INDIAN JOURNAL OF LAW, POLITY AND ADMINISTRATION

SAFEGUARDING ENVIRONMENTAL EQUILIBRIUM THROUGH DISTINCT LEGAL RECOGNITION

*Shivangi Mishra

ABSTRACT

Social, religious and commercial contraptions have caused unnerving ripples in environmental equilibrium. The swarming wave of ruthless commercialization has merged with vulnerabilities of religious orthodoxies thereby begetting practices that often lock horns with the placidity of our environment. Popular hybrid practices of modern day such as pyrotechnical vitiation of air quality and unrestricted escalation of decibels under the garb of religious beliefs have been looked askance in this research expedition. It is imperative to ensure that exigencies of our ailing environment reign supreme when pitted against capricious notions encaged by theological aphorisms. The legal device slithers into the realm of environment where popular perceptions and floating traditions have pledged to disrupt equilibrium. The ingenious carpentry that law employs aims to attack socially entrenched practices that devastate environmental soundness. The concept of inter-generational equity has been invoked to understand the dual capacity by virtue of which we stand indebted to the environment we inhabit. It posits that human beings are obligated to protect the environment and future generations in equal measure. In the concluding segments, an appraisal of the Indian Water Act, 1974 reveals that the environment yearns for a distinct legal personality of which exclusively the 'environment' becomes the recipient.

COALESCING THE THEORIES OF PUNISHMENT WITH INTERNATIONAL ENVIRONMENTAL JURISPRUDENCE TO CURB ENVIRONMENTAL DELINQUENCY

Today, when the world is registering victories as an emancipated circle, free from the shackles of colonisation, man has set sailing on a wicked mission to enslave the natural resources to prove his supremacy. However, little can the human race glean that natural resources are designed for creation and destruction in equal measure. In mythological folklores, it is trite that man shall bear the brunt of his misdeeds. Wary of the havoc

environmental pollution can wreck on the biosphere, the legal sword has been spearheading the mission of environmental protection under the aegis of the National Green Tribunal, Rio Declaration on Environment and Development formulated at the Earth Summit in 1992 and Stockholm Declaration, 1972. On superficial levels, India, armed with a plethora of protective legislations, appears to be well-equipped to tackle the menace of water pollution. Article 48A[1] of the Constitution casts a duty on the State to protect and improve the environment. This provision provides that it is incumbent upon the State to protect the environment. It further highlights that the State borrows the natural resources in the form of a trust from nature and hence acting in the capacity of trustees, the State is under an entailing obligation to act responsibly and conscientiously. There even occurs an astute role reversal in the Constitution in the shape of Article 51A[2], that imposes a fundamental duty on every citizen to protect and improve the environment. The Magna Carta of International environmental law, the Stockholm Declaration (1972) launched hefty attacks on environmental pollution by weaving together the towers of precautionary principle, polluter pays principle and sustainable development. The fusion of the three principles presents an efficacious patchwork of the theories of punishment intrinsic to criminal jurisprudence and hence strives to annihilate the menace of pollution. The precautionary principle resonates the preventive theory of punishment as it strives to incapacitate the root cause of pollution even if the possibilities of danger to the environment are not corroborated by incontrovertible evidence. Applying the dictum of the principle of preventive detention, the precautionary principle strikes activities endangering the environment if the presence of 'suspicion' is ensured. Principle 15 of the Rio Declaration on Environment and Development[3] incorporates the precautionary principle that asserts where there exist threats inflicting grave or irremediable damage, lack of absolute certainty shall not be cited as a reason for postponing cost effective measures to prevent environmental degradation. The 'polluter pays' principle coincides with the deterrent theory as it endeavours to dissuade polluters by burdening them with the costs of mitigating the ill effects of pollution. Moreover, the polluter pays principle deters potential polluters by setting an unwelcome example where the originator of pollution causing activities is made to face the entailing financial liabilities. The concept of sustainable development underpins the reformative theory of punishment. In consonance with the spirit

