Chapter-7

JUDICIAL APPROACH TO CONTROL THE PROBLEM OF AIR POLLUTION

An independent non-political judiciary is crucial to the sustenance our democratic form of government. The vitality of the democratic process, noble ideals of justice, liberty and equality in the constitutional edifice, as well as the rule of law are all dependent on the tone of the judiciary. Democracy signifies a government of the people, by the people and for the people, and the noble ideals should be easily accessible to all its members if a government claims to be truly democratic.

The Constitution of India honours separation of powers between the Legislative, Executive and the Judiciary and no organ is allowed to assume powers, which essentially belongs to other. But a strict and rigid separation of powers is not feasible and as such an interface is acceptable and pre-envisagedly provided for in exceptional areas.

The main and prior function of the judiciary is to deliver justice to all without fear or favour. The courts are intermediary between people and other organs of the State. It has powers to scrutinize legislations and administrative actions on the anvil of the Constitution and the law, in matters brought before it for adjudication or reference. This is termed as the Court's power of judicial review and has been proclaimed to be a basic feature of the Constitution.[1]

The Indian Judiciary has adopted an activist goal-oriented approach in the matter of interpretation of fundamental right. The judiciary has expanded the frontiers of fundamental rights and in the process rewritten some parts of

[1] *L. Chandra Kumar* v. *Union of India*, AIR 1997 SC 1125, See also K. Ramaswami J. in *S.R.Bommai* v. *Union of India*, AIR 1994 SC 1918.

the Constitution through a variety of techniques of judicial activism.[2] In this process the Supreme Court held that Article 21 include in its sweep a right to clean environment and that the permanent assets of the mankind cannot be allowed to be exhausted in our generation.

The Supreme Court and High Courts in each States are in the apex of the judicial reform and have made immense contributions towards the development of various concepts of environmental jurisprudence. A study on the problem of air pollution would remain incomplete if the judicial activism and the judicial reforms to control air pollution is not understood clearly. The judiciary has dug out every legislative measures scattered in our statute books and put the gloss of all the principles and doctrine from National and International concepts and amalgamated those to develop environmental law rapidly to meet the need of the country. The pace of the development of law to control air pollution was slow prior to the Bhopal gas disaster and oleum gas leakage. The law during this period and judicial approach shows that prior to the enactment of Air (Prevention and Control of Pollution) Act 1981.

Most of the cases brought before the court deal with the problem of air pollution by giving common law remedies. The reliefs were penal or civil depending on the nature of the case, i.e. whether it related to negligence, public nuisance, private nuisance or strict liable. The cases relating to these offences have been discussed under the chapter common law principles. The remedies given in civil matters were damages, injunction, interim orders, declaration and decrees. Only air pollution causing public nuisance came under the purview of Penal provisions under sections 268 to 294A of the Indian Penal Code and under section 133 of the Criminal Procedure Code.

The provision of the Criminal Procedure code was applied to abate nuisance through judicial activism. In the case of *Govind Singh* v. *Shanti Swarup*[3], the Supreme Court of India while upholding the Magistrates observations rightly remarked that: We are of the opinion that in the matter of

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[2] See Hon' Justice P.N.Bhagwati, "Enforcement of Fundamental Rights: Role of the Courts", Indian Bar Review, Vol 24 (1 & 2) 1997, p.19.
[3] AIR 1979 SC *

this nature (Public nuisance) where what is involved is not merely a right of the private individual but the health, safety and convenience of public at large, the safer course should be to accept the view of the learned Magistrate, who saw for himself the hazard resulting from the working of bakery.

Municipal Council, Ratlam v. *Shri Vardhichand*[4] and other cases like *Krishna Gopal,* followed this case. The Supreme Court and the High Courts have used section 133 of Code of Criminal Procedure as a potent weapon to abate pollution.

The legislature often fails to keep pace with the changing need and values nor is it realistic to expect that it will have provided for all contingencies and eventualities. It is therefore, not only necessary but also obligatory on the court to step into fill the lacuna. When courts perform this function undoubtedly they legislate judicially. But that is a kind of legislation delegated to them to further the object of the legislation and to promote the goals of the society or to put it negatively, to prevent the frustration of the or perversion of the goals and values of the society. So long as the courts keep themselves bothered to the ethos of the society and do not travel off its course, their role in this respect has to be welcomed. The oleum gas leak case[5] and the Bhopal gas[6] tragedy are the burning example of such a situation.

7.1. **Evolution of Absolute Liability Rule**

The Supreme Court evolved the Absolute liability rule in *M.C.Mehta* v. *Union of India.*[5] In this case, the liability stricter than that of the rule in *Rylands* v. *Fletcher* emerged. On 4th and 5th December, 1985 oleum gas leaked from one of the units of Delhi Cloth Mills Ltd. called, Shriram Food and Fertilizer Industries located in thickly populated area of Delhi and allegedly affected large number of people and one advocate practicing in the Tis Hazari Court died on account of inhalation of Oleum gas. The matter was brought before the Supreme Court through Public Interest Litigation and raised some seminal

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[4] AIR 1981 SC 1622.
[5] AIR 1987 SC 965 ; (1987) 1 SCC 395.
[6] *Union Carbide Corporation* v. *Union of India,* AIR 1990 SC 273 ; *Union Carbide Corporation* v. *Union of India,* AIR 1992 SC 248.

questions concerning the true scope and ambit of Articles 21 and 32 and sections 2(2) and 23 of Air (Prevention and Control of Pollution) Act, 1981.

P.N.Bhagwati, C.J., who delivered the judgment observed:-

"It is undoubtedly true that chlorine gas is dangerous to the life and health of the community and if it escapes either from the storage tanks or from the filled cylinders or from any other point in the course of production, it is likely to affect the health and well-being of the workmen and the people living in the vicinity." Regarding quantity of chlorine available in air which may pose health problem he remarks "....chlorine is a hazardous gas and though smaller concentrations of chlorine in the air may cause only irritation and coughing larger concentrations, whether above 25 parts per million (PPM) or above 40 parts per million are likely to cause serious danger to life.... There can be no doubt that there would hazard to the life and health of the community, if there is escape of chlorine gas from the caustic chlorine plant".

But in order to balance the development and the fundamental right enshrined in Article 21 of the Constitution, the Court said:-

"We cannot ignore the interest of the workmen while deciding this delicate and complex question. It could not be disputed... that the effect of permanently closing down the caustic chlorine plant would be to throw about 4,000 workmen out of the employment and that such closure would lead to their utter impoverishment".

The court found that unit complying all the provisions contained in Section 2(b), 19(1), 21 and 23(b) of Air Act, allowed the industry to function.

Referring to the escape of this poisonous gas, the Supreme Court held that the principle evolved in nineteenth century in the *Rylands* case was inadequate to meet the needs of a modern scientific world with hazardous and dangerous activity becoming very common and hence laid down the new rule, where an enterprise is engaged in a hazardous or inherently dangerous activity and harm results to any one on account of an accident or in the operation of such hazardous or inherently dangerous activity resulting for example, 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 tortuous principle of strict liability under the rule in *Rylands* v. *Fletcher*.

This rule was approved in *Charan Lal Sahu* v. *Union of India*[7] where the court pointed out that this rule is 'absolute and non-delegable' and the enterprise cannot escape liability by showing that it had taken reasonable care and there was no negligence on its part. The Supreme Court also explained the basis of this rule as follows:

1. If an enterprise is permitted to carry on an hazardous or inherently dangerous activity for its profit, the law must presume that such permission is conditional on the enterprise absorbing the cost of any accident (including indemnification of all those who suffer harm in the accident) arising on account of such hazardous or inherently dangerous activity as an appropriate item of its over-heads; and
2. The enterprise alone has the resource to discover and guard against hazards or dangers and to provide a warning against potential hazards.

The rule in *M.C.Mehta* v. *Union of India*, will not depend on the non-natural use of land and escape from that land of the defendant, to impose this stricter liability, which were necessary aspects of the rule in *Rylands* v. *Fletcher*. The only specific and significant requirement is that the enterprise must have engaged in hazardous and inherently dangerous activity and the harm should have resulted out of such activity. The rule in the *M.C.Mehta* makes no such distinction between persons within the premises where the enterprise is carried on and persons outside the premises, for the escape of the thing causing harm from premises is not a necessary condition for the applicability of the rule.

Another important distinction between the two rules is regarding the award of damages. Damages available where the rule in *Rylands* v. *Fletcher* applies, will be ordinary or compensatory but in cases where the rule in *M.C.Mehta*

[7] AIR 1990 SC 1480.

applies, the court can allow exemplary damages and the larger and more prosperous the enterprise, the greater must be the amount of compensation payable by it. However, this was considered to be obiter by the Supreme Court in the *Charan Lal Sahu* case, while the same court said that it was not obiter and was appropriate and suited to the conditions prevailing in India, in *Indian Council for Enviro Legal Action* v. *Union of India*[8].

