COMMENT:

AIR AND WATER POLLUTION IN THE PHILIPPINES: LEGAL PROBLEMS AND PROPOSED SOLUTIONS

A step forward, another step backward. That seems to be the pattern that governs man's existence. In this age of moon-landing, heart transplants, test-tube babies and atomic energy, it is a cause of unending wonder why man has ever invented nuclear weapons that can smite the world many times over. Indeed, why industrialization has to be paid in terms of sluggish, rubbish-laden rivers, air which is fouled by smoke and poisoned by chemicals, wasted forests and strip-mined lands, extinct species of wildlife, haphazard growth of urban areas and transportation systems, increased congestion in our cities and intolerable noise levels.

Payment of the price has been deferred while improvement of technological power is taking place. Soon demand will be made to improve the quality of our environment and restore the balance of nature which technological growth and human shortsightedness have impaired.

This paper does not attempt to propose a panacea for all these problems. Rather it seeks to examine the nature of the problem of air and water pollution. In this regard, it was necessary to investigate existing legislative policy pointing out in the process its strength and weaknesses and making humble observations that could further strengthen the law so that a more effective pollution program can be achieved.

Air Pollution

Air pollution was of little significance before the industrial revolution which has been exploding since the late 18th century. Yet even primitive peoples were quick to realize the importance of keeping down smoke from fires or dusts from traffic. Good air was sought in making settlements, and the ancient Greek physicians of the Hippocratic school appreciated the value of good air in preventing disease. Vitruvius, the great Roman architect under Augustus, gave detailed instructions for the ventilation of buildings to assure wholesome air. He even had a glimpse of what green plants might do in keeping good air in cities, for he recommended treelined streets, to help keep fresh air in crowded areas.

Until recently, air was the classic example of "free good" — a good so plentiful that it may be obtained by anyone without cost or effort and in

almost limitless quantity. Today, however, it has ceased to be "free." It is fast becoming a valuable good not only in terms of economic costs but also in terms of the physical discomfort and hazard to health associated with impure air.

One of the most dramatic, convincing, and undeniable evidence of the deleterious effects of air pollution on humans happened in United States, in Donora, Pennsylvania. The Donora episode occurred in October, 1948. A small town with a population of 14,000, it lies in the center of an area of heavy industrial production — steel mills, a wire plant, a zinc smelter, and coke plants all in the immediate vicinity.

The inhabitants were long accustomed to dirty air but had never experienced a smog like the one which began on October 26, 1948. On Monday, October 25, a stable layer of air formed in the valley area. From then until the smog was broken by rain on Sunday, this layer acted like a lid clamped over the valley, allowing the build-up of atmospheric pollutants.

Two days after it started, the air was thick and heavy, and visibility was markedly reduced. Although a few persons started to feel ill on Wednesday, October 27, it was on Thursday that a large number became affected. Shortness of breath and cough were the most prominent symptoms, although sore throat, headache, lacrimation, eye irritation, nausea and even vomitting and diarrhea occurred in some. Between 6:00 p.m. and midnight on Thursday, 40% of the affected people reported the onset of their illness. By Friday, almost every person who became ill during the episode was already ill; seventeen of the total twenty deaths occurred that day. By the end of the episode, a total of 5,910 persons, 42.7% of all persons living in the area, were affected to some degree by the smog. The elderly and those with pre-existing heart and lung disease were the most severely affected although persons in all age groups were affected as well.[1]

Similar incidents happened in London, England and in New York City. And certain conclusions have been made.

First, under certain meteorological conditions air pollution may increase to such degree as to cause widespread illness and even death. Second, individuals with chronic bronchitis or other similar diseases of the lung may be affected by air pollution at the levels experienced in the industrialized urban center. Third, there are present in urban air substances that can cause irritation of the mucus membrane. Last, in normal populations of all ages, there is little question that air pollution contributes to the symptom, illness, and physiologic burden in the urban setting.

No case of similar nature has been reported in the Philippines. But the effects of air pollution on health are so undeniable that our government is already reacting to the problem even if only very, very slowly.

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[1] Cassell, *The Health Effects of Air Pollution and Their Implications for Control*, 33 LAW AND CONTEMP. PROB. 197, 202 (1968).

AVAILABLE LEGAL MEANS OF CONTROL

A. *Nuisance*

Most of the early law involving air pollution was a part of the common law of nuisance. This legal concept has been regarded as incapable of precise definition[2] although it has been referred to as a well-understood term, a term with a well-defined meaning.

In legal phraseology, the term is applied to that class of wrongs that arise from the unreasonable, unwarrantable, or unlawful use by a person of his own property, real or personal, or from his own improper, indecent, or unlawful personal conduct, working an obstruction or injury to a right of another, or of the public, and producing such material annoyance, inconvenience, discomfort, or hurt that the law will presume a consequent damage.[3] Under the Civil Code, nuisance is defined as "any act, omission, establishment, condition of property, or anything else which injures or endangers the health or safety of others; (2) annoys or offends the senses; (3) shocks, defies or disregards decency or morality; (4) obstructs or interferes with the free passage of any public highway or street, or any body of water; (5) hinders or impairs the use of property."[4]

