

Water Pollution in India: A Jurisprudential Analysis

Stanzin Chostak¹

Abstract

A range of dimensions of water pollution in its broader legislative, policy and judicial sense is covered in this research paper. The increasing complexity of water law and the growing web of laws that address water pollution in a direct and indirect way are also highlighted in this paper. The different layers of water law, both in terms of substantive areas as well as in terms of the different types of instruments that make up water law are addressed. One of the reasons why water law in general has often not been given the prominence that it deserves is because of this complexity. Yet, there is no denying the fact that water pollution laws will be an increasingly key area of the legal framework and needs to be addressed as such. The endeavour of this research article is to provide an easier entry point for stakeholders interested in different dimensions of water law.

Keywords: Water, Pollution, Constitution , Environmental Jurisprudence.

I. Introduction

The central government enacted the Water (Prevention and Control of Pollution) Act, 1974 Act(hereinafter Water Act) with the object of ‘prevention and control’ of water pollution and to ‘maintain or restore’ the ‘wholesomeness’ of water. The preamble to the Water Act gives an indication that the Act is meant for protecting and preserving water in the larger interest of living and non-living organisms. The Environment Protection Act,1986(hereinafter EP Act) also sets forth the same philosophy in a comprehensive manner to cover the whole ecosystem. It is expressly stated that the object of the EP Act is the ‘protection and improvement’ of the environment. Hence, these laws provide the framework for the protection and preservation of the environment.²

The word ‘pollution’ under the Water Acts is defined broadly to include all direct and indirect actions, which can render water harmful or injurious to public health, safety or to the life of other organisms.³The Authority constituted under the Water Act, Pollution Control Board, is empowered to carry out the objectives of the Act, that is, prevention and control of

¹ Assistant Professor (Senior Scale) Campus Law Centre, Faculty of Law, University of Delhi (110007)

² Phillipe Cullet and Sujith Koonan(eds.) *Water Law in India: An Introduction to Legal Instruments* 173 (Oxford University Press, New Delhi, 2011)..

³ The Water (Prevention and Control of Pollution) Act, 1974, Section 2(e).

water pollution.⁴ The water Act prescribes a two-tier institutional mechanism, one at the central level (hereafter ‘Central Board’) and the other at the state level (hereafter ‘State Board’). The Pollution Control Board also has the responsibility to implement the EP Act. Therefore, powers and responsibilities of the Pollution Control Board are very wide and it is the primary agency responsible to take care of the quality of the environment as a whole.⁵

The State Board under the Water Act is empowered to enter and inspect any premises conduct investigation and advise the state government with regard to the prevention, control or abatement of water pollution.⁶ Moreover, the State Board is also empowered to issue any order, which includes the order requiring any person concerned to construct sufficient mechanisms for the disposal of sewage and trade effluents or to modify, alter or extend any such existing system or to adopt such remedial measures necessary to prevent, control or abate water pollution. It also has the power to issue an order of closure, prohibition or regulation of industries.⁷ The Water Act also makes it mandatory for any industry that is likely to pollute water to obtain a license under the Act.⁸

The Water Act also gives some special and overriding powers to the Central Government. The Central Government is empowered to give directions to any person, officer or authority in exercise of its powers under the Act.⁹ This includes power to direct closure of any industry, prohibition or regulation of any industry and stoppage or regulation of supply of water, electricity or any other services.¹⁰ The person or authority against whom such directions have been given is bound to comply with them.¹¹

The normative contents of environmental laws in India have been widened through the interpretative role played by the Indian higher judiciary. Some of the cardinal principles developed as part of international environmental law are now part of Indian law such as the precautionary principle; polluter pays principle, public trust doctrine and the principle of

⁴ See also, “Sabarimala official warns pilgrims of prosecution if they discard clothes in Pamba river”, *The Times of India*. Nov.1, 2015.

⁵ *Supra* note 1.

⁶ *Supra* note 2 at section 16(h).

⁷ *Supra* note 2 at section 16(1) and 33A.

⁸ *Supra* note 2 at section 25.

⁹ *Supra* note 2 at section 33A.