7.1.(i). Judicial Response to The Tragedy In Bhopal

The Bhopal gas leakage is the most tragic industrial disaster which occurred as a result of leakage of Methyl Iso-cyanate(MIC), a highly toxic gas from a plant set-up by the Union Carbide India Limited (UCIL). To understand the magnitude and impact of Bhopal Catastrophe, one should be aware of what happened in Bhopal. Why did the hearts of the judges bleed when calamity like Bhopal disaster occurred?

We would also stand still to learn that the demon of death silently invaded millions of hearts and lungs without knocking the doors during the midnight of 2 and 3 December 1984, in Bhopal. It is not only future generation being deprived of the healthy nature but that an MNC leaked poisonous gas, which was decimating the natural life of the present and future. Over 16,000 children, men and women were laid dead and more than five lakhs were maimed. During maintenance operations in the methyl-iso-cyanide (MIC) plant, a large quantity of water entered one of the storage tanks containing 60 tons of MIC, triggering off a runaway reaction. A deadly cocktail of MIC and other chemicals such as hydrogen cyanide and phosgene was carried by the northerly wind to the neighbouring communities. People woke up with invisible clouds of poison gas, stinging eyes and burning throats. The suffocating gas invaded lungs and created enormous fluids inundating their lives with their own body fluids. Running here and there for life did not save their lives, as the killer gas was all pervading.

[8] AIR 1996 SC 1480.

A small leak at 11.00 pm occurred from an MIC storage tank 610. Workers noticed it but thought it to be a normal and small leak, to the source of which could not be located. The sting of MIC was getting stronger and temperature and pressure were rapidly rising in tank. At around 12.30 am a gigantic hiss came out, a runaway chemical chain reaction, triggered by the entrance of water, and created tremendous heat and pressure. Forty tons of deadly gases burst past the rupture disc, overwhelmed the plant's safety systems, and shot into the atmosphere. Most of the workers fled in panic. Larry Everest narrated: 'Throughout the slums and shanty settlements that surround the Union Carbide plant on three sides, thousands were awakened by the suffocating, burning effects of the gas, the cries of neighbours, the clamor of running, stumbling feet, or by the howls of animals in their death throes. Mothers did not know their children had died. Children didn't know their mothers had died. Men did not know their whole families had died. Anyone who was left alive ran away blindly'.[9] The toxic cloud was so dense and searing that people was reduced to near blindness in their rush through narrow, ill-lit alleys. Some who managed to hang onto life panicked leaving loved ones behind. Families who tried to stay together were often separated momentarily in the blinding gas and then unable to regroup. Soon there was a massive exodus away from the Union Carbide Factory, now a fount of death, a stream of humanity of tens of thousands strong-walking, running, clinging to taxis, trucks, three wheeled autorickshaws or any other means of escape they could find. Bhopal looked like a battle zone in a chemical war. It was littered with the dead lying in alleys, ditches, roadways, or still trapped in their huts, in the contorted positions of sudden death. They lay intermingled with the goats, cows, sheep, and other animals that had also perished. The gas cloud had devastated everything living in its path, even killing plants and turning leaves black. People were just lying on the road like dogs and cats. The survivors wandered among the carnage desperately seeking family and loved ones they

[9] 'India disaster: Chronicle of Nightmare', *New York Times* 10 December 1984 as quoted by Mr Everest.

had lost in the chaotic night. The total number of dead may never be known. People continue to die from the effects of the gas. Estimates of the number severely debilitated, run as high as 60,000. And one can only speculate on what the long-term effects of such a massive exposure to toxins will be. There were mounting incidents of spontaneous abortions and stillbirths. Thousands could not work. All in all it was the worst industrial disaster in history.

The reason for such a great human tragedy and continuing misery is just an irresponsible and callous mismanagement spread over at every MIC plant operation. There was no proper and prompt sealing of the carbide plant. The leak was underestimated to be a routine one. Neither the Union Carbide nor the civic administration could rise up to the occasion and offer effective management of the sudden crisis. The administrative officers ran for safer places instead of doing their duties. There was a total breakdown of the system and machinery. Every one was allowed to die as none was operating the system that collapsed.

There was improper maintenance of the plant as its five-stage security system was prone to failures and contamination. There were serious defects in their design. The Union Carbide Corporation was well aware of the unacceptable state of safety systems and criminally preferred to continue the operations without caring for life, nature and future. The Union Carbide Corporation had every reason to know the possibility of the worst disaster in case of a gas leak.

The Union Carbide Corporation wanted to cut costs to enhance the profits. The cost cutting drive includes pruning the staff, reducing the quality of construction material, shrinking the safety measures and continuing adoption of hazardous operating procedures, as their alternatives are expensive.

It is only when an accident of the magnitude and impact like the Bhopal catastrophe takes place those environmentalists, social workers, the general public and government institutions wake up to a new awareness. Along with launching rehabilitative measures, they start thinking about new ways and means of preventing similar tragedies in the future. This process leads to

legislative and administrative activism. Industrial accidents involving environmental hazards also give rise to judicial concern.

The Union of India on 8 April 1985 in exercise of its powers under section 3 filed a suit in the United States District Court of New York against the Union Carbide Corporation for an estimated $3 billion. Some American lawyers earlier filed suits in different federal courts, which were superseded and consolidated by a suit filed on 28 June 1985. The Union Carbide strongly contended that the Indian government was to blame. The Union Carbide Corporation wanted dismissal of suits on the ground of *forum non conveniens* pointing out that the suits can be more conveniently tried in Indian courts.

On 12 May 1986, JF Keenan J ruled that India and not the US was the appropriate forum for Bhopal compensation litigation. It dismissed the suits on the following grounds:

1. Union Carbide shall consent to submit to the jurisdiction of the courts of India, and shall continue to waive defences based upon the statute of limitations;
2. Union Carbide shall agree to satisfy any judgment rendered by an Indian court, and if applicable, upheld by the appellate courts in that country, where such judgment and affirmance comport with the minimal requirements of due process;
3. Union Carbide shall be subject to discovery under the model of the United States Federal Rules of Civil Procedure after appropriate demand by plaintiffs.

There were appeals and cross appeals to the US court of appeals, which were decided on 14 January 1987, upholding the plea of *forum non conveniens*. In the first pre-trial hearing in the consolidated Bhopal litigation in the US federal courts, John F Keenan, asked Carbide as 'a matter of fundamental human decency' to provide an interim relief payment of $5-10 million. Carbide agreed to provide $5 million for this purpose, provided a satisfactory plan of distribution and accounting of the funds was devised.

After the dismissal of the suits in America, the Union of India filed a suit in the district court of Bhopal. The Supreme Court of India had in the meantime evolved the principle of absolute liability imposing a stricter liability on the enterprise handling hazardous activity, in *M.C.Mehta* v. *Union of India*[10].

On 17 December 1987, Deo J passed a significant order directing Union Carbide to pay Rs 350 crores as interim relief. The order was unprecedented and decidedly controversial. Being an interim order, it could not be decreed. And without a decree the Union Carbide Corporation refused to pay it. The order was challenged before the Madhya Pradesh High Court at Jabalpur on the grounds that the trial judge was not authorized to pass the order under any provisions of the Indian Civil Penal Code. On 4 April, SK Seth J of the High Court upheld the liability of Union Carbide[11] for the Bhopal disaster but reduced the interim compensation to Rs 250 crores and against that order the Union Carbide went for appeal to the Supreme Court. The Supreme Court[12] directed Union Carbide to pay up US $470 million in 'full and final settlement' of all claims, rights and liabilities arising out of the disaster in 1984. The entire suit was ordered to be settled with a view to provide 'immediate and substantial relief to the victims', essentially on the following conditions:

1. The Union Carbide Corporation shall pay a sum of US $ 470 million (approximately 750 crores) to the Union of India in full settlement of all claims, rights and liabilities related to and arising out of the Bhopal Gas disaster;
2. All civil proceedings arising out of the Bhopal Gas disaster shall stand concluded in terms of the settlement and all criminal proceedings related to and arising out of the disaster shall stand quashed wherever these may be pending. Further directions for implementation of the settlement were made on 15 February 1989.

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[10] Supra note No. 5.
[11] *Union Carbide Corporation* v. *Union of India* 1988 MPLJ 540.
[12] *Union Carbide Corporation* v. *Union of India* AIR 1990 SC 273.

