CHAPTER VII

POLLUTION AND NUISANCE
INTRODUCTION:

Nature is the mother of its creatures. Life on earth fully depends on the natural equilibrium. Human civilisation, so far developed on earth, is in a continuous process of development. But this entire developmental work of human civilisation is subject to the fulfilment of the primary condition that without affecting and/or destroying the natural resources and environment, the progress has got to be brought forward. The non-observance of this primary condition will lead to the annihilation of living beings on earth. Power and rate of growth of mankind are two enemies of nature. Power includes political power and money power. In order to establish political supremacy over other brother nations, some states even run amuck to destroy the natural environment of other sister states. The dropping of atom bombs on Hiroshima and Nagasaki in Japan and using chemical weapons on the soil of Vietnam by the USA are the glaring examples of this kind. The test of atom bombs and hydrogen bombs and other chemical weapons is a great threat to nature. Money power is no less dangerous than the political power. The multinational corporations and the business tycoons who control the real political power structure of the state, often ravish nature for wrongful gains. The growth of the birth rate is another danger to nature. Natural resources both on surface and in water have their limits. Each sister state has a distinctly definite capacity to feed a definite number of
persons with its natural resources. So long as the number of people do not exceed these limitations, there cannot be a clash between demand and supply. But when the numbers do exceed and pose a threat to the existence of the society, the political power explores ways and means to keep the supply line intact with the rate of growth of the people. In doing so, the natural resources are nakedly and wantonly exploited and molested at the cost of human safety and security. But unfortunately there is no positive law to combat these three indomitable forces of enemies to nature and mankind.

**DEFINITION OF POLLUTION :**

Pollution is any kind of environmental impairment. The United Nations Conference on Human Environment resolved: "Human activities inevitably and increasingly introduce material and energy into the environment; when that material or energy endangers or is likely to endanger man's health, his well being or his resources, directly or indirectly, it is called a Pollution".

HARMONIOUS EXPLOITATION OF NATURAL RESOURCES:

Not only the earth but also the ocean supplies food to mankind. The ocean contains 16,000 species of fish, one hundred species of mollusks, 50 species of crustaceans and 16,000 species of sea wood. "Of this total, only some species are used as food. At present we are using 50 million tons of fish, about one million tons of crabs, crayfish and mollusks and 2 million tons of whales and seals a year. The total amount of organic materials produced in the oceans is more or less equal to that of the territorial parts of the globe. More than 15,000 million people depend upon marine resources. Between 1958 and 1963 the world rate of catching fish increased by 42 percent, i.e. from 72 to 102 billion pounds. This figure is increasing every year. At present daily fresh water consumption in the USA averages more than 4000 litres per head as compared to 50 litres in the last century. By the year 2000, mankind will need 20 million cu. km. of drinking water which is almost as much as the total water reserved". The destruction of this vast ocean wealth by pollution will have tremendously destructive effect on the existence of mankind. The welfare of human race is dependent upon the harmonious relation between mankind and

the nature. Live and let live is the basic tenet for harmonious exploitation of natural resources. It is the condition precedent of such exploitation that natural resources either on earth or in the ocean should be exploited and used without harming nature and without affecting ecological balance.

**MAGNITUDE OF POLLUTION:**

It has been estimated that at present approximately 1,00,000 million tons of various ores, fuels and construction materials are extracted from the earth every year. More than 10 million tons of synthetic materials are produced and 100 million tons of mineral fertilisers and 4 million tons of chemical weed killers and pesticides are used. More than 200 million tons of carbon monoxide are discharged into the earth's atmosphere. Approximately 146 million tons of sulphur dioxide and 53 million tons of nitric oxide etc. discharged every year. Industrial plants on earth discharge more than 30,000 million cubic metres of untreated water, 250 million tons of dust and 70 million tons of poisonous gases. All these pollute soils, river, water, lakes, seas and the air. An unbridled exploitation and molestation of natural resources has already damaged the fertile soil layer of 2000 million hectres of land. Two thirds of the

total global forests have already been cut down. Hundreds of species of animals have already vanished. All cities on earth taken together produce approximately 3,000 million tons of solid industrial and household waste every year.

In the United States there are 10,000 locations for storing chemical wastes and 75 percent of all toxic materials are located in regions that are important for water supply system. The rapid development of chemical industries coupled with the discharge of large volumes of SO2 by thermal power stations, coal-fuelled plants have led to a catastrophic increase in the acid content of atmospheric precipitation. Such acid rains affect lakes, forests and soil. The engines of automobiles and other machines discharge 40 percent of the nitric oxide while municipal services produce 30 percent.

According to Jacques Cousteau, a three-inch long fish is hardly seen in the Mediterranean sea. Sargoso sea water has shrunk to 100 ft. He estimates that the vitality of the sea in terms of plants and sea life has declined to some 30 percent to 50 percent in the past 20 years. Noxious substances continue to accumulate in the fish-rich areas off the North Atlantic and the Bering Sea.

Nuclear tests conducted by China in January, 1976 raised the radio activity level over the sea of Japan hundreds of times above normal.

International view published in American
Review reveals, "The Sewage and industrial effluents flowing into the Hudson and Rhine, the wastes drifting along Mediterranean shores - the mercury turning up in Phillipine Tuna and Florida sword fish - the D.D.T. from farm land of the world building up in Penguins of Antarctic - the only discharge of ships defacing our beaches all end up adding to the pollution of the ocean that are part of our global life system".

The USA engaged in a chemical offensive against countries of South-East Asia. Between 1961 and 1969 the USA's chemical units in South Vietnam applied chemicals to one-half of all arable and forest lands. That apart, the U.S. armed forces fired more than 14 million tons of bombs and shells on Vietnam, Laos and Kampuchia i.e. 300 K.g. per inhabitant. 'Orange', 'white' and 'blue' are names of herbicides and defoliants which the U.S. Air Force scattered over South Vietnam's fields and forests. Their use was followed by destruction of all life. As a result thereof 30% of the rich mango-grove forests of South Vietnam have now been transformed into swamp land. About 1.2 million persons have directly experienced the influence of American chemical weapons. Most of them have developed chronic illness, especially neuro-paralytic and intestinal disease as well as impaired eye sight. A Hydrogen Bomb lost at the sea by the U.S. Navy in 1965 lies on the ocean floor just 70 miles from Japan's

Rayukyu islands, much close to the land than 500 miles was officially acknowledged. Shipping alone accounts for about one million tonnés per year. While discharging from and into rivers account for no less than three million tons and possibly five million tons per annum. Hydrocarbons in marine environment come from a variety of sources viz. natural submarine seepage, natural decay of marine plant and animal life, shore based industrial and transport activities, automobiles, off-shore drilling, wrecked oil tankers and other ships, discharges from vessels that pump out cargo with sea water, crude oil.

Pesticides are also known as Organochlorine Compounds. They have been in use for about three decades. DDT, BHC Dieldrin, Endrin Aldrin and Endosulfan are most commonly used for agriculture, military, public health and pest control. Large scale of spraying from the air is the mode of its application. 50 percent enter into environment through water run-off from agricultural fields and through open air. Pesticides disrupt the transmission of impulses of the Central Nervous System. Japan banned a group of chemicals called synthetic pyrethorid. It was subsequently exported to India.

for use in the agricultural fields. These dreaded chemicals used to be known as cancer causing chemicals. According to World Health Organisation Report, India produces about 70 percent of the total insecticides production of Asia and Africa. Brazil, India, Mexico, South Korea, Malaysia, Philippines and Thailand are major users of pesticides. It is now estimated that 1.5 to 2 million people suffer from pesticide poisoning caused by the indiscriminate spraying on crops or vegetation. The high use of DDT and BHG in developing countries has endangered the physical conditions of the inhabitants of the developing countries. Human breast milk in China and India shows several times the medium level of DDT and BHG. Pesticide also pollutes the entire food chain and the environment. It is estimated that between two-thirds and four-fifths of all of Japan's pollution intensive foreign investments have been located mainly in Asian and Latin American countries. In America, sixty-seven companies have listed 204 hazardous chemicals which they are using. An official of an EXON plant in Louisiana told the Committee that the plant released more than 5,60,000 pounds of benzene every year. Benzene is known to cause Leukemia in human beings. In the same year EPA released a list of 402 toxic

chemicals stored or otherwise used in American plants which could endanger communities in the event of accident or leaks.

The total percentage of forests damaged by acid rain in West Germany rose from eight percent in 1982 to fifty percent in 1984. The Minamata disaster in Japan in 1950s and 1960s was one of the most tragic examples of the danger of untreated industrial effluents. Hundreds of Japanese were crippled by mercury poisoning after they ate river fish contaminated by effluents from the Chisso Company. 41 persons eventually died. Because of increase of mercury concentration directed in Tuna fish, the sale of Tuna fish containing mercury above a certain level was banned in U.S.A. Another outbreak occurred in Negate city with 26 cases and 5 deaths due to the same cause. A recent report says that several residents of an area near Niagara Falls were affected by liver disorders caused by seepage of chemicals from dumping area. The Seveso accident in July, 1976 near the Italian City of Milan has semblance with Bhopal accident. The companies were subsidiaries of MNCS. The disaster involved leakage of a toxic chemical. Within a few hours of the leak, pets began to bleed at the nose and mouth and died. Vegetation withered and thousands of fowls died.

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12. Ibid.

and domestic livestock collapsed and died. Residents began to complain of blistering skin, diarrhoea, headache, dizziness, kidney and liver pains. A week after the disaster the company disclosed, for the first time, that dioxin, a substance used as a defoliant by U.S. armed forces in Vietnam and also as a bactericide (used for body car, according to producer), had been released. An American firm Velsicol had its plants at Raport, Texas. The company was the manufacturer of phosvel, an insecticide. The chemical was banned in America but the company continued to export it to Colombia and other countries. In 1971, exposure to phosvel killed more than 1,000 water buffalos and an unknown number of peasants in Pakistan. Other products, banned or restricted in the United States and other Western countries, like aldrin, dieldrin, heptachlor, BHC, methyl Panathinon and melathinon are sold to developing countries such as, India, Costa Rica and the Philippines. The release of methyl isocyamate (MIC) from a plant owned and operated by Union Carbide India Ltd. (UCIL) in Bhopal, India on December 3, 1984.

resulted in the death of 3000 persons and caused physical injury to as many as 2,00,000 persons including 40,000 disabled according to claim of the Govt. of India.

WASTES:

Wastes may be divided into two categories viz. Domestic Wastes and Industrial Wastes. Domestic wastes may again be divided into five sub-categories viz. Sewage, food processing, detergent, run-off from agricultural areas and dredging spoils. Industrial Wastes may be divided into four sub-categories viz. Heavy metals, Radio active nuclei, Inorganic chemicals and heated water.

The domestic wastes, when untreated, have the following characteristics:

(A) A high bacterial content with parasites and possibly virus concentrations that contaminate mollusks and shell fish and limit the use of bathing areas.


18. R.A. Malviya : Environmental Pollution AND Control under International Law. P. 100.
(B) Dissolved organic and suspended constituents that place a high biochemical oxygen demand in decomposition.

(C) High nutrient concentrations of phosphorous and nitrogen compounds that enrich receiving waters and speed eutrophication.

(D) Floatables of organic and inorganic constituents that cause serious amenity problems and interfere with primary production and self purification processes.

(E) Bottom sludge with trace concentrations of heavy metal contaminants.

INDUSTRIAL WASTES:

MERCUry:

Mercury is the most serious environmental contaminant among the heavy toxic metals. Its deleterious effects are permanent. It poisons fish, chicken, pigeons, sharks, cattle, dogs, horses, rabbits and men. About half of the World mercury production, that is 9200 tons per year, is used for agriculture and industries. Out of this, about 4000 - 5000 tons enter into ocean as a result of release of man-utilised compounds. This leads to the formation of poison, methyl, mercury chloride causing illness, blindness and death of man and other
Sea's 85% pollution rate is estimated to come from coastal and inland water sources. About 3 crores of people living in the sea coastal areas of U.S.A. give out 5 lac tons of waste per year which enters into marine environment. In other words, U.S. inhabitants are responsible for 20% of the World's domestic coastal effluents.

**LEAD:**

Lead is highly toxic. The rapid increase of lead levels in the marine environment affects animals and can act as an enzyme inhibitor. It impairs cell and metabolism, acute exposure of lead is likely to damage gill surfaces and inhibit oxygen carbon-dioxide transfer. The World produces this toxic metal 3 million tons per year. Over 10% of this production is used in leaded gasoline and motor fuels. Over 10 tons of lead reach the marine environment from this source alone. An equal amount is introduced in effluents from chemical factories and the natural processes of weathering.

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OTHER METALS:

Production of Copper, Zinc, Arsenic, Chromium and Cadmium poses potential hazards of marine pollution. Copper and zinc are used in the manufacture of water pipes and water tank plating. Plating and galvanising is used to prevent rust. Copper and lead are found in some measurable quantities in sewage, sludges etc. They are also used in various industries. Cadmium, copper, zinc, arsenic have been observed to get accumulated as residue in plankton, fish and bivalves. Their damaging effect is slow and often irreversible and can be first observed sometimes in the second generation only. Anemia is one of the earliest manifestation of cadmium toxicity among the exposed industrial workers.

RADIOACTIVITY:

Radioactivity can reach the aquatic environment from a variety of sources viz. fall-out, nuclear powered ships and submarines, nuclear power plants, laboratory experiments and medical uses of radio isotopes etc.

