WATER POLLUTION IN INDIA: ENVIRONMENTAL RIGHTS LITIGATION AS A SOLUTION

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I have read and understood Regulation 21 of the General and Admissions Regulations for students of the SOAS, University of London concerning plagiarism. I undertake that all the material presented for examination is my own work and has not been written for me, in whole or in part, by any other person. I also undertake that any quotation or paraphrase from the published or unpublished work of another person has been duly acknowledged in the work which I present for examination.

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ABSTRACT

Water Pollution in India: Environmental Rights Litigation as a Solution

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There is an inverse relationship between water pollution and the enjoyment of the rights to environment sanitation and water and the right of the environment (environmental rights). The Supreme Court of India and high courts (together, the higher judiciary) have emerged as the last (and sometimes first) resort for affected individuals or communities or their representatives to allege non-realisation or violation of these environmental rights. The primary objective of this thesis is to examine the potential and limits of environmental rights litigation as a solution to the problem of water pollution in India. This exercise is based on an assessment of litigation's contribution to the prevention or control of pollution, maintenance or improvement of water quality, and/or remediation of pollution in the form of compensation for victims or damages for environmental degradation. For this purpose, this thesis undertakes a comprehensive analysis of decisions of the higher judiciary in cases relating to water pollution/quality where the litigant(s) relied on one or more of the environmental rights, explicitly or implicitly. It finds that the potential and limits of environmental rights litigation are influenced by the expansive or restrictive determination of the nature, scope and content of the environmental rights and the corresponding duties of the State and non-State actors, the judicial remedies and the operationalisation of coercive remedies and/or monitoring mechanisms to influence their implementation, and the effectiveness of implementation of court decisions. To the literature exploring the transformative potential of socio-economic rights (SER) litigation, the thesis offers a study focusing on the problem of water pollution. It also reiterates a fundamental limitation of rights litigation as a solution to environmental problems - its inherent (selective) anthropocentrism. Further, it assuages concerns relating to judicial activism and the objections to the judicial enforcement of SER more generally.

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TABLE OF ABBREVIATIONS AND ACRONYMS

AIR	All India Reporter
ALD	Andhra Law Digest
ALR	Andhra Law Reporter
Allahabad LR	Allahabad Law Report**s**
ALT	Andhra Law Times
BCR	Bombay Cases Reporter
CER	Constitutional Environmental Rights
CESCR	Committee on Economic, Social and Cultural Rights
CETP	Common Effluent Treatment Plant
CGWA	Central Groundwater Authority
CPCB	Central Pollution Control Board
CRC	Convention on the Rights of the Child
CUP	Cambridge University Press
CUPS	Control of Urban Pollution Series
CWN	Calcutta Weekly Notes
Cal HCN	Calcutta High Court Notes
DLT	Delhi Law Times
GC	General Comment
GLH	Gujarat Law Herald
IETP	Individual Effluent Treatment Plant
ILR	India Law Reporter
IRBM	Interstate River Boundary Monitoring Programme Series
JCR	Jharkhand Cases Reporter
JMP	Joint Monitoring Programme

KLJ	Karnataka Law Journal
KLT	Kerala Law Times
LW	Law Weekly
Madras LJ	Madras Law Journal
Maharashtra LJ	Maharashtra Law Journal
MoDWS	Ministry of Drinking Water and Sanitation
MoEF	Ministry of Environment and Forests
MoUD	Ministry of Urban Development
MINARS	Monitoring of Indian National Aquatic Resources
NGT	National Green Tribunal
OLR	Orissa Law Reporter
OUP	Oxford University Press
SCALE	Supreme Court Almanac
SCC	Supreme Court Cases
SCC (Supp)	Supreme Court Cases (Supplement)
SCR	Supreme Court Reporter
SER	Socio-Economic Rights
SPCB	State Pollution Control Board
STP	Sewage Treatment Plant
TDS	Total Dissolved Solids
UN	United Nations
WHO	World Health Organisation
ZLD	Zero Liquid Discharge

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Vajubhai Arsibhai Dodiya v Gujarat Pollution Control Board Application No. 64 of 2012 (NGT - Western Zone Bench, Judgment of 31 October 2013).

Vimal Bhai v Tehri Hydro Development Corporation and Others OA No. 197 of 2016 (MA No. 376 of 2016) (NGT - Principal Bench, Judgement of 13 April 2017).

Other Jurisdictions

Rylands v Fletcher (1868) LR 3 HL 330 (House of Lords).

CHAPTER 1
INTRODUCTION: SETTING THE STAGE

1.1 An overview

Water pollution is a very serious problem in India. The objective of this thesis is to examine the potential and limits of environmental rights litigation before the Supreme Court of India (Supreme Court or Court) or high courts (together, the higher judiciary, a widely used term in India) as a solution to this problem. It focuses on three constitutional environmental rights (CER) – the rights to environment, sanitation and water - that have been read by the higher judiciary into the fundamental right to life guaranteed by Article 21 of the Constitution of India (Constitution). It also draws upon the right to health, which has been read into the fundamental right to life. Recognising that the CER do not capture the adverse effects of water pollution/quality that are experienced by the natural environment irrespective of whether or not human beings as right-holders are affected, this thesis also explores the higher judiciary's engagement with the right of the environment.

The potential and limits of environmental rights litigation as a solution is measured in terms of its contribution to the realisation of the CER or redress of their violation, which may take place through the prevention or control of water pollution, the maintenance or improvement of water quality, and/or the remediation of water pollution. Like other socio-economic rights (SER) litigation, concerns relating to the legitimacy of the higher judiciary, both from the perspective of the right-holders as well as the relationship between the three branches of government, underpin the enquiry. At the same time, this thesis recognises that environmental rights litigation is 'a solution' and not the only solution to the problem of water pollution.

1.2 The context

In order to set the stage for the enquiry, this section first summarises the problem, its causes and its effects. It then examines the key components of the regulatory response and their limits as an explanation for the resort to environmental rights litigation before the higher judiciary. This is followed by a brief explanation of the legal basis on which

the right-holders or their representatives are able to exercise their procedural right of access to judicial remedies.

1.2.1 The problem, causes and effects

India is placed 120th out of 122 countries in terms of water quality.[1] Almost 70 per cent of the country's surface water resources,[2] and an increasing percentage of its groundwater reserves[3] are polluted. The three major anthropogenic sources of water pollution are the discharge of large quantities of untreated or partly treated sewage and industrial effluents (point sources), and run-off from land-based activities such as agriculture (non-point or diffuse sources), into water bodies and on land.[4]

Wastewater comprises almost 80 per cent of the water supplied for domestic use in urban areas.[5] But there is a wide gap between sewage generation and its treatment in urban India.[6] The Central Pollution Control Board (CPCB) identifies the discharge of untreated domestic wastewater from cities and towns as the main cause of organic pollution.[7] Other domestic sources of water pollution include dumping or discharge of septage and faecal sludge from on-site sanitation systems such as septic tanks and pits on land or into water

[1] World Water Assessment Programme (WWAP), 'Water For People, Water For Life' The United Nations World Water Development Report (WWAP 2003) 140. See also NITI Aayog, Composite Water Management Index – A Tool for Water Management (NITI Aayog 2018) 1.

[2] MN Murty and Surender Kumar, 'Water Pollution in India: An Economic Appraisal' in Infrastructure Development Finance Company (ed), Infrastructure Development Finance Corporation (ed), *India Infrastructure Report 2011 – Water: Policy and Performance for Sustainable Development* (OUP 2011) 285.

[3] M Dinesh Kumar and Tushaar Shah, 'Groundwater Pollution and Contamination in India – The Emerging Challenge' in *Hindu Survey of the Environment 2004* (Kasturi and Sons 2004) <www.indiawaterportal.org/sites/indiawaterportal.org/files/ground-pollute4_FULL_.pdf>.

[4] Bishwanath Goldar and Nandini Banerjee, 'Impact of Informal Regulation of Pollution on Water Quality in Rivers in India' (2004) 73(2) Journal of Environmental Management 117.

[5] Central Pollution Control Board, Status of Water Supply, Wastewater Generation and Treatment in Class-I Cities & Class-II Towns of India, CUPS/70/2009-10 (CPCB 2009) 1.

[6] See Central Pollution Control Board, Inventorisation of Sewage Treatment Plants, CUPS/*/2015 (CPCB 2015) Foreword & 6.

[7] Central Pollution Control Board, Status of Water Quality in India - 2012, MINARS/36/2013-14 (CPCB 2012) 41.

bodies,[8] the practice of open defecation that is prevalent in rural areas,[9] and dumping of solid waste on land.[10] Religious ceremonies such as idol immersion and the practice of offering tributes into water bodies may also result in water pollution.[11]

The industrial sector is the second biggest user and polluter of water.[12] A large part of the water withdrawn for industrial use is discharged as polluted water.[13] Small-scale units contribute almost 40 per cent of industrial water pollution.[14] Agricultural run-offs contain residues of chemical fertilisers and pesticides and cause eutrophication, which increases the nutritional content of watercourses and allows disease vectors or algae to proliferate.[15]

There is also a link between the quantity and quality of water. The absence of adequate water for the dilution of effluents in surface water bodies leads to water pollution and/or poor water quality.[16] This can be partly explained by the increased extraction of water to meet the growing demand for different uses. Similarly, the depletion of levels of groundwater leads to an increase in the concentration of the same amount of contaminants.[17]

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[8] Ministry of Urban Development, Advisory Note: Septage Management in Urban India (MoUD 2013) 12.

[9] AV Rajgire, 'Open Defecation: A Prominent Source of Pollution in Drinking Water in Villages' (2013) 2(1) International Journal of Life Sciences Biotechnology and Pharma Research 238.

[10] See Mufeed Sharholy, Kafeel Ahmad, Gauhar Mahmood, and RC Trivedi, 'Municipal Solid Waste Management in Indian Cities – A Review' (2008) 28 Waste Management 459.

[11] See 'Pollution of Hinduism' Down to Earth (7 June 2015) <www.downtoearth.org.in/coverage/pollution-of-hinduisim-17622>.

[12] Suresh Chand Aggarwal and Surender Kumar, 'Industrial Water Demand in India – Challenges and Implications for Water Pricing' in Infrastructure Development Finance Corporation (ed), *India Infrastructure Report 2011 – Water: Policy and Performance for Sustainable Development* (OUP 2011) 274.

[13] Chandra Bhushan, 'Not a Non-issue – Water Use in Industry' Down to Earth (15 February 2004) <http://old.cseindia.org/dte-supplement/industry20040215/non-issue.htm>.

[14] Murty and Kumar, 'Water Pollution in India' (n 2) 288.

[15] GD Agrawal, 'Diffuse Agricultural Water Pollution in India' (1999) 39(3) Water Science and Technology 33; Murty and Kumar, 'Water Pollution in India' (n 2) 288.