Essentially, this concept is used as a tool for the balancing of competing and conflicting property interests. Its basic premise is that while an individual is to be accorded great freedom in the use of his property, he is nonetheless not permitted to use his property in a manner detrimental to the property interests of others. *Sic utere tuo ut alienum non laedas.* Under the Civil Code, it is provided: "The owner of a thing cannot make use thereof in such a manner as to injure the rights of a third person."[5]

Thus in the case of *Iloilo Cold Storage Co. v. Council of Iloilo*[6] where residents near the plant of the defendant company made complaints that the smoke from the plant of the defendant company was very injurious to their health and comfort, the court said: "A nuisance which affects the imme-

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[2] Jeakins v. City of El Dorado, 143 Kan. 206, 53 P. 2d 798 (1936). In Engle v. State, 53 Ariz. 458, 90 P. 2d 988 (1939). The Court held that the term "nuisance" is incapable of precise definition because the controlling facts are seldom alike and each case stands on its own footing.

[3] Maier v. Published Commercial Alcohol Co., 62 F. Supp. 161 (1945); City of Phoenix v. Johnson, 51 Ariz. 115, 75 P. 2d 30 (1930); Wilson v. Evans Hotel Co., 188 Ga. 498, 4 S.E. 2d 155 (1939); Gardner v. International Shoe Co., 319 IPP. App. 416, 49 N.E. 2d 328 (1943).

Distinguished from 'damage," nuisance is the wrong committed, "damage" or "injury" is the result of the nuisance and damages are the compensation for the damage or injury done. City of Holdenville v. Kiser, 195 Okla. 189, 156 P. 2d 363 (1945).

[4] CIVIL CODE, art. 694.

[5] *Ibid.*, art. 341.

[6] 24 Phil. 471 (1913).

diate safety of persons or property which constitutes an obstruction to the streets and highways under circumstances presenting an emergency, may be summarily abated under the undefined law of necessity. It is akin to the right of destroying property for the public safety in case of prevalence of a devastating fire or other exigency."

Every man then, under the concept of controlled ownership gives up something of this absolute right of dominion and use of his own to be regulated or restrained by law, so that others may not be hurt or injured unreasonably in the use and enjoyment of their property.

Nuisances are often divided either as public or private although it is not always easy to determine the class to which any given injury is to be designated.[7] The distinction between the two lies in the difference of the rights affected thereby.[8]

Professor Beuscher defines public nuisance as involving "a polyglot collection of interferences with the comfort, moral standards, health, safety and convenience of the public. Many of such nuisances are public merely because they spread themselves over a wide enough area to affect, adversely, the use of considerable number of privately-owned parcels of land."[9]

And it is private only because the individual has been injured.

Increasingly, though, private actions to abate the effects of air pollution have been resorted to. And almost invariably the action is accompanied by a prayer for injunction.

Courts dislike prohibition by injunction. It is not issued as a matter of course but rather, it is exercised sparingly, reluctantly and cautiously. Before the same can be granted against a nuisance, there must be an actual, material, substantial and serious injury and permanent or potentially permanent injury. The action is dependent upon proof of damage and a finding that the defendant's activity is "unreasonable."

Several factors are considered by the court before injunction is granted.[10] A balance of the several factors involved is usually made. This principle

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[7] Kelley v. Mayor of City of New York, 6 Misc. Rep. 516, 27 N.Y.S. 164 (1894). Article 265 of the NEW CIVIL CODE states: "Nuisance is either public or private".

[8] City of Phoenix v. Johnson, *supra*, note 3; Adams v. City of Toledo, 163 Ore. 185, 96 P. 2d 1078 (1939); State v. Turner, 198 S.C. 487, 18 S.E. 2d 372 (1939).

[9] Beuscher & Morrison, *Judicial Zoning Through Nuisance Cases*, 1955 WIS. L. REV. 440, 440-441.

[10] (a) Certainty of annoyance/injury

> "The general rule is that an injunction will be granted only to restrain actually existing nuisances. A reasonable, strong probability or well-guided apprehension of injury is required and the danger must be real." Adams v. Correll, 28 Ohio App. 55, 162 N.E. 397 (1927).

(b) Irreparable injury

> "A court will not interfere to prevent or abate a nuisance which causes

of balancing has been explained in *Cogswell v. New York, New Haven & Hartford R. Co.*[11]

> "The compromises exacted by the necessities of the social state, and the fact that some inconveniences to others must by necessity attend the ordinary use of property, without permitting which there could in many cases no valuable use at all, have compelled the recognition, in all systems of jurisprudence, of the principle that each member of society must submit to annoyances consequent upon the ordinary and common use of property, provided such use is reasonable both as respects the owner of the property, and those immediately affected by the use, in view of time, place and circumstances."

Under this principle one realizes the difficulty of securing injunction. For there is no way of knowing in advance which principles of law will most commend themselves to a court or which equities will most influence its finding.

This difficulty is well-illustrated by the two cases that follow.

In *Madison v. Ducktown Sulphur, Copper and Iron Co.*[12] three groups of complainant landowners showed to the satisfaction of the court that their

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injury not alleged to be irreparable. So a mere diminution or depreciation of the value of property by a nuisance, without irreparable mischief, will not furnish sufficient ground for relief by injunction." Hazlett v. Maryland Refining Co. of Ponca City, 30 F. 2d 808 (1934).

