

Judicial Trends in Water Law

A Case Study'

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INTRODUCTION

Water is being used and abused indiscriminately in India. Conflicts and disputes, therefore, continue to arise over issues of water sharing, water allocation, liability, sanctions, usages, water markets and water pricing. Disputes are resolved either in the formal **or** the informal sectors. At the informal, local level, there are the Panchayats and ~~the~~ Naya Panchayats which help in solving some of the water related disputes. Other disputes **are** brought to the courts.

This paper presents an analysis of the water related cases brought to the High Courts and the Supreme Courts between 1887 AD and 1966AD. **The** earliest case dealt by the court was that of *Emperor Vs. Halodhur Piroe* and the last case included in our study is that of *Indian Enviro-legal Council Vs. UOI*, which was decided in April 1996. Water related cases spanning over a century have been collected, documented and analysed to understand and get a better and holistic perspective on the existing and emerging water related issues and trends.

The role of ~~the~~ judiciary in the laying down of **rules** in ~~the~~ adjudication of these cases is vital for a holistic understanding **of** the entire problem and for tracing the evolution of ~~the~~ concept of development of water rights vis-a-vis different laws. As we trace the history of water law cases, we can clearly discern how, on the one hand, the judgements delivered by the courts have altered the ambit of the law and how, on the other hand, changes in the laws have affected the judgements in cases relating to water. The cases also reveal how rights vis-a-vis water law have emerged, enlarged and **are** still growing strong; how Public Interest Litigation (PIL) has been used to widen the ambit of the court as well as law so that all citizens and individuals whether they are affected

or not can move the court and get grievances redressed. Our analysis revealed that the earlier judgements were based solely on the facts of the case and that only recently have the judges looked into the larger issues of equity, economics of source and environment. Further, environmental concerns and issues have emerged strongly in the **80s** of this century. During decade there were some important development which led to significant changes in the way water rights cases were filed and decisions delivered. Some very important cases were decided, public interest litigation (PIL) as a source and means of getting environmental rights justified as well as pro-active stand of the judiciary (judiciary activism) emerged, the concept of locus standi was liberalized and the scope of environmental rights and justice emerged.

In this paper we will first discuss cases which were filed and judgements delivered under Criminal Law, followed by cases filed under law of Torts, and Administrative Law. We will then discuss the developments in water related laws, followed by development in Constitutional Law and of water rights. The major category of laws which are relevant for the cases reviewed are Criminal Law (especially Indian Penal Code, **1860**, the Criminal Procedure Code, **1878** and the Criminal Procedure Code, **1972**), the law of Torts, Constitutional Law (especially Articles 21, 32, 226, 297), Easements Act, **1882**, and laws specific to water (such as the North Indian Canal and Drainage Act, **1873**, the Ferries Act, **1897**, and the Water Act, **1974**). In some cases, the existing laws were re-interpreted or interpreted differently by the courts, leading to development of law in favour of the public and better environment. These cases deal mainly with the responsibilities of the state and municipal bodies in providing services, such as potable drinking water, and environmental issues.

THE LEGAL FRAMEWORK

Criminal Law

Until the Water Act was enacted in **1974**, disputes relating to water, including pollution, were booked under the Indian Penal Code (IPC), **1860** and the Criminal Procedure Code (CrPC), **1878** (and later the amended Act, i.e., the Criminal Procedure Code, **1972**). The British had enacted the IPC **1860** and the CrPC **1878** for better administration of their colony and to help them (the British) to better exploit the natural resources of India. These laws were applicable uniformly all over the country. The types of cases that were booked under these laws related to public nuisance, mischief, theft, and so on.

The law relating to “mischief” in the IPC has been used in litigation related to drainage. In the case of *Aluru Srinivaulu Vs. Somiah Chetty*, 1967, the accused blocked the drain and obstructed the flow of sewage from the complainant’s house. The Hon’ble Court held that a drain was ‘property’ and that the act of blocking it amounted to “causing a change...so as to destroy its utility...”, thus amounting to “mischief” under Section **425** of the IPC.

Almost all the cases discussed in the category of surface water /tanks relate to the *actus reus* involved in forcibly opening canals, erecting dams, and cutting bunds or channels. The issues dealt with in this category are mostly rights based issues like riparian rights, natural rights and easements

rights which are discussed to understand and ascertain the extent and the nature of the dispute. The cases are generally filed under Section 430 of the IPC, i.e., "... mischief by doing any act which causes...a diminution of the supply of water..." .

Issues concerning encroachments on navigable rivers are filed under Section 290, of the IPC. In the case of *King Emperor Vs. Fateh Din, 1909*, the court held that encroachment on a tidal navigable river did not amount to a public nuisance so as to attract Section 290. In the IPC, the need to produce evidence to show that such an encroachment satisfied the ingredients of "public nuisance" as enumerated in Section 268 of the IPC was stressed. In an equally striking case of *Emperor Vs. Mahadeo Prasad, 1923*, it was held that running water which was not reduced into possession could not form the subject matter of theft. In these cases the courts lay stress on the proof of the actual diminution of water supply. In addition, since these are criminal law cases, the "intention" of the offender has also to be proved. This has made litigation rather technical and, in many cases, rather cumbersome.

In other instances, the courts have directed the parties to approach alternative forums and statutes for effective redressal of their disputes, therein conceding the inadequacy of criminal law to deal with issues of this nature. For example, in the case of *Ashutosh Vs. Emperor, 1930*, where a canal distributary was forcibly opened, the learned Judge stated that the section applicable to the case in question was Section 70 of the Northern India Canal And Drainage Act, 1873 and not the IPC provisions. In another case (*Emperor Vs. Halodhur Piroe*), the court observed that disputes concerning the right to use water should be rightly placed before a Civil Court and not before a Criminal Court..