[1] Const. of India, art. 48A (1950).
[2] Const. of India, art. 51A (1950).
[3] Principle 5, Stockholm Declaration (1972).

of the reformative theory, the concept of sustainable development aims at evoking humanistic sentiments and persuading the polluters to refrain from engaging in pollution causing activities to protect the human family. By repainting the otherwise tranquil landscape in bloody hues, mankind has set the stage for a gory battle where they will be pitted up against their dear posterity. The principle of sustainable development crystallised under the tutelage of the Stockholm Declaration formulated at the United Nations National Conference on Human Environment, 1972. The Declaration alludes that the ideals envisaging preservation of the natural environment and nurturing of environmental concern for the future generations remain the cornerstone of the concept of sustainable development. Principle 3[4] of the Declaration enumerates that the capacity of our planet, the Earth to produce vital renewable resources be preserved and wherever practical, be restored. Principle 5 further anchors environmental consciousness by asserting that non-renewable resources must be used in such a judicious manner that protects them from the danger of future exhaustion. Hefty contractual agreements were forged with governments of various nations under the banner of environmental protection. The ASEAN agreement that crystalised on July 9, 1985 signified the coming together of contracting parties to preserve biodiversity and guarantee the continuing productivity of workable natural resources under their jurisdiction in tune with scientific thresholds and goals of sustainable development[5]. Converged with the concept of 'inter- generational equity', the principle of sustainable development strives to evoke environmental consciousness across the longitudes and latitudes of present and future generations alike. Christened as inter-generational equity, the principle sprang to life by virtue of the Brundtland Report prepared in 1987. The theory of inter-generational equity posits that there exist two essential relationships, one owed to the natural system and another owed to our dear posterity. With respect to the first relationship, we, being a part of the natural system are subject to responsibilities towards the environment as our actions directly affect the world we inhabit. It is uncontested that "as the most sentient of species, we have a special responsibility to care for the system."[6] The second relationship is distinctly intergenerational. The National Research Council aptly propounds that all members of the human species hold the Earth and its resources in trust for future generations and avail its

[4] Principle 3, Stockholm Declaration (1972).
[5] Redclift Michael, Sustainable Development: Exploring the Contradictions (1987).
[6] National Research Council, Division on Earth and Life Studies, Commission on Geosciences, Environment and Resources, Water Science and Technology Board, Sustaining our Water Resources.

resources as mere beneficiaries of the trust, and hence such rights do not accrue at the peril of the natural system and its coming generations. The natural environment is held in common with the coexistent tripartite generational axis that comprises of past, present and future generations. The present generations must be mindful that "All generations have an equal normative claim in relation to the natural system of which they are a part. There is no basis for favouring one generation over another in the care and use of the planet."[7]

> "The concept of intergenerational fairness in using and conserving the planet strikes deep

Mirroring the situation of environmental emergency the world stands posed with, it has been remarked that "the intergenerational framework carries within it an intra-generational dimension. Were it otherwise, members of the present generation could allocate the benefits of the world's resources to some communities and the burdens of caring for it to others and still claim on balance to have satisfied intergenerational fairness."[8]

CONSTRUCTING A LEGAL FORTRESS AROUND WATER BODIES

We may now shift our focus to the plight of water bodies that find themselves vitiated in a landscape fraught with ruthless religious niceties. The indispensability of water in the biospheric equilibrium preempts debate and discourse. Unassailability of water resources as enlivening conduits of miracle and life support systems postulate radiance of life on earth. It is the ardent need of deplorable state of affairs that systematic and systemic process of water pollution and defilement of sacred water bodies be curtailed and mitigated. Employing an equally concerned tone, The Supreme Court in *M.C. Mehta v. Union of India and Ors.*[9], raising a disquieting alarm, disclosed the report of NITI Aayog on "Composite Water Management Index" that laid bare petrifying facts and figures. The report revealed that by the year 2020, twenty one major cities including Delhi, Bangalore and Hyderabad were expected to reach zero ground water levels, affecting access to ground water for 100 million people. The Court further asserted that, "The situation is critical and requires urgent and concrete steps."

