

Environmental Law



As regards recent changes, it should be noted that the environmental regulatory authorities (i.e. the Central Pollution Control Board (CPCB) and the State Pollution Control Boards (SPCBs)) have been directed by the National Green Tribunal (NGT) to strictly implement the (previously dormant) Comprehensive Environmental Pollution Index (CEPI) and take it into account. CEPI applies weightages to different contaminants, quantities of atmospheric pollutants,

receptors (the amount of individuals affected) and additional high-risk materials. The first CEPI test was completed in 2009, but the requirements for the CEPI were revised in 2016 and the final CEPI study was released in 2018. The implementation of the CEPI requirements by the regulatory authorities was then directly regulated by the NGT in 2019. Industrial clusters are categorised under the CEPI as Polluted Industrial Areas (PIAs), which are each ranked as one of the following:

- A critically polluted area (CPA).
- A severely polluted area (SPA).
- Other polluted areas (OPAs).

CPCBs and SPCBs will instead focus on remediating and obtaining restitution from polluting companies in these CEPI zones, and the extension or construction of new sites in those areas will be refused. The major environmental regulations, including the issuing of separate primary environmental licences (or permits) in India, include the following:

- Water (Prevention and Control of Pollution) Act 1974 (Water Act), which also initially identified the powers, functions and hierarchy of the environmental agencies, the CPCB and the SPCBs.

- Air (Prevention and Control of Pollution) Act 1981 (Air Act).
- Environment (Protection) Act 1986 (EP Act). This umbrella law enables the central government to take measures it deems necessary to protect and improve the environment, and to prevent, control and abate environmental pollution. A wide range of rules and notifications have been adopted under it, such as the:
 - E-Waste (Management) Rules 2016, as amended in 2018 (E-Waste Rules);
 - Bio-Medical Waste Management Rules 2016;
 - Plastic Waste Management Rules 2016;
 - Solid Waste Management Rules, 2016;
 - Construction and Demolition Waste Management Rules 2016;
 - Hazardous and Other Waste (Management and Transboundary Movement) Rules 2016, as amended in 2019 (HW Rules);
 - Manufacture, Storage and Import of Hazardous Chemicals Rules 1989 (MSIHC Rules);
 - Coastal Regulation Zone Notification 2019; and
 - Environment Impact Assessment Notification 2006.
 - Wild Life (Protection) Act 1972.
 - Forest (Conservation) Act 1980.
 - Public Liability Insurance Act 1991.
 - Biological Diversity Act 2002.
 - National Green Tribunal Act 2010.

Regulatory authorities

The key regulatory authorities are the:

- Ministry of Environment, Forests and Climate Change (MoEFCC).
- CPCB.
- SPCBs.
- District Level Authorities (that is, municipal corporations).

Extent do regulators enforce environmental requirements

In terms of regulatory compliance, there has been an upward trend that can be explained by multiple causes. Different states, for example, have begun to rely on the development of continuous online emissions / effluent tracking systems, which provide the State Pollution Control Boards (SPCBs) with the appropriate and objective information to track the compliance of industries under their authority. Moreover, the state high courts, the Central Supreme Court, and the various benches throughout India of the National Green Tribunal (NGT) closely monitor the implementation and enforcement of environmental laws. With regard to CEPI industrial clusters, the NGT not only actively supervises whether, and how, the CPCB and SPCBs enforce environmental laws, but quite importantly for companies which are new to India, the NGT also has the power to address environmental issues directly with the relevant polluting company, even merely on the basis of media reports of such activity.

Permitting regime for polluting emissions to land, air and water? Can companies apply for a single environmental permit for all activities on a site or do they have to apply for separate permits?

Integrated/separate permitting regime

An integrated permit system is in place to a large extent. For instance, a Consent to Establish (CTE) and subsequent Consent to Operate (CTO) and their renewals under the Water Act and Air Act can typically be obtained by submitting a combined consent application to the relevant SPCB.