(c) Continuous or recurring injury

"An essential fact to be shown when abatement of a nuisance is that the annoyance or loss complained of will be continuous or recurrent for the occurrence of nuisances if temporary and occasional is not a ground for interference by injunction except in extreme cases." City of Harrisonville, Mo. v. W.S. Dickey Mfg. Co., 289 U.S. 334, 77 L.Ed. 1208, 53 S .Ct. 602 (1933); Nelson v. Milligan, 151 Ill. 462, 38 N.E. 239 (1894).

(d) Adequate remedy at law

"The fact that complainant has no remedy, or no adequate remedy at law is a strong ground for granting equitable relief." Roger v. Gibson, 267 Ky. 32, 101 S.W. 2d 200 (1937).

(e) Relative injury from continuance or abatement

"An injunction will not be granted where the loss to the defendant far outweighs the benefit to be gained by the plaintiff." Hansen v. Independent School District No. 1 in Nez Pence County, 61 Idaho 109, 98 P. 2d 959 (1939).

This principle has been variously referred to as the "comparative injury doctrine," or the "doctrine of balancing hardship," or of the "balance of interests," or of "the balance of conveniences." This is not unqualified. It is not applied where the plaintiff's right is clear and has no adequate redress at law. The reason given is that the right of the citizen to possess and enjoy property depends, not on its value as compared with other property, but on constitutional guarantees." See Krebs v. Herman, 90 Colo. 61, 79 A.L.R. 1054, 6 P. 2d 907 (1931).

(f) The doctrine of "coming to nuisance"

"This doctrine estops plaintiff from bringing suit when he acquires his property rights with knowledge of the nuisance. This is directly at odds with the realities of the air pollution problem. Carried to its extreme, it would ban suit to anyone who moved into a city with a pollution problem. This is hardly a solution to the problem of urbanization and air pollution". Waschak v. Moffat, 379 Pa 441, 109 A. 310 (1954).

[11] 103 N.Y. 10, 13-14, 8 N.E. 537, 57 Am. Rep. 701 (1886).

[12] 113 Tenn 331, 83 S.W. 658 (1904).

lands had been damaged by smoke and gas emissions from a large mining and ore reduction facility. Their farms, timber and crop interests have been badly injured and smoke made their life in the ore uncomfortable so much so that they could not even raise and harvest their customary crops.

Thus they sought an injunction, to protect their property rights by ending the air pollution.

But the court refused after it made a short-run economics of plant shutdown. It tilted the balance against the property owners. Neither the desire to protect property rights nor a recognition of the need for air pollution control dictated the balance it struck.

> "In order to protect by injunction several small tracts of land aggregating in value less than $1,000, we are asked to destroy other property worth $2,000,000 and wreck two great mining and manufacturing enterprises that are of great importance not only to their owners but to the state . . . The result would be practically a confiscation of the property of the defendants . . . without compensation . . . We see no reason or escape from the conclusion that the only proper decree is to allow the complainants a reference for the ascertainment of damages, and that the injunction must be denied them."

An entirely different approach has been taken by the California Supreme Court with an almost identical nuisance action — here involving air polluting emissions from cement works with resultant damage to nearby citrus fruit orchards and the homes of the orchardists — was strongly influenced by the underlying property issues at stake: economic factors though recognized were summarily dismissed. As a result, the air polluting activity was enjoined.[13]

> "We are not insensible to the fact that petitioner's business is a very important enterprise . . . and that great loss may result to the corporation by the enforcement of the injunction. Even if the officers of the corporation are willing to furnish a bond in a sum equal to the value of the properties of Gilbert and Hubert Estate, we cannot take from the benefit of the injunctive relief . . . To permit the cement company to continue its operations, even to the extent of destroying the property of the two plaintiffs and requiring payment of the full value thereof, would be, in effect, allowing the seizure of private property for other than a public one — something unheard of and totally unauthorized in the law . . . .
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> Nor can it make the slightest difference that the plaintiffs' property is of insignificant value to him, as compared with the advantages that would accrue to the defendant's from its occupation[14] There can be no balancing

[13] Hulbert v. California Portland Cement Co., 161 Cal. 239, 118 P. 928, 38 L.R.A. (N.S.) 436 (1911).

[14] The "balance of hardship" doctrine. This means that the resulting injuries must be balanced by the court, and that where the hardship inflicted upon one party by the granting of an injunction would be very much greater than that which would be suffered by the other party if the nuisance were permitted to continue, injunctive relief should be denied. Riedeman v. Mt. Morris Electric Light Co., 56 App. Div. 23, 67 N.Y.S. 391 (1900).

De minimis non curat lex. The law does not care for, or take notice of, very small or trifling matters. McCleery v. Highland Bay Gold Mine Co., 140 F. 951 (1904).

> of conveniences when such balancing involves the preservation of an established right, though possessed by a peasant only to a cottage as his home, and which will be extinguished if relief is not granted against one who would destroy it in artificially using his own land."

The attitude adopted by the courts however, is a minority position because of the hard economic facts that surround cases of nuisance, especially those for the abatement of air pollution.

A middle ground between the two approaches has been sought. Between the "damages-only" Tennessee approach and the California approach, a compromise is struck. This takes the form of granting damages for past injury and, though not issuing an injunction, ordering the polluter to install equipment or take other measures designed to minimize the future air polluting effects of his activity.