[7] Id.
[8] Id.
[9] Original Application No. 496/2016.

Water resources and other components of environment are endowed with peculiar characteristics by the arcane and mystic laws of cosmos. Sitting astride on temporal and transcendental boundaries, the best help that can be extended to environment, is draping it with the cloak of life thereby conferring upon environment and its resources rights and privileges imbued in a legal personality. This concept is premised on animating environment in order to confer the title of a spectrum of protective rights upon it. Donning the robes of legal personality, water resources shall become entitled to sue its polluters for defilement and other injurious acts directed at the deterioration of invaluable water bodies. Indian jurisprudence has taken a step towards the beneficial conferment, albeit remaining one step shy. Artificial agents such as Central[10] and State[11] Boards established under aegis of the Water (Prevention and Control of Pollution) Act, 1974 have been draped with legal personality rendering the attempt of environmental empowerment fragmented and incomplete. The benefits of legal personality should rather be showered directly upon environment so that it directly sues through a body of animate individuals in event of pollution or mismanagement. Simplistically, this would mean that a body of individuals must not be termed as a legal personality, instead environment must own a legal personality operated through appointed individuals. By enchaining environment in the shackles of forced guardianship, the already ailing environment has been exposed to the whims of its self-styled guardian.

The Water Act, 1974, has conferred the status of a body corporate upon the Central and State Boards that have been established as sentinels ensuring water conservation. The Boards are embodied with perpetual succession and a common seal with powers, subject to the provisions of the Water Act, 1974, to acquire, hold and dispose of property and to enter into contractual agreements. Bestowed with the status of a legal person, it may sue or be sued. It is a rightful assertion that the natural environment, not being an animate tangible entity, cannot in itself function as a body corporate and hence the presence of an establishment comprising of live entities is a prerequisite. However, if were to draw a parallel with the corporate world which successfully pioneered the concept of legal personality, we may decipher that a company, being an abstract entity bears close semblance to the environment. Despite being

[10] Water Act, Sec.3 (3) (1974).
[11] Water Act, Sec.4 (3) (1974).

an inanimate and intangible notion, a company has been recognised as a legal personality with the company's members constituting the directors, promoters, creditors and shareholders taking charge of translating the legal fiction named company into a full-fledged reality. Unlike environmental administration, the board of directors in the corporate landscape are not recipients of the benefits of legal personality, had it been so, the chief objective of animating an otherwise dormant behemoth central to the functioning of corporate affairs, would collapse in futility as already animate objects would be empowered by a double legal shield under the banner of their own names. It is bearing in mind this pivotal consideration that even though the management of the affairs of a company continues to vest with the directors, in individual capacities as well as behind the corporate veil, the real management and beneficial rights are assumed by the legal fiction, that is, the company. In the same nerve as that of corporate affairs, environment must be granted the shield of legal personality and not the Central and State Boards as devised by the Water Act, 1974, in order to ward off mismanagement at the hands of the functionaries of the Boards and streamline the process of directly benefitting the environment against indiscriminate mishaps.

The chief reason behind conferment of legal personality upon environment is to shield its water resources and other components from pollution and degradation. As a legal personality, the water bodies shall become eligible to sue the polluters for attempts directed at vandalizing their sanctity. This would serve as a potential tool of deterrence signaling the solemnity attached in safeguarding the piousness of environment.

