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Legal control on water pollution

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Abstract

Water pollution is a very serious problem in India. The right to a water pollution-free environment has been read into the fundamental right to life guaranteed under the Constitution of India. In addition to a specific law to prevent and control water pollution as well as the environment protection legislation, which follow a command-and-control approach, the statutory framework governing water pollution comprises provisions of municipal laws and public nuisance-related provisions in civil and criminal laws. While the first three laws have suffered from serious implementation failures, the provisions relating to public nuisance have also not been invoked. However, the issue of water pollution has been raised in a number of public interest litigations to varying effect

Introduction

Water pollution is said to have occurred when the pollution load exceeds the natural regenerative capacity of a water resource. It is a very serious problem in India where 70 per cent of the sources of surface water, such as rivers and lakes,

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are polluted and there is an alarming increase in groundwater pollution as well. In light of the fact that surface water and groundwater are the major sources of water supply for different uses, their pollution creates a situation where water may be available in sufficient quantity but there is water scarcity due to quality concerns.

The sources of water pollution can be divided into point sources and non-point (or diffuse) sources – the former include disposal of untreated or partly treated industrial effluents and domestic sewage while the latter include agricultural run-off. Water pollution can also result from encroachments, sand mining, religious activities, dumping of waste, etc.

The main provisions of Part II of the Control of Pollution Act 1974, concerned with controls upon the pollution of inland and coastal waters, were held in abeyance for a long period after the Act passed into law.¹ The reasons for this delay lay in the enactment by

Parliament of legislation for which the Treasury was unable or unwilling to devote the funds necessary for implementation. The background to the delay represents a regrettable catalogue of administrative prevarication, which at best was a sacrifice of the water environment to the economic recession of the late 1970s and early 1980s, and at worst a circumvention of the constitutional principle of the rule of law whereby Parliamentarily enacted legislation should take effect without being subject to an implementation timetable manipulated

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according to considerations of political expediency.² Fortunately the major provisions of Part II of the 1974 Act are now operative and constitute the basis of water pollution control in England, Wales and Scotland.³

It may seem to the formidable body of personnel who are charged with the day to day administration and enforcement⁴ of Part II of the Control of Pollution Act 1974 that scarcely has it come into substantial operation, and its intricacies come to be fully appreciated, than the prospect of its departure is in view. The revision and re-enactment of Part II of 'COPA' is currently being considered as an incidental feature of the Government's plan for the privatization of the water industry,⁵ and present indications are that its provisions will be replaced by part of a new Water Act planned to pass into law late in 1989.⁶ At the time of writing, however, few details have emerged as to the degree of modification of the law envisaged under the forthcoming legislation, and it would be highly speculative to try to anticipate the outcome of the close Parliamentary scrutiny to which the Water Bill is likely to be subject. Nonetheless it is a profitable exercise to take a close look at some aspects of the present law with a view to identifying shortcomings and considering scope for future improvements. If the substantive law of water pollution is to be revised, as an adjunct to the extensive administrative reforms necessary to transfer regulatory responsibility for the water environment from the water authorities to the proposed National Rivers Authority, then it is preferable that every opportunity should be taken to rectify the main weaknesses

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which have been revealed during the relatively short operative life-span of the present provisions.

The main focus of the present article is, therefore, upon the lessons which are to be learnt from recent past experience of the operation of water pollution law, rather than as an attempt to prophesy the details of the Water Act which will emerge as the uncertain end product of the legislative process. For this reason the discussion which follows is somewhat selective in highlighting a small number of problematic aspects of Part II of the 1974 Act, and the context in which they stand, rather than attempting to provide a comprehensive discussion of its scope.⁷ Specifically, the areas which have given rise to difficulties are: the breadth of discharge consents; the defence of 'good agricultural practice'; the availability of public information; and the provision of compensation for water authority operations for the protection of the water environment. Whilst not wishing to present these matters as the only shortcomings in the present law, they represent areas in which significant improvements could be achieved by means of relatively small modifications to the existing legislation.