It would thus seem very apparent that if this approach to the problem were more widely used, the nuisance action might become a more effective pollution control.

In general though, the law of nuisance appears to be too deeply rooted in property concepts and in the legal technicalities which are associated with property rights to be an effective instrument for controlling air pollution. Our own Supreme Court in the case of *Bengzon v. Province of Pangasinan*[15] did not grant the injunctive relief. Instead, it ordered the defendant to pay for the value of the property of plaintiff, thus, adopting what the Hulbert decision referred to as "expropriation for private use."

The courts, "while paying lip-service to the landowner's right to pollution-free air have nevertheless recognized a right to do at least some polluting of the air."[16] The obstacles confronting an individual who intends to bring a nuisance action are often too overwhelming to ever hope for a large-scale attack on air pollution in this manner.

It was in this context that American legislature have been forced to act. It must be in this context that our own Legislature must also act.

B. *Legislation and/or Regulations*

The Problem of Formulating Standards

The air pollution problem is so varied and so technical in nature that

[15] 62 Phil. 816 (1936).

[16] Juergensmeyer, *Control of Pollution Through the Assertion of Private Rights*, 1967 DUKE L. J. 1131. Holman v. Athens Empire Laundry Co. 149 Ga. 345, 6 A.L.R. 1564, 100 S.E. 207 (1919), illustrates this attitude: "Every person has the right to have the air diffused over his property or premises, whether located in the city or country, in its natural state and free from artificial impurities.... The pollution of air, so far as reasonably necessary to the enjoyment of life and indispensable to the progress of society is not actionable."

Congress must adopt multiple and varying legal techniques to achieve realistic control.

The power of Congress to enact air pollution legislation cannot be doubted. Certainly, it is within the proper framework of an exercise of the police power. This is an inherent right of the state. At its root the power is regulative, aimed at protecting the state and the individual citizens from the adverse effects of otherwise unregulated activities of persons or corporations. This power has been viewed not merely as a power which may or may not be used at the discretion of organized governments but rather as a power which must be exercised to protect the state's citizens. "Its proper exercise is the highest duty of government. The state may in some cases forego the right to taxation, but it can never relieve itself of the duty of providing for the safety of its citizens. This duty, and consequent power, overrides all statute or contract exemptions."[17]

Thus, in Republic Act No. 3931 our Legislature declared as national policy the "maintenance of reasonable standards of purity for the waters and air of this country with their utilization for domestic, agricultural, industrial and other legitimate purposes."[18]

In recognition of the growing seriousness of pollution — both air and water — Congress on June 18, 1964 passed a law creating the National Water and Air Pollution Control Commission. Delegated to said agency is the power to "determine if pollution exists in any of the waters and atmospheric air of the Philippines."[19]

What is pollution?

The law defines this as "such alteration of the physical, chemical and/or biological properties of any water and/or atmospheric air of the Philippines, or any such discharge of any liquid, gaseous or solid substance into any of the waters and/or atmospheric air of the country as will or is likely to create or render such waters and/or atmospheric air harmful or detrimental or injurious to public health, safety or welfare, legitimate uses or to livestock, wild animals, birds, fish or other aquatic life."[20]

The subjective nature of experience lends great difficulty to a problem of definition especially in the field of nuisance effects. For what may be nuisance to one may represent only ordinary living condition to others, and

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[17] Boston & M.R. v. County Commissioners York Country, 79 Me. 386 10 A. 113 (1887). More pointed was the observation that the "state can never relieve itself of the duty of providing for the safety of its citizens."

[18] Rep. Act No. 3931 (1964), sec. 1.

[19] *Ibid.*, sec. 6 (1).

[20] *Ibid.*, sec. 2 (a).

there will never be any unanimity regarding this phase of air pollution. But when pollution becomes toxic, it becomes more or less settled. Even then, there is still a considerable divergence of opinion. All chemicals, whatever their nature, may be harmful to humans when certain concentration is reached and maintained for a sufficiently long time. This is true for the natural constituents of air — oxygen, nitrogen and carbon dioxide — as well as for the group of poisonous gases such as cyanide or sulfur dioxide.[21]

One major problem thus occurs. Standards of pollution based on health effects have not yet been developed.

> "When the public health aspects of air pollution are considered, we find unfortunately, that we have very little information which can be used to demonstrate the cause and effect relationship of air pollution. In none of the historic major acute episodes of air pollution has been possible to identify a single pollutant as the cause of hygienic effects. Rather, it is postulated that the injury was produced by a combination of initiating materials acting synergistically."[22]

One approach to this problem is for the Commission to establish regions or sub-regions within the state which need not be contiguous with existing municipal boundaries for purposes of denoting air sheds and conducting air quality studies and imposing quality standards or other pollution control mechanisms or any other purpose consistent with the air pollution program.

In each region, the Commission may adopt reasonable ambient air quality standards[23] to minimize long-term dangers to health as well as discomfort and maximize the aesthetically pleasing characteristics of clean air.

The rationale of this approach is readily seen. As previously shown, establishing standards of the type in question is a technical problem. The members of the legislative body will have the continuing capacity to monitor, reevaluate, and adjust these standards once established. The Commission would have both the technical competence and continuing capacity.