UNIFYING ENVIRONMENTAL JURISPRUDENCE AND ENVIRONMENTALLY SENSITIVE CUSTOMARY PRACTICES

In order to ascertain the degree of environmental consciousness pervading Indian civilization, we must begin by deciphering the graph of the codes and dictums pertaining to preservation of water. A vivid understanding can be arrived at only by flipping the yellow pages of history backwards and weighing the significance of canonical agreements and codes shielding water bodies and resources from depletion and degradation. Charting the journey of laws and regulations with respect to preservation of water, it may be inferred that, right from its cradle, the Indian civilisation has revered water as a sacred and essential resource. Water law in ancient India gradually evolved from custom to religion and finally to written codes. The

painstaking process of codification of water laws was hailed as an exercise vital for the salubriousness of life and living. During the British colonial period, the foundation was laid down for the construction of dams and canals. Laws relating to the regulation of the use of water resources were largely governed by the principles of Common Law that included riparian rights allowing a landowner the right to take a reasonable portion of the flow of a watercourse. Drawing a parallel with the present age, a chord of divergence can be traced in the customary patterns of the two conflicting time periods. The contrast leads to a quagmire where diverging personalities of the sacred water bodies and their entailing treatments contrived by religious caprice are gleaned. Where religion proclaimed the water bodies as deities in times of yore, the present age, contrariwise, is marked by the defilement of the pious rivers for the attainment of similar religious pursuits like ensuring peace and mirth in life after death and facilitation of the process of salvation subsequent to death. It is most distressing that whenever social engineers begin taking tentative steps for the protection of river bodies, superstitions and religious bigotries pose them with formidable riddles.

Undertaking the responsibility of unyoking the perplexing knots of the logjam caused by floating customary and religious notions, the National Green Tribunal, in February, 2016, stood sentinel for the environment and inspected the measures to be taken for minimising river pollution while performing the tradition of cremation ordained by Hinduism. It was contended that the steps involved in the procedure of cremation were detrimental to the water resources. Mindful of the unchecked escalation in the levels of pollution, the Tribunal further directed the Union Environment Ministry and Delhi government to initiate programmes to provide alternative modes of cremation. **Moreover**, a bench headed by Justice UD Salvi postulated that there was an urgent need to adopt environment-friendly methods like electric crematoriums and exhorted the need to shift gears to the widespread use of CNG. The bench solicitously remarked that the deplorable state of environment prompts a progressive transformation in the mindset of the masses. The bench, asserted that since the impasse is embroiled in sensitive and volatile considerations like religious belief and immutable faith, it becomes the singular responsibility of self-styled religious preachers to steer the faith in a direction so as to bring about a progressive transformation in the mindset of people practicing their faith and encourage them to adopt practices that are conducive to environment. At the same time, the bench adopted a concerned tone regarding the practice of cremation prescribed by Hinduism. It was pronounced by the Court that, “It is also the responsibility of the

government to cultivate an environment-friendly mindset among the citizenry and devise alternatives for cremation," Vying for an effective remedy with respect to the pollution caused to holy rivers, the Court further directed authorities, including civic bodies, to educate the public in this regard. Most importantly, the Green Panel simplifying the fiery and unassailability of entrenched religious practices of cremation and burial clarified,

> "The traditional means of cremation caused adverse impact on environment and dispersal of ashes in the river lead to serious water pollution. Religions of the world, therefore, conceived of different methods for disposal of the dead on the basis of their theology and the circumstances in which the believers lived. Where there was plenty of wood, the individuals thought of disposal of their dead by burning with wood, but where there was scarcity of wood the individuals buried their dead."

The NGT was hearing a plea by advocate DM Bhalla who contended that cremation of humans by conventional methods aggravated the malady of water and air pollution, therefore, alternative modes of cremation must be devised. It was further remarked that cremation of human remains by traditional method involving wood has serious impact on environment as "the forest cover is sacrificed and obnoxious gases emanated from the burning of human mortal remains pollute the air."

Consonant to the aforementioned ideal is the verdict of the Court in *Jaswinder Kaur v. Union of India and Ors*[12], where the Court implored to protect river Ganges from the noxious waves of commercialization and materialism,

> "The major source of pollution of River Ganga are inflow of untreated sewage, cremation, ritual bathing and submerging offerings, road widening along the river Ganga, lack of facilities to handle solid waste in the towns and cities and rampart mushrooming of hotels and ashrams in the state of Uttarakhand."