[16] CPCB (2012) (n 7) 41.

[17] Malavika Vyawahare, 'Not Just Scarcity, Groundwater Contamination is India's Hidden Crisis' Hindustan Times (22 March 2017) <www.hindustantimes.com/india-news/not-just-scarcity-groundwater-contamination-is-india-s-hidden-crisis/story-bBiwL1eyJJeMgFQcX4Cn7K.html>.

Water pollution severely affects water quality and threatens the availability of water for different uses. Up to 70 per cent of India's drinking water supply is contaminated.[18] The annual socio-economic costs of water pollution are also extremely high: about 37.7 million people are affected by waterborne diseases, 1.5 million children die of diarrhoea and 73 million working days are lost due to waterborne diseases, leading to an economic burden of USD 600 million.[19] It also results in substantial adverse impacts on the environment and on agricultural production and livestock in rural areas.[20] Therefore, there is an urgent need to address the problem.

1.2.2 The regulatory response

The existing domestic law framework addresses certain aspects of the problem of water pollution/quality. This sub-section briefly summarises the scope and limits of four of its components.

Pollution-related laws

The pollution-related laws, which are classified as environmental laws, comprise the Water (Prevention and Control of Pollution) Act, 1974 (WPCPA) and the Environment (Protection) Act, 1986 (EPA), which were enacted by the Central Government in exercise of its power under Article 249 of the Constitution, subject to adoption by states under Article 252 of the Constitution.[21] Their primary objective is to prevent and control water pollution and to maintain or restore the wholesomeness of water, and to protect and improve the environment respectively. The WPCPA applies to two point sources of water pollution - sewage effluent and trade effluents, while the EPA deals with environmental pollution generally. The definition of pollution appears to accommodate both human and non-human dimensions. The institutional framework comprises the CPCB at the national

[18] NITI Aayog (n 1) 47.

[19] Ministry of Drinking Water and Sanitation, Handbook on Drinking Water Treatment Technologies (2nd edn MoDWS 2013) 1.

[20] See V Ratna Reddy and Bhagirath Behera, 'Impact of Water Pollution on Rural Communities: An Economic Analysis' (2006) 58(3) Ecological Economics 520.

[21] See generally Bharat Desai, *Water Pollution in India: Law and Enforcement* (Lancer Books 1990); Shyam Divan and Armin Rosencranz, *Environmental Law and Policy in India: Cases, Materials and Statutes* (2nd edn Impression OUP 2002) chapter 5.

level, and State Pollution Control Boards (SPCBs) and Pollution Control Committees (PCCs) at the level of States and Union Territories respectively (together, statutory authorities). The EPA additionally vests a number of powers in the Central Government, through the Ministry of Environment & Forests (now Ministry of Environment, Forests & Climate Change).

These laws adopt a command-and-control approach. The Central Government (through the CPCB) has prescribed standards for water quality as well as discharge standards of water pollutants from different sources. The quality of water found in rivers, lakes and groundwater is governed by ambient standards, which designate water quality according to the level of various parameters. Recognising the need to promote development activities and to ensure the cost effectiveness of measures, the primary water quality criteria seek to maintain or restore natural water bodies to such a quality as is required for their 'designated best uses' rather than at pristine level.[22] Industrial and domestic effluents are governed by a set of source-specific standards expressed in terms of their concentration.

Under the WPCPA, in order to obtain consents to establish and operate any industry, operation or process, or any treatment and disposal system from the SPCB/PCC, industries or local bodies,[23] as the case may be, are required to establish and operate pollution control devices to treat effluents to the abovementioned prescribed standards. The consents are also subject to the fulfilment of other conditions. The enforcement powers of the statutory authorities under both laws include the power to obtain information, to take samples of effluents, and to enter and inspect premises. They can also direct any person, office or local authority to close, prohibit or regulate any operation or process, or to stop or regulate supply of electricity, water or any other service. However, designated courts (not the statutory authorities) are empowered to penalise non-compliance or contravention of certain statutory provisions pursuant to a complaint filed

[22] CPCB (2012) (n 7) 20.

[23] The local bodies include municipal corporations (population > one million) and municipalities (population between 100,000 and one million) in urban areas, and Panchayati Raj Institutions (*gram sabhas* or *panchayats*) in rural areas.

by the statutory authority or a person. But court proceedings are costly, uncertain and slow, and rarely result in convictions.[24]

The WPCPA also includes certain provisions in the nature of injunctions, and no one is allowed to let wastewater flow into and pollute any stream or well. The EPA requires the prescribed authority or agency to take necessary remedial measures to prevent or mitigate environmental pollution, as early as practicable. Further, the EPA empowers the Central Government to frame delegated legislation – rules, regulations, notifications or government orders – in order to achieve its objectives. Several of these notifications[25] and rules[26] include provisions relating to the treatment and discharge of effluents into water bodies (or on land that percolates into groundwater). Further, the Central Ground Water Authority is constituted under the EPA to regulate and control the development and management of groundwater resources.

At least three factors limit the potential of pollution-related laws to address the problem of water pollution. First, they are mainly confined to controlling industrial water pollution; they do not regulate water pollution originating from the household and agriculture sectors.[27] And they do not pay adequate attention to the link between the quantity and quality of water in different water bodies. The second factor is the problem of poor or partial implementation or non-implementation of laws.[28] Reasons include poor understanding of environmental problems, lack of resources such as funds, qualified staff and access to suitable monitoring equipment, poor enforcement infrastructure, lack of punitive measures, extensive corruption, political interference and lobbying by interest groups, etc.[29] The third factor relates to regulatory design or the weaknesses or

[24] CM Abraham and Armin Rosencranz, 'An Evaluation of Pollution Control Legislation in India' (1986) 11 Columbia Journal of Environmental Law 101, 111.

[25] See, for example, Environmental Impact Assessment Notification 2006; Coastal Regulation Zone Notification 2011; Mahabaleshwar Panchgani Eco-Sensitive Zone Notification 2001.

[26] See, for example, Wetlands (Conservation and Management) Rules 2010; Solid Waste Management Rules 2016; Bio-Medical Waste Management Rules 2016.

[27] Murty and Kumar, 'Water Pollution in India' (n 2) 289-90.

[28] See T Rajaram and Ashutosh Das, 'Water Pollution by Industrial Effluents in India: Discharge Scenarios and Case for Participatory Ecosystem Specific Local Regulation' (2008) 40(1) Futures 56, 61.

[29] See, for example, Divan and Rosencranz (n 21) 167; Geetanjoy Sahu, 'Implications of Indian Supreme Court's Innovations for Environmental Jurisprudence' (2008) 4(1) Law Environment and Development Journal 375, 389.

inadequacies of the prescribed standards.[30]

Water-related laws

Article 246(3) of the Constitution of India grants exclusive power to the State Legislature to make laws with respect to matters, including water, which are enumerated in List II in the Seventh Schedule or the State List. Therefore, the second source comprises water-related laws enacted at the state level. Their objectives vary depending on whether they are concerned with the use of water, the source of water, or the institutional framework.[31] Some laws that focus on particular uses of water such as irrigation include provisions pertaining to water pollution/quality but they do not consider the adverse impacts of the use of fertilizers and pesticides.[32] There are no specific laws relating to the provision of water for other uses, such as for drinking or domestic purposes or in industry. Instead, standards for the quality of drinking water are laid down in the form of a non-legally binding guidance issued by the Bureau of Indian Standards.[33]

Surface water receives attention in irrigation laws as well as in pollution-related laws. There is no mention of the term 'contamination' or 'pollution' of groundwater and there are no provisions for its protection and conservation in the Model Bill to Regulate and Control the Development and Management of Groundwater 2005 prepared by the Central Government.[34] In most of the laws enacted pursuant to this Model Bill, the state groundwater authority is only required to 'have regard to' groundwater quality. Sustainable management of the state's water resources is one of the objectives of laws

[30] See, for example, Susan G Hadden, 'Statutes and Standards for Pollution Control in India' (1987) 22(16) Economic and Political Weekly 709, 709 & 716-17; Rajaram and Das (n 28) 59.

[31] See generally Philippe Cullet and Sujith Koonan (eds), *Water Law in India: An Introduction to Legal Instruments* (OUP 2017).

[32] Paritosh C Tyagi, 'Water Pollution and Contamination' in Ramaswamy R Iyer (ed), *Water and the Laws in India* (Sage Publications 2009) 331.

[33] See Aviram Sharma, 'Drinking Water Quality in Indian Water Policies, Laws, and Courtrooms: Understanding the Intersections of Science and Law in Developing Countries' (2017) 37(1) Bulletin of Science, Technology & Society 45.

[34] Sujith Koonan, 'Legal Regime Governing Groundwater' in Philippe Cullet, Alix Gowlland Gualtieri, Roopa Madhav, and Usha Ramanathan (eds), *Water Law for the Twenty-First Century – National and International Aspects of Water Law Reform in India* (Routledge 2010).

establishing water regulatory authorities.[35] The prevention and control of water pollution is imperative for this purpose but most of the laws are silent in respect of mechanisms. Further, all these laws include penal provisions but they are seldom invoked.

Laws governing local bodies

In addition to water, the State List in the Seventh Schedule of the Constitution also includes sanitation and public health. Following constitutional amendments in the year 1993, most states delegated their duties, powers and functions in respect of the provision of water supply for drinking and domestic use, drainage and sanitation, all of which have a bearing on water pollution/quality, to local bodies. A major limitation is the jurisdictional remit of these laws. Further, enforcement remains a challenge as the statutory duties or functions are not stated in absolute terms.[36] They are included in a long list of duties or functions and remain under-prioritised; the duties are mandatory in some states, discretionary in other states, or the mandatory duty is made contingent upon the availability of funds etc.; and they are often phrased in a general manner.

These laws include some provisions to ensure the accountability of local bodies, for example, by establishing an ombudsman but they are rarely invoked. In addition, the state government often neglects urban local bodies. Urban local bodies have little or no say in the development of water and sanitation infrastructure but they are responsible for its operation and maintenance.[37] Similarly, the *panchayats* (or village councils) are mainly entrusted with the implementation of different public works programmes administered by the Ministry of Rural Development, Government of India, in accordance with government directives.[38] They are heavily dependent on government grants, and they do not undertake

[35] Sujith Koonan and Lovleen Bhullar, 'Water Regulatory Authorities in India – The Way Forward?' International Environmental Law Research Centre Policy Paper 2012-04 (IELRC 2012) <www.ielrc.org/content/p1204.pdf>.

[36] Lovleen Bhullar, 'Ensuring Safe Municipal Wastewater Disposal in Urban India' (2014) 25(2) Journal of Environmental Law 235.