23. R.A. Malviya: Environmental Pollution and its Control under International Law. P. 104.
24. - do - P. 104.
The radioactive pollution endangering the existence of lives in the world and natural environment, congenial to life, lies in nuclear war, nuclear and allied weapons testing. Local radioactive pollution endangering lives and local environment lies in the accident of nuclear plants. This includes loss or accident to a nuclear vessel or submarine in the sea. Nuclear plant accident in Chernobyl in USSR in 1987 caused not only 41 deaths but also an apprehension that thousands of people were being attacked with cancer. The Chernobyl pointedly shows to the world conscience what may happen in other parts of the planet. U.S. nuclear powered sub-marine THRESHER was lost in the North Atlantic in 1963. It released a large quantity of radio activity into the marine environment. Scorpion sank in the Atlantic near the Azores on 21st May, 1968. T.A. Rice and D.A. Wolfe say, "a single major accident might result in 3400 deaths at distances upto 15 miles, 4300 injuries at distances upto 45 miles and property damage of as much as 7 billion dollars." In Britain, radioactive wastes are piped into the Irish Sea and at Oak Ridge, in USA, into the Tennessee River system. Besides, in the U.S. it is sometimes buried in the earth or taken in containers to the deep sea and there


settled. But the water will soon erode the containers and dissolve their dangerous content. Mr. Boris Gorizontov has given an account of some instances of nuclear tests and accidents. A major tragedy occurred in Bikini Atoll in the Pacific, which was selected by the Pentagon as a testing ground for nuclear weapons over a period of 12 years. As a result, the Island has, in effect, become a desert in which life develops once again through its lower forms, while residual radiation will long continue to exceed acceptable level. The Pentagon first tested the hydrogen bomb in 1952 in that area. Altogether the United States carried out 43 nuclear tests in Atoll, and this led to a complete destruction of plant and animal life both in the Atoll itself and in the adjoining Pacific waters. On January 24, 1961, a disaster nearby occurred in the State of North Caroline when a B-52 bomber carrying two Hydrogen Bombs of 24 megatons crashed 15 miles to the North of the City of Goldsboro. Only chance saved that State's inhabitants from the horrors of a nuclear explosion. Similarly in Spain, in the region of Palomares, two American planes collided in mid air on January 17, 1966. One of them carried four Hydrogen Bombs. On crashing two of them produced radio active pollution over a large area. In 1977 an American nuclear sub-marine met with an accident.

near Sardinia. It was carrying nuclear-tipped missiles. Upon submerging it struck a rock and damaged its structure. Three members of the crew were seriously wounded. The submarine was able to surface and reach the U.S. naval base on Maddalena, a tiny island near the coast of Sardinia, where U.S. nuclear-powered vessels have been based since 1972. An accident took place in the United States in May, 1981 near the shores of Florida. This could have produced extremely serious consequences. When landing on the nuclear-powered air-craft carrier Nimitz an A-6E attack plane crashed on its deck. A fire developed on the deck of a ship that carried nuclear weapons. Five air crafts were completely destroyed while another five were seriously damaged. Fourteen servicemen were killed and fifteen were wounded. At the end of the Second World War large numbers of containers filled with radio active wastes were dumped into the ocean along the coasts of the United States. Studies have shown that 30 percent of these containers leaked. The United States' Environmental Protection Agency has also found radio active pollution of the sea bed 35 miles west of San Francisco. Waste products from experimental production activities as well as worn out nuclear research equipment were buried there over a period of 30 years.

This horrible and magnitudinal effect of pollution is significantly alarming. Men by their own endeavour and tireless efforts, gradually but through many ups and downs have developed their civilization. This progress in human civilization is not aimed at destruction of mankind. The
scientific and technological development, no doubt, is the crowning achievement of mankind. It imposes a self-restraint upon them. This limitation is the human consciousness which permits enjoyment of the natural resources in the interest and welfare of mankind without any right to ravish nature. Thus there must be cohesion and harmonious relation between human consciousness and scientific and technological advancement. The human consciousness not only advocates safety and security of mankind and the entire animal world but it also postulates that mankind has no right or authority to destroy natural phenomena which means annihilation of mankind.

**IDENTIFICATION OF POLLUTION:**

Mc. Loughlin has given a definition which has a wide range to include pollution of the environment even within private premises. For example, protection of people who are invited or permitted to enter private premises (factories, shops, offices, railway premises etc.) whether socially or on business or even as employees. The constituents of his definition are:

1. Introduction of substances;
2. by man;
3. into any part of the environment;

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28r J.M.C. Loughlin: The law relating to Water Pollution (Manchester) 1972 PP 1-2 and quoted and discussed by R.A. Malviya at Page- 69.
IV. directly or indirectly;
V. adversely to affect;
VI. opportunity to use and enjoy it.

The 1982 convention on the Law of the Sea, a recent landmark agreement in the history of international environmental law, employs damage and the perspectives while defining Pollution. Pollution of the marine environment is understood here as the

"Introduction by man, directly or indirectly, of substances or energy into the marine environment which results or is likely to result in such deleterious effects as harm to living resources and marine life, hazards, to human health, hindrance to marine activities including fishing and other legitimate uses of the sea, impairment of quality for use of sea water and reduction of amenities."

APPROACHES TO POLLUTION:

There are two approaches to pollution viz. past approaches and the present approach. The past approaches may again be divided into five conceptual categories viz.

(a) Pollution as an alteration of existing environment;

(b) Pollution as right of territorial sovereignty;
(c) Pollution as damage;
(d) Pollution as interference with other uses of the environment and
(e) Pollution as exceeding assimilative capacity of environment:

(a) Pollution as an alteration of existing environment:

This approach advocates absolute purity of the existing environment. It does not allow any alteration of environmental condition. "In no case it is permissible to let water injurious to public health flow into streams and ditches." The purity approach has been reflected in the 1959 Antarctic Treaty which prohibits nuclear explosion. The 1963 Nuclear Test Ban Treaty permits no nuclear explosions in the three parts of the bio-sphere i.e. atmosphere, outer space and under-water. The U.N. General Assembly vide its Resolution No. 2228(XXVI) Dec. 16, 1971 has stressed the urgent need for suspension of nuclear and thermo nuclear tests.

Both Notes 30 and 31 cited by R.A. Malviya at Page-25.
(b) **Pollution as right of territorial sovereignty**:  

International law does not allow any degree of environmental change within the geographical borders of a sovereign state irrespective of whether it causes any extra-territorial harm or change.

(c) **Pollution as damage**:  

Pollution when causes damage to man and property is actionable.

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*U.S. v. Canada* is also known as the "Trail Smelter" Arbitration. The fumes from Smelter at Trail B.C. Canada damaged the atmosphere of Washington. The dispute was decided by the Tribunal. The tribunal held that tangible injury translatable into probable monetary damage "would constitute damage". The Tribunal observed that both international and U.S. Municipal law deny any State, "to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another or the properties or persons therein, when the cause is of serious consequences and the injury is established by clear convincing evidence."

The tribunal ultimately held that the dominion of Canada was responsible in international law for the conduct of the Trail Smelter. The tribunal allowed the American claim as to compensation in part and required the Trail...

32. UNRIAA V.3 P.1905 cited by R.A. Malviya at Page- 27.
Smelter to refrain from causing any damage through fumes in the State of Washington in future. The judgment of the tribunal is based on age old maxim, "Sic Uttere tuo" or the general obligation to every state not to use its own resources to cause injuries to another state. The tribunal further held that the activities of the wrong-doer state are prohibited "when the cause is one of serious consequence and the injury is established by clear and convincing evidence." With regard to the judgment of the Trail Smelter Arbitration Mr. R.A. Malviya commented, "The determination of 'pollution' for purposes of fixing international liability in Trail case denies propriety of the level until actually serious consequences are proved. Therefore, accepting such a definition for purposes of a preventive regime seems inappropriate because many commonly stated resources such as rivers, lakes and seas could already biologically and irreversibly deteriorate in quality before clear and convincing proof is obtained. The 1909 Boundary Walls Treaty between the U.S. and the Great Britain (Canada) also approaches pollution from a damage perspective.

Art. IV states:

"It is further agreed that the waters here defined as boundary walls and waters flowing across the boundary shall not be polluted on either side to the injury of health or property on the other".

23 In Missouri v. Illinois, the Court emphasised the need for a case to be "of serious magnitude,

clearly and fully proved", before the Court should intervene. The inability of Missouri to draw a clear connection between the increased rate of death due to typhoid and the Chicago sewage resulted the case being dismissed. It is respectfully submitted that the pollution cases should not be dealt with in the manner of private nuisance cases. In pollution cases the Court should adopt an inquisitorial system of judicial enquiry. The effect and magnitude of pollution can only be ascertained with the help of scientific and technological enquiry. Such enquiry report is only available in government department. In the greater interest of the community it is the duty of the Court to take assistance of the department of pollution and such duty should not be assigned to the plaintiff.

In New York v. New Jersey, New York lost its case against New Jersey because it could not substantiate that New Jersey's proposed sewage disposal plan would pollute the waters of the bay so as to create a public nuisance by causing offensive odours or unrightly deposits on the surface or that it would seriously add to the pollution of it. There being some confusion between the concept of public nuisance and undefined pollution concept, the Court implied that "offensive odours and unrightly deposits" could be made the basis of valid claim if satisfactorily proved.

In *Sierra Club v. Morton*, the Court held that "aesthetic and environmental well-being, like economic well-being are important ingredients of the quality of life in our society". The Court argued that "the interest alleged to have been injured may reflect aesthetic, conservational and recreational as well as economic values". The Court did not object to the idea that such interests could be injured in a legal sense. But the Court objected to the fact that the Sierra Club had not shown the connection of the injury to the individuals it represented. The Court dismissed the case on the ground that the Sierra Club was unable to demonstrate the injury which would have been done to its members by a proposed development of a secluded mountain site. It is respectfully submitted that the American Courts still cling to the common law standing. The Common law rule of standing can not bring about justice to pollution affected people. Since pollution affects environment and polluted environment affects mankind in a limited area of the globe, it is impracticable to invite all the affected people in Court to prove the effect of pollution separately. The American Courts ought to have accepted the new procedural jurisprudence of Public interest litigation. The Indian Law is more socially effective than American Law of standing.

35. 405 U.S. 734-35 (1972) Cited by R.A. Malviya

at PAGE-31.
In Georgia v. Tennessee Copper Co., it was alleged that the environment of Georgia was damaged by Tennessee Copper Co. Georgia made out a case on the requirements of law enunciated in Missouri v. Illinois. The Court decreed the suit. The Court held, "it is fair and reasonable demand on the part of a sovereign that the air over its territory should not be polluted on a great scale by sulphurous acid gas, that the forests of its mountains, should not be further destroyed or threatened."

The author agrees with this decision.

(d) Pollution as interference with other uses of the environment:

Man's requirement to the user of environment is essentially a degree which is useful to his immediate interests and the environmental alteration is something to be halted only if the benefits of so doing outweighs the costs. The criteria here is the degree of interference. The reasons behind this theory has been explained in New Jersey v. New York.

"A river is more than an amnesty, it is treasure. It offers a necessity of life that must be rationed among those who have power over it. Both states

37. R.A. Malviya at Page- 34r
have real and substantial interest in the river that must be reconciled as best as may be. The different traditions and practice in different parts of the country may lead to varying results but the effort is always to secure equitable apportionment without quibbling over formulas."

Article IX of the Helsinki Rules defines pollution, "injury to the environment irrespective of the effects on subsequent users." Changing of water quality or its composition should also be brought into definition of water pollution.

(e) **Pollution as exceeding assimilative capacity of environment:**

Pollution is considered as waste in quality and in kind which cannot be made harmless by natural processes. Pollution over-loads the natural cycles by human activities, such as development of synthetic chemicals PCBS.

**MODERN APPROACH :**

The modern approach to pollution is reflected in the UNO's resolution No. 1346 (XLV) dated 30.7.68 followed by Resolution No. 2208 (XXIII) and other Municipal Statutes of 

recent enactments.

POLLUTION CONTROL AND THE LAW:

There are two types of laws in this field viz. private law and statutory law. Private law is limited to establishing private rights against common law nuisance, statute laws are introduced where gaps and lacunas are observed in the protection offered by the efficacious application of private law. The statute law has thus directed itself to the broader environmental objectives which are absent in the private nuisance conflict between neighbours. Instances of statutory intervention in Britain can be found at least as far back as Edward I's reign, when an Act was passed in 1273 to prohibit the use of coal which was thought to be injurious to health.

PRIVATE LAW:

It is of common law origin. It relates to the protection of individual rights. Probono Publico is not applicable to private nuisance affecting rights of the neighbour. This law is intended to re-establish the status quo ante. But there are several practical hindrances to establish rights in favour of pollution victims in British Courts. Before establishing any such rights the plaintiff must prove that (1) he has legal interest in land; (2) the interference complained of

must usually be more tangible than aesthetic harm. (3) the plaintiff's activity must not be unduly sensitive. Only on fulfilment of these conditions a nuisance as complained of becomes actionable. Under private law of nuisance the plaintiff is entitled to damages and injunction. Total injunction banning the interference is socially efficacious. According to common law practice, damages can only be given for the past pecuniary injuries, although fresh claims can be made by a plaintiff if new infringements take place. It is to be noted that the courts are reluctant to compensate for non-tangible damage, (for example, the effects on mental health). Another aspect of the common law practice in deciding dispute over nuisance or pollution is that technical advice from engineers, scientists and ecologists with scientific data on nuisance or pollution is not called for by the courts.

In Pakku v. V.P. Aiyasami, the single Judge of the Madras High Court observed that the villagers had an immemorial right to the use of the water in the tank for their drinking and bathing purposes, and also for bathing and washing their cattle, and any interference with that right would give the villagers a right of action, though the plaintiffs have no proprietary rights in the tank. The action of the defendants amounted to a nuisance. The Court held that the plaintiffs were

41. AIR 1969 (Mad), Page- 351.
entitled to an injunction against the defendants as prayed for. The author of the thesis agrees with this decision.

Nuisance from smoke has been defined as even when unaccompanied by noise or noxious vapours and although not injurious to health, smoke may constitute an actionable nuisance or be the subject of indictment provided that the nuisance produced is such as affects materially to interfere with the ordinary comfort. The fact that the smoke arose from the premises in a manufacturing town does not affect the question of nuisance if it can be shown that the annoyance otherwise caused has been materially increased. Nuisance of this kind is now to a substantial extent regulated by Statute. Relying on the maxim "Cujus est Solum, ejus est usque ad Coelum" (He who owns the soil owns it up to the sky) Ramaswamy J. held, "when smoke emanates it will also pass through the holes in the chimney and the emanating smoke will be injurious to the health of neighbours. It will therefore, cause discomfort in the enjoyment of the property and be injurious to health. The maxim will equally apply to the open space. Emitting smoke thus constitutes actionable nuisance furnishing cause of action for a suit. It follows therefore, that when the defendant effects a chimney with holes emitting smoke through them towards the side of the

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plaintiff, an actionable wrong is committed by the defendant."

Sections 436 and 437 of the Calcutta Municipal Act bar a person from establishing and running a workshop with machines in a premises without the permission and licence as required respectively under the aforesaid provisions. By obtaining a professional licence under section 218 of the Calcutta Municipal Act, 1951, the requirement of the permission and licence under Section 436 and 437 respectively of the Act is not dispensed with. The proviso to Section 218 shall not be deemed to alter the liability of the licensee to take out a licence under any other section of the Act. M. N. Roy and Sukumar Chakrabarty JJ of the Calcutta High Court held, "nuisance is the unlawful interference with a person's use or enjoyment of land, of some rights over it or in connection with it. The land includes the house or the building attached to it. While deciding on the alleged actionable nuisance, the Court must consider if the defendant is using the property reasonably or not". It is most respectfully submitted that while deciding reasonableness, the court will consider one or more facts namely (1) the locality, (2) duration, (3) hypersensibility on the part of the plaintiff and (4) any spiteful or malicious motive on the part of the defendant. The Court further held that "where the suit premises is situated in a mixed locality having factory, workshop and residential houses, the members of

44. Jadunath Basak -vs - Mrityunjoy Seth & others 90 C.W.N. 546 D.B.
the residential houses of the locality appear to be accustomed to live with some sort of sound and noise because the running of the machines and mere personal discomfort to the members of the family of the plaintiff by the noise of the machine in the ground floor of the suit premises will not amount to actionable nuisance unless injury to members of the family of the plaintiff either in health and personal comfort or mode of living is proved. Talukdar J. of the Calcutta High Court

"nuisance is a relative term depending entirely upon the environment, taste, habit and the standard of living of the residents. Noise is a sign of civilisation. There must be some noise which is the price we have to pay for progress. It will be impossible to eliminate all noise and smell in a welfare state and undisturbed peace may well be the peace of the grave-yard." It is respectfully submitted that the question of harmonious relation between developmental works and environment is mostly involved in nuisance and pollution cases. It is undesirable to decide such issue without assistance of technological and ecological scientists. A judge who is not an ecological scientist, only on receipt of expert report, can decide as to whether a particular type of nuisance can be prevented by judicial order or not.