The Union Carbide accepted the decision as fair and reasonable. However, the countries as a whole, particularly the victim groups were bewildered. Review petitions were filed on behalf of the victims against the settlement. Review petitions were decided by the Supreme Court on 3 October 1991[13]. By this decision, the settlement was upheld subject to certain modifications as follows:

1. The quashing of the criminal proceedings was set aside.
2. For a period of eight years, facilities for medical surveillance of the population of Bhopal exposed to MIC should be provided by periodical medical check up. For this purpose, a hospital with at least 500 beds strength, with the best of equipment and facilities, should be established. The facilities shall be provided free of cost to the victims for a period of 9 years from now. The state government shall provide suitable land free of cost and Union Carbide Corporation Union Carbide India Limited shall bear the expenses of establishing the hospital maintaining it for a period of eight years.
3. In respect of the population of the affected wards, (including those who filed claims) the Government of India shall take out appropriate medical group insurance cover from the Life Insurance Corporation of India or the General Insurance Corporation of India for compensation to those who, though presently asymtomatic and had filed no claims for compensation, might become symptomatic in future and to those later-born children who might manifest congenital or prenatal MIC related afflictions. There shall be no upper individual monetary limit for the insurance liability. The period of insurance shall be for a period of eight years in future. The number of persons to be covered by this group shall be about one-lakh persons. The premium shall be paid out of the settlement fund.
4. In the event of the settlement fund being found inadequate to meet to compensation, the Union of India will meet the deficiency.

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[13] *Union Carbide Corporation* v. *Union of India* AIR 1992 SC 248.

The government was directed to appoint 40 claim commissioners with necessary staff to start adjudication of the claims under the scheme. It was also directed that in the matter of disbursement of compensation, the guidelines laid down by the Gujarat High Court in the case of *Moolji Bhai Azrambhai Harizan* v. *United India Insurance Company Ltd,*[14] should be followed.

The settlement raised serious controversy all over the nation. Questions were raised on the amount of compensation, which worked out to around Rs 10,000 per victim if it had been divided equally amongst all. In the same year, an article in the Times of India stated that approximately US $ 40,000 was spent on the rehabilitation of every sea otter affected by the Alaska oil spill. Each sea otter was thus given rations of lobsters costing US $ 500 per day. Thus, it was commented that, the life of an Indian citizen in Bhopal was clearly much cheaper than that of a sea otter in America.

However, there was a strong argument in favour of the settlement also. The time to be consumed in hearing appeals until the case is finally disposed of, it was contended that the settlement was reasonable. If every trial had taken its own course, the enforcement of the judgment would become a big practical impossibility. Even if the *Mehta Rule* was strictly applied, only Union Carbide India Limited could have alone become liable and not the Union Carbide Corporation. The Union Carbide India Limited had just Rs 100 crore worth assets in India and so even if a decree in the suit were passed against the Union Carbide Corporation, the proceedings in America for realization of that decree would have become inevitable.[15]

By applying the principle of vicarious liability the state that held shares in Union Carbide, also could have become jointly liable for the damage caused. Considering the possibility of delay and the above facts, the settlement was considered to be useful and satisfactory.

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[14] (1982) (1) 23 Guj LR 756.
[15] Ramaswamy Iyer, *The Law of Torts*, 9th edn., pp.737-739.

7.1.(ii). Constitutional Validity of the Bhopal Act

In order to avoid the multiplicity of parties, the Parliament passed the Bhopal Gas Leak Disaster (Processing and Claims) Act 1985. The Act conferred on the Government of India, the responsibility of suing *parens partriae* on behalf of the victims. The Bhopal litigation which gave the parens patriae jurisdiction was challenged on various grounds in *Charan Lal Sahu* v. *Union of India*[16]. In this case the question arose as to whether the Bhopal Gas Leak Disaster (Processing and Claims) Act 1985 is constitutionally valid? After summing up the events before and after the disaster, the court went on to quote the provisions of the Bhopal Act. The court examined the various contentions of the victims and the government of India. The court observed:

In our opinion, conceptually and jurisprudentially, there is no bar on the State to assume responsibilities analogous to *parens patriae* to discharge the State obligations under the Constitution. What the Central Government had done in the instant case seems to us to be an expression of its sovereign power. This power is plenary and inherent in every sovereign state to do all things, which promote the health, peace, morals, education and good order of the people and tend to increase for the wealth and prosperity of the state.

The court held that the Act is constitutionally valid and that it proceeds on the hypothesis that until the claims of the victims are realized or obtained from the delinquents, namely, Union Carbide Corporation and Union Carbide India Limited by settlement or by adjudication and until the proceedings in respect thereof continue the Central Government must pay interim compensation or maintenance for the victims.

The Bhopal gas leak disaster and its terrible aftermath reveals the urgent need for the government to lay down certain norms and standards to follow before granting such licences or permissions and the government should insist as a condition precedent to the grant of such licences or permissions, creation of a fund in anticipation by the industries to be available for payment of damages out of the said fund in case of leakages or damages in case of accident

[16] AIR 1990 SC 1480.

or disaster flowing from negligent working of such industrial operations or failure to ensure measures preventing such occurrence. The government should also ensure that the parties must agree to abide to pay such damages out of the said damages by procedure separately evolved for computation and payment of damages without exposing the victims or sufferers of the negligent act to the long and delayed procedure. Special procedure must be provided for and the industries must agree as a condition for the grant of licence to abide by such procedure or to abide by statutory arbitration. The basis for damages in case of leakages and accident should also be statutorily fixed taking into consideration the nature of damages inflicted, the consequences thereof and the ability and capacity of the parties to pay.

Charan La! Sahu was heard after the Supreme Court pronounced the compromise judgment of the Supreme Court on Bhopal compensation. No wonder, which the questions relating to the validity of the compromise came up in the case although the court was mainly concerned with the validity of the Bhopal litigation legislation. Significantly, one may notice that the later judgement that reviewed the compromise judgment modified one important aspect. This was the court's reluctance to exclude the criminal liability of Union Carbide Corporation at any cost.

7.1.(iii). The Review Judgement

In *Union Carbide Corporation* v. *Union of India*,[17] the main ground of challenge raised in the petition for review was that the court could not quash all pending proceedings, civil and criminal, and come to a compromise in an appeal against an interim order in a suit.

The court opined that such technicalities do not fall under the preview of the constitutional interpretation as the main matter was being disposed of with the consent of parties in a special leave petition with the goal of doing complete justice under Article 142 of the Constitution of India. The power to do

[17] (1991) 4 SCC 584

complete justice could be exercised with the aid of the principles under the Code of Criminal Procedure, which enables withdrawal of prosecution. The bar against future prosecution neither clothed the Union Carbide Corporation with immunity nor amounted to a stifling of prosecution, but was only a reiteration of the consequences of termination of prosecution, which was a motive, not a consideration, for entering into the agreement. Despite these perspectives, the court found no grounds for justifying withdrawal of prosecutions.

Setting aside the quashing of prosecution, the Supreme Court said that the offences relate to and arise out of a terrible and ghastly tragedy... It is a matter of importance that the offences alleged in the context of a disaster of such gravity and magnitude should not remain uninvestigated.[18]

The court rejected another contention that the giving of a notice, which is essential in a representative suit, was not given and hence the compromise was invalid. It was pointed out that the provision for notice in the Code of Civil Procedure for representative suits should not *proprio vigore* apply to a compromise judgement and that notice of proceedings in the review is enough compliance on the matter.

On the aspect of notice to victims Justice Venkatachaliah referred again to *Charan Lal Sahu* v. *Union of India*[19]. The court said that a settlement without notice to the victims could be valid under the Bhopal Act, provided that the Act was valid. The *Charan Lal Sahu* view was quoted to point out that the urgent need to help the victims would make a post-decisional hearing sufficient and would not result in injustice to the victims.

On the third important issue as to what would be the outcome if the settlement was found inadequate, the Court held that the Union of India, as a welfare state, has the responsibility to make good the deficiency and safeguard the interest of the victims. This is the point on which Justice Ahmedi dissented saying that it is impermissible in law to impose such a burden and thereby saddle the Indian tax payer with the liability, particularly when the Union of

[18] P.Leelakrishnan, *Environmental Law Case Book*, 2004, pp 320-321.
[19] (1990) 1 SCC 613, para 111-124.

India was not found to be a tort feasor. He seems to have even suggested a fresh settlement or trial if the settlement fund was found inadequate.

Medical Surveillance

The Supreme Court ordered the establishment of a full-fledged hospital equipped as a speciality hospital for treatment and research of MIC related afflictions. The court also directed that the state government and capital outlays should give the land and operational expenses should be borne by the Union Carbide Corporation and Union Carbide India Limited.