Further flipping the pages of colonial history, a spectrum of other Acts were enacted to regulate canal system for navigation purposes and levying taxes on the users. There were a plethora of legislations to spell out the technique of river conservation, and rules on ferries and fisheries, for instance, the Northern India Ferries Act, 1878 and Indian Fisheries Act, 1897. Furthermore, the Northern India Canal and Drainage Act, 1873, overhauled irrigation,

[12] ORIGINAL APPLICATION NO. 382 OF 2015.

navigation and drainage. While this Act did not directly assert state's ownership over surface waters, it recognized the right of the Government to 'use and control for public purposes the water of all rivers and streams flowing in natural channels, and of all lakes'. The changing equations resulted in the State assuming the reins of the galloping resources. It was welcomed as a progressive move as the State took cognizance of the fact that water resources are primordial in the sustenance and development of the biosphere and have to be managed by the supreme power of a country. However, it must be remarked that these enactments were only piecemeal as they failed to uplift the environment from ghastly forces of devastation. Industrial residue and waste are the major culprits for the deteriorating health of water bodies. Acts of negligence, indiscriminate use and dereliction of duties must entail penal consequences as water forms the bedrock for life on earth. The statutes enacted in the colonial era callously betrayed the spirit of active environmental protection and vigilance.

CONCLUSION: AN APPRAISAL OF THE WATER ACT, 1974: ARRIVING AT A SOLUTION

The belief, that the human race and the gyrating technological creations are entrusted with the obligation of safeguarding their long lost ailing friend, the water bodies, was assimilated to a considerable extent in the Water (Prevention and Control of Pollution) Act, 1974. The Act is an august outcome of the Parliament, taking recourse to its centralizing tendencies to legislate in the national interest as Articles 249[13] and 252[14] of the Indian Constitution were invoked to concretise the progressive guidelines enshrined in the Act. The 1960s heralded the era of enhanced water consciousness. As a consequence of the burning discourses on prevention of pollution to water bodies in the 1960s, the Health Ministry of Central Government constituted an Expert Committee to present recommendations for formulating laws to prevent and control water pollution. In its well deliberated response, the Committee recommended the Central and State governments to assume the reins and enact a legislation in this regard. Sensing the urgency of the water crisis, the Parliament enacted the Water Act of 1974.

The Water (Prevention and Control of Pollution) Act aims to provide for the prevention and control of water pollution, and for the maintenance and restoration of wholesomeness of

[13] Const. of India, art. 249 (1950).
[14] Const. of India, art. 252, (1950).

water in the country[15]. Striving to create two-tier vigilantes for efficaciously dispensing with the water crisis, the Act provides for the establishment of the Central[16] and State Boards[17]. Reposing unflinching faith in the effectiveness of the federal structure, the Central and State Boards have been assigned supervisory as well as regulatory functions to expend their powers rooted in judicious water management. The Act is a creative blend of procedural and substantive laws as, apart from enumerating the establishment of the Boards and their entailing powers and functions, it lays down the procedure with respect to the penalties[18] imposed in instances of contravention to the letter and spirit of the Act. It has been provided in the Act that whoever fails to comply with any direction under sub-section 2[19] or 3[20] of Section 20 of the Water Act, 1974, within such time as may be specified in the direction shall, on conviction be punishable with imprisonment for a term which may extend to three months or with fine which may extend to ten thousand rupees or with both and in case such dereliction or failure continues, with an additional fine which may extend to five thousand rupees for every day during which such failure continues[21]. Section 20 emboldens the Board with powers of obtaining information to carry out stream surveys[22], conduct enquiries into water abstraction and discharge of sewage[23] and give directions to persons in charge of any establishment, if an industry, to furnish information regarding the construction, installation and operation of such establishment[24]. Section 21 empowers the State Board to take samples of effluents. The rules concerning admissibility of samples of effluents as evidence in a Court have been delineated in the Act[25]. Furthermore, cementing the layers of protection, there exists a structured procedure in the Act to ensure that it does not get plagued by the malady of stagnancy and the procedure is not stalled at any juncture by want of legislative myopia. In order to ensure that statutory safeguards envisaged in the Act are implemented, the Boards can invoke judicial backing. The Board may make application to courts for restraining