[37] Central Pollution Control Board, State of Sewage Treatment in India, CUPS 60/2005-2006 (CPCB 2005) ¶1.6.

[38] Dilip Kumar Ghosh, 'Rural Infrastructure and the Panchayats: A Report from West Bengal' in 'Sanitation and Panchayats in Infrastructure' in Sebastian Morris (ed) *India Infrastructure Report 2004 – Ensuring Value for Money* (OUP 2004) 327.

any work on their own initiative because their own resource base is very limited.[39]

In addition to the abovementioned limitations, these three sources of laws face one common problem, that is, different authorities are responsible for the implementation of different laws. On the one hand, fragmentation is a recurring theme, the implementing authorities operate in silos, and coordination is largely absent. On the other hand, there is an overlap in the mandate of different authorities.

Nuisance-related laws

Water pollution and/or poor water quality qualifies as a nuisance, in respect of which civil or criminal remedies can be claimed in private or class action litigation.

The aggrieved parties may initiate private litigation under tort law and seek pecuniary compensation or damages for the commission of nuisance as a civil wrong.[40] However, tort law is not well developed in India, litigation is protracted, and the amount of damages awarded is very low and does not serve as a serious deterrent to the wrong-doer/polluter.[41] Public nuisance that disturbs the members of the public living in the vicinity is a criminal offence under the Indian Penal Code, 1860 and it is punishable with fine and/or imprisonment. But these provisions are outdated and ambiguous, and the quantum of punishment is meagre.[42] In any event, private litigation is unsuitable where the victims of water pollution are unaware of their legal rights.[43] Given the nature of harm resulting from water pollution and/or poor water quality, more than one victim and one polluter may be involved and it may be difficult to meet the standing requirement.[44] Further, as

[39] ibid 327 & 331.

[40] See Manjula Batra, 'Tortious Liability in Water Law' in Chhatrapati Singh (ed), *Water Law and Policy* (Indian Law Institute 1992).

[41] See Abraham and Rosencranz (n 24) 113 fn 67. See also Ruchi Pant, 'From Communities' Hands to MNCs BOOTs: A Case Study from India on the Right to Water' (2003) <http://www.righttowater.org.uk/pdfs/india_cs.pdf>.

[42] SN Jain, 'Legal Control of Water Pollution in India' in SL Agarwal (ed), *Legal Control of Environmental Pollution* (NM Tripathi 1980) 16-17.

[43] Francis Xavier Rathinam and AV Raja, 'Courts as Regulators: Public Interest Litigation in India' (2011) 16(2) Environment and Development Economics 199, 200.

[44] ibid.

the number of victims and total damages are greater than the individual share of damages, the polluter may be able to settle the claim with potential individual litigants.[45]

The Code of Criminal Procedure, 1973 empowers the magistrate to order the removal of public nuisance caused by water pollution in certain situations but this provision remains unused.[46] Similarly, the Code of Civil Procedure, 1908, which provides for the institution of a civil suit for an injunction, declaration or any other appropriate relief without requiring special damage, is not invoked in cases relating to water pollution. Further, one or more members of a class having the same interest may sue or defend on behalf of themselves and all the other members of the class.[47] However, where the number of victims and polluters is very large, problems such as coordination failures, high transaction costs of collecting information about the victims and the damages, and free riding may emerge.[48]

As a result, notwithstanding the existence of a regulatory framework, the discharge of untreated or partly treated effluents into surface water bodies or on land (that percolate into groundwater) continues abated. This has led to and exacerbated water pollution and poor water quality.

1.2.3 A solution: environmental rights litigation

This state-of-affairs compelled affected or concerned members of the public to file writ petitions or public interest litigation (PIL) before the Supreme Court or any of the 24 high courts with jurisdiction over a State, a Union Territory or a group of states and union territories alleging non-realisation or violation of the fundamental right to life, which is guaranteed by Article 21 of the Constitution. In a vast number of cases, the occurrence or exacerbation of water pollution or poor water quality was attributed to the non-

[45] AV Raja and Francis Rathinam, 'Economic Efficiency of Public Interest Litigation (PIL): Lessons from India', Munich Personal RePEc Archive, MPRA Paper No 3870 (2007) <https://mpra.ub.uni-muenchen.de/3870/1/MPRA/>.

[46] Kelly D Alley, *On the Banks of the Ganga: When Wastewater Meets a Sacred River* (University of Michigan Press 2002) 145.

[47] See, for example, *MC Mehta v Union of India and Others* (1987) 4 SCC 463.

[48] Rathinam and Raja (n 43) 200.

implementation or poor implementation of the abovementioned pollution-control laws and laws governing local bodies. It is pertinent to mention that Part III of the Constitution guarantees a number of justiciable fundamental rights (akin to civil and political rights) to every person but it does not include the rights to environment, sanitation and water. The non-justiciable Directive Principles of State Policy (DPSP), which are included in Part IV of the Constitution, accommodate the environment and health as social goals and impose positive duties on the State. Further, in accordance with the doctrine of separation of powers, the legislature and the executive are responsible for law making and its implementation respectively, and the judiciary engages almost exclusively in the interpretation and adjudication of provisions of law.

The litigants were able to approach the higher judiciary because of certain procedural and substantive innovations.[49] First, the Court relaxed the traditional standing requirement and permitted individuals as well as organisations to allege violations of their own or others' fundamental rights. Second, the Court adopted a 'harmonious' approach and established a link between the fundamental rights in Part III and the DPSP in Part IV of the Constitution.[50] This led to various social goals that inform Part IV of the Constitution being read into the fundamental right to life (Chapter 3, section 3.2.3). As a result, the rights to environment, sanitation and water became constitutional environmental rights.

1.3 The current state-of-play

This section synthesises the key components of the scholarship that form the building blocks of this thesis and/or led to the identification of gaps in existing research. It focuses on literature addressing two aspects of rights litigation – adjudication and implementation – which inform this thesis, as explained in section 1.4.1.

[49] See Clark D Cunningham, 'Public Interest Litigation in the Indian Supreme Court: A Study in the Light of American Experience' (1987) 29(4) Journal of the Indian Law Institute 494; PP Craig and SL Deshpande, 'Rights, Autonomy and Process: Public Interest Litigation in India' (1989) 9(3) Oxford Journal of Legal Studies 356; Jamie Cassels, 'Judicial Activism and Public Interest Litigation in India: Attempting the Impossible?' (1989) 37(3) American Journal of Comparative Law 495.

[50] See *Minerva Mills v Union of India* (1980) 3 SCC 625 ¶56; *Bandhua Mukti Morcha v v Union of India and Others* (1984) 3 SCC 161 ¶10.

1.3.1 Adjudication

The theoretical frame

The issue of justiciability or enforcement of SER, which include the CER, underpins the determination of the scope and content of the rights and the corresponding duties, and the judicial remedies. The importance of justiciability is reflected in the statement: 'It is one thing to assert the nature of the right and another to define and enforce it.'[51] Craig Scott and Patrick Macklem define 'justiciability' broadly as 'the extent to which a matter is suitable for judicial determination'.[52] In other words, justiciability refers to 'the ability to judicially determine whether or not a person's right has been violated or whether the state has failed to meet a constitutionally recognised obligation to respect, protect or fulfil a person's right.'[53]

Two types of objections have been raised to the justiciability of SER, which are founded on the following (often artificial) distinction between SER and civil and political rights:[54]

Socio-economic rights	Civil and political rights
Positive rights – require government to act rather than refrain from acting	Negative rights – require government to refrain from interfering
Resource intensive – expensive	Cost-free
Progressive – require time to realise	Immediately realisable
Vague, imprecise, open-ended, indeterminate, abstract aspiration – in terms of obligations they mandate	Higher degree of precision
Involve complex, polycentric and diffuse interests in collective goods	Comprehensible – involve discrete clashes of identifiable individual interests

[51] Audrey R Chapman and Sage Russell, 'Introduction' in Audrey R Chapman and Sage Russell (eds) *Core Obligations: Building a Framework for Economic, Social and Cultural Rights* (Intersentia 2002) 6.

[52] Craig Scott and Patrick Macklem, 'Constitutional Ropes of Sand or Justiciable Guarantees? Social Rights in a New South African Constitution' (1991) 141(1) University of Pennsylvania Law Review 1, 17.

[53] ibid.

[54] ibid 24, 43-44.

In particular, the *democratic legitimacy objection* looks to 'the nature, or character, of social rights' and asks 'whether it would be legitimate to confer constitutional status on social rights'.[55] It raises the question of judicial supremacy resulting from the transfer of power from an elected legislature or executive to the unelected judiciary and its implications for the traditional notions of democracy and the doctrine of separation of powers.[56] Concerns are also expressed about the judiciary's case-by-case, reactionary, piecemeal and short-term approach.[57]

The *institutional competence objection* looks to 'the nature or character of the judiciary' and asks 'whether the judiciary possesses the institutional capacity and competence to adjudicate social rights'.[58] In particular, polycentricity or 'many centred'-ness highlights the lack of technical expertise (both scientific and economic) of courts to fully understand and adjudicate such complex issues.[59] The objection also relates to the impact of court decisions, with policy and budgetary implications for example, on the relationship between the branches of government.[60]

Over the years, scholars have dissolved the artificial distinction between SER and civil and political rights. They view both SER and civil and political rights as positive or negative rights that may impose positive or negative duties on the State and involve expenditure.[61] Drawing upon the progressive development of human rights law, Alan Boyle expresses optimism about the role of judicial interpretation and refinement in the

[55] Martha Jackman, 'The Protection of Welfare Rights Under the Charter' (1988) 20(2) Ottawa Law Review 257, 331.

[56] See, for example, Jeremy Waldron, 'A Rights-Based Critique of Constitutional Rights' (1993) 13 Oxford Journal of Legal Studies 18, 20.

[57] Ellen Wiles, 'Aspirational Principles or Enforceable Rights? The Future for Socio-Economic Rights in National Law' (2007) 22(1) American University International Law Review 35, 44.

[58] See Jackman (n 55) 332. See also Gerald N Rosenberg, *The Hollow Hope: Can Courts Bring About Social Change* (Chicago University Press 1991) 21.

[59] Lon L Fuller and Kenneth I Winston, 'The Forms and Limits of Adjudication' (1978) 92 Harvard Law Review 353, 394-404.

[60] Scott and Macklem (n 52) 24. See also Wiles (n 57) 53-54.