There are also some cases dealing with irrigation matters and criminal law. The earliest of these cases is the case of *King-Emperor Vs. Fateh Din, 1909*, in which the respondents were charged under Section 430, IPC as they had prevented others from irrigation to the extent to which they were entitled. The Court held that the condition precedent to conviction under Section 430 is that mischief (as under Section 425 of the IPC) must be done. Any act resulting in the diminishing of the value of the property needs to be proved.

Water can also be the subject matter of theft or mischief. In the earlier mentioned case of *Emperor Vs. Mahadeo Prasad, 1923*, the court ruled that in India, as in England, water, when conveyed in pipes and thereby reduced into possession, can be the subject of theft. Similarly, in the case of *Ashutosh Ghose Vs. Emperor, 1930*, the Calcutta High Court held that before a person can be convicted under Section 430 of the IPC for interfering with water supply, the intention to inflict loss must be proved.

The penal consequences of fishing were initially rather ambiguous. In the earlier discussed case of *Emperor Vs. Halodhur Piroe*, the accused was let off even though he voluntarily corrupted a river by strewing branches for fishing, because Section 227 talked only about 'public springs and reservoirs' and not 'rivers'. But this was altered by subsequent cases and the position is rather clear now. Fish in open and unenclosed waters are *fares naturae*. They are not capable of possession and hence cannot form the subject matter of theft. Even in private waters, if the fish are able to move in and out, fishing does not amount to theft. But where the sluice of a private enclosed tank is closed and the fish are unable to escape, then they are capable of being objects of theft.

Despite a special legislation which deals with water pollution most of the litigations has been filed either under the general criminal law or under Article 32 and 226 of the Constitution of India. Many cases have been filed under Section 133 of the IPC, which deals with "public nuisance". The issues in these cases dealt essentially with the question: "what amounts to a public nuisance?" In *Venkata Reddy Vs. State*, 1953, the Madras High Court ruled that raising the level of a bund, thus making it prone to mosquito breeding, would constitute the offence. On the other hand, in *Emperor Vs. Halodhur Piroe*, the court held that corrupting a river by strewing branches for the purpose of fishing did not constitute the offence. However, the most striking of these decisions was given in *Emperor Vs. Nama Rama 1904*, where the court stated that strewing plants in a continuous stream with a view to extract fibre amounted to "fouling of water", as envisaged under Section 290 of the IPC.

The question of environment was not totally ignored in the earlier court decisions. A landmark judgement was given by the Court in 1926 in the *Desi Sugar Mills Vs. Tupsu Kahar* case in which the question that came up for decision was whether Section 133 (1) of the CrPC was applicable to a case dealing with pollution of a river by effluents from a factory. It was held that the section was applicable to cases where rivers were polluted. The Court looked into the larger question of environment and said that everyone must recognize that it is of utmost importance to keep the sources of public water supply pure and free from pollution by industrial factories.

Law of Torts

The British introduced the law of Torts and the defence of sovereign immunity. The law of Torts based on various principles that had been formulated by the British Courts was transplanted to the Indian legal system. These principles were applied to conflicts on issues of negligence and nuisance. The law of torts is based on the principle that where there is a right, there is a remedy. Thus, the principles of strict liability as evolved in the famous *Rylands Vs. Fletcher* case and the defences available came to be applied to the Indian situation.

The earliest application of the *Rylands Vs. Fletcher* rule in India was made in the case of *Secretary of State Vs. Ramtahal Ram*, 1925. This was a case dealing with negligence in torts, and the concepts of duty and liability of the government vis-a-vis the irrigation canals. The Court held that the defendant had a duty of care to protect others from damage caused by the overflow of water from the canal. Because the duty was not fulfilled or no adequate precautions were undertaken, the defendant was liable for the damage caused and the plaintiffs were entitled to compensation.

The growth of the law of Torts as another important judicial trend can be discerned from the various cases that we have collected, documented and analysed. After the famous *Rylands Vs. Fletcher* case, some defences became available vis-a-vis liability. One defence among them was 'Act of God'. In the case of *Puroshathama Rajaliar Vs. Kannaya*, 1928 the court defined 'Act of God' as the occurrence of an act, exceeding the ordinary contemplation, and one which no reasonable man would anticipate. The main issue in contemplation was whether the breach of a river bank and consequent floods diminished the petitioners crop and whether this amounted to an 'Act of God' or not. The court held that an extraordinary flood is one which no reasonable man would anticipate, hence it is an 'Act of God'.

A question that came up for decision in the *M & S M Railway Co. Vs. Maharaja of Pithapuram, 1937* case was whether a railway company official was justified in cutting open a dam in order to protect a railway bridge from being washed away by floods, when this act resulted in the flooding and damaging of the plaintiff's land. Does the fact that the act took place on the petitioner's own land and that it was done with a good motive make a difference in this claim for damages? The Hon'ble Court held that a riparian owner who commits an act in order to save his property from being flooded and this act diverts the flood to, and damages, a neighbour's land, will be liable for the damage. The fact that he had a good motive and that the act was carried on his own land does not change the liability. Since the railway official changed the flood channel, thus damaging the plaintiff's land, the railway company is liable for damages. The rule that the Hon'ble Court applied in this decision was that a riparian owner may make defences against flood anywhere on his land provided he does not interfere with a recognised flood channel which results in damaging a neighbour's property.