Legal Framework

The legal framework for water pollution comprises of the Constitution of India, legally binding and enforceable laws and rules framed under the laws, as well as judicial decisions. There are also a number of non-binding administrative

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regulations and guidelines concerning water quality or water pollution at national, state and local levels. While some are concerned with public health, others apply to environmental quality. Similarly, while some of them focus exclusively on drinking water, others relate in general to the different uses of water.

This section highlights the salient features of the legal framework.

I. Constitution of India

The Constitution of India does not specifically mention water pollution. However, the Supreme Court of India has interpreted Article 21 of the Constitution, which guarantees the fundamental right to life, broadly to include the right of enjoyment of pollution-free water environment⁸ and the right to hygienic environment⁹.

Two of the Directive Principles of State Policy, included in Part IV of the Constitution, which provide that the State shall endeavour (a) to improve public health (Article 47); and (b) to protect and improve the environment (Article 48-A), are also relevant. Further, protection and improvement of the natural environment, including lakes and rivers, has been identified as a fundamental duty of every citizen in the Constitution (Article 51-A(g)).

Under the Constitution, water, sanitation and public health are included in List II of the Seventh Schedule; in other words, state governments rather than

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the Central Government exercise powers in respect of these subjects. The 73rd and 4th Constitutional Amendment Acts in the year 1992 led to the introduction of Parts IX and X in the Constitution, which constitutionalised local level governing bodies, that is, municipal authorities in urban areas and Panchayati Raj Institutions (Gram Sabhas or panchayats) in rural areas. States have been vested with the discretion to delegate any or all of the functions relating to water, sanitation and public health, among others, to these local bodies.

II. Laws relating to local bodies

Following constitutional amendments in the year 1992 (see section 3.1. above), the statutory framework concerning water pollution in India includes laws (as well as bye-laws, rules and regulations framed thereunder) relating to municipal and panchayat areas passed by State Government or local government as well as public health laws. While some of these laws include explicit provisions imposing an obligation on the local bodies to prevent and control water pollution, most of them require the local bodies to provide clean and wholesome drinking water to the residents. Laws enacted by State Governments to govern parastatal bodies, cantonments or development authorities, as the case may be, are also relevant for this purpose.

III. Environmental laws

The existing environmental laws adopt a command-and-control approach towards water pollution. In other words, they lay down limits or standards of discharge of effluents into water bodies and punish non-compliance with such limits or standards. This sub-section discusses two such laws.

III (a) Water (Prevention and Control of Pollution) Act, 1974

According to the Constitution, State Governments or Union Territory administrations (as the case may be) exercise control over water (including water pollution). The Water¹⁰ was enacted by the Central Government in exercise of the power vested in it by resolutions passed by two or more State Legislatures in accordance with Article 252 of the Constitution. The Water¹¹ complement the Water Act.

The two main objectives of the Water Act are:

- (i) to prevent and control water pollution; and
- (ii) to maintain or restore wholesomeness of water.

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III (b) Environment (Protection) Act, 1986

While the Water Act applies specifically to water pollution, the subsequently enacted¹² which provides for environmental protection and improvement, applies to different types of environmental pollution, including water pollution. It has been clarified that in case of conflict between the two laws, the provisions of the Environment Act will prevail.

Under the Environment Act, the Central Government (through the Ministry of Environment and Forests or MoEF) has been vested with the power to lay down standards for environmental quality in its various aspects and for emission or discharge of environmental pollutants from various sources having regard to their quality or composition. This has led to the notification of rules, which provide water quality standards for various areas and purposes and the maximum allowable limits of concentration of various water pollutants for different areas.

The Act prohibits a person carrying on any industry, operation or process from discharging or emitting water pollutants (or permitting their discharge or emission) in excess of the prescribed standards. Where a discharge of a water pollutant in excess of the prescribed standards occurs (or is apprehended) due to an accident or other unforeseen act or event, the person responsible for the discharge and the person in charge of the place where the discharge occurs (or is apprehended) are required to prevent or mitigate the resulting water pollution and

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to inform the prescribed authority of such an apprehension or actual occurrence. The prescribed authority is also required to undertake the necessary remedial measures as early as practicable.