[61] See Cécile Fabre, *Social Rights Under the Constitution: Government and the Decent Life* (OUP 2000) 44; Sandra Fredman, *Human Rights Transformed: Positive Rights and Positive Duties* (OUP 2008) 65-91; Stephen Holmes and Cass R Sunstein, *The Cost of Rights: Why Liberty Depends on Taxes* (WW Norton 1999) 35-48.

development of the right to environment.[62] Arguably, this optimism may be extended to the other CER. In response to the democratic legitimacy objection, it is argued that the judiciary does not operate in a vacuum, insulated from any accountability.[63] The institutional competence objection is valid where courts act as experts without possessing the necessary expertise. But as Susan Wiles argues, all aspects of SER are not complex and judges are trained to deal with a certain degree of complexity.[64]

The Indian context

At a general level, there is an inextricable link between SER and PIL in India: the holders of SER often allege non-realisation or violation of their rights in petitions filed as PIL before the higher judiciary.[65] There is a widely held perception that the Supreme Court regards SER as justiciable.[66] However, Madhav Khosla rightly identifies an important limitation of this literature: it may acknowledge the recognition of SER by the higher judiciary but its primary focus is PIL and the underlying procedural and substantive innovations.[67] Second, several concerns relating to judicial activism and PIL in India mirror objections to the justiciability of SER.[68] Third, the justiciability issue is examined in literature on SER that adopts a positive[69] or critical[70] perspective. But a majority of

[62] See, for example, Alan Boyle, 'The Role of International Human Rights Law in the Protection of the Environment' in Alan Boyle and Michael Anderson (eds), *Human Rights Approaches to Environmental Protection* (OUP 1996) 51.

[63] Marius Pieterse, 'Coming to Terms with Judicial Enforcement of Socio-Economic Rights' (2004) 20(3) South African Journal of Human Rights 383, 391.

[64] Wiles (n 57) 54.

[65] See Madhav Khosla, 'Making Social Rights Conditional: Lessons from India' (2010) 8(4) International Journal of Constitutional Law 739, 743.

[66] See Michael R Anderson, 'Human Rights Approaches to Environmental Protection: An Overview' in Alan Boyle and Michael Anderson (eds), *Human Rights Approaches to Environmental Protection* (OUP 1996) 16; Scott and Macklem (n 52) 16; Shylashri Shankar and Pratap Bhanu Mehta, 'Courts and Socio-Economic Rights in India' in Varun Gauri and Daniel M Brinks (eds) *Courting Social Justice: Judicial Enforcement of Social and Economic Rights in the Developing World* (CUP 2010).

[67] Khosla (n 65) 743-44.

[68] See, for example, Cassels (n 49) 509-15.

[69] See generally S Muralidhar, 'Economic, Social and Cultural Rights: An Indian Response to the Justiciability Debate' in Yash Ghai and Jill Cottrell (eds), *Economic, Social and Cultural Rights in Practice* (Interights 2004); S Muralidhar, 'India: The Expectations and Challenges of Judicial Enforcement of Social Rights' in Malcolm Langford (ed), *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (CUP 2008). See also Inga Winkler, *The Human Right to Water: Significance, Legal Status and Implications for Water Allocation* (Hart Publishing 2012).

[70] See generally Anashri Pillay, 'Revisiting the Indian Experience of Economic and Social Rights Adjudication: The Need for a Principled Approach to Judicial Activism and Restraint' (2014) 63(2)

these works do not engage with the manner in which the higher judiciary determines the scope and content of the SER, the corresponding duties, and judicial remedies in particular cases. In fact, a similar criticism is mounted in respect of court decisions where often there is a declaration of justiciability but little or no engagement with its operationalisation.[71]

More specifically, in the context of the CER, some constitutional lawyers who examine the emergence of PIL in India and the procedural and substantive innovations underpinning it, as well as the extent of judicial activism or passivism refer to environmental cases and the balancing exercise that is undertaken by the higher judiciary.[72] In addition, since the 1990s, a significant body of independent literature on public interest environmental litigation has emerged.[73] Almost a decade later, scholars began to examine litigation relating to the right to water.[74] Discussion of the right to sanitation is a more recent development.[75] Most of these insights acknowledge the recognition of the rights and the inverse relationship between these rights and water pollution/quality. To varying extent, they engage with the determination of the scope and

International and Comparative Law Quarterly 385; Rehan Abeyratne, 'Socioeconomic Rights in the Indian Constitution: Towards a Broader Conception of Legitimacy' (2014) 39(1) Brooklyn Journal of International Law 1. See also Lavanya Rajamani, 'The Right to Environmental Protection in India: Many a Slip Between the Cup and the Lip?' (2007) 16(3) Review of European Community and International Environmental Law 274 [Rajamani (2007a)]; Anonymous, 'Note: What Price for the Priceless?: Implementing the Justiciability of the Right to Water' (2007) 120(4) Harvard Law Review 1067, 1069.

[71] See Khosla (n 65) 743.

[72] See, for example, Craig and Deshpande (n 49) 369-71; Cassels (n 49) 504 & 506; GL Peiris, 'Public Interest Litigation in the Indian Subcontinent: Current Dimensions' (1991) 40(1) International and Comparative Law Quarterly 66, 74-75.

[73] See, for example, Bharat Desai, 'Enforcement of the Right to Environment Protection Through Public Interest Litigation in India' (1993) 33 Indian Journal of International Law 27; Ayesha Dias, 'Judicial Activism in the Development and Enforcement of Environmental Law: Some Comparative Insights from the Indian Experience' (1994) 6(2) Journal of Environmental Law 243; J Mijin Cha, 'A Critical Examination of the Environmental Jurisprudence of the Courts of India' (2005) 10(2) Albany Journal of Environmental Outlook 197; Lavanya Rajamani, 'Public Interest Environmental Litigation in India: Exploring Issues of Access, Participation, Equity, Effectiveness and Sustainability' (2007) 19(3) Journal of Environmental Law 293 [Rajamani (2007b)]; Rajamani (2007a) (n 70).

[74] See, for example, Pant (n 41); S Muralidhar, 'The Right to Water: An Overview of the Indian Legal Regime' in Eibe Riedel and Peter Rothen (eds), *The Human Right to Water* (Berliner Wissenschafts-Verlag 2006); Philippe Cullet, 'Right to Water in India – Plugging Conceptual and Practical Gaps' (2013) 17(1) The International Journal of Human Rights 56.

[75] See, for example, Rebecca M Coleman, 'The Human Rights of Sanitation for All: A Study of India' (2011) 24(1) Pacific McGeorge Global Business and Development Law Journal 267; Philippe Cullet, 'Policy as Law: Lessons from Sanitation Interventions in Rural India' (2018) 54(2) Stanford Journal of International Law 241.

content of the rights although their procedural aspects receive less attention than the substantive aspects.

The State is the primary duty-bearer in respect of justiciable constitutional rights. In addition, the DPSP include a number of non-justiciable duties of the State. Environmental law scholars reiterate the duties of the State corresponding to the CER and/or in relation to water pollution/quality, as identified by the higher judiciary.[76] Article 51A(g) of the Constitution embodies a fundamental but non-justiciable duty of citizens to protect and improve the environment. Scholarship refers to this provision as an outcome of a constitutional amendment or in discussions about the harmonious reading of constitutional provisions by the higher judiciary.[77]

International law

International law can have an impact on and be influenced by developments at the national level.[78] It is, therefore, important to examine international law's engagement with the rights to environment, sanitation and water and the corresponding duties. To varying extents, non-binding instruments of international human rights law recognise these rights or their components. The writings of international law scholars preceded this development. They first examined the right to environment,[79] and then the right to water.[80] Initially, the right to sanitation was discussed in the context of the right to water,[81] then the right to water and sanitation,[82] and more recently as an independent right.[83] Scholars engage with the source of the rights, and they highlight the issue of

[76] See, for example, Aruna Venkat, *Environmental Law and Policy* (PHI Learning Private Limited 2011).

[77] See, for example, CM Jariwala, 'The Constitution 42nd Amendment Act and the Environment' in SL Agarwal (ed), *Legal Control of Environmental Pollution* (NM Tripathi 1980); Cassels (n 49).

[78] Pillay (n 70) 385.

[79] See, for example, Dinah Shelton, 'Human Rights, Environmental Rights, and the Right to Environment' (1991) 28(1) Stanford Journal of International Law 103.

[80] See, for example, Peter H Gleick, 'The Human Right to Water' (1999) 1(5) Water Policy 487.

[81] See, for example, Erik B Bluemel, 'The Implications of Formulating a Human Right to Water' (2004) 31(4) Ecology Law Quarterly 957.

[82] See, for example, Thorsten Kiefer and Virginia Roaf, 'The Human Right to Water and Sanitation: Benefits and Limitations' in Mikel Mencisidor (ed), *The Human Right to Water: Current Situation and Future Challenges* (Icaria Editorial 2008).

[83] See, for example, Keri Ellis and Loretta Feris, 'The Right to Sanitation: Time to Delink from the Right to Water' (2014) 36(3) Human Rights Quarterly 607.

limited elaboration of the scope and content of the rights and the need for the development of domestic legal systems to make these rights meaningful.

International law identifies the State as the primary duty-bearer in respect of rights. The Committee on Economic, Social and Cultural Rights (CESCR) has adopted a tripartite typology of obligations of the State, which includes obligations to respect, protect and fulfil human rights.[84] This typology informs a number of General Comments issued by the CESCR to interpret the provisions of the International Covenant on Economic, Social and Cultural Rights, and scholars have relied on it to examine the obligations of the State corresponding to the right to water,[85] and to a lesser extent the right to a healthy environment,[86] and the right to sanitation.[87] However, Ida Elisabeth Koch cautions that the tripartite typology does not represent the final word. She highlights issues such as inconsistency in the placement of measures in the different categories, and dilution of the differences among the three categories.[88]

The literature highlights the issue of water pollution/quality, but often it does not consider whether or not, and if yes, in what manner, international law accommodates the issue of water pollution/quality in its engagement with the rights and the corresponding duties.

Right of the environment

The rights to environment, sanitation and water encompass environmental considerations at the domestic level as well as the international level. But they cannot be equated with

[84] See Magdalena Sepulveda Carmona, *Nature of the Obligations Under the International Covenant on Economic, Social and Cultural Rights* (Intersentia 2003). This tripartite typology was first proposed by Asbjørn Eide for understanding the right to food. See Asbjørn Eide, 'Realisation of Social and Economic Rights and the Minimum Threshold Approach' (1989) 10 Human Rights Law Journal 35.

[85] See, for example, Winkler (n 69) Chapter 4.

[86] See, for example, Melissa Fung, 'Right to a Healthy Environment: Core Obligations under the International Covenant of Economic, Social and Cultural Rights' (2006) 14(1) Willamette Journal of International Law and Dispute Resolution 97, 110-16.

[87] See, for example, Malcolm Langford, Jamie Bartram, and Virginia Roaf, 'The Human Right to Sanitation' in Malcolm Langford and Anna FS Russell (eds), *The Human Right to Water: Theory, Practice and Prospects* (CUP 2017) 365-71.