On issues pertaining to the burden of proof in water supply cases, the courts seem to agree that the plaintiff that alleges negligence on the part of the Municipality has to prove the negligence. In *Ramdas Tapandas Vs. Sukkur Municipality, 1940*, and in *Partab Daldas Vs. Hyderabad Municipality, 1932* the Court held that there could not be a presumption that the leakage was due to the negligence of the respective defendant; the burden was on the plaintiffs to prove that their buildings were damaged by leakage from a Municipal pipe. However, earlier, in another case (*Kasia Pillai Vs. G.K. Pillai, 1929*) the Court ruled that it is the duty of the government to take all necessary precautionary steps to prevent overflowing of an irrigation canal and it shall be liable to compensate, if someone's property is damaged.

An important rule was applied and upheld by the Madras High Court in the case of *Shanmugavel Goundan Vs. Venkataswami Asari, 1936*, where the court held that storing of water for agricultural purposes is a natural and lawful use and is not actionable for damages unless negligence is proved. This rule was deemed necessary in order to protect customary usages of water. In another case, the Court stated that the owner of the upper lands or the upper riparians can discharge the surplus of naturally brought water from his land on to the lower lands, provided there is no damage.

In *N. Arivudai Nambi Vs. State of Tamil Nadu*, the court held that in case of diversion of water from a river by forming a channel manually, the landlords had the right to take water from lands situated on the banks of the river, provided there is no complaint by the lower riparian owners that their share of water was affected by this act.

In another case (*Sarju Prasad Vs. Mahadeo Prasad, 1932*), the question that came up before the court was whether a compensation suit was maintainable in case of deficiency of water resulting from the reduction of the dimension of a sluice. The court held that if the reduction of the size of the sluice results in the decrease of the water supply to which the plaintiff is entitled, then the mere fact of the sluice being part of the canal works cannot be relied on as justification for interference with the plaintiff's rights. The court reversed the decree of the lower court and sent it back for re-admission and to determine whether the plaintiff's have, inter-alia, an easement to receive water in excess of the quantity which they receive through the reduced sluice, and whether they have suffered any damage.

There are other cases dealing with surface water which have been filed under the law of Torts — under negligence and nuisance. In the case of *Stare of Gujarat Vs. Patel Mohanbhai Mathurbhai, 1974*, of nuisance, the defendants had dug a trench on their own land in which rain water had accumulated. The water then precolated to, and damaged, the foundation of the plaintiffs house. The Court refused to apply the distinction between natural and unnatural use of land as laid down in the *Rylands Vs. Fletcher* case and instead applied the doctrine of *sic utere tuo ut alienum non laedas*, i.e., that where the defendant was negligent and could have prevented the damage from being caused, he would be liable for all such damages caused to the plaintiff. In a similar case the government was held liable for the construction of a canal which resulted in the percolation of water in the respondent's well, thereby submerging his water pump and ultimately drying his crops.

Development of Administration Law/Duty of Municipality and Municipal Corporations

On analysing water related cases we see another important aspect of the development of law, namely, the development of the duties and liabilities of the administration and the municipal corporations and the **use** of other laws in addition to Criminal Law and the law of Torts for the settlement of disputes. This has assumed great importance because of the alarming growth of urbanisation which has resulted in problems relating to sanitation and drainage. The Courts have been approached very often to compel municipal authorities to provide adequate sanitation. This *is* normally done by filing a writ of mandamus against the appropriate authority'

In the case of *Kali Krishana Narain Vs. Municipal Board, 1943*, Lucknow, the Court ruled that the Municipal Board had the duty to get drains periodically checked **by** competent persons so as to ensure that they remain in a proper working condition. In this case, the Board was held liable because the appellant's house collapsed due to its negligence in carrying out its duty of getting the drains checked. But in some other cases, especially before Independence (i.e., before 1947), the Municipalities have been given the benefit of doubt. In *Partab Dialdas Vs. Hyderabad Municipality, 1932*, a pipe maintained **by** the defendants leaked and the water damaged to the appellant's building. In this case, the Court ruled that the burden of proof of the negligence of the defendant was on the plaintiff-failing which the action would fail. A statutory body is not liable for damages unless the power conferred upon it **is** negligently exercised. In the Lahore Municipality case (pre-Independence), titled *Syed Muzzafar Hussain Vs. Administration of Lahore Municipality, 1942*, the court was of the view that the drainage arrangements should be rearranged only if the system was found to be dangerous to public health or interfered with the ordinary comforts of individuals. This would, however, depend on the facts and circumstances of a case.

In *Kashi Nath Vs. Municipal Board, Agra, 1939*, the plaintiff brought a suit against the Municipal Board of Agra for damage caused due to the non-supply of water to the second storey of the plaintiff's house. He prayed for a mandatory injunction to the Board, to supply water to him during prescribed hours. The Allahabad High Court, while dismissing a second appeal, ruled that in the circumstances, the court will not grant the injunction because it is incapable of enforcing it.

Cases relating to the various aspects of water supply, rural as well as urban, have decreased in the post- Independence period, i.e., after 1941. The underlying basis that the courts have worked on

is that the Municipal Authorities and other local bodies are under an obligation to make arrangements for water supply.

The Courts, on more than one occasion, have had to deal with the plea of the state, that there is a paucity of funds. But repeatedly the courts have held, as for example, in *Janki Nathubhai Vs. Sardar Nagar Municipality, 1986*, and also in the famous Ratlam Municipality case, that this excuse will not attract the sympathy of the court. In the case of *Ratlam Municipal Corporation Vs. Vardichand, 1980*, local residents filed a criminal case under Section 133 of the Criminal Procedure Code, 1973 against the Municipality. On appeal, the Supreme Court came down harshly on the Municipality and directed it to “clean up “ the area. This has come to be considered a *landmark* case, for this very reason. Subsequent to this famous, landmark case, the other public interest litigation cases which are of great importance are the *M. C. Mehta* case and the *Ganga* Pollution case in which the Municipalities were directed to perform their statutory duty of ensuring that sewage from the towns would not be emptied into the Ganga without first treating it.