The Central Government has also issued a number of notifications, which are relevant for the prevention and control of water pollution. These include:

Environment Impact Assessment Notification, 2006¹³

Different eco-Sensitive Zone notifications

Coastal Regulation Zone Notification, 2011¹⁴

III (c) Limitations of environmental laws

There are several reasons for the poor implementation or nonimplementation of the provisions concerning water pollution in the Water Act and/or the Environment Act. These include:

- Inadequate infrastructure (monitoring stations) and frequency of monitoring

- Low rate of compliance
 - o Poor implementation and monitoring by SPCB

- Failure of the SPCB to act against defaulters/polluters due to resource constraints - financial, human and technical

- Lack of will

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- Corruption

- Multiple responsibilities of SPCBs (under the Water Act as well as the Air (Prevention and Control of Pollution) Act,

1981) o Very low quantum of penalty/fine, so cost of non-compliance < cost of compliance

- Inadequacy of standards, which does not rule out occurrence of water pollution regardless of compliance

In addition, the application of the Water Act is confined to point sources of water pollution. The absence of legal provisions governing non-point sources of water pollution undermines the implementation of the provisions of the Water Act.

Judicial Decisions

The Supreme Court of India, High Courts as well as the National Green Tribunal have adjudicated a number of cases where the issue of water pollution was raised. Some of these cases have provided the courts with an opportunity to address situations resulting from poor implementation or non-implementation of the relevant provisions of existing laws (see the MC Mehta cases below). In some other cases, courts have relied on principles of environmental law, such as the polluter pays principle and the precautionary principle, to impose liability on the

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polluter or the potential polluter who has then been directed to undertake the necessary remedial or preventative measures, as the case may be (see the Indian Council case & Vellore case below). There are several other cases where over the years, important aspects of the water pollution issue have been raised before the courts.

In¹⁵ public interest litigation sought an order from the Supreme Court to restrain the tanneries near Kanpur city from discharging trade effluents into the river Ganga until they set up effluent treatment plants. The Court observed that the provisions of the Water Act were comprehensive but the SPCBs had not taken effective steps to prevent the discharge of effluents into the river Ganga. It also noted the failure of the Central Government to do much under the Environment Act to stop the grave public nuisance caused by the tanneries. Insofar as the tanneries are concerned, the Court observed that the fact that their effluents are first discharged into municipal sewers did not absolve the tanneries from being proceeded against under the provisions of the law in force, since ultimately the effluents reach the river Ganga. Among other directions, the Court ordered stoppage of work in the tanneries, which were discharging effluents into the river and which did not set up primary treatment plants. It considered the financial capacity of the tanneries to set up primary treatment plants to be irrelevant. According to the Court, the tanneries were not being taken by surprise as they were

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being asked to take necessary steps to prevent discharge of untreated wastewater into the river for several years.

In another important case,¹⁶ public interest litigation was filed seeking the enforcement of the statutory provisions which impose duties on municipal authorities and the SPCB constituted under the Water Act.. The Supreme Court observed that the municipal authorities have the statutory duty to prevent public nuisance caused by pollution of the river Ganga and therefore, the municipal corporation of Kanpur has to bear the major responsibility for river pollution near the city. The Court also took note of the fact that many of the provisions of the Water Act and the municipal laws for prevention and control of water pollution have just remained on paper without any adequate action being taken pursuant thereto.

In¹⁷ among other claims, it was alleged that water in wells and streams in village Bichhri in Udaipur district in the State of Rajasthan had become unfit for consumption as a result of disposal of untreated toxic sludge from an industrial complex located within the limits of the village. The Supreme Court held that the respondents were absolutely liable to pay compensation for the harm caused by them to the villagers in the affected area and surrounding areas as well as to the environment. According to the Court, the power to levy costs required for carrying out remedial measures is implicit in the Environment Act.