[88] See Ida Elisabeth Koch, 'Dichotomies, Trichotomies or Waves of Duties' (2005) 5(1) Human Rights Law Review 81, 88.

the right of the environment.[89] Scholars have identified different approaches towards rights that accommodate environmental considerations to different extents. These approaches are relevant for an examination of the potential and limits of environmental rights litigation from a broader perspective. The importance of the need to accommodate the human-non-human interactions in environmental law, as viewed through the lens of the Anthropocene,[90] is recognised but it is not considered in detail here because cases adjudicated by the higher judiciary in the past form the primary focus of this thesis.

Strong anthropocentric rights adopt an instrumental approach, which values the environment solely in terms of its immediate human utility and 'perceives the non-human world solely as a means to a human ends'.[91] Courts may grant citizens a right to an environment with an attached prefix without elaborating what such an environment entails.[92] Or they may restrict activities that are likely to cause environmental harm/pollution that creates a significant threat to human life and health.[93] Environmentalists argue that anthropocentric approaches to environmental protection are "the root of environmental degradation".[94] Furthermore, if the focus is primarily human health, substantial environmental degradation can occur before it actually harms any humans.[95] Consequently, it is possible that the environmental right will be unenforceable until it is too late.[96] Further, the anthropocentric approach is 'inconsistent with scientific knowledge' that illustrates the overall importance of environmental protection to human well-being.[97]

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[89] Anderson, 'Human Rights Approaches to Environmental Protection' (n 66) 14.

[90] See, for example, Louis Kotze (ed), *Re-imagining Environmental Law and Governance for the Anthropocene* (Hart Publishing 2017).

[91] Catherine Redgwell, 'Life, The Universe And Everything: A Critique Of Anthropocentric Rights' in Alan Boyle and Michael Anderson (eds), *Human Rights Approaches to Environmental Protection* (OUP 1996) 73.

[92] Joshua J Bruckerhoff, 'Giving Nature Constitutional Protection: A Less Anthropocentric Interpretation of Environmental Rights' (2008) 86(3) Texas Law Review 615, 631.

[93] Prudence E Taylor, 'From Environment to Ecological Human Rights: A New Dynamic in International Environmental Law?' (1998) 10 Georgetown International Environmental Law Review 309, 351-52.

[94] ibid 352.

[95] Elizabeth F Brown, 'In Defense of Environmental Rights in East European Constitutions' (1993) 1(1) The University of Chicago Law School Roundtable 191, 212.

[96] Bruckerhoff (n 92) 624.

[97] ibid 641.

A weak anthropocentric approach recognises interrelatedness and interdependence of the natural world of which human beings form a part, but it is based on the perception that the destruction of the former threatens the existence or well-being of the latter.[98] In other words, an indirect instrumental value is attached to nature or the environment.[99] Courts can ensure some degree of environmental protection while deciding cases in which anthropocentric rights are invoked.[100] In contrast to these anthropocentric approaches, a biocentric approach expresses concern for species and ecosystems for their own sake.[101] It 'proposes a fundamental shift in consciousness from human domination of nature to a perception of human and non-human life as of equal intrinsic value'.[102] Such an approach can guarantee a healthy environment (in the broadest sense) for present and future generations; not just an environment that satisfies minimal health standards for humans.[103]

1.3.2 Implementation of court decisions

The implementation of court decisions is critical given the seriousness of the implications following from non-implementation or even partial or poor implementation. First, this results in the non-realisation or failure to redress the violation of the rights, and the failure to achieve the broader objectives. Second, there is no deterrent effect on the violators. Third, it compromises the legitimacy of the judiciary in the eyes of the government, the litigants and the members of the public. For the purpose of this thesis, the term 'implementation' is defined as 'the behaviour of lower courts, government agencies, or affected parties as it relates to enforcing a judicial decision'.[104] A related term – 'compliance' refers to 'full execution of the action (or complete avoidance of the action)

[98] Redgwell (n 91) 73-74.

[99] ibid.

[100] Bruckerhoff (n 92) 640.

[101] Redgwell (n 91) 74.

[102] ibid 80.

[103] Bruckerhoff (n 92) 616.

[104] Bradley C Canon and Charles A Johnson, *Judicial Policies: Implementation and Impact* (Congressional Quarterly Press 1999) 17.

called for (or prohibited) in one or more court rulings.'[105] This thesis uses these two terms inter-changeably.

César Rodríguez-Garavito focuses on two internal factors that can influence the implementation of court decisions and that are within the purview of courts: type of decision and the existence and nature of monitoring.[106] A third internal factor is the use of coercive remedies. The rest of this sub-section considers each of these factors.

Type of decision

It is possible to examine the court decision as a component of the adjudication stage. Scholars have examined the judicial remedies granted in court decisions with or without reference to rights, and expressed some views on their implications for the relationship between the three branches of government. Equally, the instrumental approach to implementation *inter alia* focuses on various attributes of court decisions.[107] Further, in the specific context of water pollution where the right-holders or their representatives often pray for remediation, the nature, strength, and complexity of judicial remedies that impose liability on the polluter and grant compensation to victims and/or damages for environmental restoration can influence their implementation.

The right-remedy continuum

[105] See Diana Kapiszewski and Matthew M Taylor, 'Compliance: Conceptualising, Measuring, and Explaining Adherence to Judicial Rulings' (2013) 38(4) Law & Social Inquiry 803, 806. See also Canon and Johnson (n 104) 17.

[106] César Rodríguez-Garavito, 'Beyond the Courtroom: The Impact of Judicial Activism on Socioeconomic Rights in Latin America' (2011) 89(7) Texas Law Review 1669, 1675-76. See also César Rodríguez-Garavito and Diana Rodríguez-Franco, *Radical Deprivation on Trial: The Impact of Judicial Activism on Socioeconomic Rights in the Global South* (CUP 2015) 16.

[107] See generally James F Spriggs II, 'Explaining Federal Bureaucratic Compliance with Supreme Court Decisions' (1997) 50(3) Political Research Quarterly 567, 570-72; Kapiszewski and Taylor (n 105) 819-20. See also Malcolm Langford, César Rodríguez-Garavito, and Julieta Rossi, 'Introduction: From Jurisprudence to Compliance' in Malcolm Langford, César Rodríguez-Garavito, and Julieta Rossi (eds), *Social Rights Judgments and the Politics of Compliance: Making it Stick* (CUP 2017) 15 & 21. In the Indian context, see S Muralidhar, 'Judicial Enforcement of Economic and Social Rights: The Indian Scenario' in Fons Coomans (ed), *Justiciability of Economic and Social Rights – Experiences from Domestic Systems* (Intersentia 2006) 242-43.

The nature of judicial remedies may vary. First, they may impose positive or negative duties.[108] Second, they may be general and/or vague; alternatively, they may be specific and/or detailed and prescriptive.[109] The former are not specific about the actor(s) toward whom they are directed, what action is required, or how quickly it must be carried out.[110] The latter are narrow, individual, measured and cautious, with limited impact beyond the parties.[111] Third, remedies may be mandatory or they may be framed as suggestions or recommendations.[112]

Mark Tushnet distinguishes between strong and weak remedies on the basis of the breadth of orders and the extent to which orders are compulsory and peremptory.[113] The overlap with the nature of remedies is evident. In the case of weak remedies, courts may simply recognise a right, or follow recognition with a declaration that a right has been violated, without enforcing it and providing a remedy.[114] In Clark Cunningham's description of collaborative non-adversarial public law litigation, the court may act as an ombudsman who receives complaints and brings the most important ones to the attention of the responsible authorities.[115] Alternatively, courts may issue a general, flexible and non-coercive order asking the government to develop and implement a plan or program for the realisation of the right to some extent, over a reasonable but unspecified period of time.[116] The underlying assumption is that the government will respond positively to the

[108] Fredman (n 61) 92-99.

[109] McNollgast, Roger G Noll, and Barry R Weingast, 'Conditions for Judicial Independence' (2006) 15 Journal of Contemporary Legal Issues 105, 110.

[110] Kapiszewski and Taylor (n 105) 814.

[111] Daniel M Brinks and Varun Gauri, 'A New Policy Landscape: Legalizing Social and Economic Rights in the Developing World' in Varun Gauri and Daniel M Brinks (eds) *Courting Social Justice: Judicial Enforcement of Social and Economic Rights in the Developing World* (CUP 2010) 329.

[112] Muralidhar, 'Judicial Enforcement of Economic and Social Rights' (n 107) 243-44.

[113] Mark Tushnet, *Weak Courts, Strong Rights: Judicial Review and Social Welfare Rights in Comparative Constitutional Law* (Princeton University Press 2008) 21.

[114] ibid 248. See also Nick Robinson, 'Expanding Judiciaries: India and the Rise of the Good Governance Court' (2009) 8 Washington University Global Studies Law Review 1, 44.

[115] Cunningham (n 49) 504.

[116] See Tushnet (n 113) 248; Kent Roach, 'The Challenges of Crafting Remedies for Violations of Socio-economic Rights' in Malcolm Langford (ed), *Social Rights Jurisprudence – Emerging Trends in International and Comparative Law* (CUP 2009) 52; Katharine G Young, 'A Typology of Economic and Social Rights Adjudication: Exploring the Catalytic Function of Judicial Review' (2010) 8(3) International Journal of Constitutional Law 1, 8-11.

moral suasion of courts and undertake the necessary measures.[117] Weak remedies tend to leave implementation entirely in the hands of the government.[118]

In contrast, strong remedies involve precise-outcome-oriented orders or monologic judgments.[119] Courts specify a plan of action, which is to be implemented within a specified time period, as well as strong enforcement mechanisms including time-bound reporting requirements and consequences in case of non-implementation.[120] According to Tushnet: 'Typically, courts will resist easy modifications of their orders when officials say that practical difficulties have stood in the way of full implementation.'[121] Examples such as mandatory orders or injunctions are premised on the general apathy displayed by the executive.[122] Cunningham's investigative non-adversarial litigation approach may lead to strong remedies where the court appoints special commissions or experts to gather facts and data in a report, propose remedial relief and monitor implementation, or actually decide factual issues on delegated authority.[123]

Rosalind Dixon discusses an intermediate category – moderate remedies – where courts serve as a site for an ongoing dialogue or negotiation among the parties to develop solutions to the problem.[124] Such remedies form a key component of Cunningham's description of collaborative non-adversarial public law litigation where the court provides a forum for clear and calm discussion of public issues, or acts as mediator by suggesting possible compromises and moving parties towards agreement.[125] Here, undisputed facts

[117] Roach, 'The Challenges of Crafting Remedies for Violations of Socio-economic Rights' (n 116) 52-53.

[118] Tushnet (n 113) 248.