[15] Preamble, Water Act, 1974 [Act No. 6 of Year 1974].
[16] Water Act, Sec. 3 (1974).
[17] Water Act, Sec 4 (1974).
[18] Water Act, Sec. 41-50 (1974).
[19] Water Act, Sec. 20(2) (1974).
[20] Water Act, Sec. 20(3) (1974).
[21] Water Act, Sec. 41(1) (1974).
[22] Water Act, Sec. 20(1) (1974).
[23] Water Act, Sec. 20(2) (1974).
[24] Water Act, Sec. 20(3) (1974).
[25] Water Act, Sec. 21(2) (1974).

apprehended pollution of water in streams or wells[26]. The Court may in turn make an order as it deems fit. The Court may in such order,

(a) direct the person who is likely to cause or has caused pollution of the water in the stream or well to desist from taking such action as is likely to cause pollution or as the case may be to remove from such stream or well, such matter, and

(b) authorise the Board if the direction being a direction for removal of any matter from such stream or well is not complied with by the person to whom such direction is issued, to undertake the removal and disposal of the matter in such a manner as may be specified by the Court[27].

In order to ensure that the Act takes measured strides in the direction of environmental conservation, it is imperative that the letter of law keeps itself abreast of the fluctuating environmental scenario. The establishment of Central[28] and State[29] Water Testing Laboratories ensure that a veracious yardstick is contrived for the assessment of the levels of pollution by testing and analyzing samples of water, sewage or trade effluent. After a studied analysis, the laboratory prepares its report so that the Board can progressively take required action for facing imminent and future challenges pertaining to water management.

The contours of the Act have been drawn in all-encompassing paints. The term, 'Pollution' has been assigned an inclusive meaning, including contamination of water or alteration of the physical, chemical or biological properties of water or discharge of any sewage or trade effluent or of any other liquid, gaseous or solid substance into water whether directly or indirectly as may, or is likely to, create a nuisance or render such water harmful or injurious to public health or safety, or to domestic, commercial, industrial, agricultural or other legitimate uses, or to the life and health of animals or plants or of aquatic organisms.

The Water (Prevention and Control of Pollution) Cess Act was enacted in 1977, to provide for the levy and collection of a cess on water consumed by persons operating and carrying on certain types of industrial activities. This cess is collected with a view to augment the resources of the Central Board and the State Boards for the prevention and control of water pollution constituted under the Water (Prevention and Control of Pollution) Act. The Water

[26] Water Act, Sec. 33 (2) (1974).
[27] Water Act, Sec. 33 (3) (1974).
[28] Water Act, Sec. 51 (1974).
[29] Water Act, Sec. 52 (1974).

Cess also ensures that precious resources are not splurged by the masses. It must be carefully noted that the cess is levied and collected on water consumed by local authorities and persons carrying on industries. Levying of cess ensures that water resources are used with judicious thrift and caution and hence it may be touted as another welcome move in regulating the menace of water wastage.

As we arrive at the concluding segments of our academic exploration, it is linearly traceable that the shield of Water Act, 1974 has been intricately contrived to curb water pollution. However, in spite of the presence of stringent safeguards, it remains that the plummeting health of water resources is attributable to legal inadequacies. In its zeal for drawing comprehensive borders, the Act of 1974 overlooks the need to protect water resources by placing them within the halo of an ineffective legal personality. The Act, strikingly misfires the spell of legal personality by bringing human run Boards within its aegis. Legal personality should be conferred directly upon the environment in order to barricade the environment with legal protection. Animate entities shall administer environmental transactions only under the façade of legal personality bestowed upon the environment to ensure that real benefits are duly passed onto the fiction that comprises of floating environmental resources, omnipresent in the world we inhabit.

WORDS SPEAK