Conclusion

The somewhat critical tone of this article is not intended to overshadow the major legal improvements brought to the water environment by the implementation of Part II of the Control of Pollution Act 1974, but as a recognition that good laws must, of force, give way to better. The bulk of the Act is undeniably a considerable advancement beyond previous legislation,¹⁸ but this is no reason to suppose that subsequent legislation could not be better still and, in the light of a general decline in the state of the natural water environment,¹⁹ there is every reason to suppose that a strengthening of the law is necessary. In respect of provisions relating to discharge consents, 'good agricultural practice', public information, and compensation for water authority operations, significant improvements can be achieved and, moreover, without the need to take the legislation 'back to the drawing board'. The maintenance of the existing legal order will be appreciated by those with the difficult practical task of administration and enforcement, and change for its own sake will be unwelcome. Where changes are demonstrably necessary, however, and can be made without the need to overturn provisions that have proven their workability, such changes ought to be made. The forthcoming Water Act provides the ideal opportunity to do this, and it would be regrettable if further deterioration in the state of our rivers and watercourses were to be the price paid for that opportunity not being taken.

REFERENCES

1. The Control of Pollution Act 1974 has been brought into operation by means of a series of commencement orders the latest of which is the Control of Pollution Act 1974 (Commencement No 18) Order 1985 (SI 1985 No 70) which has the effect of bringing almost all of Part 11 of the Act into force from July 1986. In respect of transitional provisions, see

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Burton and Freestone, 'The Control of Pollution Act 1974 and Tidal Waters: Problems of Implementation of Part II' (1986) *IJECL* 241, and Burton, 'The Control of Pollution Act 1974, Part II: The Extension of Control to All discharges to UK Tidal Waters' (1987) *IJECL* 10.

2. See Pearce, 'Dirty Water Under the Bridge', Ch 20 in Goldsmith and Hildyard *Great Britain or Industrial Wasteland* (1986); and Royal Commission on Environmental Pollution, Tenth Report, Tackling Pollution—Experiences and Prospects (1984) Cmnd 9149 para 3.50.
3. With certain modifications Part 11 of the Control of Pollution Act 1974 is applicable to Scotland, (1106(1)) but not to Northern Ireland (5109(3)).
4. It is the overall legal responsibility of the Secretary of State for the Environment to restore and maintain the wholesomeness of rivers and other inland water (31 Water Act 1973). In practice, however, the direct execution of these functions is carried out by the ten water authorities in England and Wales which take responsibility for a range of matters concerned with water quality. These include, the formulation of development plans for the management and improvement of water; the systematic monitoring of water quality in their area; the enforcement of pollution control legislation; the supervision of remedial measures in pollution emergencies; and conservation responsibilities in relation to water see Department of the Environment, Consultation Document, *The Water Environment: The Next Steps* (1986) para 2.9.

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5. The literature on legal aspects of the Government's plans for privatization of the water industry includes the following: Privatisation of the Water Authorities in England and Wales (1986) Cmnd 9734; Department of the Environment, Consultation Document, The Water Environment: The Next Steps (1986); Department of the Environment, Consultation Document, The National River Authority: The Government's Proposals for a Public Regulator? Body in a Privatised Water Industry (1987); and Department of the Environment, Policy Document, The National Rivers Authority: The Government's Policy for a Public Regulatory Body in a Privatised Water Industry (1987). The enabling legislation facilitating the transition to a privatized water industry is the Public Utility Transfers and Water Charges Act 1988.
6. Department of the Environment, personal communication.
7. For a more general discussion of Part II of the Control of Pollution Act 1974, see Howarth Water Pollution Law (1988), ch.4.
8. Subash Kumar v State of Bihar & Others, AIR 1991 SC 420).
9. Virendra Gaur & Others v State of Haryana & Others, (1995) 2 SCC 577).

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10. The Water (Prevention and Control of Pollution) Act, 1974
11. The Water (Prevention and Control of Pollution) Rules, 1975 complement the Water Act.
12. Environment (Protection) Act, 1986 (the 'Environment Act').
13. Environment Impact Assessment Notification, 2006.
14. Coastal Regulation Zone Notification, 2011.
15. MC Mehta v. Union of India(Kanpur Tanneries case), AIR 1988 SC 1037.
16. MC Mehta v. Union of India(Municipalities case), AIR 1988 SC 1115, a public interest litigation was filed seeking the enforcement.
17. Indian Council for Enviro-Legal Action v Union of India and Others, AIR 1996 SC 1446.
18. On the history of water pollution law generally, see Howarth Water Pollution Law (1988) Ch.
19. Generally, see Department of the Environment, River Quality in England and Walts 1985 (1986).