¹⁰ *Ibid.*

¹¹ *Ibid.*

absolute liability.¹² After discussing the constitutional and statutory provisions related to the environment, the Supreme Court of India in *Vellore Citizens' Welfare Forum case* held that:

We have no hesitation in holding that the precautionary principle and polluter pays principle are part of the environmental law of the country'.¹³

The court further defines the precautionary principle. The precautionary principle casts duty upon the state to take measures to '...anticipate, prevent and attack the causes of environmental degradation'.¹⁴ As per the precautionary principle, the precautionary measures shall not be postponed because of scientific uncertainty.¹⁵

The polluter pays principle has been recognised as part of Indian law by the Supreme Court in the *Bichhri case*.¹⁶ It was held that '... once the activity carried on is hazardous or inherently dangerous, the person carrying on such activity is liable to make good the loss caused to any other person by his activity irrespective of the fact whether he took reasonable care while carrying on his activity...'.¹⁷ The polluter pays principle as understood and illustrated by the Supreme Court of India seems to be linked with the liability of the polluter in the case of hazardous substances.¹⁸ The court seems to have used the principle as a basis of the liability of the polluter *vis-a-vis* damages caused to individuals and the environment. The liability as illustrated by the Supreme Court is absolute in nature.¹⁹ The Supreme Court further held that sections 3 and 5 of the EP Act empower the Central Government to give directions and take measures for giving effect to this principle.²⁰

Hence it appears that environmental laws in India provide legal framework to deal with pollution related problems. The legal framework also provides institutional mechanism to implement laws. The scope of environmental law has been widened through judicial initiatives, that is, by incorporating some of the cardinal principles as part of

¹² *Vellore Citizen's Welfare Forum v Union of India* (1996) 5SCC 647.

¹³ *Ibid.*

¹⁴ *Id* at para 11.

¹⁵ *Ibid.*

¹⁶ *Indian Council for Enviro-Legal Action and Ors. v. Union of India*, (1996) 3SCC 212.

¹⁷ *Id* at para 65; *M.C.Mehta v. Union of India*, AIR 1987 SC 1086 (Oluem Gas Leak Case).

¹⁸ For details regarding the origin and development of the polluter principle, see Nicolas de Sadeleer, *Environmental Principles: From Political Slogans to Legal Rules* (Oxford University Press, 2002).

¹⁹ *Indian Council for Enviro-Legal Action and Ors. V. Union of India*, Supreme Court of India, (1996) 3SCC 212.

²⁰ *Indian Council for Enviro-Legal Action and Ors. V. Union of India*, Supreme Court of India, (1996) 3SCC 212.

environmental laws in India. The Government and courts in the country are bound to follow and apply these principles.

II. Prosecutions Under the General Criminal Law: Indian Penal Code²¹

2.1. The Indian Penal Code: General Scheme

Chapter 14 (Sections 263-294 A) of the Indian Penal Code contains detailed provisions punishing offences affecting the public health, safety, convenience, decency and morals. Quite a large number of these sections are concerned with matters that are directly or indirectly relevant to environmental law. In fact, the importance of these sections in the context of environmental law has not been sufficiently realised. Some of the important provisions in this Chapter of the Penal Code may be mentioned here.²²

2.2. Sections 268, Indian Penal Code: Public Nuisances

The pivotal section in chapter 14 of the Indian Penal Code is section 268, which defines what is a public nuisance. It is provided that a person is guilty of a public nuisance who does any act or is guilty of any illegal omission which causes any common danger or annoyance to the public or to the people in general who dwell or occupy property in the vicinity or which must necessarily cause injury, obstruction, danger or annoyance to persons who may have occasion to use any public right.²³

The second paragraph of section 268 of the Indian Penal Code provides that a common nuisance is not excused on the ground that it causes some convenience or advantage.²⁴

It will be seen that section 268 emphasises, *inter alia*, the element of injury to the people who dwell in the vicinity. Conduct that causes environmental pollution would fall under the section in most cases.

2.3. Section 269 of the Indian Penal Code: Spreading disease

Besides the generic provision contained in section 268 of the Indian Penal Code, there is a specific provision in Chapter 14 of that Code, which can be pressed into service. For example, section 260 punishes a person who intentionally or negligently does any

²¹ P.M. Bakshi, *Environmental Law: The Procedural Options* 19 (The Indian Law Institute, New Delhi, 1993).

²² *Ibid.*

²³ *Ibid*

²⁴ *Ibid.*

act which is likely to spread the infection of any disease dangerous to life, if he knows or has reason to believe that it is likely to spread such disease. The same act, if done malignantly, is punishable under section 270.²⁵

(a) In the same Chapter of the Indian Penal Code, sections 284 to 289 address themselves to negligent conduct with respect to various types of substances. The substances dealt with vary from section to section. But the nature of the conduct dealt with, is common to all the sections. The conduct is described in the relevant sections as under:-

- (i) doing(with the particular substance) any acts so rashly or negligently, as to endanger human life or to be likely to cause hurt or injury to any other person; or
 - (ii) knowingly or negligently omitting to take such order with the substance, in his possession, as is sufficient to guard against any probable danger to human life from such substance.
- (b) The substance or activities covered by the relevant provisions are the following:-
- (i) any poisonous substance(section 284),
 - (ii) fire or any combustible substance (section285);
 - (iii) any explosive substance (section 286);
 - (iv) any machinery (section 287)
 - (v) pulling down or repairing any building (section 288);
 - (vi) any animal (section 289).