7.1.(iv). Need for Group Insurance for Prospective Victims

The likelihood of future complications was one of the aspects, which the court took into account. The court was concerned as to how should cases of yet unborn children of mothers exposed to MIC toxicity where the children are found to have or develop congenital defects be taken care of. The court suggested that such contingencies shall be taken care of by obtaining an appropriate medical group insurance cover from the General Insurance Corporation of India or the Life Insurance Corporation of India for compensation to this contingent class of possible prospective victims.

The court also directed the Union of India to obtain appropriate medical group insurance cover to take care of compensation for such prospective victims, for which the premiums were ordered to be paid from the settlement fund. Thus the persons and children born to exposed mothers who may become symptomatic in future were taken care of.

The opinion of the court was influenced by the report of the Scottish Law Commission that it is highly probable that in appropriate circumstances, Common Law would provide a remedy for a plaintiff suffering from a pre-natal injury caused by another's fault.

7.1.(v). Difficulties faced in Mass Disaster

The Bhopal gas disaster raised many issues but many of them remain unanswered. It is still not clear about who must bear the legal responsibility. Initially for the worst industrial catastrophe in history there was the phenomenon of shifting of burden from the company to government and

government to company. Investigations following the Bhopal catastrophe showed that both the government and company went far beyond the mere neglect of elementary safety measures. In an analysis in the British trade publication *Project Management*, a UN expert enumerated 16 factory shortcomings, 13 operational errors, 19 failures in communication and 26 system shortcomings. Many of these were the fault of company management, but many were also government's fault. Some mistakes by the company like, turning off the cooling system supposed to keep the MIC at a temperature of zero degrees Celsius to prevent a reaction, six months before the accident is astonishing.[20] It was also alleged that Carbide plant in Bhopal was operated at an unacceptably low standard, which was known and ignored by the government.[21] Although Government was responsible to some extent, it escaped its liability and brought the suit as exclusive plaintiff in all litigation arising from the disaster.

Leaving aside the question that should be blamed, one would be eager to learn what redressal was provided through judicial and legal activism. The disaster no doubt had many issues involved in its for delivering justice. The main issues were how zealously did the Indian Government pursue the case? Was the compensation awarded to the victims appropriate? Ultimately did the victims of Bhopal disaster receive justice in its true sense?

The individual based compensation scheme was criticized and community based compensation was said to be more beneficial by Kibel and Rosencranz[22]. It was opined that although individual-based compensation scheme may appear as an appropriate, effective and fair response, the scheme possesses many flaws. These flaws render the scheme dysfunctional, and prevent the Indian Government from achieving basic medical, social and justice-related goals. The three primary flaws concern (1) administrative burden and time delay; (2) the susceptibility of claimants to exploitation and

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[20] Shyam Divan, Armin Rosencranz, *Environmental Law and Policy in India*, 2nd edn., p.550.
[21] T.R.Chauhan, *Inside the killer Carbide Plant- A Bhopal Worker's Story*, 1994, see Shyam Divan, Armin Rosencranz, *Environmental Law and Policy in India*, 2nd edn., p.551.
[22] Kibel and Rosencranz, "A blanket spread to thin: Compensation for Bhopal's Victims", Economics and Political Weekly, 2 July 1994, p.1643.

manipulation; and (3) most importantly, the failure to provide for the future of the Bhopal Community and affected unborn generations...

There is an alternative to the flaws, and limitations of individual based distribution scheme 'community based' compensation. The effects of awarding compensation directly to victims was cited primarily to have negative effects, through a survey conducted by Ram Shankar Tiwari[23] and other authors. It was opined that there was a palytic effect on the community's work initiative; people who were self-employed before the disaster had sold off their assets and were living of the money. Intra-family dispute had increased due quarrels over respective shares. There was and increase in divorce and remarriage in order claim greater or multiple compensation awards. Finally there was an alarming trend amongst compensation recipients to spend the money immediately, rather than invest the funds in long term assets. Tiwari and his colleagues suggested that money be distributed in cash only, to the extend needed to pay medical bills, with the rest distributed in the form of insurance policies or government bonds for the victims.

The compensation machinery has also did not provide relief properly. The media reports recount numerous instances of kickbacks paid by victims to government officials, a racket involving counterfeiting of claim documents and even corruption by a compensation judge. The claimants, inability to pay bribe (has often resulted) in denial of compensation.[24] The department of Bhopal Gas Tragedy Relief and Rehabilitation has been frequently in news with condemnatory reports on corruption and inefficiency. In June 2000 the Union Government announced the institution of a high level investigation into expenditures made by the department.

The other main issue was the creation of the Bhopal Hospital Trust. To meet the needs of the gas victims, the Supreme Court, on 3rd October 1991, ordered the Government of India to construct a 500-bed hospital. The cost of the hospital construction was at first extracted from the eventual liquidation of

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[23] Sam Basir, "India-Bhopal: Relief Money May Spark Socioeconomic Crisis", Inter Press Service, 9 December 1994., See Divan, Rosencranz, Environmental Law and Policy in India, 2nd edn. P.559.
[24] The Bhopal Gas Tragedy: A Report from Sambhavna Trust, 15 (1998).

Union Carbide India Limited's shares by the Bhopal District Court when Carbide refused to put up money. Shortly after the Bhopal District Court attached Carbide's UCIL shares, Carbide registered a charitable trust in London to provide medical relief to Bhopal.

An analysis of the above facts gives us the picture of the real scenario of the Bhopal Gas tragedy. The management of the disaster in its entirety might seem to be mismanagement for any observer. Although efforts were made by the legislature and the judiciary to deliver justice, it could not be achieved completely. However, such a disaster has at least made the people aware of chemical disasters, which might occur from industries. The legislative had to wake up and draft many laws to deal with such situation. The Government also has become more conscious and therefore, many policies have been adopted for hazardous industries. The judiciary too have got activated and many steps in a positive direction was taken, like the holding of most trial of safety measures was done, while passing an order for reopening *Sriram*. There have been many principle and doctrines, which have been evolved by the courts. After the Bhopal disaster, a case[25] was filed by Law Society of India before the Kerala High Court to restrain a giant public sector fertilizer company from operating its 10,000-ton ammonia storage tank in Cochin. The petitioners claimed that an accidental leakage of ammonia could devastate the entire city and its environs. The court investigated two broad questions in this case. The first question was the possibility of the operational failure of 10,000 tones of ammonia storage tank and the consequent leak of ammonia and the degree of pollution of air and the resultant ecological imbalance they may cause thereby and as a result of this environment pollution the hazards that have to be faced by the people of Wellingdon Island and the city of Cochin. The second question was whether there is any reasonable catastrophic failure, of the tank resulting in a crack or break or a rupture which would result in an uncontrollable major leak of ammonia with its resultant devastation of the entire population in Wellingdon Island and the city of Cochin and surrounding places on account of the seminal

[25] *Law Society of India* v. *Fertilizers and Chemicals Travancore Ltd*, AIR 1994 Ker 308.

sensitive and strategical sitting of the tank in the port area very close to the runway of the airport and very near to the Southern Naval Command.

The findings of the court were that the catastrophic failure of the tank was not an unreal or remote possibility, but a credible and contingent possibility to be reasonably anticipated on the facts unfolded in the case. In case of a catastrophic accident, the city of Cochin would turn into a city of the dead and the nearby place, a morbid graveyard. The happen of the accident would be unpredictable and therefore the court felt it was unwise to forget or slur it. The court opined that once it happens, it is irreversible, so prudence dictates not complaisance, but positive action. The court concluded that the location of the tank endangered public safety. The court held that Deprivation of life under Article 21 of the Constitution of India comprehends certainly deprivations other than total deprivations. The guarantee of life is certainly more than immunity from annihilation of life. Right to environment is part of right to life. A state of perpetual anxiety and fear of extermination of life is not an environment adequate for health and well being of human race. Therefore, the continuation of the operation of the ammonia storage tank is a plain and clear violation of the fundamental right guaranteed under Article 21 of the Constitution and so we are obliged to stop it. The respondent was ordered to de-commission and empty the ammonia storage tank at wellingdon Island within three months from date of order. The respondent was also directed to pay Rs 5,000/- to the petitioner as cost of litigation.

This is off course, one of the rare case where economic interest were subordinated to safety concerns and a giant public sector fertilizer company was restrained from operating its 10,000 ton ammonia storage tank in Cochin. This case is one of the examples of judicial activism against hazardous industry, which was prone to create future disaster. These facts reflect that the public today have become aware of their rights against hazardous industries and have succeeded.