The basis of the law of nuisance according to Brain C.J. is "Sic utere tuo ut alienum non laedas which means that a man must not make use of his property in such a way

45. M/s. KANAK Kumar & Asok Kumar & Anr. v. Corporation of Calcutta 73 GW 32.
as unreasonably and unnecessarily to cause inconvenience to his neighbours.

In Colls v. Home and Colonial Stores Ltd., Lord Chancellor Earl of Halsbury observed, "the tests depend upon the surrounding circumstances." His Lordship further held, "What may be called the uncertainty of the test, may also be described as its elasticity. A dweller in towns cannot expect to have as pure air, as free from smoke, smell and noise as if he lives in the county and distant from other dwellings and yet an excess of smoke, smell and noise may give a cause of action but in each of such cases it becomes a question of degree, and the question is in such case whether it amounts to a nuisance which will give a right of action." It is most respectfully submitted that this judicial precept is based on nineteen century thought over nuisance when law of pollution was conspicuously absent. The test is, therefore, obsolete to-day. Only the ecological scientists can say how much fresh air is essential for mankind and whether that quantity of fresh air is affected by the act of the polluter.

In Polsam and Alfige Ltd. v. Rushmer, the House of Lords approved the doctrine of local standard of comfort enunciated in Colls v. Home and Colonial Stores Ltd.

46. 1904 Appeal Cases Page-179.
47. 1907 Appeal Cases 121 at Page-123.
and held, "the law of nuisance undoubtedly is elastic." It is respectfully submitted that the author does not agree with this view. There must be a minimum standard of comfort essential for keeping good health. That standard must be maintained by applying the rule of harmony.

48. In Sturges v. Bridgeman, Lord Justice Thesigur observed, "whether anything is a nuisance or not is a question to be determined not merely by an abstract consideration of the thing itself, but in reference to its circumstances; what would be a nuisance in Belgrave Square would not necessarily be so in Bermoussday. In Fishenden v. Higgs, Lord Justice Romer observed, "a reasonable person would not expect precisely as much light in Mayfair as he would get in the county, and he would not expect precisely so much light in the City of London as he would get in Mayfair. In Rampalit Shaw v. Corporation of Calcutta, S. K. Neogi J. held "So in considering the question of nuisance the Magistrate should have applied his mind to the nature of locality". I disagree with the aforesaid views. The decisions lead to arbitrariness. The criteria is whether a minimum standard of light and air required for preservation of human life is affected or not. The maximum standard is not the consideration of the court.

48. 11 Chancery Division Page- 852 at Page- 865.
49. 163 L.T. Page- 140.
The maximum standard is always flexible and subject to rule of harmony. But minimum standard is unelastic. It should be strictly followed and observed.

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Halsbury’s laws of England have dealt with the general principle of law relating to nuisance between neighbouring properties. It runs as follows:--

"General Principles :— Apart from any limit to the enjoyment of his property which may have been acquired against him by contract, grant or prescription, every person is entitled, as against his neighbour, to the comfortable and healthful enjoyment of the premises owned or occupied by him whether for pleasure or business. In deciding whether in any particular case his right has been invaded and a nuisance thereby caused, it is necessary to determine whether the act complained of is an inconvenience materially interfering with the ordinary physical comfort of human existence not merely according to elegant or dainty modes and habits of living, but according to plain and sober and simple notions obtaining among the English people. It is also necessary to take into account the circumstances and character of the locality where the complainant is living and any similar annoyances which exist or previously existed there. At present, the ability to

51. 4th Edition Volume 34.
receive television free from occasional, even if recurrent and severe, electrical interference is not so important, a part of an ordinary house-holder's enjoyment of his property as to make such interference an actionable nuisance.

Smoke, Fumes and Smells:

Smoke, fumes and smells, either together or singly, which materially interfere with the ordinary physical comfort of human existence when judged by the standard previously stated, constitute a nuisance in law. They need not be actually noxious or injurious to health and it is immaterial that there are other sources of discomfort in the neighbourhood, of the one complained of is a material, addition to it. The fact that the nuisance existed long before the complainant occupied his premises does not relieve the offender unless, he can show that as against the complainant, he has acquired the right to commit the annoyance complained of. If a nuisance exists, it cannot be justified on the ground that the place is a suitable or convenient one, or that it arises from the defendant's use of his own property in a common and useful manner and for his own convenience; or that the benefit to the public in the neighbourhood far exceeds the inconvenience to the plaintiff or that the defendant has been granted the right to carry on the trade if it is not proved that the trade cannot be carried on without causing inconvenience, or that others in the vicinity do not complain.
In these cases the question of nuisance or no nuisance is pre-eminently one of degree and no specific rules can be laid down. Circumstances and the locality must also be considered, for that which would be a nuisance in one district may be tolerated in another.

**Fumes Act - From Commercial Operations:**

Apart from fumes and smells arising from trades held to be offensive, the vitiations of the atmosphere may be held to be a nuisance and capable of being restrained by injunction when it arises from the burning of bricks, manure works, sewage works, glass works, cement works, chemical works, smoke from railway engine sheds, the stalling horses left standing in a street opposite business premises for an unreasonable time, gasworks, the smelting ore, a blacksmith's shoeing, forger, smoke from factory engines, the discharge and deposit of manure at a railway siding or of night soil and other waste matter, the burning of mineral refuse, coke ovens, stables, the deposit of house and street refuse, a cooking stove, the manufacture of fish guano and fish oil and the carrying on of a fried fish shop.

A hospital for infectious diseases is not necessarily a nuisance, nor is it an offensive business under public health legislation". 
In Galstaun v. Doonia Lal Seal, the Calcutta High Court held, "under the Municipal Law no private person can claim a right to foul an ordinary drain by discharging into it what it was not intended to carry off."

Where the defendant, the owner of a Shellac factory, discharged into the Municipal drain, which was not constructed or intended for carrying off such stuff, refuse liquid of an offensive character, which interfered with the ordinary comfort of the plaintiff's occupation of property and caused him special injury, it was held, "the plaintiff was entitled to restrain him, where moreover, the defendant discharged the liquid into the drain knowing from the condition of the drain and the nature of the liquid that it could not be efficiently carried away, but must stagnate, decompose and create a nuisance." It was held, "the defendant must be responsible for the necessary consequences of his action and was not entitled to shift the responsibility on the Municipality by contending that if the latter would improve the drain, there would be no nuisance." It was also held, "an injunction for the permanent stoppage of the nuisance was the only effectual remedy in the case. That apart, the substantial damages should be awarded against the defendant who has persisted in a nuisance causing material injury to the plaintiff". I agree with the decision.

52. (1905) ILR (Cal.) 697.
The law relating to private nuisance is well settled.

In Dhanna Lel v. Chitter Singh, the Court laid down the principles governing private nuisance as follows:


(1) Constant noise, if abnormal or unusual, can be an actionable nuisance, if it interferes with one's physical comforts.

(2) The test of a nuisance causing personal discomfort in the actual local standard of comfort and not an ideal or absolute standard.

(3) Generally, unusual or abnormal noise on defendant's premises which disturbs the sleep of the occupants of the plaintiff's house during night or which is so loud during day time that due to it one cannot hear ordinary conversation in the plaintiff's house or which cannot allow the occupants of the plaintiff's house to carry on their ordinary work is deemed to be a noise which interferes with one's physical comforts.

(4) Even in a noisy locality, if there is substantial addition to the noise by introduction of some machine, instrument or performance at defendant's premises which materially affects the physical comforts of the occupants of the plaintiff's house, then also the noise will amount to actionable claim.

(5) If the noise amounts to an actionable nuisance, the defence that the defendant is making a reasonable use of his own property will be ineffectual.
No use of one's own property is reasonable if it causes substantial discomfort to other persons.

"If a man creates a nuisance", said Kekowish J. in *Attorney General v. Cole & Sons* "he cannot say that he is acting reasonably. The two things are self contradictory".

(6) If the defendant is found to be carrying on his business, so as to create a nuisance to his neighbours, he is not acting reasonably as regards them, and may be restrained by injunction although he may be conducting his business in a proper manner according to rules framed in this behalf either by the Municipality or by the Government. The latter defence can be effective in case of public nuisance, but not in that of a private nuisance.

(7) If an operation in the defendant's premises can not by any care and skill be prevented from causing a private nuisance to the neighbours, it cannot be undertaken at all, except with the consent of those injured by it.

55. *Attorney General v. Cole & Sons* 1 Ch. 205 at page 207.
(8) The right to commit a private nuisance can, in certain circumstances, be acquired either by prescription or by the authority of a statute. The principles laid down in Dhanna Lal's case are not exhaustive. The Court ought to have considered the rule of minimum standard of comfort. In fact, in the modern world this rule should be the most effective guideline in determining dispute over nuisance.

56. According to Salmond "man is a social being. He is living in society. Give and take is necessary in all human actions. Those acts necessary for common and ordinary use and occupation of land and houses may be done, if conveniently done. It is as much for the advantage of one owner as of another. For every nuisance one complaints of as the result of the use of the neighbours' land he himself will create in the ordinary use of his land."

57. According to Ramaswamy Iyer "even if a neighbour builds with a view to obstruct light, he cannot complain or prevent. Such complaint or prevention could be had only if he acquires an easement by grant or prescription. Such rights would amount to a restrictive covenant by the grantor. Regarding acquisition of such prescriptive rights, also there are limitations provided by law".

The traditional concept of "NUISANCE" as enunciated by common law courts has undergone a great change. It is now a species under the genus pollution. Therefore, in modern legal thought and jurisprudence, nuisance as a branch of law is closely associated with the protection of the environment. Major portion of the nuisance cases concern pollution by oil, noxious fumes, interference with leisure activities, offensive smells from stable yards, noise from industrial installation, chemicals and pesticides group of fertilizers. Therefore, the legal norms governing the protection or control of the environment should equally be applicable in the case of nuisance. This broad generalisation is subject to three qualifications viz. (1) Some types of nuisance such as obstruction to highways, interference with overhanging trees which have no connection with environment or ecology have to be dealt with by the common law rules in absence of statutory provision; (2) the environmental control being major premises, the cases of private or public nuisance should be adjudicated with a view to controlling injurious activities for the benefit of the whole community and (3) the common law of nuisance has been supplemented to a great extent by the statutory provisions and powers designed to control environmental damage. For example Public Health Act,
1936, the Control of Pollution Act, 1974, Clean Air Act, 1956 and 1968. The law of torts is very much connected with the effect of wrong-doing. If the effect of nuisance which pollutes the environment and consequently affects health, the comfort of mankind, animals and land, it should be stopped by judicial judgment. If the damage cost is less than the abatement costs, the award of damage alone cannot yield socially effective result without injunction. Another lacuna of the common law practice is that ordinarily interim injunction is not granted. As a litigation generally runs about a decade to settle the disputes between the parties, it is essential that on the complaint of private or public nuisance, the court must pass an order of interim injunction unless the defendant can show prima facie by producing certificate from the environmental

Under part III of the Public Health Act (U.K.) a local authority which is satisfied that such a nuisance exists is under a statutory duty to serve an abatement notice requiring the nuisance to be terminated and, if the notice is not obeyed, to lay a complaint before a Magistrate Court, which then makes a nuisance abatement order.

The Act is designed to control, disposal of waste of various kinds, principally by adopting a system of licensing. Parts of this Act give rise to civil liability in damages.

The best known provision is that of Sec.11 which allows a local authority to designate "smoke less zones".
scientists that the acts complained of are not capable of polluting environment and consequently having no effect on men, animals and land. In the era of technological advancement the court should take the opinion of the scientists, experts and engineers in deciding cases of nuisance relating to pollution control of the environment. The jurisdiction of the court must not confine to the past acts of nuisance but also to present and future occurrences. Sometimes the acts complained of may not affect men, animal and land presently but they may have far reaching effect affecting future generation. The present common law practice does not allow action for future injury being remote but apprehension of future injury plays vital role to pass an injunction to prevent such happening. Both nuisance and pollution are social evils against which the basic human rights and the nature must be protected. In common law, law of limitation is applicable to nuisance but it has no application in pollution cases. In fact, there is no logic or reason for a man to acquire a prescriptive right to affect human health, animal and land.

STATUTE LAW : LEGISLATION AND ENFORCEMENT OF LAW :

Most of the countries have their centralized Pollution Control positive laws. The United Kingdom and the United States of America have regulated standards of one kind or another. The statutory intervention in the United Kingdom heralded from the nineteenth century movement to protect
public health in a newly industrialized society. The statutory control aimed at the prohibition of nuisance and pollution deemed to be detrimental and prejudicial to public health. But the statutory prohibition and enforcement of statutory restrictions were too weak to control the pollutants. The social pressure grew more and more which resulted in passing the era from statutory nuisance to the legislation of emission standards. This conceptual shift necessitates the legal shift also, particularly in view of the fact that the underlying principle suggests that an activity of pollutants can be restricted if it is presumed as distinct from it being proved to be harmful. A series of reports in the nineteenth century established the link or connection of cause and effect relation between emission of pollutants and untreated sewage on the one hand and the health of those affected on the other hand.

Let us now examine the different methods of standards which United Kingdom has been thriving to establish.

The 1876 Rivers Pollution Act set up the practice of restricting or prohibiting all forms of river pollution but at the same time it limited the circumstances in which the law could be enforced. It is interesting to note that prohibitory law was directed to be enforced against the polluting industries if the action did not cause any material injury to the interest of the polluters. Possibly, in the nineteen century, the English society needed more and more industry for export of finished goods to their vast colonies. The English society made
an attempt to harmonise social interest with abatement of pollution. If the said Act is studied as a whole it will appear that while the British Parliament enacted law prohibiting all forms of river pollution, at the same time the Parliament's intention not to enforce the law against polluters was explicit. The polluters could not know before hand what would constitute an infringement of the law as made effective by the enforcement agency.