[119] Rodríguez-Garavito and Rodríguez-Franco (n 106) 10.

[120] Muralidhar, 'Judicial Enforcement of Economic and Social Rights' (n 107); Muralidhar, 'India' (n 69). See generally Tushnet (n 113) 249; Young (n 116) 18.

[121] Tushnet (n 113) 249.

[122] Muralidhar, 'Judicial Enforcement of Economic and Social Rights' (n 107) 244.

[123] Cunningham (n 49) 506-08.

[124] See Rosalind Dixon, 'Creating Dialogue about Socioeconomic Rights: Strong-form versus Weak-form Judicial Review Revisited' (2007) 5(3) International Journal of Constitutional Law 391. See also Roberto Gargarella, 'Dialogic Justice in the Enforcement of Social Rights' in Siri Gloppen and Alicia Yamin (eds), *Litigating Health Rights: Can Courts Bring More Justice to Health?* (Harvard University Press 2011).

[125] Cunningham (n 49) 504. See generally Katharine G Young, *Constituting Economic and Social Rights* (OUP 2012) 200-06.

make it possible to achieve a clear consensus on the need for action.[126] Alternatively, courts may 'outline procedures and broad goals, as well as criteria and deadlines for assessing progress, but leave decisions on means and policies to the government'.[127] This resembles weak remedies in Tushnet's typology.[128]

Notwithstanding this typology based on the strength of the remedies, it is important to view the distinction between the remedies as a continuum rather than as a dichotomy.[129] Further, Charles Sabel and William Simon suggest that weak remedies must, in the first instance, become converted into strong ones before they can be reconstituted as better weak remedies.[130]

Judicial remedies may also be straightforward or complex.[131] Courts may grant relief to an identifiable and manageable number of individuals or a collective (the petitioners, the right-holders represented by the petitioner(s) or a wider group of people), issue clear and detailed directions to specific respondents to act and/or cease to act in a particular manner in accordance with their constitutional or statutory mandate and/or indicate a particular timeframe for action. Alternatively, they may grant systemic relief to the right-holders at large, and issue general and vague directions to the respondents without clarifying the division of responsibilities. Further, the respondents may be required to undertake a large number of actions in an unrealistically short timeframe.[132]

Beyond the right-remedy continuum

[126] Cunningham (n 49) 505. See also Fredman (n 61) 127-28.

[127] See Brinks and Gauri, 'A New Policy Landscape' (n 111) 329. See also Rodríguez-Garavito and Rodríguez-Franco (n 106) 10 & 16.

[128] Tushnet (n 113) 31.

[129] Young (n 116) 6.

[130] See Charles F Sabel and William H Simon, 'Destabilization Rights: How Public Law Litigation Succeeds' (2004) 117(4) Harvard Law Review 1015, 1065-67.

[131] See Kapiszewski and Taylor (n 105) 811. See also Langford and two others, 'Introduction' (n 107) 7-8.

[132] Langford and two others, 'Introduction' (n 107) 7-8.

Writing about public law litigation, Abram Chayes observes that the right and remedy are 'thoroughly disconnected' and 'to some extent transmuted' in some cases.[133] Cunningham discusses this phenomenon in the Indian context. Akin to Tushnet's weak remedies, courts may simply recognise/declare the rights or their violation without providing a remedy.[134] Alternatively, they may grant immediate remedies to an individual or a collective of petitioners through interim orders before conducting a preliminary examination of the merits of the case and arriving at a final decision on the rights or in respect of systemic remedies.[135] Or they may grant relief, which was not asked for, or which exceeded the relief required for addressing the violation of the rights alleged in the petition.[136] According to Susan Susman, the Court accommodates its own view of "public interest".[137] In some of these cases, the judicial remedies may be 'expressed in highly general terms rather than limited to the particular case in litigation'.[138]

Khosla distinguishes between the systemic rights approach where 'the nature of the right is not conditional upon state action',[139] and the conditional rights approach, which is concerned with the implementation of measures undertaken by the state rather than the inherent nature of the right.[140] According to him, the Supreme Court adopted the latter approach.[141] However, Anashri Pillay argues that the conditional rights approach does not provide a complete explanation for inconsistencies in the Court's approach.[142]

Judicial activism/passivism in PIL and the objections to justiciability of SER

[133] See Abram Chayes, 'The Role of the Judge in Public Law Litigation' (1976) 89(7) Harvard Law Review 1281, 1293.

[134] See Cunningham (n 49) 515.

[135] ibid 511-12. See also Roach 'The Challenges of Crafting Remedies for Violations of Socio-economic Rights' (n 116) 56; Susan D Susman, 'Distant Voices in the Courts of India: Transformation of Standing in Public Interest Litigation' (1994-1995) 13(1) Wisconsin International Law Journal 57, 91.

[136] Cunningham (n 49) 513. See also Susman (n 135) 90-92.

[137] Susman (n 135) 90.

[138] Oliver Mendelsohn, 'The Supreme Court as the Most Trusted Public Institution in India' (2000) 23 South Asia 103, 116.

[139] Khosla (n 65) 741.

[140] ibid 742.

[141] ibid.

[142] Pillay (n 70) 401.

Environmental law scholars often restate the remedies granted by the higher judiciary,[143] but they do not engage with the nature, strength, and complexity of the remedies.[144] Constitutional law scholars go further when they refer to some of the remedies to highlight or assuage concerns relating to judicial activism in PIL, which often mirror the objections to the judicial enforcement of SER generally. Much of this work suffers from the inherent reductionism in a binary framing of the relationship among the three branches of government.

On the one hand, the democratic legitimacy objection is evident in the argument that the Court fills gaps in existing legislation or addresses issues that are not covered by any legislation.[145] This is variously described as judicial activism or judicial law-making or the takeover of legislative functions by the judiciary.[146] But SP Sathe justifies this 'as being an essential component of its role as a constitutional court'.[147] The Court has also been charged with usurpation of powers and functions of the executive.[148] Upendra Baxi describes the practice of granting remedies without rights as the 'creeping jurisdiction' of the judiciary or the 'taking over the direction of administration in a particular arena from the executive'. [149] Other examples include court decisions involving availability of resources, policy priorities, and expertise, [150] directing policies, [151] or creating new policies and new institutions for their implementation.[152] Some argue that the Court risks making decisions that may not be the most effective solutions to the cases that come

[143] See, for example, Venkat (n 76).

[144] Exceptions include Divan and Rosencranz (n 21).

[145] See generally SP Sathe, *Judicial Activism in India – Transgressing Borders and Enforcing Limits* (OUP 2003) 242. In the context of PIEL, see Dias (n 73) 249.

[146] See, for example, Shubhankar Dam and Vivek Tewary, 'Polluting Environment, Polluting Constitution: Is a 'Polluted' Constitution Worse than a Polluted Environment?' (2005) 17(3) Journal of Environmental Law 383, 388.

[147] Sathe (n 145) 242.

[148] See generally Cassels (n 49) 506.

[149] Upendra Baxi, 'Taking Rights Seriously: Social Action Litigation in the Supreme Court of India' (1982) 29 The Review (International Commission of Jurists) 37, 42.

[150] Cunningham (n 49) 517.

[151] Armin Rosencranz and Michael Jackson, 'The Delhi Pollution Case: The Supreme Court of India and the Limits of Judicial Power' (2003) 28(2) Columbia Journal of Environmental Law 223, 224-25.

[152] Dam and Tewary (n 146) 388. See also Robinson (n 114) 51.

before it.[153] Others view such court decisions as a 'substitute [for] the ineffective administrative directives' of pollution control authorities.[154]

In cases where the Court steps in to fill gaps in existing legislation, the institutional competence objection is implicit in the contention that it often fails to determine whether there is any acceptable amount of pollution, or any level of risk, that will not prove to be a violation.[155] But, according to Lavanya Rajamani, 'rights language does not lend itself readily to the sorts of qualitative and quantitative assessments of environmental quality necessary for a more precise formulation'.[156]

On the other hand, another group of scholars highlight the adoption of weak remedies as an indicator of the higher judiciary's awareness of its limits. The first limit is that court decisions are not self-executing; their implementation depends on political support.[157] Second, the judges' perception regarding the implementation of their decisions and their ability to monitor implementation may lead them to 'only pick battles that they can win'.[158] Third, the higher judiciary recognises the complexity of environmental (rights) litigation given the scientific and technical nature of the issues, the piecemeal picture of the problem that litigation affords, and its lack of resources.[159]

Crafting remedies with the polluter pays principle

The polluter pays principle, which forms an integral element of the toolkit of principles of environmental law, is used to determine the liability of polluters of the environment (including water). A plethora of literature examines the underlying economic theory and the origin of the principle in the Organisation for Economic Cooperation and

[153] Rosencranz and Jackson (n 151) 224-25.

[154] Shyam Divan, 'A Mistake of Judgment' Down to Earth (30 April 2002) <www.downtoearth.org.in/blog/a-mistake-of---judgment-14470>.

[155] Michael R Anderson and Anees Ahmed, 'Assessing Environmental Damage Under Indian Law' (1996) 5(4) Review of European Community and International Environmental Law 335, 337.

[156] Rajamani (2007b) (n 73) 279.

[157] PN Bhagwati, 'Judicial Activism and Public Interest Litigation' (1985) 23(3) Columbia Journal of Transnational Law 561, 576-77.

[158] Shankar and Mehta, 'Courts and Socio-Economic Rights in India' (n 66) 177. See also Susman (n 135) 90; Tushnet (n 113) 237.

[159] See generally Rosenberg (n 58) 280-81.

Development (OECD)/European context as well as international environmental law.[160] Some scholars have also engaged with the theoretical underpinnings of the principle.[161] Environmental law scholars in India repeatedly refer to its invocation by the Court; in fact, this is presented as an example of its creativity to develop domestic environmental jurisprudence.[162] Here, it is pertinent to mention that the Court has read the polluter pays principle – as recognised in other jurisdictions and/or international environmental law – into the fundamental right to life guaranteed under the Constitution and/or domestic environmental laws such as the EPA and the WPCPA.[163] However, very little is known about the higher judiciary's engagement with the polluter pays principle and the implications of its application for the grant of judicial remedies, particularly in cases relating to water pollution caused by non-State actors as polluters, where the litigants often seek remedies for loss caused to the victims/right-holders and/or damages for environmental restoration. It is, therefore, useful to examine the manner and extent of application of the polluter pays principle by the higher judiciary in such cases, and its implications for environmental rights litigation.