The cases discussed above show that the judiciary has exhibited dynamism in evolving new ways of dispensation to combat the ever increasing problem of drainage and sanitation. These cases also establish the fact that statutory bodies or administration cannot take the defence of paucity of funds or staff to forgo their primary duties .

Statutes on Water Law

The British enacted and applied their own laws in India without bothering about the prevailing and existing local dispute resolution mechanisms. As a result of these new enactments the local forums had to take a back seat since these laws were applicable all over the country. The Northern India Canal and Drainage Act, 1873, the Northern India Ferries Act, 1878, and the Fisheries Act, 1897 were enacted by the British. The other Acts were enacted by the Indian Government after Independence. We will briefly review the major laws relating to water. with reference to their application in court cases.

(i) The Northern India Canal And Drainage Act, 1873

The Northern India Canal And Drainage Act, 1873 deals extensively with irrigation matters. In the case of *Gajjan Singh Vs. State of Punjab, 1967*, the superintending Engineer sought to alter a water course that he himself had approved earlier. The court held this review to be invalid. The Rule that the court applied was that no one can review his own orders or orders of a subordinate authority.

(ii) The Northern India Ferries Act, 1878

To ferry is to convey passengers and goods, essentially by boat, across water. This makes the ferry a property and capable of being possessed. This point was discussed in a criminal case (*Dhanajoy Dhara Vs. Provat Chandra Biswas, 1934*) where the accused had forcibly occupied a ferry. It was held to be an act of trespass, thus reiterating that a ferry was a “property” .

In India, the principal statute dealing with the ferries is the Northern India Ferries Act, 1878. This statute draws a distinction between public ferries and private ferries, and different provisions apply to each.

The right to a ferry franchise has always been granted by the presumed owner of water resources: the state. Initially, this right was determined solely by the evidence of a direct grant by the Crown. Even prescription did not constitute a valid franchise. But this has long been subject to change and the position now is that a valid license has to be obtained in order to ply a ferry in a river.

The law relating to ferries is therefore quite settled. The rights to a ferry can be exercised irrespective of any rights in land. This right is wholly unconnected with the ownership or occupation of land and it is not necessary that a ferry owner should have any property in the soil of the river over which he has a right of ferry. Even though it seems an exercise in administrative law, ferries continue to be an integral part of the law relating to water.

(iii) ***The Fisheries Act, 1897***

The right to fish in tidal navigable waters was earlier determined by the proof of a grant by the crown or by prescription, failing which the right was deemed to be non-existent. And the prescriptive right to catch fish stood proved merely by the fact that the defendants did not deny such an act. But if the river changed its course, the status of this "right to fish" was unclear. In the case of ***Ishwar Chandra Das Vs. Upendra Nath Ghosh*** it was held that the right would cease since the property now became the property of the adjacent owner. However, in a subsequent case, ***Srinath Roy Vs. Dinabandhu Sen***, the privy council ruled that the grantee of such a right could follow the shifting river for the enjoyment of his right so long as the waters of the river system are within the upstream and downstream limits of his grant.

Before the Indian Constitution came into force, the right of fishing in territorial waters was vested in the local zamindar. Article 297 changed this position. It vested "all land, minerals and other things of value underlying the ocean within territorial waters,..." in the Union (i.e., the Indian State). However, even before it came into force the courts had anticipated this transfer of right to the state.

In an important case, ***AMSSVM and Co Vs. State***, the court held that "Whatever theory might ultimately find acceptance with the family of nations as to the true basis of the right which a state possesses over territorial waters, there cannot be any doubt that with reference to the rights of fishery, the marginal belt must be regarded as part of the territory of the littoral state."

Under the Fisheries Act, 1897, the Government could settle the fishery rights in favour of a particular cooperative society for a fixed period and this period could be further extended. In instances where the Government chooses to cancel this extension, it has to hear the party — irrespective of whether the party has complied with the directions of the extension or not. The principles of natural justice and all necessary procedures have to be adhered to mandatorily.

The courts have not normally concerned themselves with the socio-economic aspects of the fishermen and have confined themselves to technical determination of the cases. But there has been a gradual and welcome change. In ***State of Kerala Vs. Joseph Anthony***, the Supreme Court

upheld a Government ban on fishing by mechanised boats because it affected the rights of the traditional local fishermen. Similarly, the court ruled that a Government circular that sought to eliminate middlemen and settled fishery rights directly with genuine co-operative societies and local fishermen did not amount to “creating a monopoly”. It was, on the contrary, attempting to involve the fishermen directly.

(iv) *Water (Prevention and Control) of Pollution Act, 1974*

The Parliament recognizing the importance of water free from pollution enacted the Water (Prevention and Control) of Pollution Act in **1974** (Water Act, **1974**). This Act was enacted to ensure the wholesomeness of water and to ensure that with industrialization and growth of cities domestic and industrial effluents and waste waters are not thrown into the streams and rivers without being treated first. For these purposes the act also envisages the creation of a Central Pollution Control Board and the State Pollution Control Boards in the States.

Although the main legislation dealing with water pollution is the Water Act, **1974**, most of the litigations have been filed under the general criminal law or under Articles 32 and 226 of Constitution of India. In the period between **1980** to **1990**, there has been a massive increase in pollution related litigations. In fact, just from **1990** to **1993**, upto thirteen judgements have been delivered by different courts on this issue.