On account of growing social need to control pollution effectively, it is imperative to establish effective standards to reduce the uncertainty over the level. The legislature may itself specify the standards. This approach is widely accepted in the United States and other European countries. But this approach has been largely restricted to air pollution. The Royal Commission of Sewage Disposal of 1912 was of the opinion that standards were not feasible because the effects of many pollutants were not established. However, the Royal Commission recommended a guide line of 3 parts suspended matter per 1,00,000 sewage effluent, for sanitary authorities to follow. The Report of the River Pollution Prevention Sub-Committee of the Central Water Advisory Committee, of the United Kingdom made in 1949 took the view that local variations made local standards preferable to national standards and recommended a system of legislated local standards. The 1951 Rivers (Prevention of Pollution) Act, set up river boards with the power to establish local standards on any river through byelaws but unfortunately such laws are not confirmed on account of the difficulty in formulating standards for all pollutants.
According to Paul Burrows, "this experience led to lack of enthusiasm for the rigid application of legislated standards on the part of legislators and administrators, and to the adoption of a more flexible 'consent' method of control for water pollution, which some people regard as characteristic of the British approach to pollution control and which has been endorsed by the Royal Commission on Environmental pollution". In dealing with air and water pollution the British Pollution Control Agencies are inclined to apply flexible rules. This is evident from the fact that the Agencies have retained discretion over the rigidity of the standard to be applied to particular polluters. The British Parliament has delegated its power to Alkali Inspectorate and other bodies to establish individual standards for pollution. The British Parliament has set up a criterion of "best practicable means" in terms of technological and managerial feasibility before the Alkali Inspectorate for the purpose of formulating standards. So far as the control of river pollution is concerned, the enforcement agencies have the power to set the individual standard which a polluter must meet. Under the British Law, the Polluter is under legal obligation to secure a 'consent' to pollute. Such consent must specify the quantity and concentration of the effluent he may emit. Non-compliance with this rule will be considered as a criminal offence and the criminal punishment may be inflicted upon the polluters. Changes in the terms of any particular consent can

be made only by means of formal proceedings, otherwise not. The discretion exercised by the regional water authorities is notable. At the instance of such authority a polluter violating standards is prosecuted. It lays down conditions to be effectively followed by industries. The 1947 Control of Pollution Act creates public accountability of the local enforcement agency. The present Pollution Control Acts in Britain do not indicate that the Government policy is in favour of national uniform standard. This gives rise to flexibility resulting in disadvantage of concealing activity on the part of the law enforcing agency who possesses a substantial degree of discretion in formulating standard and its enforcement. We find little intention of such agency to prosecute the violators of standards. 

Krier argues in relation to the United States that a system that allows regional variations in pollution control may give too much leverage to polluting interests. Krier favours imposition of uniform standards which provide regional pollution control agencies to set more or less stringent standards. According to him, this uniform standards would alter the balance of power between polluting and anti-polluting interests. Unlike the British Approach, the United States of America has a hard-hitting nationally uniform approach. But this approach

cannot be said to be perfect. Paul Burrows has described the deficiency in the U.S. Approach. According to him, "in the case of air pollution, the uniformity relates to the air quality target (ambient standard) set rather than to the emission standards imposed on particular polluters. A uniform ambient standard implies for strictest emission standards for those polluters whose pollutants most seriously affect air quality, but the implied emissions standard are not sensitive to differences in polluters abatement costs." The U.S legislation lays emphasis on ambient standards. This creates a problem of proof. The main obstacle in dealing with ambient standard is that in the case of several pollution sources it will be difficult to establish and prove the link between particular polluting emissions and the quality of air or water in the locality. The U.S legislation of 1970s has shifted the emphasis towards emissions control. The Environment Protection Agency (EPA) has been given power by the 1970 Clean Air Amendment Act to set emission pollutants standards for hazardous pollutants. To find out the pollutants, the EPA is required "best adequately demonstrated control technology" to be used which is the echo of the Britain's "best practicable means". The U.S legislation has established emission limits for automobiles but its counterpart, the British legislation, has not established any such

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emission limits for automobiles except on new vehicles. The U.S. Water Pollution Control Act of 1972 shifts its standards from ambient standards to emission standards. In the United States most of the enforcement agencies have been amalgamated into the EPA, whereas the British enforcement agencies still remain fragmented into many bodies. The tighter legislatively specified duties are imposed on the American EPA to carry out the legislative will, whereas British agencies still enjoy greater discretionary power over standard setting.

India falls within the third world developing countries. It was a colony of the United Kingdom for about two hundred years. India was basically an agricultural country. With the advent of British rule and for their own purpose, industrialisation in some specified industries started in the nineteenth and twentieth centuries. The people of India are mostly poor. 50% of the people live under below average standard. The birth rate is high and alarming. Illiteracy is another curse. In 1988, according to Census Report, 67% of the people are illiterates. The British Rulers also passed certain pieces of legislation over Pollution Control in India. After independence India has enacted a few pieces of legislations on Pollution Control.

Delhi Municipal Corporation Act, 1957 empowers the Commissioner to make an order restraining the use of water from any well, tank or other source of supply, not vested in the Corporation, when it is so polluted, detrimental and prejudicial to public health.

Section 241 requires that no person shall throw, empty or turn into any Municipal drain or into any drain communicating with a Municipal drain:

(a.) Any matter likely to injure the drain or to interfere with the free flow of its contents or to affect prejudicially the treatment and disposal of its contents; or

(b.) any chemical, refuse or waste stream or any liquid of a temperature higher than fortyfive degrees centigrade being refuse or stream, or a liquid which when so heated is, either alone or in combination with the contents of the drain, dangerous, or the cause of a nuisance, or prejudicial to health; or

(c.) any dangerous petroleum.

I. The Shore Nuisance (Bombay & Kolaba) Act 1853;
II. Orient Gas Company Act, 1857;
III. Serais Act, 1867;
IV. The Northern India Central Drainage Act, 1873;
Section 250 provides that no sewage shall be discharged into any water course until it has been so treated as not to affect prejudicially the purity and quality of the water into which it is discharged.

Section 354 provides that all filthy and polluted and obnoxious matter accumulating upon the premises of a person is to be collected and removed to specified places in the prescribed manner.

Section 356 has specific provisions with regard to accumulation and the removal of rubbish belonging to factories and workshops. The Commissioner has been given power to ask the factory owners to remove the rubbish, filth and other polluted or obnoxious matter to specified places in the prescribed manner. The Commissioner may himself do so and charge the cost of such removal from the owners.

V. The Construction in Fair Ways Act, 1881;
VI. Indian Ports Act, 1908;
VII. The Indian Steam Vessels Act, 1917;
VIII. The Indian Forests Act, 1927;
IX. Bengal Smoke Nuisance Act, 1905;
X. Indian Penal Code, 1872 (ss. 277, 269, 290);
XI. Tamil Nadu Public Health Act, 1939;
XII. Tamil Nadu Municipal Act, 1920;
XIII. Bengal Municipal Act, 1932;
XIV. Calcutta Municipal Act, 1951;
Section 357 prohibits a person from depositing any rubbish etc. on the bank of a water course.

The Merchant Shipping Act, 1958 deals with marine pollution. It is in pursuance of the International Convention of 1954. The Act appears to be a comprehensive one covering various types of waters. It applies to streams which include rivers, water course, island water (natural or artificial), subterranean waters, sea or tidal waters. The Act makes provisions for the establishment of a Central Board for Prevention and Control of Water Pollution and the State Boards for the purpose. These Boards are autonomous.

Two important functions are to be carried out by the State Boards viz. (1) to lay down standards of pollution and (2) to make consent orders for putting trade and sewage effluent into the stream. The Central Board is bound by the directions in writing as the Central Government may give. Every State Board is bound by the directions in writing as the Central Board or the State Government may give. Where the direction given by the State Government is inconsistent with the direction by the Central Board, the matter is to be referred to the Central Government.

The Indian Parliament has borrowed the law from the British Act and re-enacted it with some departure and the departure has made the legislation weaker. The subjective and objective condition of India and the desire of the Indian people are not reflected in the Indian Act. The Act itself
creates various problems viz. multiplicity of authorities, multiplicity of controls and multiplicity of enactments.

Water (Prevention and Control of Pollution) Act, 1974;

The objects and reasons for the enactment were stated in the Bill as follows:

"The problem of pollution of rivers and streams has assumed considerable importance and urgency in recent years as a result of the growth of industries and the increasing tendency to urbanization. It is therefore essential to ensure that the domestic and industrial effluents are not allowed to be discharged into the water courses without adequate treatment as such discharges would render the water unsuitable as source of drinking water as well as for supporting fish life and for use in irrigation. Pollution of rivers and streams also causes increasing damage to the country's economy."

A Committee was set up in 1962 to draw a draft enactment for the prevention of water pollution. The Bill follows the recommendations of the Committee to seek to

(1) establish at the Centre as well as in the States Water Pollution Prevention Boards with the necessary complement of technical and administrative staff and to confer on them much power as are necessary to deal effectively with the problem of water pollution in the country.
(II.) provide penalties for contravention of the provisions of Act, and

(III) establish Central and State water testing laboratories to enable the Boards to assess the extent of pollution, lay down standards and establish guilt and default.

The Act was amended in the year 1978.

Pollution has been defined in Clause (C) of Section 2 of the Act as follows:

"Pollution means 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 adequate organisms."

Section 16 of the Act deals with functions of Central Board. The Central Board shall promote cleanliness of streams and wells in different areas of the State. The Central Board may perform all or any of the following functions, namely:
(a) advise 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 or 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;

(g) lay down, modify or annul, in consideration 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.

The Board can establish or recognise a laboratory or laboratories to enable it to perform its statutory function including the analysis of samples of water from any stream or as well or of samples of any sewage or trade effluents. Rule 11 of the Water (Prevention and Control of Pollution) Rules, 1975 enables the Central Board to appoint a consulting engineer to assist the Board in its functions. Section 17 of the Act deals with functions of the State Board
Sub-Section 2 of the Section 20 of the Act lays down that a Board may give directions requiring any person who in its opinion is obstructing water from any such stream or well in the area in quantities which are substantial in relation to the flow or volume of that stream or well or its discharging sewage or trade effluent into any such stream or well, to give such information as to the obstruction or the discharge at such times and time in such form as may be specified in the directions.

Clause (c) of Sub-Section (1) of section 32 of the Act lays down that where it appears to the State Board that any poisonous, noxious or polluting matter is present in any stream or well or has entered into that stream or well due to any accident or other unforeseen act or event, and if the Board is of opinion that it is necessary or expedient to take immediate action, it may for reasons to be recorded in writing carry out such operations 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. Section 41 of the Act prescribes penalty for non-compliance with the aforesaid directions. The Penalty to be imposed is imprisonment for a term which may extend to three months or with fine which may extend to five thousand rupees or with both and in case the failure continues with an additional fine which
may extend to one thousand rupees for every day during which such failure continues after the conviction for the first such failure.

Section 42 of the Act prescribes penalty for certain acts. It lays down -

(1) Whoever -

(a) destroys, pulls down, removes, injures or defaces any pillar, post or stake fixed in the ground or any notice or other matter put up, described or placed by or under the authority of the Board, or

(b) obstructs any person acting under the orders or directions of the Board from exercising his powers and performing his functions under this Act, or

(c) damages any works or property belonging to the Board, or

(d) fails to furnish to any officer or other employee of the Board any information required by him for the purpose of the Act, or

(e) fails to intimate the occurrence of any accident or other unforeseen act or event under Section 31 to the Board and other authorities or agencies as required by that Section, or
(f) in giving any information which he is required to give under this Act, knowingly or wilfully makes a statement which is false in any material particular, or

(g) for the purpose of obtaining any consent under Section 25 or Section 26, knowingly or wilfully makes a statement which is false in any material particular,

shall be punishable with imprisonment for term which may extend to three months or with fine which may extend to one thousand rupees or with both.

Section 24 of the Act imposes two obligations upon the polluters -

(i) not to knowingly cause or permit poisonous, noxious or polluting matter into any stream or well;

(ii) not to knowingly cause or permit or enter into any stream or any other matter that may impede the flow of water in a stream as to substantially aggravate pollution.

Section 43 prescribes penalty for contravention of provisions of Section 24. The prescribed punishment is imprisonment for a term which shall not be less than six months but which may extend to six years and with fine.
Section 25 of the Act lays down that previous consent of the State Board is necessary to bring into use any new or altered outlet for discharge of sewage or trade effluent into any stream or well. Section 26 of the Act lays down that where immediately before the commencement of this Act any person was discharging any sewage or trade effluent into a stream or well or sewer or on land, the provisions of Section 25 shall so far as may be apply in relation to such person as they apply in relation to the person referred to in that Section to the modification that the application for consent to be made under Sub-section (2) of that Section.

Section 44 prescribes penalty i.e. imprisonment of a term which shall not be less than six months and it may extend to six years and with fine for contravention of Section 25 and Section 26.

Section 45 prescribes enhanced penalty after previous conviction. Section 46 prescribes publication of names of offenders. Section 47 deals with offences by companies and the liability of Director, Manager, Secretaries or any other officer of the company. Section 48 deals with offences committed by Government Departments.

Section 58 of the Act lays down, "No civil court shall have jurisdiction to entertain any suit or proceeding in respect of any matter which an appellate authority constituted under this Act is empowered by or under
this Act to determine, and no injunction shall be granted by any court or other authority in respect of any action taken or to be taken in pursuance of any power conferred by or under this Act.

The pollution monitoring and control have been duly considered in Paras 18.23 to 18.34 of Chapter 18 of the Seventh Plan documents of India.

POLLUTION CONTROL AND THE INCOME TAX LAW.

Under the Income Tax Act, 1961 a deduction towards depreciation from income tax business or profession is allowed at the rates mentioned in the Income Tax Rules, 1962. At present Sec 32 of the Income Tax Act, 1961 allows such a deduction. The deduction for depreciation for pollution control equipments provided in Rules is as follows:

Table of Rates at which Depreciation is Admissible.

(For assessment year 1983-84 and 1984-85 onwards.

64. Sunil Goyal and Sunil Forwai: Manual of Pollution Control Law in India: Book Corpn. 1986, Pages 165, 166.
Class of assets. | Depreciation allowance as percentage of actual cost in the case of ocean-going ships: (i) | (ii) Written down value in the case of any other asset. | Remarks.
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<td>(b) Water pollution control equipments, being.</td>
<td></td>
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<td>(i) Mechanical screen systems.</td>
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(i) Aerated detritus chambers (including air compressor)

(iii) Mechanically skimmed oil and grease removal systems.

(iv) Chemical feed systems and flash mixing equipment.

(v) Mechanical calculators and mechanical reactors.

(vi) Diffused air/mechanically aerated activated sludge systems.

(vii) Aerated lagoon systems.

(viii) Biofilters.

(ix) Methane - recovery anaerobic digester systems.

(x) Air flotation systems.

(xi) Air/steam stripping steams.

(xii) Urea hydrolysis systems.

(xiii) Marine outfall systems.

(xiv) Centrifuge for dewatering sludge.