Monitoring of implementation

Monitoring by courts can influence the implementation of court decisions. Monitoring can be strong, moderate, or weak.[164] In the first case, courts set specific deadlines and benchmarks, issue new directions in light of progress reports and encourage discussion among the parties.[165] In the second case, courts establish institutions for oversight or task

[160] See, for example, Arthur C Pigou, *The Economics of Welfare* (2nd edn Macmillan 1924); Philippe Sands and Jacqueline Peel, *Principles of International Environmental Law* (3rd edn CUP 2012); Candice Stevens, 'Interpreting the Polluter Pays Principle in the Trade and Environment Context' (1994) 27(3) Cornell International Law Journal 577.

[161] See, for example, Nicolas de Sadeleer, *Environmental Principles: From Political Slogans to Legal Rules* (OUP 2002) Chapter 1; Hans Christian Bugge, 'The Polluter Pays Principle: Dilemmas of Justice in National and International Contexts' in Jonas Ebbesson and Phoebe Okowa (eds), *Environmental Law and Justice in Context* (CUP 2009).

[162] See, for example, Rajamani (2007a) (n 70) 280-84; Sahu (n 29) 384-85.

[163] See *Indian Council for Enviro-Legal Action v Union of India and Others* (1996) 3 SCC 212 ¶67 and *Vellore Citizens' Welfare Forum v Union of India and Others* (1996) 5 SCC 647 ¶13, respectively.

[164] Rodríguez-Garavito and Rodríguez-Franco (n 106) 10-11.

[165] ibid. See also Roach, 'The Challenges of Crafting Remedies for Violations of Socio-economic Rights' (n 116) 54.

existing bodies with ensuring compliance,[166] or ask for 'compliance reports that are not meant to lead to additional pressure' from the court.[167] Courts choose not to keep jurisdiction over the matter in the third case.[168]

In India, strong monitoring is illustrated by the use of continuing mandamus by the higher judiciary, particularly the Supreme Court, in cases relating to the rights to food and education.[169] In the post-judgment phase, the higher judiciary monitored the implementation of its decisions in some cases.[170] In some cases, the Court appointed agencies or constituted committees or commissions to monitoring implementation.[171] The use of continuing mandamus in environmental rights litigation is recognised but there is little discussion of the other two types of monitoring.[172]

Monitoring of court decisions does not suggest a direct correlation between the strength of monitoring and implementation of court decisions. The strength of the right and the nature, strength and complexity of the remedies are other relevant factors. For instance, Rodríguez-Garavito focuses on the positive impact of strong monitoring of moderate remedies, which promote dialogue among the parties, on the implementation of structural cases.[173] The importance of external factors cannot be ruled out either. Nevertheless monitoring serves as an additional factor that may influence the implementation of court decisions.

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[166] See Siri Gloppen, 'Litigating Health Rights: Framing the Analysis' in Alicia Ely Yamin and Siri Gloppen (eds), *Litigating Health Rights: Can Courts Bring More Justice to Health?* (Harvard University Press 2011) 36.

[167] Rodríguez-Garavito and Rodríguez-Franco (n 106) 11; James R May and Erin Daly, *Global Environmental Constitutionalism* (CUP 2015) 170.

[168] Rodríguez-Garavito and Rodríguez-Franco (n 106) 11.

[169] See Muralidhar, 'Judicial Enforcement of Economic and Social Rights' (n 107); Shankar and Mehta, 'Courts and Socioeconomic Rights in India' (n 66) 174.

[170] Muralidhar, 'Judicial Enforcement of Economic and Social Rights' (n 107) 242; Muralidhar, 'India' (n 69) 110.

[171] See generally Cunningham (n 49) 506; Ashok H Desai and S Muralidhar, 'Public Interest Litigation: Potential and Problems' in BN Kirpal, Ashok H Desai, Gopal Subramanian, Rajeev Dhavan, and Raju Ramachandran (eds), *Supreme But Not Infallible: Essays in Honour of the Supreme Court of India* (OUP 2000) 165.

[172] For an exception, see Dias (n 73) 257.

[173] Rodríguez-Garavito (n 106) 1691.

Coercive remedies

The court's power to order and enforce sanctions or coercive remedies forms an integral component of the traditional instrumental approach to compliance.[174] Domestic courts have used coercive remedies such as attachment of assets, fines, or penalties for contempt of court.[175] In India, S Muralidhar observes that '[t]he court usually builds into its directions a forewarning of the consequences of disobedience or non-implementation, such as action for contempt of court.'[176] It is pertinent to mention that the Constitution as well as the Contempt of Courts Act, 1971 empower the higher judiciary to exercise the power of contempt of court.

In some cases, the very threat of being punished for contempt of court may trigger implementation.[177] Rajamani gives the example of *Almitra H Patel v Union of India*, where municipalities across India reacted with panic to the threat and actively began implementing the court decision in respect of solid waste management.[178] At the same time, she cautions that the panic and possibility of missing deadline may 'result in the diversion of scarce funds from other more strategic uses'.[179]

Generally, however, the Court is reluctant to use the contempt power by the higher judiciary.[180] This reluctance may be traced to the cautious note struck by the Court in *Union of India v Satish Chandra Sharma* where it held that the contempt power should be used 'only sparingly if the court is convinced that there has been wilful defiance or disobedience.'[181] Alternatively:

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[174] See Langford and two others, 'Introduction' (n 107) 10.

[175] Kapiszewski and Taylor (n 105) 819. See also Gloppen, 'Litigating Health Rights' (n 166) 36; Langford and two others, 'Introduction' (n 107) 10.

[176] Muralidhar, 'India' (n 69) 110.

[177] Desai (n 73) 37-39.

[178] Rajamani (2007b) (n 73) 311.

[179] ibid 311-12.

[180] See Fredman (n 61) 128 (yes); Sathe (n 145) 245 (no).

[181] (1980) 2 SCC 144 ¶13.

> …once there is clear evidence of active obedience, coupled with expression of regret, delayed though the compliance be due to the inevitable time-lag induced by paper logged procedures, the court may be clement…[182]

Overall, scholars rarely discuss the potential and actual use of coercive remedies to influence implementation of court decisions in India.

1.3.3 Effectiveness of implementation

The effectiveness of implementation of court decisions is a critical factor in determining the potential and limits of environmental rights litigation as a solution to the problem of water pollution in India. The effectiveness can be affected by the nature and speed of implementation. It may be full or partial or minimal or there may be no implementation,[183] and it may be immediate, moderate or sluggish.[184] At the same time, it is important to remember that effectiveness is related, but is not identical, to implementation.[185] Low levels of implementation are not an indication of low effectiveness; high levels of implementation may signal low effectiveness.[186]

There are two perspectives on the implementation of court decisions. The neorealist perspective focuses on the direct and material effects, which follow immediately from implementation and 'produce an observable change in the conduct of those it directly targets'.[187] In contrast, for authors inspired by a constructivist conception of the relationship between law and society, court decisions 'produce indirect transformations

[182] ibid.

[183] See generally Kapiszewski and Taylor (n 105) 806-07; Langford and two others, 'Introduction' (n 107) 7 & 20. See also Geetanjoy Sahu, *Environmental Jurisprudence and the Supreme Court* (Orient BlackSwan 2014) 120.

[184] Langford and two others, 'Introduction' (n 107) 20.

[185] Yasuhiro Shigeta, *International Judicial Control of Environmental Protection: Standard Setting, Compliance Control and the Development of International Environmental Law by the International Judiciary* (Kluwer Law International 2010) 18.

[186] Kal Raustiala, 'Compliance & Effectiveness in International Regulatory Cooperation' (2000) 32(3) Case Western Reserve Journal of International Law 387, 388.

[187] Rodríguez-Garavito (n 106) 1677. See also Rosenberg (n 58).

in social relations' and 'alter social actors' perceptions and legitimise the litigants' worldview'.[188]

Another way of looking at these perspectives is that implementation represents one end of the spectrum of effectiveness, the other end of which assesses the impact of court decisions. Here, the term *impact* refers to 'the total influence or effect of a decision, which may be greater than mere implementation of the order (for example, through additional indirect effects) or even 'net negative' due to unintended consequences.'[189] But there are a number of methodological challenges facing establishment of the impact of court decisions that relate to collection of data and inferring causality etc.[190]

In the past decade, the evaluation of implementation of court decisions in cases relating to SER and their transformative potential for society has emerged as an area of study.[191] However, these studies lag behind studies of the adjudication stage. Siri Gloppen offers some explanations.[192] The beneficiaries may not be restricted to an individual or a limited group of people, it may be difficult to determine the implementation of court decisions, and the time between the judgment and expected implementation may be long or disputed, and it may be difficult to locate data. In addition, the higher judiciary in India may issue a number of interim orders and directions before delivering the final judgment.

Nonetheless scholars have examined implementation of court decisions relating to SER in India in general.[193] They have also considered the implementation of specific court

[188] Pierre Bourdieu, 'The Force of Law: Toward a Sociology of the Juridical Field' (1987) 38(5) Hastings Law Journal 805, 837-39 & 848.

[189] Langford and two others, 'Introduction' (n 107) 8.

[190] See, for example, James P Levine, 'Methodological Concerns in Studying Supreme Court Efficacy' (1970) 4(4) Law and Society Review 583; Upendra Baxi, 'Who Bothers About the Supreme Court: The Problem of Impact of Judicial Decisions' (1982) 24(4) Journal of the Indian Law Institute 848.

[191] See, for example, Roberto Gargarella, Pilar Domingo, and Theunis Roux (eds), *Courts and Social Transformation in New Democracies: An Institutional Voice for the Poor?* (Ashgate 2008); Varun Gauri and Daniel M Brinks (eds) *Courting Social Justice: Judicial Enforcement of Social and Economic Rights in the Developing World* (CUP 2010); Alicia Ely Yamin and Siri Gloppen (eds), *Litigating Health Rights: Can Courts Bring More Justice to Health?* (Harvard University Press 2011).

[192] Gloppen, 'Litigating Health Rights' (n 166) 35-36.

[193] See Jayna Kothari, 'Social Rights and the Indian Constitution' 2004 (2) Law, Social Justice & Global Development Journal (LGD) <www.go.warwick.ac.uk/ elj/lgd/2004_2/kothari>; Muralidhar, 'India' (n 70).

decisions relating to the rights to health and education,[194] and to food.[195] In addition, widespread non-implementation or partial implementation of court decisions in some landmark public interest environmental litigation is examined in several general,[196] and a few specific,[197] studies. In particular, Geetanjoy Sahu examines three factors that determined the implementation of court decisions in two environmental cases: judicial activism in the implementation process, resource capacity of the petitioner, and the prevailing political and economic conditions.[198]

1.4 Research methodology

1.4.1 Objectives, research questions, and framework of analysis

The objective of this thesis is to examine the potential and limits of environmental rights litigation as a solution to the problem of water pollution. The primary research question is: *To what extent can environmental rights litigation contribute to addressing the problem of water pollution in India?* The secondary research question is: *What are the factors that enhance or impede the contribution of environmental rights litigation as a solution to the problem of water pollution?* The research hypotheses are:

(i) Environmental rights litigation can address some aspects of the problem of water pollution.