The Bhopal Tragedy was not caused merely as a failure of technology, but as a failure of knowledge. People realized that environment awareness was

essential. If the right people had right information of what was happening at UCIL, it could have stop the happening of the accident or the gravity of the disaster could be lessened. In United States the community right-to-know provisions have received a boost after Bhopal. Our courts too have taken initiative towards the same direction. In *Sriram* Gas Leak case, the court recognized the need to introduce full fledged courts on environment to make the coming generations aware and to make them capable to adjudicate the environmental problems. In *M.C.Mehta* v. *Union of India*[26], the division bench of Rang Nath Mishra, C.J., G.N. Ray and A.S. Anand JJ. Of the same court stressed on the need to show films and documentary for short duration on the television and in cinema halls and, that the All India Radio may assist this process of education, and direction was issued to the Central Government and the State Government to ensure compliance of the conditions laid down by the court. The Court in this case opined that law is a regulator of human conduct but no law can indeed effectively work unless there is an element of acceptance by the people in society. No law works out smoothly unless the interaction is voluntary. In order that human conduct may be in accordance with the prescription of law it is necessary that there should be appropriate awareness about what the law requires and there is an element of acceptance that the requirement of law is grounded upon a philosophy, which should be followed. This would be possible only when steps are taken in an adequate measure to make people aware of the indispensable necessity of their conduct being oriented in accordance with the requirements of law. It was further observed that in a democratic polity dissemination of information is the foundation of the system. Keeping the citizens informed is an obligation of the Government. It is equally the responsibility of society to adequately educate every component of it so that the social level is kept up. Supreme Court, therefore, accepted on principle the prayers made by the petitioner, for issuing appropriate directions to cinema exhibition halls to exhibit slides containing information and messages on environment free of cost; direction for spread of information

[26] AIR 1992 SC 382.

relating to environment in national and regional languages and for broadcast thereof on the All India Radio and exposure thereof on the television in regular and short term programmes with a view to educating the people of India about their social obligation in the matter of the upkeep of the environment in proper shape and making them alive to their obligation not to act as polluting agencies or factors; and to make environment as a compulsory subjects in schools and colleges in a graded system to that there would be a general growth of awareness and issued certain directions to the Government to that effect.[27]

It may be pointed out here that there should be similar steps taken to make the people aware in rural India, through traditional media or folk media would accept such communication.

The courts have also give remedies from the Air Act and other provisions. *Chaitanya Pulvarising Iindustry* v. *Karnataka State Pollution Control Board*[28] case is of peculiar nature where the court held that remedy against non-compliance of condition laid down by the Board is to close down the industry.

After coming to the Air Act 1981, some areas were declared to the Air Pollution Control area where petitioner's industry was situated. The industry failed to obtain the consent of the Board under Rule 19 of the Act and the Board ordered for closure of the industry.

The Act is designed to prevent, control and abatement of air pollution, the provisions relate to preservation of quality of air and control of pollution. Keeping in view these objects the Act has provided for measures, which are preventive in nature, in the cases of industries to be established, and in the case of industries already established, they are remedial. In the case of industries established, it insists on obtaining consent of Board, making the industry amenable to the administrative control of the Board. Once consent is given, the Board can issue order, directions, etc. which are to be complied with by the industry... Non compliance of these conditions is made punishable under

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[27] Id., pp 384-85.
[28] AIR 1987 Kant 82.

section 37... the direction to close down the factory solely because it has not obtained consent of the Board is clearly illegal... the petitioner has failed to comply with its order, it may take action under section 37... but that would not justify the passing of a prohibitory order which apart from causing loss to the owner has a serious consequence paralyzing the industry affecting the livelihood of employed persons, the consequence may be more hazardous than the air pollution. Therefore, the harsh step of prohibiting the working of the Factory is neither warranted nor has it the legal sanctity.

In *Mathew Lukose* v. *Kerala State Pollution Board*[29] a petitioner was filed in the Kerala High Court against pollution caused by a Chemical Company. This progressive judgment reaffirmed that Article 21 of the Constitution includes right to clean air, water and a wholesome environment. Justice Sankaran Nair displays his grasp and undertaking of environment issues as he discusses the intensity of pollution problem in comparison with international tolerable limits.

Recalling the effects of air pollution, Sankaran Nair J. observed that the importance of environment and proper environmental management policy couldn't be under-rated. Awareness of this, when necessary, must be enforced by sanctions. Environmental deficit and degradation cause disastrous consequences like global warning, green house effect and depletion of ozone layer... cloud formation due to air pollution can also trap sunlight and heat of the earth. Photochemical smogs with lethal consequences due to air pollution are well known. Ozone depletion has caused deleterious effects.

In *Animal Feeds Diaries and Chemical Limited* v. *Orissa State (Prevention and Control of Pollution) Board*[30] following questions were before the court whether---

(i) Member Secretary of the Board is authorized to issue directions under section 31 of the Air Act.

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[29] 1991 Forest Law Times 10.
[30] AIR 1995 Ori. 84.

(ii) The area where petitioner's factory was situated had been declared to be an air control area.

(iii) On the emission of foul odour from the petitioner's factory, Board could issue direction to close down the factory.

On making evaluation of the section 31-A of the Air Act, which hives power to the Board to delegate its power and function to any officer or authority who shall comply the direction, the court held that in want or evidence of directions of the Board being delegated to officers/ authorities, the direction issued by the member secretary to close down factory was not valid.

But regarding third question the court held after examining the report that- there is possibility of preparation of poultry feed and foul odour was coming from the room where dry fishes have been stored... under section 19 of the Act, after an area is declared by the State Government to be air pollution control area, the State Government can prohibit the use of such fuel which will have effect of air pollution... Air pollutant has been defined in section 2(b) to mean 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 plant or property or environment. Air pollution as defined in section 2(b) to mean the presence in the atmosphere any air pollutant.... The Act is designed to prevent control and abatement of air pollution. The provisions under this Act relate to preservation of quality of air and control of air pollution, keeping these objects, in view the Act has provided for measures, which are preventive in nature in the case of industries to be established, and the cases of industries already established. The measures are remedial and that is why in case of an established industry consent of the Board is insisted upon. The Board can issue such direction within the ambit of section 31-A only on being satisfied that industry in question emits, "air pollutant" by which there has been an air pollution. Possibility of emission of foul odour or emission of foul odour itself without a finding that there has been emission of air pollutant would not clothe the jurisdiction with the Board to issue any direction, and in

the absence of any finding that petitioner's factory emits any air pollutant as defined in section 2(a) of the Act it was not within the jurisdiction of the Board to issue the direction to shift or close down the industry in exercise of power under section 31-A of the Act.

The Herculean task undertaken by the apex branch of Indian judiciary to clean up the foul and miserable air in India has been made possible by the now settled principle of dilution of rules of *locus standi*. Besides asserting the apex court have also contributed towards development of innovative steps by using section 133 Code of Criminal Procedure and other legislative measures, including the Right to environment as within the ambit of Right to life.

7.2. Cases initiated on Writ Applications

In the case of *Rural Litigation and Entitlement Kendra, Dehradun* v. *The State of U.P.*[31], a writ petition was filed under Article 32 of the Constitution, calling for the Hon'ble Supreme Court's intervention in stopping stone quarrying, which it was alleged were violation of Articles 21 and 48A.

The limestone quarrying in the Dehradun Valley triggered the first public interest environment case in the Supreme Court. In *Court on its own motion* v. *State of Himachal Pradesh*[32], a division bench of Himachal Pradesh High Court guided a public interest litigation to prevent stone crushing in the hills around Shimla. The court took suo moto cognizance of the reports.

The stone quarrying had the effect of causing irreparable damage to the Hills, villages and surrounding farmland in the Doon valley. It was probably the first case of its kind praying for the Supreme Court to intervene in the matter when all efforts through local government and the local bureaucracy had failed.

To ascertain the facts as alleged in the Public Interest Petition, the Supreme Court appointed a committee to study the impact of lime quarrying and mining operations in the area. After the submissions made by the

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[31] AIR 1985 SC 652.
[32] 1994 Far L T 103.

Committee and its recommendations, in an unprecedented move, the Court ordered closure of the quarries, banned the use of explosives and ordered land reclamation and employment programs to prevent joblessness and unemployment, as a result of such closure.

Court took *suo motu* cognizance of the reports appearing in the daily edition of the Tribune on 31 December 1992 and Indian Express on 10 January 1993 that illegal mining and installation of stone crushers have caused havoc at twelve places in the suburbs of Shimla, including Kamla Nagar, Tara Devi, Dhalli Nal Dehra and Choora Chowki, Kamla Nagar is also known as Bhatha Kuffar. Interim injunctions prohibiting quarrying were issued against the mine lessees against the mine lessees but were partially modified.