(xv) Rotating biological contractors or bio disc.
In his budget speech presenting the Central Government's Budget 1986-87 the Finance Minister had proposed to enhance the rate of depreciation on plant and machinery used as anti-pollution devices. The text of Para 96 of Part B of the Speech covering this aspect reads as follows:

"96. As promised in the Long Term Fiscal Policy Statement, I propose to introduce a system of allowing depreciation in respect of blocks of assets of the present system of depreciation on individual assets. Simultaneously I propose to rationalise the rate structure by reducing the number of rates as also by providing for depreciation at higher rates so as to ensure that more than 80 percent of the cost of the plant and machinery is written off in a period of 4 years or less. This will render replacement easier and help modernisation. Apart from those items which are eligible for 100 percent depreciation in the initial year itself, there are at present different rates of plant and machinery. I propose to have only two rates of depreciation at 33\%\quad per\,\,cent\,\,and\,\,50\,\,per\,\,cent\,\,plant\,\,and\,\,machinery\,\,used\,\,as\,\,anti-pollution\,\,devices\,\,and\,\,those\,\,using\,\,indigenous\,\,knowhow,\,\,are\,\,proposed\,\,to\,\,be\,\,placed\,\,in\,\,a\,\,block\,\,carrying\,\,the\,\,higher\,\,rate\,\,of\,\,depreciation\,\,of\,\,50\,\,per\,\,cent."
Buildings meant for low-paid employees of industrial undertakings will be entitled to depreciation at 20 per cent as against the general rate of 5 per cent for residential buildings and 10 per cent for non-residential buildings.

**POLLUTION CONTROL AND INDUSTRIAL LICENSING SYSTEM.**

Under the Industries (Development & Regulation) Act, 1951 an industrial licence is required to be obtained inter alia:

(a) for setting up a new industrial undertaking;

(b) for manufacture of a new article;

(c) for effective substantial expansion;

(d) for effective change of location;

(e) for carrying on business at any time after the provisions of the Act became applicable to an industrial undertaking for any reason whatsoever.

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Secretariate for Industrial Approval (SIA) has been set up by the Government of India in the Department of Industrial Development, Udyog Bhawan, New Delhi - 110001 for granting Letters of Intent. The Government of India vide their Press Release dated 21.6.1984 announced a list of 18 industries which are highly polluting. This list was subsequently revised by a subsequent Press Release dated 10.12.84. The text of this Press Release is given below:

"Environmental Clearance of Industrial Licences - Conditions of Letter of Intent Industrial Licence.

With a view to checking and preventing air, water and soil pollution arising out of industrial projects, certain conditions to be fulfilled are already being incorporated in the Letters of Intent. Subsequently, it was decided that in respect of certain industries of a highly polluting nature, it would not only be necessary to install suitable pollution control equipment but also to identify the site and location of the project where a particular industrial unit would be set up. In order to provide concrete shape in this requirement, Government had announced, vide press note No. 9 (1984 series) dated 21st June, 1984, a list of 18 industries causing high pollution and it was stated that in respect of these industries, the Letter of Intent would be converted into an industrial licence, only after the following conditions were fulfilled:
1) The State Director of Industries confirms that the site of the project has been approved from the environmental angle by the Competent State Authority;

ii) The entrepreneur commits to both the central and the State Government that he will install the appropriate equipment and implement the prescribed measure for the prevention and control of pollution.

iii) The concerned State Pollution Control Board has certified that the proposal meets with the environmental requirements and that the equipment installed or proposed to be installed are adequate and appropriate to the requirements.

The revised list of industries earmarked for highly polluting in nature:

1. Primary metallurgical producing industries viz. Zinc, lead, copper, aluminium and steel;
2. Paper, Pulp and Newsprint;
3. Pesticides/Insecticides;
4. Refineries;
5. Fertilizers;
6. Paints;
7. Dyes;
8. Leather Tanning;
9. Rayon;
10. Sodium/ Potassium Cyanide;
11. Basic drugs;
12. Foundry;
13. Storage Batteries (Lead acid type);
14. Acids / Alkalies;
15. Plastics;
16. Rubber - Synthetic;
17. Cement;
18. Asbestos;
19. Fermentation industry;
20. Electroplating industry.

It is, therefore, notified for information of all concerned that in respect of the above mentioned 20 industries, the conversion of letter of intent into industrial licence will take place only if apart from other prescribed
conditions as set out above have been fully satisfied.

THE AIR (PREVENTION AND CONTROL OF POLLUTION) ACT, 1981.

The statement of objects and reasons for the Bill runs as follows:

"With the increasing industrialisation and the tendency of the majority of industries to congregate in areas which are already heavily industrialised, the problem of air pollution has begun to be felt in the country. The problem is more acute in those heavily industrialised areas which are also densely populated. Short term studies conducted by the National Environmental Engineering Research Institute, Nagpur, have confirmed that the cities of Calcutta, Bombay, Delhi etc. are facing the impact of air pollution on a steadily increasing level.

2. The presence in air, beyond certain limits, of various pollutants discharged through industrial emission and from certain human activities connected with traffic, heating, use of domestic fuel refuse incinerations etc. has detrimental effect on the health of the people as also on animal life, vegetation and property."
3. In the United Nations Conference on the Human Environment held in Stockholm in June, 1972, in which India participated, decisions were taken to take appropriate steps for the preservation of the natural resources of the earth which, among other things include the preservation of the quality of air and control of air pollution. The Government has decided to implement these decisions of the conference in so far as they relate to the preservation of the quality of air and control of air pollution.

4. It is felt that there should be an integrated approach for tackling the environmental problems relating to pollution. It is therefore proposed that the Central Board for the preservation and control of water pollution constituted under the Water (Prevention and Control of Pollution) Act, 1974, will also perform the function of the Central Board for the prevention and control of air pollution in the Union Territories. It is also proposed that the State Boards constituted under the said Act will also perform the function of State Boards in respect to prevention, control and abatement of air pollution. However, in those States in which State Board for the prevention and control of Water Pollution have not been constituted under that Act, separate State Boards for the prevention and control of air pollution are proposed to be constituted.
Under this Act "air pollutant" means any solid, liquid or gaseous substance present in the atmosphere in such concentration as may be or tend to be injurious to human beings or other living creatures or plants or property or environment;

air pollution means the presence in the atmosphere of any pollutant,

'emission' means any solid or liquid or gas coming out of any chimney, duct or flue or any other outlet.

According to research work of the National Environmental Engineering and Research Institute, 70% of the available water in India is polluted. It is estimated that 73 million workdays are lost every year due to water borne diseases, The cost of treatment and loss in production amount to Rs. 600 crores a year.

After reviewing the environmental laws in India the Tewari Committee, appointed in 1980, noted the following shortcomings of the existing environmental legislations:

I. Many of these laws are outdated.

II. They lack statements of explicit policy objectives.

III. They are mutually inconsistent.

IV. They lack adequate provisions for helping the
implementing machinery.

V. There is no procedure for reviewing the efficacy of the laws.

The Tiwari Committee suggested the following main recommendations:

I. Comparative review and reformation of some Central and State Acts such as, the Insecticides Act, 1968, the Water (Prevention and Control of Pollution) Act, 1974 and the Indian Forest Act, 1927.

II. New Legislation for areas of action not covered by the present laws (such as, those concerning toxic substances).

III. The Introduction of "Environmental protection" in the concurrent list of the seventh Schedule.

After the Tiwari Committee submitted its report to the Government of India, the Parliament enacted the Environment (Protection) Act, 1986. The statement of objects and reasons of the Bill run as follows:

"Concern over the state of environment has grown the world over since the sixties. The decline in environmental quality has been evidenced by increasing pollution, loss of vegetal cover and biological diversity, excessive concentrations
of harmful chemicals in the ambient atmosphere and in food chains, growing risks of environmental accidents and threats to life support systems. The world community's resolve to protect and enhance the environmental quality found expression in the decisions taken at the United Nations Conference on the Human Environment held in Stockholm in June, 1972. Government of India participated in the Conference and strongly voiced the environmental concerns. While several measures have been taken for environmental protection both before and after the conference, the need for a general legislation further to implement the decisions of the Conference has become increasingly evident.

2. Although there are existing laws dealing directly or indirectly with several environmental matters, it is necessary to have a general legislation for environmental protection. Existing laws generally focus on specific types of pollution or on specific categories of hazardous substances. Some major areas of environmental hazards are not covered. There also exist uncovered gaps in areas of major environmental hazards. There are inadequate linkages in handling matters of industrial and environmental safety. Control mechanisms to guard against slow, insidious build up of hazardous substances, especially new chemicals, in the environment are weak. Because of a multiplicity of regulatory agencies, there is need for an authority which can assume the leading role for studying planning and implementing long term requirements of environmental safety and to give direction to, and co-ordinate a system of speedy and
adequate response to emergency situations threatening the environment.

3. In view of what has been stated above, there is urgent need for the enactment of a general legislation on environmental protection which inter alia, should enable co-ordination of activities of the various regulatory agencies, 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 accident threatening environment and deterrent punishment to those who endanger human environment, safety and health.

4. The Bill seeks to achieve the above objects.

Section 3 of the Act vests power in the Central Government to take all such measures or as are necessary or expedient for the purpose of protecting and improving the quality of environment and preventing, controlling or abating environmental pollution. This power includes:

(a) laying down standards for the quality of environment in its various aspects;

(b) laying down standards for emission or discharge of environmental pollutants from various sources

67. Clause III of Sub-Sec. 2 of Sec 3 of Act 29 of 1986.
whatsoever not being a ship or an aircraft;

(c) carrying out and sponsoring investigations and research relating to problems of environmental pollution;

(d) collection and dissemination of information in respect of matters relating to environmental pollution;

(e) preparation of manuals, codes or guides relating to the prevention, control and abatement of environmental pollution;

The Section also empowers the Central Government to constitute an authority or authorities for the purpose of the legislation.

The Section 15 of the Act prescribes penalty i.e. imprisonment for a term which may extend to five years or with fine which may extend to one lakh rupees or with both for contravention of the provisions of the Act, rules, orders and directions. In case of continuing contravention additional fine of Rupees Five Thousand for every day and

68. Clause IV of Sub-Sec. 2 of Sec 3 of Act 29 of 1986.
69. ,, IX ,, ,, ,
70. ,, XII ,, ,, ,
71. ,, XIII ,, ,, ,
an enhanced sentence of imprisonment for a term which may extend to seven years where contravention continued beyond a period of one year after the date of conviction.

All the aforesaid three major Pollution Control Acts are for the sake of Acts without any biting teeth. The theory of punishment in the nature of sentence and fine cannot be an effective measure in all the cases and in all circumstances. The jurisprudence dealing with such pollution problem ought to be that the measure to be taken by the State must be an effective measure so that the future violation in similar nature may not occur. Annual Reports (1978-81) show that 217 cases under Section 25(5) of the Water (Prevention and Control of Pollution) Act, 1974 and other Cognate Acts were filed till 1981. No new prosecutions were launched during 1982. Out of these 217 cases it was possible to convict and compromise with only six industries. The figure shows the remaining companies managed to escape through the lacunas of the criminal administration of justice. Again the criminal case also runs for a considerable period. The Acts do not provide and/or ensure that during the pendency of the criminal proceeding no further violation will occur. Generally, after acquittal in the criminal case, the polluting acts done by an industry are legalised. The theory of modern legislation formulates question to the legislators or social pressure groups as to whether or not a punitive measure prescribed by statute of a particular society sufficiently prevents the growth or recurrence of the offence.
If not, the legislators or the social pressure groups are to find out or ascertain as to why the law fails to control the particular offence. After due deliberation on such finding the legislators are required to enact most effective law and create most efficacious instrument to enforce such punitive law. There are other problems in the deterrent theory of criminal justice and administration in relation to environmental jurisprudence. The retributive values of the punitive measure in the nature of sentence and fine often fails because economic benefit for non-compliance will out-weigh the prescribed retribution. The environmental laws do not authorise the Board to ascertain the profit an industry has earned for non-compliance with the legislative mandate. The fine should be imposed upon that profit. The punitive punishment or penalty indulges corrupt practices, otherwise the aforesaid 217 litigations would have succeeded. Political pressure from the ruling party is another setback for effective application of the deterrent theory of criminal administration. Another probability is that it is easier to punish an individual but it is a stiff thing to punish a Corporation, or groups of people. The criminal jurisprudence presupposes the possibility of identifying the violatores or tortfeasors. Sometimes it is very difficult in environmental problems to fix the liability and responsibility on a particular person or body.

The case laws discussed below will show the lacunas of the Act as well as failure of the deterrent
theory of criminal administration. The judgments delivered by the Supreme Court of India in M.C. Mehta and Anr. v. Union of India and Others; Shriram Foods and Fertilizer Industries and Another v. Union of India & Others, manifest the judicial reflex to pollution problems in general and potential dangerous escape of pollutants into atmosphere due to accidental emission or emission relatable to Corporate neglect. The first case was registered as writ petition(Civil) No. 12379 of 1985 and the Second case was registered as Civil Writ petition No. 26 of 1986. The Bench was constituted with P.N. Bhagwati C.J., D.P. Madon and O.L. Oza JJ.

Occurrence: On 4th December, 1985, a major leakage of Oleum gas took place from one of the Units of Shriram and this leakage affected a large number of persons, both amongst the workmen and the public and an Advocate practising in the Tis Hazari Court died on account of inhalation of oleum gas. This leakage resulted from the bursting of the tank containing oleum gas as a result of the collapse of the structure on which it was mounted and it created a scare amongst the people residing in the area. Within two days, another leakage took place as a result of escape of oleum gas from the joints of a pipe.

Action taken by the Administration:

72. (1986) 1 Comp. L.J. 251 (S.C)
The immediate response of the Delhi Administration to these two leakages was the making of an order dated 6th December, 1985 by the District Magistrate, Delhi under Sub Section (I) of Section 133 of the Code of Criminal Procedure, directing and requiring Shriram within two days from the date of issue of the order to cease carrying on the occupation of manufacturing and processing hazardous and lethal chemicals and gases including chlorine, oleum, super chlorine - phosphate etc., at their establishment in Delhi and within seven days to remove such chemicals and gases from the said place and not again to keep or store at the same place and to appear on 17th December, 1985 in the Court of the District Magistrate, Delhi to show cause why the order should not be enforced.

The Supreme Court appointed a team of experts to visit the caustic chlorine plant of Shriram and to report whether the recommendations of the Monmohan Singh Committee had been carried out by the management. The team of experts orally reported to the Supreme Court at the hearing on 7th December, 1985 that they had been able to inspect the plant for only a couple of hours and that by cursory inspection showed that many of the recommendations of the Monmohan Singh Committee appeared to have complied with and that too one hundred M.T. tanks for storage of chlorine which constituted a major element of hazard or risk had been emptied.
The Supreme Court appointed the Chief Metropolitan Magistrate as the Officer before whom claims for compensation may be filed by the persons affected by leakage of Oleum gas in the course of the two incidents within 4 weeks. The time was further extended by the Supreme Court. The Court further directed the Chief Metropolitan Magistrate to examine the affected persons by a team of medical experts.