And a number of prosecutions against polluting industries have been launched under Section **33** of the Water Act. In the *Pondicherry Paper Mills* case, the Madras High Court ruled that the remedy under Section **33** was independent of the rights of the Pollution Control Board.

Regarding the nature of evidence in water pollution cases, the Delhi High Court stated in the *M/S Delhi Bottling Co. Put. Ltd. Vs. CPCB, 1986* that samples not taken in strict compliance with Section 21 of the Act are inadmissible as evidence. The court made it clear that the sample of water must be lifted from stream or well only in accordance with the provision of the Water Act. Such technical requirements of the court only obstruct and dilute the essence of the Act, which is to prevent water pollution. Taking note of this, the Supreme Court, in the cases of *Satish Sabharwal Vs. State of Maharashtra, 1986*, *UP PCB Vs. M/s Modi Distillery* and *Mahmud Ali Vs. State*, repeatedly ruled that technical obstacles in the interpretation of the environmental law will not be allowed to come in the way of prevention of water pollution. But implementation of this rule to its full potential has yet to be done.

An added feature of the present water pollution problem is the utter disregard shown by the Central and State Pollution Control Boards (PCB's) in launching prosecutions against polluters. In the *Francis Barreto* case of **1983** this lackadaisical approach of the Central PCB was highlighted. Again, in *Rajiv Ranjan Singh Vs. State of Bihar*, the Patna High Court hauled up the Central PCB for its absolute inaction and for dereliction of duties. In another case, *Travancore Cochin Chemicals Ltd. Vs. Kerala PCB*, the Kerala High Court criticised the Central and State PCBs for issuing conflicting orders.

The constitutionality of Sections **19** and **24** of the Water Act have been challenged before the Rajasthan and Gujarat High Courts in *M/s Aggarwal Textiles Vs. State of Rajasthan, 1981* and

M/s Abhilash Textiles Vs. Rajkot Municipal Corporation, respectively. However, both courts upheld the validity of the provisions, stating that the power granted by these provisions was not unbridled and did not violate Articles 14 and 19 of the Constitution of India.

In most cases, the response of the courts has been to provide injunctive reliefs. In addition, the courts have also repeatedly asked and ordered the polluters to conform to the requirements of the law, failing which they would face strict, deterrent actions.

Regarding liability for pollution caused by erring industries, the courts have normally ruled in favour of individual liability. In *K.K.Nandi Vs. Amitabh Bannerjee, 1983* the Calcutta High Court categorically stated that liability is to be fixed on every person who is in charge of, and was responsible for, the conduct of business of the company. Similar ratios were laid down in *M/s TransAsia Carpets Ltd. Vs. State of U.P., 1992* and *J.S.Huja Vs. State*.

The law relating to water pollution has normally failed to take into account the nature and uniqueness of the water as a resource. But over the last decade, the courts have begun addressing larger questions of the environment and, as a result, the right to potable water was recognised, for example, by the Kerala High Court in *F.K.Hussain Vs. Union of India, 1990*.

(v) *The Haryana Canal and Drainage Act, 1974*

The Haryana Government formulated a 'rice shoot' policy which sanctioned various new rice shoots. This was challenged by the petitioners in the case of *Darayo Singh Vs. State, 1992*, under Section 17 of the Haryana Canal and Drainage Act under which a new outlet can only be provided by preparing a draft scheme and in this case no such draft had been made.

The issue which the court looked into was whether the procedure under Section 17 and 18 of the act has been followed in the formulation of this policy. Can the procedural requirements be dispensed with? The court held that 'rice shoot' does not come within the definition of "outlet" as per the Act, hence the policy was valid. The court also looked into the purpose of the policy which was framed in the interest of the nation so that more rice was grown in areas more suitable for rice cultivation. The court also laid down guidelines for the sanctioning of 'rice shoots' to be implemented by the competent authority.

(vi) *Water Cess (Prevention and Control of Pollution Act, 1977)*

After the implementation of the Water Cess Act, 1977 many industries have challenged the imposition of the cess. These challenges required the courts to go into various issues, namely, interpretation of the Act, nature of industry, nature of end product, and so on.

What is a water cess? The Patna High Court in the famous *TISCO* case titled, *TISCO Vs. State of Bihar, 1991*, held that a cess imposed under the Water Cess Act is by way of compulsory exaction of money by a public authority for a public purpose. The court further stated that a cess is to be imposed for the purpose of treating the effluent of the factory and other sewage so that the common public may not have to use contaminated water or polluted water. The issue of interpreting the Water Cess Act also came up before the Kerala High Court in the *Kerala SPCB*

Vs. Gwalior Rayon Silk Manufacturing (Weaving) Co., 1986, case. The Hon'ble Court stated that rules that sought to ensure regulation of the release of effluents into rivers are in the interest of the public and are therefore valid. In addition they stated that mere installation of a treatment plant does not entitle one to a rebate. In other words the court ruled that the Cess Act should be construed liberally. However the Supreme Court, in the *A. P. Rayons Ltd.* case, ruled otherwise. Viewing the statute as a fiscal one, the court held that it must be construed strictly. This was reiterated by the Supreme Court in *Rajasthan State Electricity Board Vs. Cess Appellate Committee, 1991*.

Regarding the imposition of cess, it is quite settled that this would depend on the nature of the industry. In *Tata Engineering and Locomotive Company Ltd. Vs. State*, the Patna High Court stated that while identifying the nature of an industry, the totality of its activities and its dominant primary purpose should be the guiding factor and not the mere presence of some incidental processes. This test of "dominant purpose" is now the test that is followed to ascertain whether the industry attracts the provisions of the Water Cess Act.

