serves as a pivotal mechanism for solving the social problems connected with such issues. Common law doctrines under the law of torts are one among the category of laws to regulate the conduct of
environmentally harmful activities and provide remedies in cases of their breach. The common law doctrines of nuisance, trespass, negligence, principle of strict liability are applied in India along with the newly forged principle of absolute liability and other statutory measures for controlling air pollution and for preservation of air quality. The common law doctrines enshrine common law control for the liability for escape of noxious objects, discharge of noxious articles and pollutants. Thus, they cover cases of air and noise pollution.

Without undermining the significance of common law control of air quality and air pollution, it has to be admitted that common law is inadequate and difficult to operate in modern conditions. In liberalized industrialized societies, the tort actions present problems of establishing the proof of damage which is a pre-requisite for the successful action under the law of torts. Together with it, the common law standard of 'reasonableness' does not provide satisfactory basis for regulating air pollution. Further, the utility of the common law principles seems to have lessened in as much as judges in India rarely deal with cases involving 'subjective standards of reasonableness', though there are rare occasions when judges have been instrumental in modifying the common law doctrines as has been done in Shriram Gas Leak Case. By and large judges in India often seek statutory basis to support their view of reasonableness, leaving no scope for the further expansion of common law rules. This vacuum is to a certain extent filled by general laws like the Indian Penal Code 1860 and the Criminal Procedure Code 1973. The provisions contained in Sections 133 and 144 of the Criminal Procedure Code can be invoked for controlling air pollution. But the general laws are not impressive enough, as they simply contain scanty and piecemeal provisions hardly enough to effectively control the problem. Further, people also by and large remain unaware of these remedies and hardly invoke the same.
Unlike the traditional laws, the recent environmental legislations mark spectacular improvement upon the traditional dissipated statutes, in view of their wide coverage even in unregulated areas such as noise, vehicular emissions, indoor and personal sources of pollution, hazardous waste and micro-organism, toxic fumes, etc. They contain stringent penalties of sufficient deterrent value and new regulatory techniques in the form of citizens' suit. Similarly, the enforcement techniques stand improved with the Boards empowered even to shut down the polluting industries and to cut the supply of water or power. Further, public insurance cover has been made compulsory for all hazardous chemical industries extending their liability to pay compensation compulsorily to the victims of accidents to ensure workers safety. Mandatory worker's participation in plant safety and stringent penalties on high level management for the breach of factory regulations are other characteristics features of modern legislations intended to ensure worker's safety and to reduce industrial accidents. However, it has to be stated that amidst difficulties there are opportunities to develop the traditional law remedies to achieve the purpose of air pollution control more effectively and decisively without waiting for an environmental Donoghue v. Stevenson. For this, courts are also primary actors and that they should give green interpretation to traditional remedies.


To cite an instance of such approach, the decision of the Patna High Court in Sitaram Chhaparia v. State of Bihar, A.I.R.2002 Pat.134 deserves mentioning wherein the High Court directed a Tyre retreading plant set up in a residential area emitting obnoxious gases causing harm to the air environment of a locality to be wound up.(per R.S.Dhawan, C.J. & S.K.Singh, J.)