The E-Waste (Management) Rules 2016 (*see Question 19*) introduce the Extended Producer Responsibility – Authorisation for Producers, which only requires one centralised and India-wide application with the CPCB instead of with each SPCB.

Also, to streamline the environmental permit/consent system, and avoid repetitive and/or conflicting conditions, the CPCB has waived the requirement of having separate CTEs for industrial units which require an Environmental Clearance (EC) (*see Question 17*). In such cases, the EC will be considered equivalent to a CTE and no separate CTE will need to be obtained.

Single/separate permits

Depending on the type of activities undertaken by a company, multiple permits may need to be obtained.

The Ministry of Environment, Forests and Climate Change (MoEFCC) adopted a new method (from 2016) of classifying the industries it regulates and introduced a new category of "white industries". These white industries are non-polluting industries that no longer need a CTO or an EC under the Environmental Impact Assessment (EIA) Notification. Instead, they merely need to notify the relevant SPCB.

Whereas the earlier industry categories (red, orange and green) were essentially determined based on the size of industries, this new method is based on a Pollution Index (PI) for emissions (air pollutants), effluents (water pollutants) and hazardous waste generated apart from the consumption of resources. A PI score is allocated to each industrial sector as follows:

- Red category: PI score of 60 and above. Table 1 annexed to the notification covers 60 sectors (for example: asbestos, nuclear power plants, shipbreaking, oil and gas extraction, and so on).
- Orange category: PI score of 41 to 59. Table 2 lists 83 types of industries (for example: food and food processing, printing ink manufacturing, paint blending and mixing, and pharmaceutical formulations).
- Green category: PI score of 21 to 40. Table 3 identifies 63 sectors (for example: saw mills, tyres/rube retreating, polythene and plastic products).
- White category: PI score up to 20. Table 4 lists 36 types of industries (for example: solar power generation through solar photovoltaic cells, wind power, and mini hydro-electric power less than 25 megawatts).

Penalties

Failure to obtain the required consent order will incur penalties. For instance, under the Water Act, any person who breaches the consent application process is punishable with imprisonment for at least 18 months, which can be extended to six years, and a fine. Any

company operating without a consent to establish or operate will immediately receive a closure notice from the relevant SPCB.

Under directions from the NGT, the CPCB recently devised a formula to compute environmental compensation to be levied on the defaulting industry. The formula is based on the anticipated severity of pollution, the duration of the violation (number of days), the scale of the operation and the location (for example, proximity to large habitations).

Moreover, the Supreme Court and the state high courts can and do impose exemplary damages for damage to the environment. For instance, in the *Sterlites Industries case (2013)*, one of the largest copper smelter plants in India was found to be operating without a valid renewal of its environmental consent to operate. When assessing the company's liability to pay damages (that is, for damage caused to the environment during the 15 years it operated without a valid environmental permit), it reviewed the company's annual report, and determined that 10% of the profit before depreciation, interest and taxes (PBDIT) had to be paid as compensation, which amounted to INR1 billion.

The Water Act, Air Act and EP Act all contain specific provisions for offences committed by companies. Under these Acts, every person who is in charge when an offence is committed, and is responsible to the company for the conduct of its business, is guilty of the offence and liable to be prosecuted and punished accordingly. However, a person is not liable if he proves that the offence was committed without his knowledge, or that he exercised all due diligence to prevent the offence.

Further, if the offence was committed with the consent or connivance, or is attributable to any neglect by a director, manager, secretary or other officer of the company, the other person is also guilty of the offence, and liable to be prosecuted.

Importantly, the National Green Tribunal Act, 2010 (NGT Act) contains penalty provisions which are considerably higher compared to previously adopted environmental laws. Most likely all existing environmental laws will be amended (at some point) to be aligned with the NGT Act penalty provisions.

More specifically, section 26(1) of the NGT Act states that a person who fails to comply with an order or award or decision of the Tribunal is punishable with imprisonment for a term up to three years, or with a fine up to INR10 crore, or both (one crore is equal to ten million).