The court recorded the opinion of the Controller of Mines that the air pollution was caused mainly due to mechanical operation of stone crushers and not from manual extraction of stones, in which case the emission of dust remains within the standards of Ambient Air Quality. In a development parallel to the case, the state government constituted a high level committee headed by the Chief Secretary to look into environmental degradation caused by mining operations and polluting industries in the state. The committee recommended that Shimla and its suburbs be declared an Environment Protection Zone by the Central Government under rule 5 of the Environment (Protection) Rules of 1986. The High Court impleaded the committee and sought its recommendations in relation to the quarries around Shimla. In light of the deliberations of the committee, the state government urged the High Court to confirm the interim injunction in the interest of local residents, tourists and the environment.

From the material on record, it is proved that the Government had practically closed its eyes to environment degradation and ecological imbalance being caused by mining and industrial activities in and around Shimla, which has been acknowledged as Queen of the Hills for the last one century. Though the Government has brought on record its declaration made in the Industrial Policy on 1991, that environment friendliness is viewed as basic

criteria for selection of industrial projects in the State and industries causing air and water pollution, degradation of forests and soil erosion will be discouraged and industries detrimental to tourism will not be set up within the public view of National State Highways and main tourist traffic routes, yet no effective measures were taken to implement this policy.

Court opined that it will be in the interest of justice and fair play to allow respondents to work their mines and operate their stone crushers for a period of only six months from the date of this order or till Shimla Environment Protection Zone is created, whichever is earlier subject to their strictly complying will all the laws, rules, instructions and directions applicable and providing all measures under the Act of 1981 to prevent Air Pollution and also subject to their undertaking that they will implement the scheme of afforestation in the mined areas at their own cost.

The Stone crushing operations around Delhi caught the attention of the Supreme Court on an application under Article 32 of the Constitution, where M.C.Mehta objected to the quarrying because the dust particles polluted the air and the quarries violated town planning regulations.[33] The court directed the Central Pollution Control Board to inspect the plants and verify the allegations. On 15 May 1992, the court issued a detailed order 'for the reasons to be recorded and pronounced at a later stage'. Quarries in Delhi and in the surrounding areas of Haryana were told to close down in three months. Quarry owners operating without licences from the town planning authorities or who were issued closure orders under section 31A of the Air Act or section 5 of the Environment (Protection) Act of 1986, were directed to forthwith cease operations. The Haryana authorities were asked to allot alternative sites in a new 'crushing zone' located at a suitable distance from the capital.

The shifting of quarry operators away from Delhi to Haryana was fraught with danger. This led to the revival of the case in Supreme Court by M.C.Mehta, namely, *M.C.Mehta* v. *Union of India (Delhi Stone Crushing)*[34].

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[33] *M.C.Mehta* v. *Union of India (Stone Crushing)* 1992 Supp (2) SCC 85 and 86.
[34] 1996 (1) SCALE 29 (SP)

The Court directed a team of scientists and environmental engineers from the Central Pollution Control Board to inspect the new locations. The report submitted to the court projected a dismal picture. The air pollution was intense, chiefly because the dust containment systems, although installed, were not being operated by any of the quarry owners and a water shortage prevented the sprinklers from being used. The report revealed that the mining operations were being conducted haphazardly and warned of an imminent ecological disaster. The Supreme Court directed the parties to arrange for the sprinkler water supply. The quarry owners were granted two months time to install necessary pollution control devices and the state government was asked to lay a road to the quarrying zone besides implementing the suggestions and directions given by the Central Board.

The Supreme Court and the High Courts were restraining the contamination of atmosphere by dust in the above cases. However, in *Navin Chemical's* Case,[35] the Allahabad High Court declined to interfere under Article 226 of the Constitution in a petition filed by a pharmaceutical manufacturer against Detchem Mineral Corporation, who were grinding and pulverizing stone next to the drug unit. Navin Chemicals complained that the atmospheric pollution caused by Detchem was interfering in its manufacture of sensitive life saving drugs. Reviewing the material on record, the court declined to interfere since the Uttar Pradesh Pollution Board was alert to the matter. In declining relief, the court may have been influenced by the Board's contention that Navin Chemicals too was guilty of breaching the Air Act.

The failure of the Karnataka government and the state board to frame a suitable zoning policy for stone quarrying and crushing, compelled the High Court to issue general directions in *Obayya Pujari* v. *Karnataka State Pollution Control Board*[36]. The petition challenged the board's consent permitting stone crushing. Extending the scope of the petition to cover stone crushing operations across the state, the High Court directed the government to immediately

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[35] *Navin Chemicals Manufacturing and Trading Ltd.* v. *New Okhla Industrial Development Authority*, 1987 ALL.L.J. 13

[36] AIR 1999 Kar 157.

formulate a policy regulating the business and to identify 'safer zones' for such operations. The Karnataka High Court drew upon the Punjab and Haryana High Court decision in *Ishwar Singh* v. *State of Haryana*[37], to highlight the environmental damage caused by unregulated stone quarrying.

Public Interest Litigation has helped the growth of environmental jurisprudence in a tremendous fashion. The causes in environmental issues are taken up by a wide spectrum of people in society, Lawyers, association of lawyers, environmentalists, scientists, professors, groups and centers dedicated to environment protection and welfare forum. The courts have adopted a policy of appointing expert committees when they were not sure of the technical and highly complex questions of potential degradation of the environment.

In *M.C.Mehta* v. *Union of India*[38], the petitioner a lawyer environmentalist placed before the court the materials, which warned the damage of Taj Mahal from air pollutants. The Court observed that the Taj, apart from being a cultural heritage, is an industry by itself. More than two million tourists visit the Taj every year. It is a source of revenue for the country. This Court has monitored this petition for over three years with the sole object of preventing and protecting the Taj from deterioration and damage due to atmosphere and environmental pollution. It cannot be disputed that the use of coke/coal by the industries emits pollution in the ambient air. The objective behind this litigation is to stop the pollution while encouraging development of industry. The old concept that development and ecology cannot go together is no longer acceptable. Sustainable development is the answer. The development of industry is essential for the economy of the country, but at the same time the environment and the ecosystem have to be protected. The pollution created as a consequence of development must be commensurate with the carrying capacity of our ecosystems. The Court in this case elicited the expert opinions to direct relocation of industries from Taj Trapezium.

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[37] AIR 1996 P&H 30.
[38] AIR 1997 SC 734.

The breadth of judicial activity in the *Taj Trapezium* case is unmatched. The Court supervised the installation of pollution abatement equipment; shut down violators; cajoled GAIL to pipe gas to the industries; urged development of a green belt around the monument; relocated industries; fashioned a labour compensation and entitlement scheme; expedited the construction of a highway to divert traffic away from Agra; prodded the government to speed up work on barrages that would revive the flow in the Yamuna; and generally monitored development activity in the Trapezium. The judgment vigorously applied 'precautionary principle'; casting the burden on industry to show that operating with the aid of coke/coal was environmentally benign.[39]

The Supreme Court's scheme to clean the air in the Taj Trapezium was the introduction of natural gas to replace dirtier fuels such as coke and coal. On 31 August 1999 the court reviewed the progress in respect of gas supply to the Trapezium and directed 53 iron foundries, which had not agreed to accept the gas to close down. Seventy-eight iron foundries that used cupola-based technology submitted that despite their best efforts no reliable technology was available to convert their units to gas. These foundries claimed that the new technology was in the last stages of development and that they would switch over to natural gas as soon as the technology became available. The Supreme Court declined to accept the plea for an indefinite extension. The court directed the district magistrate to ensure that no coal or coke was supplied to the cupola-based foundries after 15 September 1999. The foundries were permitted to operate after they converted to natural gas.[40]

In May 1999, the Centre constituted the Taj Trapezium Pollution (Prevention and Control) Authority under section 3 of the Environment (Protection) Act of 1986. The Commissioner, Agra Division, heads the Authority, comprising eight government officials. It has wide powers to implement schemes for protecting the Taj Mahal and improving the environment including necessary measures to ensure compliance with emission

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[39] Supra note no. 20 at pp 268-269.
[40] *M.C.Mehta* v. *Union of India* AIR 1999 SC 3192.

standards by motor vehicles. The Authority is empowered to issue statutory directions under section 5 of the Act and initiate prosecutions under section 19.[41]

However, the Supreme Court is reluctant to entertain Article 32 petitions, which relate to local air pollution problems. For example, a public interest petition received by post alleging air pollution by a cement factory at Ariyalur in Tamil Nadu was directed to be sent to the Madras High Court and to be disposed of under Article 226 of the Constitution[42].

Open spaces for recreation and fresh air were given priority over urbanization and development in many cases. The importance of park and setting up green belts is necessary for reducing air pollution in urban and industrial areas.