2.4.Section 290, Indian Penal Code (Residuary)

Section 290 of the Indian Penal Code is a kind of residuary provision, punishing any person who commits a public nuisance in any case not otherwise punishable by the Code.

2.5. Section 291 of the Indian Penal Code punishes a person who repeats or continues a public nuisance, after having been enjoined by any public servant, who has lawful authority to issue such injunction, not to repeat or continue such nuisance.²⁶

²⁵ Supra note 20 at 20.

²⁶ Supra note 20 at 21.

III. Criminal Law (Special): Water Pollution Act, 1974

3.1. Scope of the Act

The Water (Prevention and Control of Pollution) Act, 1974(6 of 1974) is one of the major laws relevant to the environment. Its main objects are the following:-

- a) to provide for the prevention and control of water pollution;
- b) to provide for the maintenance and restoration of wholesomeness of water;
- c) to provide for the establishment of Boards for prevention and control of water pollution;
- d) to provide for conferring powers on such Boards; and
- e) to provide for matters connected with the above.

IV. Constitutional position

The Water Pollution Act was taken as relating to a subject not within the competence of Parliament (except as provided in articles 249 and 250 of the Constitution). The Act has been enacted in pursuance of resolutions passed by certain States whose legislatures have passed the requisite resolution: Assam, Bihar, Gujarat, Haryana, Himachal Pradesh, Jammu and Kashmir, Karnataka, Kerala, Madhya Pradesh, Rajasthan, Tripura and West Bengal.²⁷

V. Magistrate may prohibit repetition or continuance of public nuisance.

A District Magistrate or Sub-divisional Magistrate, or any other Executive Magistrate empowered by the State Government or the District Magistrate in this behalf, may order any person not to repeat or continue a public nuisance, as defined in the Indian Penal Code, or special or local law (section 143).

VI. Environmental Principles: The polluter pays principle has been held to be a sound principle by this court in *Indian Council for Enviro-Legal Action v. Union of India*, JT (1996) 2 196. The court observed, “We are of the opinion that any principle evolved in this behalf should be simple, practical and suited to the conditions obtaining in this country’. The court rules that:

Once the activity carried on is hazardous or inherently dangerous, the person carrying on such activity is liable to make good the loss cause to any other person

²⁷ *Supra* note 20 at 22

by his activity irrespective of the fact whether he took reasonable care while carrying on his activity. The rule is premised upon the very nature of the activity carried on.

Consequently, the polluting industries are 'absolutely liable to compensate for the harm caused by them to villagers in the affected area, to the soil and to the underground water and hence, they are bound to take all necessary measures to remove sludge and other pollutants lying in the affected area'. The polluter pays principle as interpreted by this court means that the absolute liability for harm to the environment extends not only to compensate the victims of pollution but also the cost of restoring the environmental degradation. Remediation of the damaged environment is part of the process of sustainable development and as such polluter is liable to pay the cost to the individual sufferers as well as the cost of reversing the damaged ecology.

1. The precautionary principle and the polluter pays principle have been accepted as part of the law. Article 21 of the Constitution of India guarantees protection of life and personal liberty. Article 47, 48A and 51 A(g) of the Constitution are as under:
 - a. 48A. Protection and improvement of the environment and safeguarding of forest and wildlife. The state shall endeavour to protect and improve the environment and to safeguard the forest and wildlife of the country.
 - b. 51A (g). To protect and improve the natural environment including forests, lakes, rivers and wildlife, and to have compassion for living creatures.

Apart from the constitutional mandate to protect and improve the environment there are plenty of post-independence legislation on the subject but more relevant enactments for our purpose are: The Water (Prevention and Control of Pollution) Act, 1974 (the Water Act), the Air (Prevention and Control of Pollution) Act, 1981 (the Air Act) and the Environment (Protection) Act, 1986 (the Environment Act). The Water Act prohibits the use of streams and wells for disposal of polluting matters. It also provides for restrictions on outlets and discharge of effluents without obtaining consent from the board. Prosecution and penalties have been provided which include sentence of imprisonment. The Air Act provides that the Central Pollution Control Board and the state pollution control boards constituted under the Water Act shall also perform the powers and functions under the Air Act. The main function of the boards,

under the Air Act is to improve the quality of the air and to prevent, control and abate air pollution in the country.²⁸

2. In view of the above mentioned constitutional and statutory provisions we have no hesitation in holding that the precautionary principle and the polluter pays principle are part of the environmental law of the country.