Republic Act No. 3931 is vague on this point. It merely empowers the Commission "to prepare and develop a comprehensive plan for the abatement of existing pollution and prevention of new and/or imminent pollution

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[21] Haagen-Smit. *When Is Air Polluted and Why is It Necessary to Measure Air Pollutants?* in NATIONAL CONFERENCE ON AIR POLLUTION, NOVEMBER 11-12, 1958, PROCEEDINGS, 81 (1959).

[22] Cholak, *Can Standard Methods Be Established For Identifying and Measuring Air Pollutants? in* NATIONAL CONFERENCE ON AIR POLLUTION, *supra, note* 21 at 104.

[23] Ambient air standard simply means that a given pollutant should not exceed a predetermined level in atmospheric quality because of aesthetic, economic, or health effects. O'Fallon, *Deficiences in The Air Quality Act of* 1967, 33 LAW & CONTEMP. PROB. 275, 278 (1968).

of the . . . atmospheric air"[24] and to issue "standards, rules and regulations to govern city and district engineers in the approval of plans and specification . . . for industrial waste disposal systems."[25]

But no matter how stringent these standards may be, in themselves, they are not a means of dealing with the sources of air pollution. There is no practical and equitable way of achieving an air quality standard in a given geographic area unless emission standards[26] are established for the sources of pollution located in the area.

One purpose of this is the fact that "individual sources of air pollution may produce injury to human health and damage to property independently of their effects on overall community air quality."[27] It is to prevent such direct and needless hazards to public health and welfare that emission standards must be established by the Commission. This, apart from the necessity for an immediate and direct frontal attack on the air pollution problem by demanding a reduction of industrial emission at the source as soon as possible.

A nation-wide emission standard is preferable to one adopted by a local agency. Industries are in competition with one another. To impose unequal restrictions on members of the same industry located in different regions would harm the more restricted form and its community. Apart from this, fear of economic injury to the community would keep the latter from setting suitably stringent emission standard.

The Problem of Adequate Regulatory Control

The law is quite adequate in the matter of regulatory controls but there are portions of the scheme which need further strengthening.

The Commission is empowered to adopt a licensing (or permit system) for the preparation of any "plans, specifications or designs or other data relative thereto,"[28] and may "issue, renew or deny permits under such reasonable conditions as it may determine to be reasonable, for the prevention and abatement of pollution. . ."[29]

Under this set-up, the Commission can frame appropriate terms and conditions with respect to each permit granted in order to insure that no

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[24] Rep. Act No. 3931 (1964), sec. 6(b), par. 5.
[25] *Ibid.*, sec. 6(b), par. 6.
[26] Emission standards limit the permissible discharge from sources of pollution. O'Fallon, *supra*, note 23 at 279.
[27] Dr. John T. Middleton, Hearings on Air Pollution – 1967 (Air Quality Act). Before The Subcomm. on Air and Water Pollution of the Senate Comm. on Public Works, 90th Cong., 1st Sess., pt. 3, at 1155-56 (1967), as cited by Fallon, *supra*, note 23 at 278-279.
[28] Rep. Act No. 3931 (1964), sec. 6(a), par. 2.
[29] *Ibid*, sec. 6(a), par. 6.

holder of permit will by his emission alone violate any standard thus adopted by the Commission.

As a tool that allows an immediate response to dangerous quality situations, the Commission is likewise authorized "to revoke, suspend or modify after hearing and notice, any permit issued under this Act, whenever modifications are necessary to prevent or abate pollution of . . . atmospheric air of the Philippines."[30]

Under the Act, the Commission is given two broad powers which it may exercise if there is any violation of the provisions of the law.

One such power given authorizes it to "institute or cause to be instituted in a court of competent jurisdiction legal proceedings to compel compliance with the provisions of this Act."[31] But before it can be determined that there is indeed a violation of the state's air pollution program, the Commission may "investigate or inquire as to any such alleged violation."[32]

Whenever it appears to the Commission that there is such a violation of any provisions of the Act or any order of the Commission it may "order whosoever causes such violation to show cause before said Commission why such discharge of industrial wastes or any waste should not be discontinued."[33]

The proceedings will be in the nature of a hearing with notice to all interested parties informing them of the date and place of hearing and the specific nature of the alleged violation. Evidence will be presented and on the basis of these the Commission shall make an order for the discontinuance of the act done in violation of the law or order, if a violation has been found.

Intended to preserve procedural fairness, this approach requires the state a certain degree of caution. One might say that at this stage, the government will use persuasion and reason to abate the pollution. There is however a clear promise that if the state's objective cannot be achieved using this approach, more stringent measures can and will be taken.

Unfortunately, though, what these measures are, the law does not define nor specify except for the authorization that the Commission can institute a legal action against the violator. As earlier pointed out in this paper, action by way of injunction is cumbersome because of the reluctant attitude of the courts.