Constitutional Development

The Constitution guarantees to all citizens the right to life and enjoins upon the state to safeguard the environment for the citizens. It imposes a duty on the state to protect the environment. The citizens have the right to a clean environment under the directive principles of the State Policy which, however, are not enforceable. The ambit of Article 21 has been increasing as judicial activism has been taking root as has been proved in various cases.

Most of the constitutional litigations have been converted to PIL in order to bring about social justice within the reach of the common man. PIL and judicial activism go hand in hand because PIL itself is the result of judicial activism. Judicial Activism is the term used for the unconventional role played by the court when it gives value judgement and grants relief to the aggrieved person or persons according to its moral and social sense of justice in a situation where statutory law is silent or even contrary.

The courts recently discussed a very vital issue — whether the larger question of the maintenance of health falls within the purview of Article 21 of the Constitution. After a long debate, finally in the recent judgement given by Chief Justice Ahmadi and Justice K. Ramaswamy and M.M. Punchi, dated February 1995, the right to health has been included in Article 21. Even though this case essentially deals with labour law, the ratio of this case has unlimited potential in the law relating to drainage and sanitation.

Article 21 of the Constitution guarantees to all persons the right to life and personal liberty. The scope of this Article has been widening through various judgements in cases such as the *Attakoya Thangal* case, the *CERS* case, and the *Subhas Kumars* case. The Andhra Pradesh High Court in its judgement gave a new "jurisprudential approach" to the question of environmental pollution. It observed that "The enjoyment of life and its entitlement and fulfilment guaranteed by Article 21 of the Constitution embraces the protection and preservation of nature's gifts without which life cannot be enjoyed...The slow poisoning by polluted atmosphere caused by environmental pollution and spoilation should be regarded as amounting to violation of Article 21 of the

Constitution “ . In the Subshas Kumar case the Supreme Court declared , “the right to life in Article 21 includes the right of enjoyment of pollution free water and air for full enjoyment of life”.

Two other important judgements reported in 1990 are the cases of Attakoya Thangal and F.K.Hussain which dealt with the groundwater usage as water supply to the citizens being a fundamental right of the citizens. Short supply of potable water in the Lakshadweep Islands had led to large scale withdrawal of water which had resulted in salination of water and had upset the fresh water equilibrium. The court held that the right to potable, sweet drinking water is an attribute of ~~the right to life and the administration cannot be allowed~~ to withdraw groundwater on a large scale. This will upset the fresh water equilibrium. The court also held that there should be a proper scheme evolved by the administration and reiterated that withdrawal of water at all levels should be effectively monitored. The Hon'ble court applied the rule that the right to life envisaged in Article 21 of the Constitution includes the right to potable water. The administration cannot be permitted to make inroads into this fundamental right. Similarly, in the case of Attakoya Thangal, every citizen's right to sweet drinking water was held to be a fundamental right and an extension of right to live which thereby included the right to sweet drinking water.

Thus over the years the scope and ambit of Article 21 of the Constitution which guarantees the right to life to all persons has included the right to sweet drinking potable water as a fundamental right. Right to health, and right to water free from industrial pollution has also been included in this fundamental right.

The Supreme Court in a recent case has held that the preservation of the environment and keeping the ecological balance unaffected is a task which not only the Government but also every citizen must undertake. It is a social obligation and every Indian citizen is to be reminded that it is his fundamental duty as enshrined in Article 51 A (g) of the Constitution.

DEVELOPMENT OF RIGHTS

Various aspects and issues of rights such as riparian rights, easement rights, property rights, natural rights, prescriptive rights, fundamental rights have evolved, emerged and developed from the water law cases. The Easements Act, 1882 has been applied in many cases dealing with water law in order to come **up** with rights of individuals, riparian owners, etc. The various rights dealt in the cases also ascertain the extent and nature of the dispute. In most cases the larger questions of the socio- economic status of the parties, equity and environment have not been considered.

There are cases that do not pertain to water law directly and yet have been discussed as water law cases. This is because the facts show that indirectly, the cases are due **to** the operation of certain inherent notions of water use and management. In certain instances, we find riots and even murder caused due to animosity generated by diversion of water. These cases are **of** utmost significance since they reflect the socio-economic status of water in the society.

Having regard to the use of water by riparian owners, the law states that the upper riparian owner could direct the water by any method provided that he did not materially injure the right of the lower riparian owner. The rights of the riparians are discussed here separately because the development of these rights is an important aspect of the development of water rights. These observations are based on the cases discussed earlier in the paper. These rights are based on the observation of the courts, the judgements given by the court, the principles that court took into account while arriving at decisions, and so on.

The rights of the riparian owner were given paramount importance and it was held that a riparian owner may **take precautions against flood anywhere on his land provided he does not** interfere with a recognized flood channel thereby damaging a neighbour's property.

The scope of the right of the riparians were further expanded when it was held by the Hon'ble courts **that a natural right vested in the owner of higher land to drain excess water to a lower land.** However, in cases where there is a drain or a channel that separates the two fields, this natural right will not arise. On the other hand, it was held that this right of the upper land owner to drain excess water by artificial means did not amount to "normal use of land" and the owner of such land was liable in damages to the owner of the lower land.

The irrigation cases deal with: (I) the right of the Government to regulate the collection, retention and distribution of water for irrigation, (ii) **the contravening rights of the riparian owners,** and (iii) the duty of the government to compensate, in the event of damage.

The earliest reported case (under the category of irrigation), *Fischer Vs. Secretary of State*, was filed under the provisions of the Easements Act, 1882. This is an important case because it discussed the rights of the Government over natural sources of water as against those of the riparian owners. The court ruled that the Government had the power to regulate, in public interest, the collection, retention and distribution of water of rivers and streams flowing in natural channels or in manually constructed works, provided that they do not thereby inflict sensible injury on any other riparian owners and diminish the supply that they have traditionally utilised.