In *Damodar Rao* v. *S O Municipal Corporation, Hydrabad*[43] the Andhra Pradesh High Court held that open space was the lungs of a populated urban residential area and it could not be used for constructing government buildings. Such conversion of the land use would affect the right to life under Article 21 of the Constitution.

Later, the Supreme Court in *Banglore Medical Trust* v. *B.S.Mudappa*[44] prevented the use of open space for siting a private medical complex in Banglore city. The court opined that open spaces for recreation and fresh air,... are matters of great public concern and of vital interest to be taken care of in a development scheme.

The Bombay High Court followed the Supreme Court's decision with same vigour[45]. The Allahabad High Court also in the case of *D.D. Vyas* v. *G.D.A.*[46] observed that in crowded towns where a resident does not get anything but atmosphere polluted by smoke and fumes emitted by endless vehicular traffic and the factories, the efficacy of beautifully laid out parks is

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[41] S.O. 350 (E) dated 17 May 1999.
[42] *V.Subramanian* v. *Union of India* 1990 (Supp) SCC 775.
[43] AIR 1987 AP 170.
[44] AIR 1991 SC 1902.
[45] Hariyan Layout Sudhar Samiti v. *State of Maharashtra*, 1997 (2) Mah LJ 98.
[46] AIR 1993 All 57.

no less than that of lungs to human beings. A public park is a gift of modern civilization, and is a significant factor for the improvement of the quality of life. The Court, further, held that open space for a public park is an essential feature of modern planning and development, as it greatly contributes to the improvement of social ecology.

7.3. Vehicular Pollution Cases

These cases reflect the repetition of history in our country as, these problems were faced by many countries when transformation from the agrarian existence to industrial society took place. However, the Nation's way of dealing with the problem is always unique. Each society has its own unique way of dealing with the problem of pollution. The problem of vehicular pollution has also emerged with other problem of urbanization. Our apex court tackled this problem; it was indeed a painstaking job to regulate vehicular pollution.

In M.C.Mehta v. Union of India[47], the Supreme Court keeping in view the mandate of Articles 47 and 48A of Part IV of the Constitution, held that the law casts an obligation on the State to improve public health and protect and improve the environment and as such directions were used to tackle the problem arising out of chaotic traffic and vehicular pollution. The Court opined that it was by reason of the lack of effort on the part of the enforcement agencies; notwithstanding adequate laws being in place, the court has been concerned with the state of air pollution in the capital of India. The Quality of air was steadily decreasing due to lack of concern or effort on the part of governmental agencies. No effective steps were taken by the administration in this behalf.

The Court had directed the Delhi Administration to file an affidavit on 23 rd September 1986 and directed the Delhi Administration to file an affidavit specifying steps taken by it for controlling pollution, emission of smoke, noise, etc from vehicles plying in Delhi.

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[47] AIR 2002 SC 1696.

It was through the intervention of the Supreme Court that certain measures were taken in controlling pollution to some extent. The measure were (a) lowering of sulpher content in diesel, first to 0.50% and then to 0.05%; (b) ensuring supply of only lead free petrol; (c) requiring the fitting of catalytic converters; (d) directing the supply of pre-mix 2T oil for lubrication of engines of two-wheelers and three-wheelers; (e) directing the phasing out of grossly polluting old vehicles; (f) directing the lowering of the benzene content in petrol; and (g) ensuring that new vehicles, petrol and diesel, meet Euro-II standards by September, 2000.[48]

It was during the proceeding of the Court that an authority was constituted under section 3 of the Environment (Protection) Act of 1986, to be called the Environment Pollution (Prevention and Control) Authority for the National Capital Region (EPPCA). Acknowledging this step as appropriate and timely, the Supreme Court clarified that the jurisdiction of the new authority would extend to the entire sphere of environmental pollution problems faced by the National Capital Region, not just vehicular emissions.[49]

The court considered the Report of Bhurelal Committee and selected CNG as an alternative fuel to diesel. The Court fixed the time limit within which the switch over to CNG was to take place on 28th July 1998. The court referred to the order dated 21st October 1994 where it had observed-- "on an earlier occasion when these matters came up before this court it was suggested that to begin with of Government vehicles and public undertaking vehicles including public transport vehicles could be equipped with CNG cylinders with necessary modification in the vehicles to avoid pollution which is hazardous to the health of the people living in highly polluted cities like Delhi and the other metros in the country."

On 28 July 1998 the court yet again expressed distress at the apathy of the state, but this time followed the litany with sweeping directions to axe New Delhi's obsolete commercial fleet. All commercial vehicles including taxis,

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[48] 1999 (6) SCC 14.
[49] *M.C.Mehta* v. *Union of India* AIR 1998 SC 617 and 773.

which were 15 years old, were ordered off the road by 2 October 1998. The court also endorsed a time frame fixed by the EPPCA for eliminating leaded petrol; converting autorikshaws, taxis and buses to clean fuels; reducing the age of the commercial fleet; and strengthening the clean-fuel distribution network.

The Court also required all private vehicles registered after 1 June 1999 to conform to Euro I norms and those registered after 1 April 2000 to meet the Euro II norms. Diesel taxis were prohibited in the NCR unless they conformed to Euro II norms. The Euro norms are European Community standards that have been enforced across Europe. On 13 May 1999,[50] the court clarified that what it meant by the 'Euro I norms' were the India 2000 norms, notified by the Central Government on 28 August 1997. In other words, the court advanced the statutory emission norms that were to come into effect on 1 April 2000 to 1 June 1999; and introduced more stringent emission standards (Euro II) with effect from 1 April 2000. The Euro II norms were re-christened 'Bharat Stage II' standards by the Central Government and were notified through the Central Motor Vehicles (Third Amendment) Rules of 2000.

Even though the time for phasing out diesel buses had expired but in view of the situation created by the Government or not cooperating or complying with the courts order, a different formula has to be worked out so as to cause as little inconvenience to the traveling public as possible, while at the same time punishing the wrong doer. Directions are, therefore, to be issued regarding the lifting of 1500 buses plus phasing out of 800 buses per month. The permits to be given are to be time bound and the continued operation of the diesel buses till they are replaced would require them to pay Rs 500/- per bus per day for 30 days of operation and thereafter Rs 1,000/- per day and the same is to be deposited with the Director of Transport, Delhi.

Lack of adequate supply of CNG has been a cause of concern and has been referred to in the various orders passed by this court from time to time. In the absence of proper response from the governmental authorities, there is no alternative but to issue the following directions:

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[50] 1999 (6) SCC 14.

The Union of India will give priority to transport sector including private vehicles all over India with regard to the allocation of CNG. This means that first the transport sector in Delhi, and in the other air-polluted cities of India.

I.A. of the Union of India for extension of time to run diesel buses is dismissed with costs of Rs 20,000/-. The NCT of Delhi shall phase out 800 diesel buses per month starting from 1 May 2002. Allocate and make available 16.1 lakh Kg per day (2 mmscmd) of CNG in the NCT of Delhi by 30 June 2002 for use by the transport sector.

7.4. Noise Pollution

The Environment (Protection) Act of 1986 (EPA) recognizes noise as an environment pollutant and empowers the Central Government to frame rules prescribing the maximum permissible limits for noise in different areas. On 14 February 2000, the Centre framed the Noise Pollution (Regulation and Control) Rules. Two types of noise standards are prescribed: Ambient air quality standards in respect of noise and emission limits for designated types of machinery, appliances and firecrackers. Separate ambient levels are fixed for industrial, commercial and residential areas and silence zones.

The 1987 amendments to the Air Act specifically extended the provisions of the Air Act, including increased penalties and the issuance of injunctions by magistrates, to noise pollution. The definition of 'air pollutant' was expanded to include noise. Besides the central statutes, local municipal legislation and the police Acts also regulate certain types of activity, which generates noise. For example, in several states regulations governing the use of loudspeakers are framed under the local police Act.

Rabin Mukherjee v. *State of West Bengal*[51] is an important case in the field of noise pollution. This case specifically deals with noisy electric and air horns used in buses and trucks. In this case writ application was moved by the petitioners for protection of their own rights and also in public interest being aggrieved by the nuisance and noise pollution which are being created by the

[51] AIR 1985 Cal 222.

transport operators by indiscriminate installation and use of electric and artificially generated air horns which cause unduly rash, shrill, loud and alarming noise. In the writ petition, the petitioners prayed for a writ in the nature of mandamus commanding the respondents to enforce the provisions of the Bengal Motor Vehicles Rules, 1940 and to enforce the restrictions against the use of such electric and other loud and shrill horns including air horns by the operators of transport vehicles. In this case Rule 114 (d) of the Bengal Motor Vehicles Rules, 1940 was involved which provides that every transport vehicle should be fitted with a bulb horn. The Hon'ble Justice stated that considering the facts and circumstances of the case and considering the mandatory provision of Rule 114(d) of the said Rules and considering the fact that in a congested State like the State of West Bengal, sudden blowing of such horn by transport vehicles produces rude shock in the human system and is acknowledged to have serious effect on various aspects of human life including blood pressure, mental and nervous system

The court directed the transport authorities to strictly enforce the provisions of the Bengal Motor Vehicles Rules, which restricted the use of loud and shrill horns.