One feasible solution is to add a provision that in an action for injunction as a result of a violation of any order of the Commission, the findings

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[30] *Ibid.*, sec. 6(a), par. 7.
[31] *Ibid.*, sec. 6(a), par. 5.
[32] *Ibid.*, sec. 8 par. 1.
[33] *Ibid.*, sec. 8, par. 2.

and records of the Commission which led to the issuance of its orders shall be *prima facie* evidence of the facts necessary to sustain the issuance of the injunction. And if during the period of non-compliance with a Commission order physical conditions in effect at the time of the issuance of the order have changed in a manner adverse to the air pollution control and abatement interest of the state or the regulatory scheme above described, the Commission's injunctive proceeding shall request the court to order a restoration of those prior existing conditions. If damages have occurred to the State or its citizens, it can bring civil action to recover damages which accrue to the state or the injured persons as the case may be.

Another legal power granted to the Commission is to bring an action under section 9. This section prohibits any person from performing any construction, installation or modification activities without securing permit from a duly constituted authority.

Violation of these prohibitions will subject the violator to fine or imprisonment.

This last approach leaves much to be desired. Making violation of regulatory order a species of criminal act and attaching fines and imprisonment may not prove effective. Violators will probably be willing to pay for the right to violate. And courts may be unwilling to convict individuals who violate environmental regulatory schemes.

Furthermore, the criminal approach misses one point of the regulatory program. It is the substance of the order that must be given effect and not the penal provision attached to the prohibited acts. The proposal made focuses on this objective by providing the powerful enforcement mechanism of injunction.

Where, however, the presence of immediate harm justifies an abridgement of the usual regulatory and enforcement procedures because of extreme or intensive air pollution posing an immediate and serious danger to health, general welfare or property values, the Commission must be given emergency powers. The law must create a mechanism which is capable of completely discarding the usual regulatory and enforcement procedures. Though it will probably be seldom used, such a tool should exist.

One other effective way of curbing or minimizing the ill-effects of pollution is the division of the municipality into zonal districts according to a comprehensive plan designed to lessen congestion in the streets, to secure safety from fire, panic and other danger, and to promote the health and general welfare, to provide adequate air, prevent overcrowding, avoid undue concentration of population.

On advocate for stricter zoning laws says: "It would seem therefore that if we are to achieve our common aim of improved atmospheric con-

ditions, an ultimately higher level of cleanliness can be achieved by the imposition of stricter standards for new construction and also for all establishments within and near such critical areas as residential neighborhoods and retail or office centers which require more protection."[34]

Zoning was one of the most radical departures from the traditional concepts of private property in our time. It prohibits a citizen from devoting his property to a purpose entirely useful and harmless, in the ordinary sense. The need for it is nevertheless so great that all, conservative and progressive alike, have accepted it and it has not been subjected to the vehement attack made on other measures deemed "liberal" or "progressive." This need has been described by the courts as arising from the "constantly increasing density of our urban populations, the multiplying forms of industry, and the growing complexity of our civilization."[35]

Presently, there are only few, if at all, regulations to prevent a property owner from using his property as he sees fit, other than a few health laws passed pursuant to a general charter provision. Zoning laws will thus restrict the owner of such property from using it in a way that will injure his neighborhood in a community.

With the establishment of districts the Commission can easily establish air quality control regions, air quality standards for the different regions.[36] Thus, rural areas can have the cleanest air while the industrial areas are permitted to have dirtier air.[37]

II. WATER POLLUTION

The only available legislation made by Congress as a response to the threat of water pollution is the passage of Republic Act 3931, already adverted to in the earlier part of this paper. It creates the National Commission on Air and Water Pollution whose primary duty is to "determine if pollution exists in any of the waters . . . of the Philippines."[38] There is yet no comprehensive statutory pollution prevention program.

Aside from the provision that it imposes on the one who violates certain prohibited conduct mostly in the construction or installation of any

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[34] May, *The Proper Role of Planning and Zoning in Air Pollution Control*, in NATIONAL CONFERENCE ON AIR POLLUTION, *supra*, note 21 at 414.

[35] American Smelting & Refining Co. v. City of Chicago, 347 Ill. App. 74, 105 N.E. 2d 803, (1952). In the case of *City of Aurora v. Burns*, 319 Ill. 84, 149 N.E. 784 (1925), the Supreme Court of Illinois considered that the establishment of zones was designed to prevent congestion and among other things, "secure quiet districts and to procure the segregation of the industrial, commercial and dwelling areas."

[36] This approach was used to divide New York state into four regional classifications: industrial, commercial, residential and rural.

[37] Thus the illogical imposition of one over-all air quality standard would be avoided.

[38] Rep. Act No. 3931 (1964), sec. 6(a), par. 1.

sewage work, industrial establishments, no real protection to the individual is afforded.

The injured party could seek relief only through the traditional method of relief: damages or an injunction. Thus the action will be prosecuted under general principles of law in the Civil Code or other related statutes.