In the case of *Gangaram Vs. Secretary of State*, the question that came up before the court was whether a compensation suit was maintainable in case of deficiency of water resulting from the reduction of the dimension of the sluice. The court held that if the reduction of the size of the sluice results in the decrease of the water supply to which the plaintiff is entitled, then the mere fact of the sluice being part of the canal works cannot be relied on as justification for interference with the plaintiff's rights. The court reversed the decree of the lower court and sent it back for re-admission and to determine whether the plaintiffs have, inter-alia, an easement to receive water in excess of the quantity which they receive through the reduced sluice, and whether they have suffered any damage.

In the case of *M and S.M. Railway Company Vs. Maharaja of Pithapuram (1937)*, discussed earlier, the Hon'ble Court held that a riparian owner, who commits an act in order to save his property from being flooded and this in effect diverts the flood to a neighbour's land and damages such land, he will be liable for the damage. The fact that he had a good motive and that the act was carried on his own land does not change the liability. Since the railway official changed the flood

channel which damaged the plaintiff's land, the railway company is liable for damages. The rule that the Hon'ble court applied while coming to this decision was that a riparian owner may make defences against flood anywhere on his land provided he does not interfere with a recognised flood channel, which results in damaging a neighbour's property

In one case the court established that the owner of upper lands can discharge the surplus of naturally brought water from his land on to the lower lands, provided no damage is caused .

The court upheld in a case that diversion of flow of water from a river by forming a channel manually, the landlords had the right to take water for lands situated on the banks of the river, provided that there is no complaint by the lower riparian owners that their share of water was effected by this act.

CONCLUSION

The present paper has tried to analyse cases relating to water law and come up with a judicial trend which reflects the role of the judiciary, the scope of judicial activism, the growing concern of the citizens, the development of PIL, the development of various laws, the growth of fundamental right, and so on. The trend that emerges from this study is that cases in the beginning of this century were mainly dealing with criminal law and related to issues of theft, mischief and nuisance. Over time law developed and the concepts widened. We see the scope of law of Torts widening, though most of the torts cases were confined to certain specialised categories of water like irrigation and pollution. The trend also sees the development of riparian rights and principles. With the increase in urbanisation and industrialisation the problems relating to sanitation and drainage also increased. This also led to the development of municipal and administrative law and the attendant duties and liabilities of the Municipal Corporations. Increased levels of pollution of the rivers and streams led to the enactment of water specific legislations to ensure water as a source for drinking water, for supporting fish life, for use in irrigation and to ensure water free from pollution.

The ambit of Constitutional law widened in the 80's as also the scope of Article 21 to include right to potable drinking water, right to environment and health, and right to water free from pollution. There was another development more or less concurrent to this constitutional development and that was the growth of public interest litigation filed by concerned citizen groups to redress their grievances whether of water pollution or improper sanitation and drainage. With the growth of the concept of PIL, water pollution cases came to be filed under the larger ambit of Articles 32 and 226 of the Constitution. Most of the constitutional litigations have been converted to PIL in order to bring about social justice within the reach of common man.

The courts have over the years held that it is the duty of Municipal Corporations to properly maintain sanitation and drainage and that paucity of funds and staff is no defence. This trend was started in the judgement of the Supreme Court in *Ratlam Municipal Corporation* case and was later reiterated in the *Ganga Pollution* case, wherein the court laid down that sanitation and drainage was to be maintained by the Municipal Corporations and that untreated sewage and effluents could

not be thrown into the river untreated. Thus, the underlying basis that the courts have worked upon is that the Municipal Authorities and other local bodies are under an obligation to make arrangements for water supply and drainage. The two cases mentioned above are landmark cases and marked the development of laws and the positive attitude of the judiciary and the activist role that it played

An analytical overview shows the general disconcert of the judges to go into issues involving social justice barring a few exceptions. They have, on the contrary, stuck by the letter of the law and have sparingly, if at all, applied the principals of judicial activism. But the Supreme Court seems to be taking the lead in moving away from this practice. In two instances, they set up expert committees to go into technical questions, which they thought themselves unqualified to comment upon. This step, though small, shows the judiciary's willingness to enlarge its own jurisdiction in order to deal with the socio economic realities of the society.

The modern judiciary cannot afford to hide behind notions of legal justice and plead incapacity when social justice issues are addressed to it. This challenge is an important one, not just because judges owe a duty to do justice with a view to creating and moulding a just society, but also because a modern judiciary can no longer obtain social and political legitimacy without making a substantial contribution to issues of social justice.

This paper thus attempts to analyse the cases relating to water filed in the High Courts and the Supreme Court since 1900 and present the judicial trends based on the that analysis. However, there are some shortcomings in the present study as we have been unable to collect and document unreported cases. Secondly, in our classification and categorisation of water law cases, hill irrigation has not been included but this was due to the lack of any case on this topic. The cases that we have collected and analysed have not helped us in discerning a trend of customary water practises. Further, not many cases are reported on big dams. We have not analysed the Narmada Dam issue because it is sub-judice. The Tehri Dam case showed the lack of judicial activism in a different light. The court while dismissing the writ petition held that in view of the material on the record the court did not find any good reason to issue a direction restraining the respondents from proceeding ahead with the implementation of the project.