Pursuant to the liberty given by the Supreme Court, the petitioner appointed an Expert Committee consisting of Dr. G.B. Agarwal, Professor T. Shivaji Rao and Sri Purkayastha. The Committee visited the caustic chlorine plant and submitted a report to the court in which it pointed out various inadequacies in the plant and expressed the opinion that it was not possible to eliminate hazard to the public so long as the plant remained at the present location.

To resolve the conflicting opinions of the Expert Committees, the Supreme Court by an order dated 18th December, 1985 constituted a committee of Experts consisting of Dr. Nilay Chowdhury as Chairman and Dr. Aghoramurty and Mr. R.K. Garg as member to inspect the caustic Chlorine plant and submit a report to the court on three points:

1. Whether the plant can be allowed to recommence the operations in its present state and conditions?
2. If not, what are the measures required to be adopted against the hazard or possibility of leaks, explosion, pollution of air and water etc. for this purpose?

3. How many of the safety devices against the above hazards and possibilities exist in the plant at present and which of them, though necessary, are not installed in the plant.

The Nilay Chowdhury Committee visited the caustic Chlorine plant on December 28, 1985 and after considering the Reports of Dr. Slater, Manmohan Singh Committee and Agarwal Committee and hearing the parties, made a report to the Court setting out 14 recommendations which in its opinion were required to be complied with by the management in order to minimise the hazards due to possible Chlorine leak. The Nilay Chowdhury Committee pointed out that it was in agreement with the recommendations made in the Report of the Manmohan Singh Committee which were exhaustive in nature.

Considering all the Reports and materials on the records the Court ordered:

"We may reiterate that the permission granted by us to Shriram to reopen caustic Chlorine plant is subject to the conditions set out in our order dated 17th February,"
1986 as modified by this order. But if for any reason, Shriram does not comply with any of these conditions and is, therefore, unable to reopen the caustic chlorine plant, it will be open to Shriram to restart the other plants in respect of which permission has been given by us by our order dated 17th February, 1986, so long as Shriram can do so without operating the caustic chlorine plant."

The aforesaid case shows beyond any shadow of doubt that there was dereliction of duty on the part of the Board and the Factory Inspector for not asking or directing the Shriram of taking effective safety measures of abatement of pollution before the accidents took place there. Although the penal provisions were there in the Acts, the Shriram Management showing their thumbs to the penal provisions violated the law of pollution control. It was the order for closure of the factory and the plant, that compelled this Govt. Company to comply with the recommendations of the Expert Committees viz. Manmohan Singh Committee and Dr. Nilay Chowdhury Committee. It is suggested that the Acts instead of prescribing penal clauses in the nature of sentences and fine ought to have empowered the Board to withdraw licence and close the industry unless the pollution control laws are satisfactorily complied with. This is the only socially effective measure that can compel the industrialists both private and public to harmonise the social interest with industrial interest.
Again the Acts do not provide any provision for compensation to the affected or aggrieved parties and the extent of liability of the polluting industry. The question of compensation was also before the Supreme Court of India in 73 H.C. Mehta & Another v. Union of India & Ors. The Bench was constituted by P.N. Bhagwati CJ, Ranga Nath Misra, O.L. Oza, M.C. Dutta and K.K. Singh JJ. The Court held, "We are aware that in America, since the Fourteenth Amendment is available only against the State, the Courts, in order to thwart racial discrimination by private parties, devised the theory of State action under which it was held that wherever private activity was aided, facilitated or supported by the State in a significant measure, such activity took the colour of state action and was subject to the constitutional limitations of the Fourteenth Amendment. This historical context in which the doctrine of State action evolved in the United States is irrelevant for our purpose especially since we have Art. 15(2) in our Constitution. But it is the principle behind the doctrine of State aid, control and regulation so impregnating a private activity as to give it the colour of State action that is of interest to us and that also to the limited extent to which it can be Indianized and harmoniously blended with our constitutional jurisprudence. That we are in no way consider ourselves bound by American exposition of constitutional law, is well demonstrated by the fact

73. AIR 1987 SC 1086 F.B. Paras 29, 31, 32.
that in Ramana Shetty this Court preferred the minority opinion of Douglas J. in Jackson v. Metropolitan Edison Company, (1974) 42 Law Ed. 2nd 477 as against the majority opinion of Rehnquist, J. And again in AIR India v. Margees Mirza (AIR 1981 S.C. 1829) this Court whilst preferring the minority view in General Electric Company v. Martha v. Gilbert, (1976) 50 Law 3d. 343 said that the provisions of the American Constitution cannot always be applied to Indian conditions or to the provisions of our Constitution and whilst some of the principles adumbrated by the American decisions may provide a useful guide, close adherence to those principles while applying them to the provisions of our Constitution is not to be favoured, because the social conditions in our country are different.

An enterprise which is engaged in a hazardous or inherently dangerous industry which poses a potential threat to the health and safety of the persons working in the factory and residing in the surrounding area owes an absolute and non-delegable duty to the community to ensure that no harm results to any one on account of hazardous or inherently dangerous nature of the activity which it has undertaken. The enterprise must be held to be under an obligation to provide that the hazardous or inherently dangerous activity in which it is engaged must be conducted with the highest standards of safety and if any harm results on account of such activity, the enterprise must be absolutely liable to compensate for such harm and it should be no answer to the enterprise to say that it
had taken all reasonable care and that the harm occurred without any negligence on its part. Since the persons harmed on account of the hazardous activity carried on by the enterprise would not be in a position to isolate the process of operation from the hazardous preparation of any substance or any other related element that caused the harm the enterprise must be held strictly liable for causing such harm as a part of the social cost for carrying the hazardous or inherently dangerous activity.

Where an enterprise is engaged in a hazardous or inherently dangerous activity and harm results to any one on account of an accident in the operation of such hazardous or inherently dangerous activity resulting for example, in escape of toxic gas, the enterprise is strictly and absolutely liable to compensate all those who are affected by the accident and such liability is not subject to any of the exceptions which operate vis-à-vis the tortious principle of strict liability.

In such a case, the measure of compensation must be co-related to the magnitude and capacity of the enterprise because such compensation must have a deterrent effect. The larger and more prosperous the enterprise, the greater must be the amount of compensation payable by it for the harm caused on account of an accident in carrying on the hazardous or inherently dangerous activity by the enterprise."

The Supreme Court has formulated the law that in case of pollution and negligence the fault need not be proved. The liability is strict. This formulation is at per with the recognised principles of law relating to harm in pollution.
Although the Supreme Court has not accepted the American doctrine of State action, the liability of the State on other two aspects has escaped the Supreme Court's attention. Firstly, the Central Govt. is the licensing authority. Without licence being granted, no hazardous industry can be established. As soon as the licence is granted to such an industry, it is the duty of the Government and the Board to see that the industry has taken or maintained all recognised standards for abatement of pollution. In breach of this duty, the State will also be vicariously liable to pay compensation to the victims/affected persons. In view of this position of law, the smallness or largeness of the shape of the enterprise is not a factor to be considered. If the enterprise is unable to pay the entire compensation, the State, in discharge of its vicarious liability, will bear the balance compensation.

With regard to the *Ryland v. Fletcher* the Supreme Court held, "The rule in *Ryland v. Fletcher* was evolved in the year 1868 and it provides that a person who for his own purpose brings on to his land and collects and keeps there anything likely to do mischief, if it escapes, must keep it at his peril and if he fails to do so is prima facie liable for the damages which is the natural consequence of its escape. The liability under this rule is strict and it is no defence that the thing escaped without that person's wilful act, default

or neglect or even that he had no knowledge of its existence. The 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 a thing escapes and does damage to another, he is liable to compensate for the damage caused. Of course, this rule applies only to non-natural user of the land and it does not apply to things naturally on the land or where the escape is due to an act of God and an act of stranger or the default of the person injured or where the thing which escapes is present by the consent of the person injured or in certain cases where there is statutory authority (vide Halsbury, Law of England, Vol. 45, Para 1305). Considerable case law has developed in England as to what is natural and what is non-natural use of land and what are precisely the circumstances in which this rule may be displaced. But it is not necessary for us to consider these decisions laying down the parameters of this rule because, in a modern industrial society with highly developed scientific knowledge and technology, where hazardous or inherently dangerous industries are necessary to carry a part of the developmental programme. This rule evolved in the nineteenth century at a time when all these developments of science and technology had not taken place, cannot afford any guidance in evolving any standard of liability consistent with the constitutional norms and the needs of the present day economy and social structure. We need not feel inhibited by the rule which was evolved in this context of a totally different kind of life.
economy. Law has to grow in order to satisfy the needs of the fast changing society and keep abreast with the economic development taking place in the country. As new situations arise the law has to be evolved in order to meet the challenge of such new situations. Law cannot afford to remain static. We have to evolve new principles and lay down new norms which would adequately deal with the new problems which arise in a highly industrialised economy. We cannot allow our judicial thinking to be constricted by reference to the law as it prevails in England or for the matter of that in any other foreign country. We no longer need the crutches of a foreign legal order. We are certainly prepared to receive light from whatever source it comes but we have to build up our own jurisprudence and we cannot countenance an argument that merely because the new law does not recognise the rule of strict and absolute liability in cases of hazardous or dangerous liability or the rule as laid down in Rylands v. Fletcher as is developed in England recognise certain limitations and responsibilities. We in India cannot hold our hands back and I venture to evolve a new principle of liability which English Courts have not done. We have to develop our own law and if we find that it is necessary to construct a new principle of liability to deal with an unusual situation has arisen and which is likely to arise in future on account of hazardous or inherently dangerous industries which are concomitant to an industrial economy, there is no reason why we should hesitate to evolve such principle of liability merely because it has not been so done in England."

The doctrine of strict liability or liability without fault is worth considering in relation to cases arising from environmental pollution. In *Waschak v. Mofitt*, it is alleged that Hydrogen Sulphide gas was emitted from two of the defendant's culm banks which damaged the paint on Plaintiff's dwelling. The defendant did not know and had no reason to anticipate the emission of the gas and the results which might follow. The Supreme Court held, the defendant was liable on the ground that a different chemical content in the foreign coal which the defendant brought to borough and processed there, accounted for the presence of the gas in the atmosphere. The Supreme Court of Pennsylvania distinguished three theories for allowing recovery against one from whose property material has escaped without negligence or fault and caused damage to other.

I. The English rule of *Rylands v. Fletcher*.

II. Absolute Nuisance Doctrine.

III. Re-statement Rules.

However, the scope of the Rule in *Rylands v. Fletcher* was meticulously interpreted in several decisions. The rule was applied to the undermentioned cases:

75. 379 - 441, 109A, 2d. 310 (1954).
I. Damage to fire, gas explosion, electricity;  
II. Oil, noxious fumes;  
III. Colliery spoil;  
IV. Rusty Wire from a decayed fence;  
V. Vibrations;  
VI. Poisonous Vegetation.

The consumer's health is the nation's health and vice-versa is equally true. Sound health, pollutionless environment with clean air and water, longevity of life are important factors to judge human prosperity. It is also a nation's barometer of socio-economic development and progress.

How can the socio-economic development and progress be achieved without affecting the nation's health?

76. Eastern and S. African Telegraph Co. Ltd. v. Capetown Tramways Companies Ltd. 1902 40 381.
The first and foremost duty of the society is to wage a war against two fronts viz. control of rate of growth of population and elimination of poverty. The first goal can be achieved by planning of a firm social policy by an enactment of law that each person shall have only two issues, and strict enforcement of law. The violators should be sternly dealt with, and rigorous imprisonment and confiscation of property may be prescribed. But only hindrance that may stand in the way is that the political party in power may be affected in election. This apprehension may be removed by national consensus of all the political parties in the State. If the proposal is resisted by the major political parties, in that event, by amendment of the constitution and the People’s Representation Act, an elected Parliament may continue for twenty years to achieve this goal.

The cry for reduction of population is no less important than the cry for democracy. Unfortunately the pollution control Acts do not provide any provision for discharging this primary task.

The Acts do not provide any provisions for shifting the hazardous and polluting industries from the thickly populated cities and towns to the places earmarked for industries. This can be done by direct State-help in giving alternative industrial land to the industrialists with sanction of adequate financial help.
In Doon Valley Case the question of environment and ecological balance was decided. The questions which arose were of grave moment and significance not only to the people residing in Mussourie Hill range forming part of the Himalayas but also having implications on the welfare of the people as consumers in general living in the country. It was also a question of resolving the conflict between development and conservation in the larger interest of the people, their health and habitable environment. The country needs a pollution-less environment so as to enable its people to protect themselves from health hazards in one form or the other. The question of protecting environment and maintaining ecological balance arose as the working of the lime stone quarries were directed to close down their operations permanently after consideration of the Bondopadhyia Committee Report. Justifying the closure, the Court observed:

"This would undoubtedly cause hardship to them but is a price that has to be paid for protecting and safeguarding the right of the people to live in healthy environment with minimal disturbance of ecological balance and without avoidable hazard to them and to their cattle, homes and agricultural land and undue affection of air, water and environments."

The author of this thesis agrees with the decision. The decision is a value judgment. It is better reasoned than that of Sierra Club v. Morton.

The Court ordered and directed the Government of India and the State of Uttar Pradesh to compensate the lessees by giving priority in grant of lease in other areas.

The Acts do not provide any provision compelling the State Government, Central Government, State Board and Central Board to publish the list of hazardous and inherently dangerous industries in cities, towns and urban areas with their locations for public information with particulars of the steps taken by the authority for abatement of pollution. This statutory duty ought to have been incorporated in the Acts to grow public interest and public information so that in the event of failure of discharging statutory duties, the people may take appropriate action both against authority and industry. The Board is inactive, inefficient, powerless and incapable of dealing with the situations. Inadequate power has been conferred upon the Board. This helpless condition of the Board has been nakedly exposed in Court decisions:

In Rabin Mukherjee v. State of West Bengal the Calcutta High Court considered the impact of noisy horn on

84. AIR 1985 (Calcutta) 222.
the human system. The Court observed that in the congested State of West Bengal, sudden blowing of electric and air horn instead of bulb horn as prescribed under the Bengal Motor Vehicles Rules, 1940 produced rude shock in the human system and serious effects in various aspects of human life including blood pressure, mental and nervous system. The question arose in a writ application filed by the petitioners in a public interest litigation, who suffered due to nuisance and noise pollution created by the indiscriminate use of electric and artificially generated air horn by the transport operators. The unduly rash shrill, loud and alarming noise caused inconvenience to the weak, infirm and indisposed persons. Further it posed serious threats to the health of the residents as well as pedestrians. The Court ruled that the State must perform statutory obligations and duty under Section 112 of the Motor Vehicles Act, 1939 to punish persons who contravened the provisions of rule 114(d) of the Bengal Motor Vehicles Rules. The Court lamented the inaction of the Government in not punishing the violators of the rules. The Court further observed that the Government should take suitable measure to implement the provision of rule 114(d) and no certificate of fitness should be granted until the eradication of noise pollution. The Court emphasised on the serious multifaced and interrelated effects of noise pollution.
In the particular case we find that the effective law is there in the statute book but the law enforcing agency is too crippled to execute the law in its true perspective for public good. The Government employees, nowadays, are more akin to politics than to discharge their statutory duties. The ministers, for their own political gain, do not gear up the law enforcing machinery to make the employees loyal to the duties entrusted to them by the statute. The cancerous disease is contagious from the ministers down to the office peons. The administrative officers are purposely made non- efficacious and cipher. The administrative officers can no longer control their subordinate staffs, rather the subordinate staffs, invariably union leaders, control the administrative Officers. If we visit any of the Government hospitals in West Bengal, we will find how polluted the hospitals are. The Doctors, Superintendent or the Directors have got nothing to do. The hospitals are controlled by the Class IV staffs. When democratically elected Government fails to discharge its minimum duties in keeping hospital pollution free, how can we expect that they will make the country pollution free? This is the tragedy of the Government and its corrupt administration.