If the failure or contravention continues, an additional fine applies up to INR 25,000 for every day the failure/contravention continues, after conviction for the first failure or contravention.

Section 26(2) of the NGT Act states that if a company fails to comply with any order or award or decision of the Tribunal, the company is punishable with a fine up to 25 crore rupees. If the failure or contravention continues, an additional fine applies up to INR100,000 for every day the failure/contravention continues, after conviction for the first failure or contravention.

The NGT has jurisdiction over all civil cases where a substantial question relating to the environment is involved, arising out any of the exhaustively enumerated environmental laws specified in Schedule I to the NGT Act (including the EP Act (and the rules adopted under it), the Water Act, the Air Act, the Forest Act, the EIA Notification Act, and so on) (*section 14(1) NGT Act*).

Under section 15(1) of the NGT Act, the NGT can order relief, compensation and restitution in the following cases:

- Relief and compensation to the victims of pollution and other environmental damage.
- Restitution for property damaged.
- Restitution of the environment.

Further, the NGT can divide the compensation or relief payable under separate heads specified in Schedule II of the NGT Act, which includes claims:

- Due to harm, damage or destruction to flora, including aquatic flora, crops, vegetables, trees and orchards.
- Including cost or restoration of account of harm or damage to the environment including pollution of soil, air, water, land and ecosystems.

Environmental Protection and Indian Penal Code

There are various sections in the Indian Penal Code, 1860 that make polluting the environment punishable. They can be used to prevent pollution in the environment. Chapter XIV of the IPC, containing Section 268-294-A, deals with the offences that are related to safety, public health, etc. These provisions make public health a priority and make any act punishable which pollutes the environment and makes the life of an individual dangerous.

Section 268 and 290

Section 268 defines the term public nuisance and says that:

1. If any person does any illegal act, or omission then he/she is guilty of an offence.
2. Such an act must have caused a 'common injury' or danger. Annoyance to the public, or to the people of a vicinity, or such an act must violate someone's public right.
3. A common nuisance is not excused on the ground that it causes some convenience or advantage.

Moreover, Section 290 makes the offence of public nuisance punishable with a fine extending up to Rs. 200. Therefore, if any act or omission of polluting the environment is committed harming any citizen then the same shall be subject to prosecution. Section 290 also makes noise pollution an offence.

In *Ratlam Municipality v. Vardhi Chandra*, Justice Krishna Iyer observed: "public nuisance because of the pollutant being discharged by big factories to the detriment of the poorer sections, is a challenge to the social justice component of the rule of law".

In *K Ramakrishnan v. The State of Kerala*, the court held the smoking in public places is an offence and the same shall amount to public nuisance. It is punishable under Section 290 of the Indian Penal Code. Moreover, according to the reports published by the World Health Organization (WHO), carbon dioxide emission from cigarettes contributes to almost 5% of the global greenhouse gas production.

Section 277

Section 277 of IPC states that if anyone who voluntarily corrupts or fouls the water of public spring or reservoir, so as to make it unfit for ordinary public use, shall be held punishable with imprisonment for up to 3 months or with fine up to Rs. 1000 or with both.

However, the interpretation of the term “public spring or reservoir” by the Indian courts is quite restrictive as it does not include flowing water of rivers, streams, and canals.

Fouling of running river water in a continuous stream is not an offence under this provision, however, if there is sufficient evidence to show that the act has caused common injury or danger to the public then it can be an offence punishable under section 290.

In *Emperor v. Nama Rama*, the accused and nine others were charged under this provision for fouling river water and making it unfit for drinking by steeping therein aloe plants to extract fibres from it. The trial Court convicted them. The Bombay High Court, after an appeal was filed, held that a river is not a public spring as mentioned in Section 277.