In *Om Birangama Religious Society* v. *State*[52] the petitioner prayed for a mandamus directing the magistrate to accord the necessary permission under the Police Act to permit the use of microphones and loudspeakers during daily pujas and other religious activities. In this case the concept of reasonable restriction was discussed. Article 19(1)(a) provides fundamental rights on all citizens to freedom of speech and expression and that this right is only subject to restriction imposed under Article 19(2) of the Constitution. Justice Banerjee used the case to frame detailed guideline for the issue of loudspeaker permits and asked the authorities to accord permission in accordance with guidelines.

[52] (1996) 100 CWN 627

The Kerala High Court in *P.A. Jacob* v. *Superintend of Police*[53] opined that the fundamental right to freedom of speech guaranteed under Article 19(1)(a) did not include the right to use a loudspeaker.

In *State of Bombay* v. Narasu Appa Mali, the court observed that religious ceremony nowhere provides that on religious festival days loudspeaker is a must without which festivals cannot be observed. The prayer to grant permission to use loudspeaker during Navratri festival was not granted. The court held that such permission would violate the Environment Act and Rules.

In *Savla and Associates* v. *National Capital Territory of Delhi and others*[54] the petitioner carrying profession of Advocate and Solicitors, brought an action for the problem created by some car mechanics that were operating from the pavements/ road in the close vicinity of the office premises and thereby causing nuisance. The creation of noise and ruckus by heavy instruments as big hammers used for denting and painting continuously just below the office of the petitioners jolts the entire office staff of petitioner out of concentration. Therefore, the petitioner brought an action under Section 25 and Rule 6 of Noise Pollution (Regulation and Control) Rules 2000. The court looked into the seizure of vehicles by Police under section 283 of Penal Code in pursuant to complaint of the petitioner and the High Court the Municipal Corporation to adhere to removal of the encroachment and take action as an when called for.

Some cases on noise pollution have been discussed under the Chapter of Constitutional Provisions. We find the courts have given instruction from time to time to control noise pollution. The society should become aware of the consequences of noise pollution. We still find loudspeakers being used everywhere during religious ceremonies. The difficulty still lies with implementation.

7.5. Review Power of Appellate Authority under the Air Act

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[53] AIR 1993 Ker 1.
[54] AIR 2003 Del 73.

In *Manoj Kumar Roy* v. *Appellte Authority*[55], the question whether, an authority vested with quasi-judicial and administrative powers reviews its own decisions even if the statute does not confer such a review power on it? The petitioner's grievances was brought before the Calcutta High Court where the petitioners were compelled to bring a Complaint before the Pollution Control Board due the noise and air pollution caused by huge air conditioning machine installed in the showroom of Digjam, close to their building. A division bench of the Supreme Court, also known as 'Green Bench' accepted the suggestion of one of the parties in that a cooling tower should be built at the top of the building where the air conditioners have been installed to avoid emanation of hot air from two air conditioners.

The High Court opined that in the context of the clear proposition laid down by the Supreme Court, it is difficult for this court to accept the contention that the power of review of the state appellate authority must be implied from the power of review given to the national environmental appellate authority under express statutory provision. The power of review has to be expressly conferred or the same should appear by way of necessary implication from the language of the statute. The same cannot be conferred by way of a side wind on the basis of certain observations, which are made in a judgment in which the power of review is not even remotely discussed. All that has been stated in the Supreme Court judgment was a mere observation of the Supreme Court on the necessity of immediate constitution of an appellate body and nothing else.

7.6. Conclusion

It is concluded that the judiciary has tried to taken painstaking job and menace of Air pollution. We can find the despair of the Supreme Court in several cases like M.C. Mehta v. Union of India (vehicular pollution case) where the courts directions were not complied with in the same spirit, as the court had desired. In some case like Taj Trapezium case the court could succeed in taking appropriate measures.

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[55] AIR 2002 Cal 216.

From the above discussion it becomes quite apparent that the matter of control and management of air pollution has been given primary importance only in the Air Pollution Control Act of 1981. All prior laws, which find certain provisions having a bearing on the subject, were codified with the primary objective of regulating factories, industries, mines and boilers etc. The matter of control of air pollution has been given only secondary importance in these earlier enactments.

The legislative measures can succeed only through the involvement of the industries and the people. An aware and informed public opinion can play a positive role in promoting environmental pollution control programmes to help supplement official efforts to check the dangerous increase in the level of air pollution. Hence, the courts have rightly opined that the common man should be given education so that he can make his individual positive contribution towards control of pollution. Further, it is very necessary to arouse civic consciousness by introducing the subject of environmental issues in educational institutions; through radio, television, newspaper, periodicals etc.

Even traditional methods like puppet shows performance in local language etc should be adopted in rural areas to educate those rural people who are totally unaware of the consequence of pollution. Similarly, contribution can also be made by the industries both in financial as well as physical terms. They themselves can take the measures for the control of pollutants by introducing built-in-systems and thus can involve themselves for the solution of the problem by joining with local and other appropriate authorities. The industries should be encourage to undertake social responsibilities, this can be done by announcement of awards by the Government to those industries who have maintained the environmental norms and have contributed towards eradication of air pollution by maintaining green belt and other devices.

In the context of air pollution, it is also a fact that some people will be more sensitive than others to a given amount of pollution. For example, people with pre-existing chronic bronchitis, emphsema, or asthama suffer more when the sulphur oxide and particulate levels go up than people without these

diseases. Therefore, initiative should be taken while controlling air pollution, to protect the more sensitive groups from being unduly affected by a level of air pollution or any other environmental insult.

The provision under the Air (Prevention and Control of Pollution) Act 1981 have failed to bring the expected control of air pollution, mainly due to the failure of enforcement agencies in enforcing properly and effectively the existing legislative measures rather than the absence of effective legislative provisions. The main reasons for such failure are:

(i) Failure of different bodies entrusted with the enforcement of air pollution control law, to act or to act in concert and co-operation.

(ii) Lack of aware and informed public opinion.

(iii) Lack of political will.

(iv) Lack of money, technical knowledge and personnel.

(v) Inadequacy of penal provisions in the Air Act 1981.

Further, there are no arrangements to orient and train the existing staff in the municipal bodies and the Pollution Control Boards for the purpose of undertaking conscious pollution control measures.

Air Pollution is a social problem not of a particular community or locality but of the public at large. Everybody is affected by this problem. The consequences of disturbance in ambient air quality are known now. It cannot be disputed that the industries, vehicles are other day-to-day activities with the help modern gazettes emit pollution in the ambient air. If this process continues the day will come when people will be gasping for fresh air. There should be effort made to stop pollution of air before it is too late. We must stop pollution while encouraging development. Since development is essential for the economy of the Country. Our policy should adhere to the concept of sustainable development.

The efficiency and aggressiveness of our courts would certainly be increased if we create an autonomous body i.e. National Environment Protection Council (NEPC) comprising of experts having high degree of scientific and technical knowledge. The suggestions of these experts and their

neutral scientific expertise would help the courts reach a better and faster decision in each case as it would provide a good input for judicial decision-making.

Our courts, by various judgements, have given birth to a new right i.e. a right to have clean environment. This right has to be placed in our Constitution. The Supreme Court had already held in the case of *Subhash Kumar* v. *State of Bihar*[56] that the right to live is a fundamental right under Article 21 of the Constitution and it includes the right of enjoyment of life. The right of enjoyment of life must include the right to have a clean environment. This right can be described as: All citizens shall have the right to clean and healthy environment through out the territory of India. Nothing in this Article shall prevent the Parliament from making any law imposing reasonable restriction only in the extra ordinary circumstances and in the interest of general public.

It is not an easy task to revive the average citizens sense of responsibility and wholehearted participation to curb the menace of air pollution. But we must put in hard work to make all members of the society aware of the pollution of atmosphere. Man had started polluting the atmosphere slowly from the day he invented fire. It is time that people should realize how important it is to preserve the ambient air quality. The legislature, executive and the judiciary along with the voluntary organizations and all the agencies of social control must join their hands and work hard within the given constraints to curb the problem of air pollution.

[56] AIR 1991 SC 424.