In M.C. Mehta v. Union of India & Others S.S. Venkataramiah and K.N. Singh JJ observed "that the effluent

85. AIR 1988(S.C) 1037."
discharged from a tannery is ten times noxious when compared with the domestic sewage water which flows into the river from any urban area on its banks." It was further observed,"the financial capacity of the tanneries should be considered as irrelevant while requiring them to establish primary treatment plants. Just like an industry which cannot pay minimum wages to its workers cannot be allowed to exist, a tannery which cannot set up a primary treatment plant cannot be permitted to continue to be in existence for the adverse effect on the public at large which is likely to ensue by the discharging of the trade effluents from the tannery to the river Ganga would be immense and it will outweigh any inconvenience that may be caused to the management and the labour employed by it on account of its closure."

The principle laid down in the judgment is that any industry which is incapable of setting up a primary treatment plant or pollution abatement plant cannot be permitted to continue to be in existence for the adverse effect on the public. But the Pollution Control Acts have not empowered the State or the Central Board to shut out or close the recalcitrant polluting industries who have acted in utter violation of the Acts, rules and guidelines.

In M.C. Mehta v. Union of India E.S. Venkataramiahand K.N. Sigh JJ. observed that although Parliament and 87

87. AIR 1988(S.C) 1115.
the State legislature have enacted many laws imposing duties on the Central and State Boards and the Municipalities for prevention and control of pollution of water, many of those provisions have just remained on paper without any adequate action being taken pursuant thereto. On account of failure of authorities to obey the statutory duties several years, the water in the river Ganga at Kanpur has become so much polluted that it can no longer be used by the people either for drinking or for bathing. The Nagar Mahapalika of Kanpur has to bear the major responsibility for the pollution of the river near Kanpore city.

The author of this thesis agrees with the decision. The judgment is pragmatic and its reasonings are based on sound principles of law.

In M/S Chhatrigraph Hydred Lime Industries v. Special Area Development Authority, Bilashpur and Others, the High Court held that the relief would not be granted to the petitioner. The High Court further held that rule of promissory estoppel does not apply in the instant case. By preventing the petitioner from further polluting the area, public interest is being served in preference to individual interest and, as such, there is no question of any discrimination.

BHOPAL GAS TRAGEDY AND THE LAW:

The U.N. Centre on Multinational Corporation in a recent report estimated that there were about 11,000 MNCS with more than 82,000 foreign subsidiaries and affiliates;

88. AIR 1989 (M.P) 82.
21,000 of these foreign units were located in the most backward countries; thirty-six percent had parent firms in the U.S., twenty-seven percent were from Britain, seven percent from France and six percent from West Germany and Japan.

All over the world, there is a list of 500 Fortunate Multinational Corporations. The place of the Union Carbide in the said Fortune List is thirty-seventh and in 1985 thirtyninth. It had sales of $9 billion and assets of $10.3 billion in 1983. It is one of the powerful MNCS. It is governed by its own rules and it often defies the Lex Loci. The Corporation had 700 units. The Union Carbide has a long history in industrial accidents. In April, 1986, the Carbide was fined $1.4 million by the U.S. Occupational Safety and Health Administration for 221 violations of fifty-five Federal Health and Safety Laws. It experienced industrial disaster in 1930 when workers of a subsidiary known as the New Kanawah Power Company constructing a hydro-electric tunnel in West Virginia, were affected by the work they undertook to do. The workers were cutting through silica. Dust from silica causes silicosis, a lung disease that can be fatal. This information was withheld and concealed to the workers. As a result of this work 476 workers eventually died of silicosis. It is the worst industrial tragedy in the United States.


Discussed by Sanjay Hazarika in his book Bhopal at Page 54.
Union Carbide had tested one of the best selling pesticides Aldicarb, on human volunteers in Panama. It submitted its unpublished report to the W.H.O. In 1976, Vinyl-chloride workers at a Carbide plant in South Charleston accounted for six cases out of a world wide total of sixty-three of a rare cancer associated with the chemical. Workers filed for compensation against the Company. Carbide uses methyl-isocyanate as well as several other compounds including Aldicarb Oxime to make Temik. Temik has been found in ground water in several American States. In 1978, Union Carbide withdrew a catalyst used in the manufacture of Polyurethane foam from the American markets after more than 100 workers handling the substance began experiencing bladder paralysis. In 1979 Carbide's health director at Djakarta, Indonesia, quit her post over wilful violations by the Company of safety procedures. The official observed that workers were suffering from kidney disease and breathing troubles.

Union Carbide established its business in British India in 1905. This business was confined to battery

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assembly factory at Calcutta till 1924. The Company was named Union Carbide India Ltd.

It is presumed that all the biodata of the Company were known to the Central Government and the State Government of Madhya Pradesh. But the Central Government without being assured as to the satisfactory procedures for safety and security of its workers as well as neighbouring people and without an agreement as to the mode and amount of compensation to be paid by the Company to the affected workers or neighbouring people and without setting out the jurisdiction of the claim case both in USA, its Head Office as well as in India, sanctioned and approved the plant and eventually granted licence to the Company. Accordingly, the plant was started in 1964 on a five acre plot in a region identified as an industrial area. In 1970 the Company obtained permission to manufacture methyl-isocyanate. The approval came on 31st October, 1975 vide Licence No. C/11/409/75 from the Ministry of Industry and Civil Supplies in New Delhi. The Central Government, at the time of granting licence, knew that the lethal gas manufactured by the Company was once used in Germany in the Second World War to kill men.

When the Union Carbide plant was started at Bhopal, its population was just above three lacs. In 1981 its population increased to seven lacs. In 1984 the population of Bhopal went up to nine lacs.
After midnight on 2nd December, 1984 the tank No. 610 containing 43,000 tons of gas leaked. The water sprinkler system had not been built to neutralize the disastrous effect of MIC Gas. Mr. Sanjoy Hazarika described it, "slowly and agonisingly, they began to die, many in their sleep. The city began to cough, to choke and heave, as tens of thousands woke to a suffocating, acrid white yellow mist that swirled in through open windows, and crept under doors into their bed-rooms and kitchens..... Human and animal corpses were scattered in the gutters and lanes of the city."

The world’s biggest industrial tragedy awoke the Central Government and the nation. The Government for a moment, was quite at a loss for it did not know how to cope with the situation, particularly in the recovery of compensation from the Union Carbide. In the meantime, the American Lawyers and Attorney experienced in pollution cases began to visit Bhopal and Delhi and through their agents collected huge numbers of applications for compensation addressed to American Court from the Victims. The Sovereign, Socialist, Secular, Republican Union of India acting parens patriae and by an Act of Parliament took upon itself to sue the Union Carbide for recovery of compensation for wantonly causing a mass disaster in a developing society. There was no precedent in India with regard to the nature of the case but at least there were two precedents in the U.S. Courts. Both the cases were decided in 1980s, one of them involved the payment of $2,000 million to former American Servicemen in Vietnam who
had been injured by exposure to Agent Orange, devastating defoliant. The money was paid out by the manufacturer because the judge ruled that the Company owed product liability for causing the injuries. The second was in 1982, where a Judge in California ruled that A.H. Robins, the manufacturer of an intrauterine device known as the Dalkin Shield, which had proved ineffective in numerous cases, should pay $38 million in compensation to scores of litigants. He said that prosecutors had proved the liability of the company in manufacturing an unsafe device—many women complained of physical problems after using the device—and the Dalkin Shield was taken off the market.

Another hurdle that stood in the way of filing cases in India was that the Indian courts did not impose strict liability on the company for disastrous effects on human lives, properties and animals whereas the American courts imposed strict liability on such cases. The Indian courts allow action on proof of negligence. There is a sharp difference of the amount of compensation between two countries. The American courts allow a good amount of compensation in such cases.

Considering all those points together, the Government of India was advised to sue the Union Carbide in U.S. Court. The Union of India filed suit against the Union Carbide in the U.S. District Court, Southern District of

New York on April 8, 1986 claiming $150 billion U.S. dollars. In the meantime, about 3500 victims filed cases in Bhopal. The Union Carbide having appeared in the action through their attorneys Kelley Drye & Warren filed a memorandum of law in support of Union Carbide Corporation's motion to dismiss the actions on the grounds of "FORUM NON CONVENIENS."

The doctrine of forum non conveniens, in the words of Justice Jackson, "is designed to assist a court" to resist imposition upon its jurisdiction even when jurisdiction is authorised by the letter of a general venue statute. When a plaintiff has a choice of Courts, he is sometimes under a temptation to report to a strategy of forcing the trial at a most inconvenient place for an adversary even at some inconvenience to himself, such a plaintiff no doubt seeks justice but justice blended with some harassment. The American Supreme Court observed that the doctrine logically, "presupposes at least two forums in which the defendant is amenable to process, the doctrine furnishes criteria of choice between them." But the Court also observed in that case that "unless the balance of

convenience is strongly in favour of the defendant, the plaintiff's choice of forum should rarely be disturbed." The Indian case on forum non conveniens rests, in the final analysis, on the community of interest between the United States and India and indeed all nations of the World as has been recognised by the U.N. system in instruments like Codes on transfer of technology, Codes for multi-nationals, and the declarations of New International Economic Order. The community of interest rests on the axiomatic premise that failure to subject multi-nationals, even in the wake of mass disasters in the discipline of the law and the command of justice is a failure which will jeopardize all that we mean by human civilization and culture.

Keenan J. delivered his verdict on the doctrine of forum non-conveniens on 12th May 1986. The Court held, "No American interest in the outcome of this litigation outweighs the interest in India in applying Indian Law and Indian values to the task of resolving this case." Referring to Indian arguments for a trial in the United States, because the Courts were not capable of conducting the cases arising out of Bhopal, Judge Keenan said this was not sustained by any evidence presented by the Government. He paid tribute to the Indian system, saying it was not right for an American Court to return the litigation. This would amount to imperialism. The Union of

96. Indian Law Institute : Mass Disasters and Multinational Liability : Introduction P XI.
India is a World power in 1986 and its Courts have the proven capacity to mete out fair and equal justice. He upheld the Carbide plea on the choice of forum saying that India was the best place for the trial because of the presence of witnesses and documentary evidence. The Judge observed that Palkhivala and J.B. Dadachauji, another Supreme Court lawyer and Union Carbide counsel in India had presented persuasive evidence on the efficacy of the Indian system. But the Judge imposed three conditions on Union Carbide. If the Union Carbide refused to accept the said conditions, the case would remain in the United States. The conditions are:

1. Union Carbide shall consent to submit to the jurisdiction of the Courts of India and shall continue to waive defence based upon the statute of limitations.

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

3. Union Carbide shall be subject to discovery under the model of the United States Federal rules and Civil Procedure after appropriate demand by the plaintiffs.

In July, 1986 Union Carbide preferred appeal before the U.S. Court of Appeals for the Second Circuit in
New York against the conditions imposed in them by Keenan J. Union Carbide was making an important point in its appeal by allowing the Union of India to the use of American discovery procedure, it said, "Judge Keenan was being unfair for he had not given the same facilities to the Corporation." The Government's offer to allow partial inspection of documents in its possession was seen as inadequate. The Carbide won positive ruling in early 1987 on the issue although the Court of Appeals reaffirmed the decision to send the case back to India. Union of India preferred appeal to the U.S. Supreme Court. But India lost the Second Appeal.

All the cases came back to India. All the pending cases at Bhopal together with cases which came back from the United States were before the Court of G.S. Patel, Judge. Here the Union of India laid its demand for compensation to a minimum sum of $3.1 billion to the 2,850 who had died and those still suffering long term effects of the gas. In mid November, 1985 upon an application of the Union of India, Patel Judge, by an order, restrained the Union Carbide temporarily from selling its property and rebuying debentures related to its plan to liquidate debts incurred in the GAF take over bid.

The Special Court Bhopal awarded interim compensation of Rs. 250 crores to be payable by the Union Carbide. The Union Carbide being aggrieved at and dissatisfied with this offer filed a revisional application before the Madhya Pradesh
High Court on the ground of jurisdiction. Madhya Pradesh High Court while rejecting the plea of lacking jurisdiction reduced the amount of interim compensation from Rupees 350 crores to 250 crores. UCC moved the Supreme Court of India and the Union of India also preferred cross objection to the Supreme Court. The matter came up for hearing before a Constitution Bench of the Supreme Court, Pathak CJ made a proposal to the parties to the action to pay $470 million to the Union of India in full and final settlement of all claims. UCC and the Union of India accepted the proposal of the Chief Justice. Thereafter, the Constitution Bench of the Supreme Court vide order dated February 14, 1989 directed the Union Carbide Corporation to pay $470 million to the Union by March, 1989 in full and final settlement of all claims, rights and liabilities arising out of the Bhopal Gas disaster of 1984. The Bench comprising the Chief Justice Mr R.S. Pathak, E.S. Venkataramiah, R.S Mishra, M.N. Venkatachalli and J.D. Ojha JJ also quashed all related criminal proceedings pending in different Courts. The Court observed, "Having considered all the facts and circumstances pleaded before us, including submissions of the parties in those proceedings including pleading of the parties, mass of the data placed before us, material relating to proceedings in the U.S. Court and offers and counter-offers made between the parties during various proceedings, as well as complex issues, laws and facts and in particular, enormity of the human sufferings caused by the Bhopal Gas disasters and the pressing urgency to provide substantial and immediate relief to the victims, we consider
the case predominantly fit for overall settlement, covering all litigations of claims and rights and liabilities arising out of the disaster and accordingly held it just suitable and reasonable to order and we do so order." The company has duly complied with the order of the Supreme Court. However, the judgement of the Supreme Court was resented by the voluntary organisations who have worked among the Bhopal Gas holocaust victims for more than four years. It is most respectfully submitted that the Supreme Court had no jurisdiction to quash the criminal cases pending in the Courts of the Magistrates. The criminal cases were not before the Supreme Court for adjudication thereon. The doctrine "justice according to law" was not followed, hence the quashing order produced not only injustice but had crippled the criminal administration of justice.