One of the reason as to what private citizens have felt compelled to go to court and devise such a pastiche of legal claims is the inconsistency in legislative response and administrative action. As a consequence this inconsistency has promoted a search for some broad legal approach thus making the possibility of obtaining effective judicial intervention more likely. As a tool of general application for citizens seeking to develop a comprehensive legal approach to resource management problems the public trust doctrine seems to have the breadth and substantive content. In order to achieve the aforesaid objective three criterias must be met by the public trust doctrine. Firstly, in the general public the doctrine must contain some concept of a legal right. It must contain some concept of a legal right in the general public; secondly its enforceability against the government must be there and thirdly, the doctrine must be capable of an interpretation consistent with contemporary concerns for environmental quality.²⁹

In some cases a governmental agency or official is not sued directly. Instead the defendant may be a private party whom the government has inadequately regulated. Furthermore, in many traditional public trust cases, the state was the plaintiff, and the defendant was a private landowner, a local government, or a public agency. Such cases are essential to understanding judicial approaches to the public trust, but the implication should not be drawn that there will be equal judicial hospitality to a privately initiated suit.

VII. Relevance of strict liability in the Legislative sphere

Moral fault far from being irrelevant played a significant part in shaping the action which was taken against offenders. For this some credit must undoubtedly be given to the legislators who constructed a legal framework which embraces concepts such as due diligence and wilful default. Wherever the onus is placed, this is a framework which cannot be ignored by those charged with the enforcement of the law. Only an official fairly mindless of his position within

²⁸ *Id* at 27.

²⁹ Joseph S. Lax, "The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention" 68 MICH.L.REV.471 (1970).

the department would knowingly launch it upon a course of action which might culminate in a valid defence or even worse, in the embarrassment of insinuations that its zest for prosecutions is indiscriminating.³⁰

Avoidance of such outcomes can only be assured by paying attention to “moral fault”- or more precisely to the extent that its absence might be successfully argued-as part of the everyday routine of taking decisions about appropriate action. Thus, although the defence of due diligence linked to third party liability may only be used very rarely, this need not mean that its effectiveness as a means of protecting the morally innocent is minimal; its very existence as a possibility, however remote, ensures that “moral fault” cannot be completely ignored by the law in action. Those who argue for the provision of such a defence in other areas of strict liability would do well to emphasise its likely impact upon the agents of law-enforcement rather than its accessibility and attractiveness to morally blameless offenders.³¹

While the legislators must be given their due, it must also be remembered, however, that statutory provisions and the procedural contingencies deriving there from are not the whole story. The decision to prosecute can also depend, as we have seen, upon an inspector’s interpretation of resources in the light of previous warnings and upon his general assessment of a firm’s attitudes and policy. However, acute these interpretations and assessments, they bear little relevance to an offender’s statutory liability. But they do cluster; it is suggested, around the issue of moral responsibility at a level of generality which is meaningful in terms of corporate behaviour. Perhaps this wise exercise of discretion not only further mitigates the harshness of strict liability but also comes to grips with violation of the law at its source.³²

VII. Conclusion

There are three different types of legal response to water pollution: the statutory response, the judicial response and the responses under the general legal system, that is, the Indian Penal Code and the Civil Procedure Code. These responses have assumed different theories of law, state and environment. It is proposed to study the theoretical and the empirical impact of these responses, so as to first explicate the assumptions and strategies, and then to suggest alternative legal modalities for pollution control. There are three different legal responses or approaches to water

³⁰ W.G.Carson, ‘Some sociological aspects of strict liability and the enforcement of factory legislation,’ 411, *Modern Law Review*, vol.33, Stevens & Sons Limited, London, 1970.

³¹ *Ibid.*

³² *Ibid.*

pollution. First is the statutory response, second the judicial response and the thirdly responses under the general legal system. The last response includes Indian Penal Code and the Civil Procedure Code. The above stated responses have assumed different theories of law, state and environment. This paper analysed aims to study the theoretical and the empirical impact of these responses, so as to explicate the assumptions and strategies, and then to suggest alternative legal modalities for pollution control.

Due to industrial and domestic waste many lakes, ponds and rivers have become highly polluted in India. In controlling such pollution, the legislative strategies have not succeeded due to various factors. The strategy adopted by the judiciary too seems to be lacking the power to move the executive. There are inadequacies in the administrative set up to check pollution. For domestic, health and agricultural purpose, the need for clean water is paramount. In the light of this it becomes important to study the rationale and the utility of the legal responses, the working of the administration set up to achieve the ends, and the forces at play, if we are to come up with requisite legal reform.