Section 278

According to Section 278, whoever voluntarily vitiates (spoils) the atmosphere of any place so as to make it harmful for any person’s health in a general dwelling, or carrying on a business in a neighbourhood or passing along the public way, shall be liable to a fine of up to Rs. 500.

Environmental Pollution and CrPC

Environmental pollution is a type of public nuisance. Section 268 of the Indian Penal Code, 1960 defines the term public nuisance as an act or omission of some act which results in annoyance or common injury to the public. In simple words, it is an act which neglects the common good of the public and harms or annoys them by causing such an act, whereas private nuisance is an act which only harms few individuals rather than the public at large. Section 290 of the Indian Penal Code, 1960 deals with the punishment for public nuisance.

The Code of Criminal Procedure, 1973, or the Criminal Procedure Code is the law that deals with the procedure of administration of substantive criminal law in India. It came into force on 1st April 1974, which contains 484 sections that have been divided into 37 chapters.

Chapter X of the CrPC, “*Maintenance of public order and tranquility*” provides efficacious, preventive, and expeditious remedies for public nuisance cases which include air, noise, water pollution, and unsanitary conditions. It contains the procedure for the enforcement. The entire corpus of 13 sections of CrPC under Chapter X i.e. from Section 133 to 144A is devoted to mitigating public nuisance.

The provisions under chapter X of CrPC provide speedy and effective remedies against public nuisance among which environmental pollution is one.

Section 133 deals with the conditional order for removal of the nuisance, it empowers a District Magistrate and Sub-Divisional Magistrate to stop the nuisance on receiving such information.

Section 134 deals with the service of summons or notification of order. It can only resort when order is not served in the manner provided.

Section 135 deals with the person against whom the order is addressed to obey or show cause. Under this section, two contingencies are envisaged that:

1. Perform in a specified manner in the order within the time period, or
2. Appear and show cause in accordance with the order.

It also provides that the person against whom the order is made should be given a reasonable opportunity to be heard and answer the allegations made against him.

Section 136 deals with the penalty if the person against whom the order is made failed to comply with Section 135 of CrPC. The penalty is prescribed under Section 188 of the Indian Penal Code, 1860.

Section 137 deals with the procedure where the existence of public rights is denied. It also applies to those cases only where there is no decision about the existence of right by any competent civil court and strong evidence in support of that against any magistrate.

These are some of the provisions under Chapter X of CrPC, the main and the utmost important provisions are under Section 133, which is discussed further in detail.

Section 133

Section 133 of CrPC provides that a sub-divisional magistrate and district magistrate or any other executive magistrate to whom the powers are granted by State Government can make a conditional order to remove such kind of nuisance on receiving information about the same or the report of any police officer. If the person who is creating nuisance objects to the order then the order can be made absolute by the concerned magistrate. Any order made by the magistrate under this provision shall not be questioned in any civil court. In the case of *Govind Singh v. Shanti Sarup (1978)*, the word nuisance was defined in very liberal terms and it includes the disposal of substances, the construction of structures, the conduct of occupation, and trade, and confinement or disposal of any dangerous animal.

If the imperative tone of this section is read with the punitive tone of Section 188 of IPC (provides punishment for a maximum of six months and a fine extendable up to one thousand rupees) it makes the prohibited act a mandatory rule.

To invoke this section, it is not required to have a large number of complaints or protest against the nuisance. It can be invoked on simply receiving a report of a public officer or other information that is deemed to be fit as a piece of evidence. This pronouncement was made in the case of *Krishna Gopal v. The State of M.P (2016)*. In this case, a complaint was registered against a glucose factory which was causing air pollution due to the discharge of steam in the air resulting in fly ash and noise pollution. This all cumulatively caused discomfort to the residents of that locality.

To understand the application of the section in a facile manner is to simply understand the conditions required as given in the case of *Suhelkhan Khudayar Khan v. State of Maharashtra (2003)*, these followings conditions have to be satisfied for providing a sanction under this section:

1. There should be a public nuisance i.e. the number of persons injuriously affected is so considerable (there should be danger or inconvenience or it is about to be caused).
2. It should not be a private dispute between the different members of the public and if it is then the adequate forum is the civil court.
3. It should be the case of imminent danger to the public interest.