The close analysis of the Supreme Court verdict shows the following short-comings and new aspect of law:

I. The amount of compensation, in consideration of the UCC's callous administration in handling the killer gas causing three thousand deaths and 40,000 permanently disabled according to government estimate, cannot be said to be deterrent award. In such cases the award must have been deterrent and at least it must have been in accordance with the rules of motor accident cases.

II. The rate of compensation is at par with the railway accident compensation. This rate, in consideration of the world's worst industrial disaster, ought to be at least Rs 2,00,000/- per head.

III. The Government liability to pay the balance compensation to the victims and affected people is still open. The Government being licensing authority is not absolved of its vicarious liability to the victims and the affected people.

IV. The tort law has been replaced by the Constitutional law. This is a new jurisprudence to deal with tort cases with reference to Art. 21 of the Constitution.

V. It nakedly points out the failure of the legislative responsibility to enact tort law, fixing rate of compensation in industrial disaster or pollution disaster.

**REMEDIES**

The environmental law as it is widely known today in the common law world is the amalgamation of common law and statutory principles. Before the statutory laws came into being, the pollution cases used to be governed by common laws and common law remedies were available. In fact, in spite of progress in positive law, particularly public law, proper remedies are still lacking. On account of such lacking,
the common law remedies still hold the field. These remedies are damages, mandatory and perpetual injunction. Mostly principles relating to public nuisance are applicable in determining the polluter's liability. Another important inroad is fixing strict liability in the case of pollution. In common law, pollution cases are divided into four categories viz. nuisance, trespass, negligence and strict liability. R.N.D. Hamilton says that the substantive law for the protection of the citizens' environment is basically of common law. But there having a difference in the definition of nuisance and pollution, difficulty often arises in employing the principles of nuisance for an effective remedy against environmental pollution. In Durga Prosad v. State, the Rajasthan High Court defines nuisance as "Nuisance ordinarily means anything which annoys or hurt or that which is offensive." The Cantonment Act, 1924; Sec. 2 defines as "Nuisance includes any act, omission, injury, damage, annoyance or offence to the sense of sight, smell hearing or which is or may be dangerous to life or injurious to health or property." The nuisance is a direct infringement of one's right to property. The act is not wrongful in itself but the result which infringes the right of another is the subject matter of tort. But in pollution the act of pollution


99. AIR 1962 (Raj.) P. 92.
is the subject. According to 1966 Helsinki Rules of the International Law Associations; injury to the environment irrespective of the effects on subsequent users is pollution. Any introduction of substance or energy that may cause the changes in the water quality or composition rather than limiting itself is pollution. On account of this wide difference between nuisance and pollution, both adjective and substantive law in dealing with pollution cases ought to be different. For instance, in the case of a nuisance, the onus is on the plaintiff to prove that he has suffered injury on account of the act of negligence or act of nuisance of the defendant. In Hagy v. 

Allied Chemical and Dye. Mrs. Hagy sued the defendant for damages to her larynx when she and her husband drove through smog which, she alleged, to have contained injurious sulphuric acid components, negligently emitted from the defendant’s plant. The defendant asserted before the Appellate Court that as a matter of law the evidence was insufficient to permit the jury to find causal connection between the smog and Mrs. Hagy's condition. The Court affirmed the verdict of the Court below on the ground that the burden was rather upon the appellants to convince the jury that the operation would have been ultimately necessary, in any event, even though the cancerous larynx had not been traumatized by the irration of the smog. In Suke v. North

Western Ice and Cold Storage Company, it is alleged that the water tank maintained by the defendant burst and dropped a large quantity of water upon the plaintiff's adjoining land and caused personal injury to the plaintiff. Here the Oregon Supreme Court did not adopt the so-called Ryland's doctrine. The Court adopted the pure and simple rule of negligence with the best of ordinary due care and gave the plaintiff the benefit and evidentiary aid of the so-called res ipsa loquitur that the instrument, which caused the injury was in the exclusive possession and control of the defendant. The decisions are correct. The rule of evidence according to the Anglo-Saxon jurisprudence should not apply in the case of pollution. The burden of proof should shift to the defendant to prove his innocence.

But in the case of pollution, upon a mere apprehension of public health, animals and properties being affected by the polluting acts in breach of statutory duties, the court may pass an order of injunctive injunction restraining the defendant from doing certain acts amounting to pollution or may pass an order of mandatory injunction directing the defendant to do certain acts for prevention of future pollution.

101. 166 Or. 557; 113 P. 2d. 209.
There is another significant difference between the two which is, that, in the case of pollution, the law of tort in the branch of nuisance is being replaced by the Constitutional Law.

In India, so far as the standing is concerned, public nuisance action can be brought either by a civil suit or by a criminal action. Sec 91 of the Code of Civil Procedure, 1908 ensures the right of action for public nuisance. The procedure for removal of a public nuisance is laid down in Sections 138-143 of the Code of Criminal Procedure, 1973. In England, all civil proceedings brought in respect of public nuisance other than a private action by an individual, who or a public or local authority which has suffered particular damage or an action brought by a local authority in its own name to protect the inhabitants of its area must be brought with the sanction and in the name of the Attorney General. A private individual or a public authority may bring a private action on public nuisance in his or in its own name when and only when he or it can show that it has suffered some particular foreseeable and substantial damages over and above that sustained by the public at large or, when the interference with such public right involves a violation of some private right of his or its own. The same rule is applicable in pollution cases in the United Kingdom and in the

United States of America. But in India the rule of standing in dealing with public nuisance and pollution has been liberalized by the new doctrine of the PUBLIC INTEREST LITIGATION (PIL) propounded by the activist Judges of the Supreme Court of India. In America, Public Law Litigation was attempted to be introduced in the legal arena. But the U.S. Supreme Court has rejected the PLL model by limiting litigation to the traditional private law model, specially on issues of standing, class action and relief. In 1976 Abraham Chayas, a distinguished Harvard Law Professor in a published article identifies eight ways in which the law of litigation differs fundamentally from traditional Private Law Litigation.

I. The scope of the law suits is not limited by a specific historical event, such as, a breach of contract or personal injury, but is consciously shaped by the courts and the parties.

II. The party structure is not limited to individual adversaries but is sprawling and amorphous.

III. The fact inquiry is not a simple investigation of past historical events but rather resembles the kind of inquiry into current problems undertaken by legislative bodies.

IV. Relief is not limited to compensation for a past wrong; instead it is often prospective, flexible and remedial having broad impact on many persons not party to the lawsuit.

V. The relief is often negotiated by the parties rather than imposed by the court.

VI. The judgment does not end the court's involvement but requires a continuing administrative judicial role.

VII. The Judge is not passive but takes an active role in organizing and shaping the litigation.

VIII. The subject matter of the lawsuit is not a private dispute but rather a grievance about public policy."

But inspite of social pressure in America in favour of PLL, the American Supreme Court did not stoop down to such social pressure, rather, it clung to the traditional standing of civil litigation. In *Sierra Club v. Morton* 104 405 U.S. 734-35 (1972).
the Court dismissed the action because the Sierra Club was unable to demonstrate the injury which would have been done to its members by a proposed development of a secluded mountain site. The American standing is based on two distinctly separate issues viz. (i) whether the petitioner is sufficiently motivated to present a good case to the Court, and (ii) whether there is an injury that requires judicial redress.

The Indian PIL is the innovation of the activist Judges of the applied jurisprudence in India. It has paved the way for a new legal thought, new legal order, new jurisprudence of standing. It is everything new. In *S.P. Gupta v. Union of India*, the Supreme Court of India, having rejected the standing rule of the Anglo-American Jurisprudence, has formulated that any member of the public to seek judicial redress for a legal wrong caused to a person or a determinate class of persons who by reason of poverty, helplessness or disability or socially or economically disadvantaged position is unable to approach the Court directly, may inform the court even by a postcard to vindicate the grievances. The postcard may be treated as an application either under Art. 226 or 32 of the Constitution of India. This new doctrine has not only expanded the role of the court and standing rule but also

107. AIR 1982, (SC.) P 149 at P. 188.
the technicality and formality of the forms of application, time including procedures have been liberalised to a great extent. In course of time the liberalised standing rule originated in Hussainara Khatoon v. State of Behar and formulated in concrete shape in S.P. Gupta v. Union of India, and it has further been relaxed to citizens standing in Lakshmi Kant Pandey v. Union of India, Rural Litigation and Entitlement Kendra, Dehra Dun v. State of U.P. M.C. Mehta v. Union of India. In these cases the petitioners did not represent the determinate group of persons suffering from poverty or social oppression but in these cases the petitioners categorically raised claims shared by the public generally. This relaxed standing rule on public interest litigation can be effectively and successfully applied to the case falling on consumer and environment issues. In S.P. Gupta's case the court observed,

"But if no specific legal injury is caused to a person or to a determinate class or group of persons by the act or omission of the State or any public authority and the injury is caused only to public interest, the

108. AIR 1979(S.C) 1360.
109. AIR 1982(S.C) 149 at 186.
110. AIR 1984(S.C) 469.
111. AIR 1985(S.C) 652.
112. AIR 1987(S.C) 965.
question arises as to who can maintain an action for vindicating the rule of law and setting aside the unlawful action of enforcing the performance of the public duty. If no one can maintain an action for redress of such a public wrong or public injury, it would be disastrous for the rule of law, for it would be open to the state or a public authority to act such impunity beyond the scope of its power or in breach of a public duty owed by it."

The Supreme Court of India has termed the PIL as non-adversial litigation which is different from adversary litigation in traditional rule. In *People's Union for Democratic Rights v. Union of India*, the Supreme Court observed: "We wish to point out with all the emphasis at our command that public interest litigation is totally different kind of litigation from the ordinary traditional litigation which is essentially of an adversary character where there is a dispute between two litigating parties, one making claim or seeking relief against the other and that other opposing such claims or resisting such relief."

Mr. Clerk D. Cunningham has correctly stated that PIL may be considered to be collaborative and investigative litigations; collaborative in this sense that the court is required to take three different functions viz. embassador, forum and mediator. In *AIR 1982(S.C) 1483* at 1476.
114. Kannanaikal v. State of Behar, a case of shocking communal violence against a rural harijan community which the police had ignored came up for hearing in the Supreme Court through a writ petition. The disputes were resolved, both interim and long term reliefs in the nature of re-allocation and rehabilitation to the victims were granted by the Supreme Court in direct assistance and collaboration of the respondent State. Sheela Barse, a journalist brought a public interest litigation on custodial violence to woman in Bombay Central Jail. The State of Maharashtra through its Advocates rendered substantial assistance to the Court to lay down the guidelines. In the Nulakapatta People's struggle for safe environment, we witnessed a struggle between villagers in Andhra Pradesh and a big contractor over a quarry operation. Under the direction of the Court, the State Government ultimately revoked the quarrying licence.

In the adversarial litigation the court always takes passive role. The plaintiff must prove his case and get the decree. The court has no duty in the matter of proving the case. But in PIL the court takes active role in investigating the facts. That is why the second procedure of

the PIL is called investigative litigation. So far as this
new procedure is concerned, justice P. N. Bhagwati in Bandhua
Mukti Morcha v. Union of India observed:

"Where one of the parties to a litigation
belongs to a poor and deprived section of the community and
does not possess adequate social and material resources, he
is bound to be at a disadvantage against a strong and power-
ful opponent under the adversary system of justice, because
of his difficulty in getting competent legal representation
and more than anything else, his inability to produce relevant
evidence before the court. Therefore, when the poor come before
the court particularly for enforcement of their fundamental
rights, it is necessary to depart from the adversial procedure
and to evolve a new procedure which will make it possible for
the poor and the weak to bring the necessary material before
the court for the purpose of securing enforcement of their Fund-
damental Rights."

In adversary litigation it is impossible
for the plaintiff to prove acts of pollution and its effect
on human beings, animals and property. Firstly, it will entail
heavy costs for appointment of a highly technical and scienti-
fic commission to ascertain the magnitude of the effect of
pollution, make suggestion of the remedial relief and monitor
its implementation. The ordinary litigant is unable to bear

117. AIR 1984 (S.C.) 802.
such costs; secondly, the commission matter may consume considerable time and it is always subject to rejection on the objection of the defendant. But in a litigation of pollution, it is impossible for the court to decree the suit without the expert's direct assistance. The new inquisitorial procedure adopted in PIL for investigating the facts often by non-legal scientific and technical experts is significantly unique in its nature and procedure. In *Sri Ram Fertilizer Gas Leak case, Rural Litigation and Entitlement Kendra, Dehra Dun case*, *Ban Kumar Misra v. State of Bihar*, *M.C. Mehta v. Union of India*, the court appointed experts Commission. But it appears that the court, in PIL, does not resolve the disputed facts and as such the court acts upon the report of such Commission which is not disputed by the parties in litigation. However, this is really a weighty and effective weapon in the hands of the courts to resolve disputes between the parties.

But in-spite of effectiveness in Public Interest Litigation as discussed above the court often fails to connect *nexus* rights and remedies. This failure on the part of the court often makes the judgment illusory and a mockery. When the fundamental rights of the people are violated or when emission of effluent substance affects health of human being or animals, a social worker moves the

118. AIR 1984 (S.C) 537.
court for vindicating the grievances. The grievances are not that the affected people have got the fundamental rights but the remedies for invasion on fundamental rights. In PIL the court mostly declares fundamental rights of the aggrieved people without giving them any remedial reliefs. The direction of the court to the Government or authority or industry is short of a decree and as such it cannot be executed. But at the same time, in pollution cases, we find that the court has given proper reliefs. For example in R.L.S. Kendra Dehra Dun case the court stopped functioning of lime stone quarries. In Shriram's case the court not only directed to pay compensation to the victim but delivered an effective decision as to fund the chemical factories subject to strict observance of the expert Committee's direction. Thus the only hindrance i.e. the lack of cohesion or harmonization between rights and remedies. If the court is inclined to award remedies in case of invasion to socially and constitutionally recognised right, the PIL will be the best effective remedial weapon against pollution. The remedies available in pollution cases are:

I. Declaration;

II. Injunction;

III. Mandatory Injunction directing a party to perform statutory obligation/duty.

IV. Closure of industries;
V. Damages.

All these reliefs can be had from PIL. Since PIL is the creature of the judiciary and is based on Constitutional jurisprudence, it is not extended to civil courts. So far as the civil court is concerned it is still governed by Section 91 and Order 1, Rule 8 XXXX of the Code of Civil Procedure. It would be better if the doctrine of PIL is extended to Civil Courts.

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