The action will be for nuisance on the ground that it "injures or endangers the health or safety of others,"[39] or "hinders or impairs the use of property."[40]

One of the recognized right of the riparian owners is to have the stream continue to flow through or by his premises in natural conditions of purity and free from any contamination or pollution,[41] such as would render it unfit for domestic purposes,[42] as well as for manufacturing purposes[43] or for agricultural purposes,[44] or for swimming or bathing purposes.[45]

Thus, an upper riparian owner has no right to pollute a stream[46] unless he has some prior or special right to some exclusive or particular enjoyment which permits such pollution.[47] Such right is termed natural easement.[48] It is annexed to the soil and is a parcel of the land itself and inheres in the estate entitled *ex jure naturae* independent of grant of prescription[49] nor may its owner be deprived such right by legislation.[50]

This right however is not one of absolute immunity from pollution. It is subject to the right of the upper owner who is entitled to use the stream in such a manner as to make it useful to himself even if it somewhat impairs the quality of the water.[51] Whether or not it is actionable depends on the reasonableness of the use.[52]

The "reasonable use" form of the riparian theory of water rights fits conveniently into the format of the nuisance action. Since both plaintiff

[39] CIVIL CODE, art. 694, par. 1.
[40] *Ibid.*, art. 694, par. 5.
[41] Wright v. Best, 19 Cal. 2d 368, 121 P. 2d 702 (1942).
[42] Storley v. Armour & Co., 107 F. 2d 499 (1939).
[43] Collins Mfg. Co. v. Wickwine Spencer Steel Co., 14 F. 2d 871 (1926).
[44] W. B. Roddenberry Co. v. Carter, 192 F. 2d 448 (1951); Storley v. Armour & Co., *supra*, note 42.
[45] Storley v. Armour, *supra*, note 42.
[46] Conley v. Amalgamated Sugar Co., 74 Idaho 416, 263 P. 2d 705 (1953).
[47] Harvey Realty Co. v. Borough of Wallingford, Ill Conn. 352, 150 A. 60 (1930).
[48] Atlanta & B. Air Line Ry v. Wood, 160 Ala. 657, 49 So. 426 (1909).
[49] Howard v. Bibb County, 127 Ga. 291, 56 S.E. 418 (1907).
[50] City of Springfield v North Fork Outlet Drainage District, 249 Ill. App. 133 (1928)
[51] Montgomery Limestone Co. v. Bearden, 256 Ala. 269, 54 So. 2d 571 (1951).
[52] Ravndal v. Northfork Placers, 60 Idaho 305, 91 P. 2d 368 (1939). In the case of *Montgomery Limestone Co. v. Bearden, supra*, note 51, the court held that if his use of the stream is a reasonable use, the fact that it incidentally impairs the purity of the water gives no cause of action to a lower riparian owner. But the riparian owner must not use the water of the stream so that it is so corrupted and polluted as practically to destroy or greatly impair its value to the lower riparian owners.

and defendant have a right to reasonable use of the watercourse, the courts must ask the inter-related questions whether the defendant's pollution has exceeded reasonable use and whether the defendant's polluting activities have infringed upon the plaintiff's right to a reasonable use.[53]

Courts have, however, almost exclusively focused upon the social value of the defendant's conduct and the suitability of his activity to the watercourse. In one leading case[54] despite the fact that the defendant was admittedly discharging large quantities of acid from the mining operation into a stream, the lower riparian owner was denied recovery, the court holding that "the defendant was engaged in an activity beneficial to the Commonwealth."

The doctrine in this case has been revised and modified to come up with a better principle.[55] But still the courts failed to measure the reasonableness of a defendant's use in terms of damage to the plaintiff.

But again, even when this approach is adopted, the courts lack a baseline from which to judge the unreasonableness of his alleged harm. Unaided by legislation, the judicial process will fail to determine the limit beyond which a watercourse may not be polluted.

Republic Act No. 3931 is grossly inadequate on this point. Apart from a very general grant of a power "to prepare a comprehensive plan for the abatement ... and prevention of pollution of the water ... and air of the Philippines," the Commission is empowered to "issue standards ... to govern city and district engineers in the approval of plans for sewage works and industrial waste disposal systems ..."[56] The Act is largely silent as to what are specific evidences of what will amount to a pollution.

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[53] The Restatement of Torts views the "reasonable use" as a weighing of the utility of the defendant's use against the gravity of the resulting harm. AMERICAN LAW INSTITUTE, RESTATEMENT OF TORTS, sec. 852 (1939).

Utility is measured by—
a. Social value which the law attaches to the primary purpose for which the use is made;
b. the suitability of the use to the watercourse or lake and to the customs and usages existing with respect to it;
c. the impracticability of preventing or avoiding the harm; and
d. the classification of the use as riparian or non-riparian. *Ibid.*, sec. 853.

Gravity of the harm is measured by strikingly similar considerations:
a. extent of the harm involved;
b. the social value which the law attaches to the particular type of use of water which is interfered with;
c. the suitability of such use to particular watercourse or lake;
d. the burden on the proprietor harmed of avoiding the harm; and
e. the classification of the use as riparian or non-riparian. *Ibid.*, sec. 854.

[54] Pennsylvania Coal Co. v. Sanderson, 113 Pa. 126, 6 A. 453, 57 A. Rep 445 (1886).

[55] One such improved version is for the courts to inquire into the standard practice within the appropriate industry. But this sets the standard to what is rather than to what ought to be.

[56] Rep. Act No. 3931 (1964), sec. 6(b), pars. 5 & 6.

The failure of the Act to provide for a uniform standard upon which to determine the existence of water pollution fatally reduces the effectiveness of the law.

It is essential therefore, before any effective action can be taken on the Act, that a water quality standard be formulated, one that will protect the public health or welfare, enhance the quality of water and serve the purposes of the Act. It should take into consideration its use and value for public water supplies, propagation of fish and other legitimate uses. It must permit the riparian owner to dispose of an amount of waste suited to the demands of his activity and to the capacity of the watercourse.