The nature and the scope of this section is explained by the judges in the case of *P.C. Cherian v. State of Kerala (1981)*. In this case, the Sub-Divisional Magistrate of Kottayam directed the stoppage of mixing of carbon in two rubber industries which were situated in the industrial area. As there was no dissemination prevention equipment. The High Court sentenced that the dissemination of carbon black in the environment is causing a public nuisance and also affecting the respiratory organs of the people.

Independence of Section 133

Section 133 of CrPC is independent of the other laws and statutes. Even after the creation of new legislatures the powers of the magistrate inscribed in this section are not repealed. There are many other special and local laws dealing with public nuisances such as the Water (Prevention and Control of Pollution) Act, 1974, Air (Prevention and Control of Pollution) Act, 1981, Environment (Protection) Act, 1986, and many more.

Some examples of independence of Section 133 are as follows:

1. Magistrates have the power to close a factory even after no appreciation certificate from the Pollution Control Board is produced. – *Nagarjuna Paper Mills Ltd. v. SDM and RDO (1987)*.

2. Section 133 doesn't get repealed automatically after the commencement of any new law. – *Lakshmi Cement Case (1994)*.
3. Section 24 of Environment Protection Act, 1986 specifically says that if any act or omission commits an offence under this act or any other act then the offender will be liable according to that other act.
4. The Supreme Court in the case of *State of M.P v. Kedia Leather & Liquor Ltd. (2000)* declared that the enactment of new pollution control laws doesn't repeal Section 133. It was also said that areas of this section and pollution laws are not identical in nature.

Remedies available under common law vis-à-vis Environmental Protection

a) Nuisance

Nuisance is related to unlawful interference with one's enjoyment of land or any right arising from it, thereto. It may be categorized into Public Nuisance or Private Nuisance. As the name suggests, public nuisance deals with interference with a right pertaining to public. Whereas, private nuisance is interference with right which is exercised exclusively by a private entity or an individual. There are a few remedies available vis-à-vis public nuisance in Criminal Procedure Code, 1973. Section 91 of the Criminal Procedure Code, 1973 prescribes that a suit may be filed to obtain a suitable relief or injunction for any cause of action affecting or likely to affect public nuisance. Also, in Criminal Procedure Code, a magistrate is empowered to restrain any person from carrying out an act that may give effect to public nuisance. In *Ramlal v. Mustafabad Oil and Oil Ginning Factory*, the Punjab and Haryana Court observed that once a noise is found to be above the necessary threshold to attract the liability of public nuisance, it is no valid defense to contend that such noise arose out of any legal activity. Apart from this, public nuisance has been made punishable under the Indian Penal Code, 1860.

b) Negligence

It is a point to note that in order to bring a successful action vis-à-vis negligence, it is necessary to establish a direct nexus between negligence and the damage caused. The other ingredient that constitutes negligence is that the respondent did not take sufficient care to avoid public nuisance that the person was required to take such care under the law. In *Naresh Dutt Tyagi v. State of Uttar Pradesh*, fumes released from the pesticides leaked to a nearby property through ventilators that resulted in the death of three children and foetus in a pregnant woman. It was held by the court that it was a clear-cut case of negligence.

c) Trespass

It is an unlawful interference with another's possession of property. The primary ingredient to establish a case of trespass is that there should be an intentional invasion of another's physical possession of property. Thus, two primary ingredients to establish a case of trespass are:

- i.) There should be intentional interference
- ii.) Such interference should be direct in nature

d) Strict Liability

The concept of strict liability started from the case of *Rylands v. Fletcher*, "the person who, for his own purposes, brings on his land and collects and keeps there anything likely to do mischief, if it escapes, must keep it in at his own peril and if he does not do so, is prima facie answerable for all the damage which is the natural consequence of its escape". The exceptions to the rule of strict liability are as follows:

- i.) Act of God
- ii.) Act committed by a third party
- iii.) Any fault committed by plaintiff himself
- iv.) An act committed after obtaining expressed or implied consent of the plaintiff
- v.) Natural use of land by the defendant

The locus classicus vis-à-vis strict liability in Indian setting is *M C Mehta v. Union of India*, popularly known as Oleum Gas Leak Case. In this case, the Hon'ble Supreme Court observed that if a hazardous or inherently dangerous activity is being carried out in any premises and in case of a release of such toxic substance any damage is caused, such enterprise is strictly and absolutely liable for all the damages arising thereto, and any of the exceptions listed out above are not applicable as a defense in a case of strict liability. In addition to this, the court also held in the *Union Carbide Corporation v. Union of India* that the compensation has to be directly proportional to magnitude and capacity of the enterprise because such compensation needs to have a deterrent effect.

Penal Provision vis-à-vis Environmental Protection

There are specific penal provisions in various legislations for the protection of environment. Chapter XIV of the Indian Penal Code (hereinafter referred as IPC), containing section 268 to 294-A, deals with offences relating to public health, safety etc. The main object of these provisions is to protect the public health, safety and convenience by rendering those acts punishable which make the environment polluted and dangerous to the life of an individual.

Section 268 of the Indian Penal Code, 1860, defines the term public nuisance and section 290 of the IPC makes public nuisance punishable. Thus, under these provisions if any act or omission causing injury to any person by polluting the environment takes place, the same can be subjected to prosecution. Noise pollution is also punishable under Section 268 of IPC. In *K Ramkrishnan v. State of Kerala.*, the court held that smoking in public place comes under the category of public nuisance. It is punishable under section 290 of Indian Penal Code. Also, in *Murli S. Deora v. Union of India*, the Supreme Court held that under Article 21, smoking in public place is a violation of fundamental right of those who don't smoke.

Sections 269 to 271 deal with negligent acts which are likely to spread infection of diseases dangerous to the life of people. These acts are punishable under sections 269 to 271. The punishment provided u/s 269 and 271 is imprisonment up to six months or fine or both. Section 277 can be used for preventing the water pollution. Under section 277 punishment of

imprisonment is up to three months or a fine up to 500 Rupees or both. Apart from these, under section 426, 430, 431 and 432 of IPC, pollution caused by mischief is also punishable.

There are two primary legislations that enlist penal provisions for violation of the law propounded in those legislations. They are The Water (Prevention and Control of Pollution) Act, 1974, and Environment (Protection) Act, 1986. According to Section 47 of The Water Pollution Act, a person is vicariously liable for the offence committed by the company if such person is in charge of the functions committed by the company or for conduct of business of the company. This is indispensable ingredient to constitute a case under S. 47 of the Act. However, the defense available under this section is that the offence in question must have been committed without knowledge or consent of the accused in question.

"It also needs to be noted that Section 16 of Environment Act and Section 47 of The Water Act are parimateria to each other. Herein, it is paramount that the complaint contains specific averments against the accused. It is not out of place to mention that the provisions of Section 16 of the Environment (Protection) Act 1986 are parimateria to the Section 141 of the Negotiable Instrument Act as well as Section 25 of the Contract Labour (Regulation and Abolition) Act, 1970, and Section 278 B of the Income Tax Act. The Hon'ble Supreme Court while dealing with the cases under Negotiable Instruments Act in *National Small Industries Corporation Ltd. vs Harmeet Singh Pental and another* reported in 2010 (3) S.C.C. 330 has held that it is mandatory for the complainant to make averments in the complaint petition that the accused is directly in charge and was responsible to the company for the conduct of the business of the company. The Hon'ble Supreme Court said that if the said necessary ingredient is missing in the complaint petition, then in that case, prosecution launched against the accused cannot be sustained."