Thus water law has developed from criminal to torts to Constitution as also specific water related statutes besides the growth of administrative law. Judicial activism has been very much the hallmark of a number of cases and the concept of rights has changed from mere riparian rights to easement rights, natural rights and fundamental rights. However, the courts have not normally concerned themselves with socio-economic aspects but have confined themselves to technical determination of the cases. Nevertheless, there is a gradual but welcome change as enumerated in some of the cases discussed in the paper. This judicial activism is perhaps the beginning of what we would call the growth of the concept of Indian environmental justice vis-a-vis water law.

NOTES

- 1 This is a revised version of the paper presented at the workshop on Water Rights, Conflict and Policy, Kathmandu, January 22-24.
- 2 Both of the authors are lawyers and work in the Center of Environmental Law, attached to the World Wildlife Fund-India.
- 3 A writ of mandamus may be defined as a command issued from the High Court or the Supreme Court, directed against the state or the authority mentioned in Article 32 as well as under Article 226 of the Constitution requiring the performance of a particular duty therein specified, which duty results from the official duty or by operation of law. In other words, prerogative writ of mandamus is imposed for securing judicial enforcement of public duties, performance of which has been wrongfully refused. Mandamus is a public law remedy and will not, therefore, be available in respect of duties of private nature.

ANNEXURE I

LIST OF CASES DISCUSSED IN THE PAPER

1. **Aluru Srinivaulu vs. T.P.Somiah Chetty**, (1967) CrLJ 1227 AP
2. **King Emperor vs. Fateh Din**, (1909) CrI No. 4 Punj. Ruling
3. **Emperor vs. Mahedeo Prasad** , (1923) ILR 45 All. Series 680
4. **Ashutosh vs Emperor**, AIR (1930) Cal. 318
5. **Emperor vs Halodhur Piroe**
6. **A.Venkata Reddy v. State**, (1953) CrLJ 520 Mad.
7. **Emperor vs Nama Rama** , (1904) VI Bom.LR 52
8. **Desi Sugar Mills vs Tupsi Kahar** , AIR (1926) Patna507
9. **Puroshattrarna Rajaliar vs. Kannayya**, AIR (1928) Mad. 139
10. **M&S.M. Railway Co. vs. Maharaja of Pithapuram**, AIR (1937) Mad. 703
11. **Rarndas Topandas vs. Sukkur Municipality**, AIR (1940) Sind 254
12. **Partab Dialdas vs. Hyderabad Municipality**, AIR (1932) Sind 131
13. **Secretary of State Vs. Ramtahal Ram** , (1925) 86 IC 928
14. **Kasia Pillai vs. G.K. Pillai**, AIR (1929) Mad.337
15. **Shanmugavel Goundan vs. Venkitaswarni Asari**, AIR (1936) Mad. 202
16. **Arivudai Nambi vs. State**
17. **Sarju Prasad vs. Mahadeo Prasad**, AIR (1932) All. 573
18. **State of Gujarat vs. Patel Mohanbhai-Mathurhhai**, (1974) 15 Guj. LR 259
19. **Kali Krishana Narain vs. Municipal Board; Lucknow**, AIR (1943) Oudh 140
20. **Syed Muzzarrar Hussain vs. Administration of Lahore Municipality**, (1942) 198 IC 773
21. **Kashi Nath vs. Municipal Board, Agra**, AIR (1939) All.375
22. **Janki Nath Bhaichara vs. Sardar Nagar Municipality**, AIR (1986) Guj.49
23. **Ratlam Municipal Corporation vs. Vardichand** , AIR (1980) SC 1622
- 24.a **M. C. Mehta vs. UOI** , 1990 (2) Scale 609
- 24.h **M.C. Mehta vs. State of Orissa**, AIR (1992) Orissa 225
25. **Gajjan Singh vs. State of Punjab**, (1967) 69 Punj.LR 395
26. **Darayo Singh vs. State**, AIR (1992) P&H 169
27. **Dhanajoy Dhara vs. Provat Chndra Biswas** , (1934) 38 CWN 665
28. **Hori Das Mal vs. Mahomed** , (1885) 11 ILR (Cal Series) 434

29. Ishwar Chandra Das Vs. Upendra Nath Ghosh
30. Srinath Roy vs. Dinabandhu Sen
31. A.M.S.S.V.M. & Co.Vs. State
32. **State** of Kerala vs. Hoseph Anthony
33. M/S Delhi Bottling Co. Pvt. Ltd. vs. C P C B, AIR (1986)Delhi 152
34. Satish Sabharwal vs. **State** of Maharashtra, 1986(2)SCALE 1231
35. U P P C B vs. M/S Modidistillery
36. Francscso Barreto vs. C P C B , District Court of Goa , Civil Suit No. 39/1983
37. Rajiv Ranjan Singh vs. State of Bihar
38. Travancore Cochin Chemicals Ltd. vs. Kerala P C B
39. M/S Aggarwal Textiles vs. State of Rajasthan , (1981) S B C , W.P. No. 1375/ 80
40. MIS Abhilash Textiles vs. Rajkot Municipal Corporation
41. K.K. Nandi vs. Amitabh Bannerjee, (1983) CrLJ 1479(Cal.)
42. Transasia Carpets Ltd. vs. state of U.P., (1992)CrLJ 673 All.
43. F.K. Hussain vs. State of Kerala, AIR (1990) KER.321
44. Attakoya Thangal vs. U O I , AIR (1990) SC
45. Tisco vs. State of Bihar, Air (1991)Patna 13
46. Kerala S P C B vs. Gwalior Rayon Silk MFG (Weaving) Co., AIR (1986) KER.256
47. Rajasthan **State** Electricity Board vs. CESS Appellate Committee, AIR (1991) SC 597
48. CERS vs. U O I , AIR (1995) SC
49. Subhash **Kumar** vs. State of Bihar, 1991(1) Scale 8