The virtue of this scheme is the fact that built into such standard is a weighing of the social value of competing riparian users and of the suitability of these uses to the particular watercourse. The standard will thus embody precisely the necessary balancing by setting as to each riparian a maximum level beyond which all pollution is impermissible.

One question emerges — the question of the procedural effect to be given to proof by the plaintiff that the defendant has caused water quality to fall below the minimum prescribed.

Will it be conclusive, or will it be merely *prima facie?*

Perhaps the best use of such standard would be to consider that a *prima facie* case is established upon showing that the defendant has exceeded the waste disposal limits imposed. The polluter would then have to offer compelling considerations to justify his invasion of the rights of the other riparian in disregard of stated public policy. Reference to the water quality standard would shift the focus of discussion from the reasonableness of defendant's use in terms of industry to the reasonableness of defendant's use in terms of a comprehensive allocation of water rights among legitimate users.

Another problem very much proximate to the problem of evolving a standard is the problem of how to secure an injunction in order that the polluter shall be enjoined to observe the limitations established or set by the quality standards. What have been said earlier about the difficulty of abating pollution through the injunction of the activity that pollutes the air can very well be said here.

To secure an injunction, the injured riparian must convince the court not only that a nuisance exists but also that an injunction is the appropriate form of relief because no other adequate remedy exists at law.

The legal remedy of action for damages tends to be insufficient in nuisance actions, since, by nature, the offense is likely to be repeated. To

require the injured riparian to bring a series of actions is thought to impose too onerous a burden upon him,[57] and to limit the injured riparian to compensation by damages is to permit the polluter to condemn another's property for private use.

Also, the doctrine of "comparative injury" may operate as a significant restriction upon the willingness of the courts to issue injunctions. Under this doctrine, the court must weigh the harm which would be caused to the plaintiff by failure to issue an injunction against the costs which its issuance would impose upon the defendant and the public interest.

In the case of *Monroe Carp Pond Co. v. River Raisin Paper Co.*[58] the court found the defendant's use of a stream to be unreasonable but refused to issue an injunction. The defendant's investment was $15 million while the plaintiff's was only $10 thousand. The court based its decision on the ground that "the granting of an injunction will work a great injury entirely disproportionate to that sustained by plaintiff upon the defendants, and it will also seriously affect the prosperity of the city."

It is perhaps best if our courts should not resort to such a parochial approach. Followed to its logical conclusion, this doctrine would deprive the poor litigant of his property by giving it to those who are already rich. The promotion of industrial growth, the protection of jobs — these are part of the "public interest," all right. But a broader definition or outlook of the term is imperative because our resources are limited and certainly, the public has a clear stake in water quality. Not only in the continued operation of a factory does the public have interest but even more in the manner of its operation. Hence, if the operation of a factory creates pollution in excess of the negotiated permissible levels, the public interest in water quality ought now to be considered in favor of enjoining the excess pollution.

CONCLUSION

Still in an agricultural stage of development, the Philippines may yet someday achieve the progress which Japan and other blooming Asian na-

[57] This doctrine has not yet found express application in the Philippines. In the case of *Iloilo v. Municipal Council*, 24 Phil. 471 (1913), the court merely said that the ice factory of the plaintiff is "not a nuisance *per se*. It is a legitimate industry, beneficial to the people, and conductive to their health, and comfort." Nothing was said about the weight of the rights of the defendants as against the rights of the plaintiff.

However, in the case of *Bengzon v. Province of Pangasinan*, 62 Phil. 816 (1936), the construction of the pumping station near the house of the plaintiff was so close that at times the smoke blinded him and his family, affecting their lungs and their eyes. This was considered as nuisance. But instead of granting the injunction, the amount of the plaintiff's property was paid. Some sort of "private expropriation" resulted.

[58] 240 Mich. 279, 215 N.W. 325 (1929).

tions have achieved in a few decades. The problem of water and air pollution may not be as acute as in other highly developed countries like US and Japan, but their sad experience must be our guide so that we may avoid the same pitfalls into which they fell. The US gross national product is expected to approach 985 billion dollars in 1970. This reflects the degree of progress which the country has achieved. But now it is beginning to pay for its progress and prosperity — at what a price! — in the form of poisoned air and filthy waters.

Will the Philippines be a victim of similar shortsightedness? And make frantic efforts, too, after conditions have become almost unlivable?

The problem of developing adequate legislative and judicial remedy can be attributed to many factors: procedural difficulties, problems of evidence, the historic limitations on legal concepts such as the nuisance doctrine and the inadequacy of our law to cope with the problem.

All these reasons are credible and contain a measure of validity. But the more important factor is that many of the encroachments of modern society on an individual's right to a quality environment are gradual, subtle, and unforeseen. When an individual decides to exert a legal claim to environmental quality, he may find that he has taken on the legal and economic resources of an entire industry.

Statutes are not to be ignored for only the legislature can provide the comprehensive approach needed for the control of pollution. It is rather unfortunate, but no matter how good the intentions and the end products of the Legislature, it cannot legislate on all matters that are essential to environmental quality. At best, it can state our national goals with respect to the type of environment we want for ourselves and for future generations. But there will always be many specific situations which the legislative body will not anticipate or deal with.

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