(ii) Environmental rights litigation cannot solve the problem of water pollution because of particular framing of the rights, the corresponding duties and the judicial remedies, as well as implementation challenges.

[194] See, for example, Shankar and Mehta, 'Courts and Socioeconomic Rights in India' (n 66).

[195] See, for example, Poorvi Chitalkar and Varun Gauri, 'India – Compliance with Orders on the Right to Food' in Malcolm Langford, César Rodríguez-Garavito, and Julieta Rossi (eds), *Social Rights Judgments and the Politics of Compliance: Making it Stick* (CUP 2017).

[196] See MK Ramesh, 'Environmental Justice: Courts and Beyond' (2002) 3(1) Indian Journal of Environmental Law 20; Cha (n 73); Michael G Faure and AV Raja, 'Effectiveness of Environmental Public Interest Litigation in India: Determining the Key Variables' (2010) 21(2) Fordham Environmental Law Review 239.

[197] See Rajamani (2007b) (n 73); Sahu (n 183) Chapter III.

[198] Sahu (n 183) 136-46.

The thesis draws upon a conceptual framework that was developed by Siri Gloppen to identify the main stages or variables in the litigation process that interact to determine the success or failure of socio-economic rights (SER) litigation: claim formation, adjudication, implementation and social outcome.[199] According to her, the general logic of the theoretical framework is applicable to the analysis of all forms of social rights litigation.[200] This thesis focuses on two stages of Gloppen's analytical framework - adjudication and implementation. This selection is based on three considerations: (i) greater amenability of adjudication and implementation to case law analysis that underpins this thesis; (ii) the exclusive focus on the role of the judiciary; and (iii) the difficulties faced in collecting information in respect of the claim formation stage of a large set of cases, and the methodological challenges involved in the study of social outcome of court decisions (discussed above), which led the researcher to exclude these two stages of the litigation process. This thesis further introduces two additional elements to the examination of the adjudication and implementation stages, that is, the determination of the duties of the State and the role of monitoring and coercive remedies, respectively. The enquiry proceeds as follows:

1. Adjudication

1.1 How does the higher judiciary recognise the CER and determine their nature, scope and content?

1.2 How does the higher judiciary determine the nature, scope and content of the corresponding duties of the State?

1.3 What are the nature, strength and complexity of judicial remedies awarded by the higher judiciary that are directed at State and non-State actors?

2. Implementation

[199] Siri Gloppen, 'Litigation as a Strategy to Hold Governments Accountable for Implementing the Right to Health' (2008) 10(2) Health and Human Rights 21. See also Siri Gloppen, 'Courts and Social Transformation: An Analytical Framework' in Roberto Gargarella, Pilar Domingo, and Theunis Roux (eds), *Courts and Social Transformation in New Democracies: An Institutional Voice for the Poor?* (Ashgate 2008) 42; Gloppen, 'Litigating Health Rights' (n 166) 25.

[200] Gloppen (2008) (n 199) 27. See also Kristi Innvaer Staveland-Saeter, 'Litigating the Right to a Healthy Environment: Assessing the Policy Impact of "The Mendoza Case"' CMI Report R2011: 6 (CMI 2010) <www.cmi.no/publications/file/4258-litigating-the-right-to-a-healthy-environment.pdf> (where the framework was applied to the right to a healthy environment).

2.1 How does the higher judiciary influence the implementation of its orders or judgments (court decisions)?

2.1.1 Does the higher judiciary monitor the implementation of court decisions?

2.1.2 Does the higher judiciary rely on coercive remedies?

2.2 To what extent is the implementation of court decisions effective?

Three considerations underpin this enquiry: the rights to environment, sanitation and water of right-holders, the right of the environment, and the relationship of the judiciary with the other branches of government.

1.4.2 Rationale

In India, litigants have relied on environmental rights litigation to seek justice from courts in cases relating to water pollution/quality since the 1980s. In recent years, the National Green Tribunal (NGT) has emerged as the preferred forum for the adjudication of such cases. In other words, environmental rights litigation is here to stay. The main objective of this thesis is to examine the potential and limits of environmental rights litigation as a solution to the problem of water pollution in India. This enquiry can contribute to the development of future domestic jurisprudence – from the perspective of judges as well as lawyers. It can also provide scholars engaged in research on domestic, comparative and international aspects of environmental law, human rights law and constitutional law issues with a perspective from India.

1.4.3 Scope and limitations

The problem of water pollution is not unique to India. But the scale of the problem and its adverse impacts on the burgeoning population and the environment provides one justification for the geographic focus on India. An examination of the potential and limits of environmental rights litigation in India is also jurisprudentially very interesting given the historical focus on the higher judiciary's procedural and substantive innovations, the twists and turns of PIL, and the creative recognition of the CER on the one hand, and current and emerging questions about the justiciability of socio-economic rights including the CER and the transformative potential of such rights on the other hand.

The potential and limits of environmental rights litigation as a solution to the problem of water pollution in India is assessed with reference to the rights to environment, sanitation and water (constitutional environmental rights or CER). The rights to environment and water are likely to be adversely affected as a result of water pollution and/or poor water quality, and the absence or inadequacy of all the CER is likely to result in water pollution and/or poor water quality. The right of the environment is also included as the constituents of the natural environment may experience some of the adverse effects of water pollution independently of human beings. While other rights such as the rights to food, culture and religion are also relevant, this thesis focuses on the abovementioned CER partly due to the recognition of the link between them, and partly because of the researcher's previous work experience in these areas.

Accordingly, the term 'environmental rights litigation' refers to litigation relating to water pollution and/or poor water quality, which seek realisation or remedies for violation of one or more of the CER, expressly or implicitly. It includes PIL as well as writ petitions filed under Article 32 of the Constitution before the Supreme Court of India or under Article 226 of the Constitution before high courts at the level of states or union territories. The Supreme Court and high courts are collectively referred to as the 'higher judiciary' and the terms 'judiciary' and 'courts' are used generally. The main reason for the selection of the higher judiciary is that it is constitutionally empowered to adjudicate rights litigation. Given the contribution of the NGT to the progressive development of domestic environmental law, the thesis also considers the jurisprudence of the NGT on the right of the environment (Chapter 3) and the remediation of water pollution (Chapter 6).

This thesis acknowledges the strategic and symbolic importance of courtroom losses in addressing the problem,[201] but it concentrates on environmental rights litigation that led to a court decision in favour of the right-holders or their representatives. The selection of implementation of court decisions and the internal factors influencing its effectiveness has led to the exclusion of external factors influencing the effectiveness of implementation, and the impact of court decisions that *inter alia* sheds light on its indirect and/or symbolic effects. More generally, as this thesis does not consider the factors

[201] Scott and Macklem (n 52) 8.

influencing judicial behaviour, variance between findings based on application of theoretical frameworks (such as the tripartite typology of obligations of the State) and the findings of behavioural studies cannot be ruled out.

1.4.4 Methodology

This thesis analyses court decisions or the 'law in books', the underlying factors that led to particular court decisions, as well as the 'law in action'. It combines a doctrinal approach with content analysis of court decisions and fieldwork involving semi-structured interviews, which represents a mixed-methods research.[202] The research is qualitative in nature.[203]

The thesis adopts an explanatory, theoretical or doctrinal approach to study the 'law in books' (*what is the law?*).[204] This involves (a) locating the source to be examined, and (b) interpreting and analysing it.[205] Litigation in India is document intensive: the parties submit written briefs to the court, and the facts of the case, the arguments of the parties and the legal reasoning that form the basis of the decision of the court are recorded in a written order or judgment. Therefore, as opposed to conventional interpretive legal methods, this thesis applies a standard social science technique – content analysis – to conduct empirical legal research. This is based on the collection of court decisions in cases relating to water pollution/quality, their systematic reading, recording of consistent features, and drawing inferences about their use and meaning.[206] Content analysis generates objective, falsifiable, and reproducible knowledge about what courts do and how and why they do it.[207] It refers to the process of reading judgments as text rather than

[202] Laura Beth Nielsen, 'The Need for Multi-Method Approaches in Empirical Legal Research' in Peter Cane and Herbert M Kritzer (eds), *The Oxford Handbook of Empirical Legal Research* (OUP 2010) 953.

[203] Ian Parker, 'Qualitative Research' in Peter Banister, Erica Burman, and Ian Parker (eds), *Qualitative Methods in Psychology: A Research Guide* (Open University Press 1994) 2.

[204] Terry Hutchinson and Nigel Duncan, 'Defining and Describing What We Do: Doctrinal Legal Research' (2012) 17(1) Deakin Law Review 83, 85.

[205] ibid 110.

[206] Klaus Krippendorff, *Content Analysis: An Introduction to its Methodology* (2nd edn Sage Publications 2004) 18.

[207] Mark A Hall and Ronald F Wright, 'Systematic Content Analysis of Judicial Opinions' (2008) 96(1) California Law Review 63, 64.

reading for the substance of the 'law' and legal reasoning in the case of the doctrinal approach.[208]

The basis and process of case selection for content analysis was as follows: First, a review of legal commentary on constitutional law, human rights law and environmental law in India yielded an initial list of court decisions in cases filed as writ petitions or PIL before the higher judiciary based on the frequency of reference. Then, additional cases were collected through keyword searches on three online legal databases/search engines: www.scconline.com and www.manupatra.com (subscription-based portals) and www.indiankanoon.com (open access portal). Another open access portal - www.nationalgreentribunal.co.in – was used to identify decisions of the NGT. It is important to highlight two limitations of content analysis. First, the sample of cases is not comprehensive as all the court decisions are not available in online legal databases and/or searchable through legal search engines. However, it is sufficient to get a sense of the pattern. Second, the most reliable method to determine whether the higher judiciary granted the relief sought by the petitioners is to compare their petition with the remedies granted in the court decision. As it was not possible to gain access to all the petitions, this thesis relies on references to the remedies sought in the court decisions.

More broadly, an important limitation of the doctrinal approach is that it is primarily concerned with the analysis of the law itself, and cannot, on its own, be used to understand how law operates as part of larger political, social, economic and cultural structures.[209] The same limitation applies to content analysis of court decisions. Therefore, empirical research, which examines how law works in practice,[210] was carried out. Given the timeframe and the complexity of the exercise, it was not possible to assess the effectiveness of implementation of a large set of court decisions. Therefore, a multiple case-study approach was adopted and three court decisions were selected: *Indian Council for Enviro-Legal Action v Union of India and Others* (1996) 3 SCC 212, *Vellore Citizens' Welfare Forum v Union of India and Others* (1996) 5 SCC 647, and *Noyyal River*

[208] Hutchinson and Duncan (n 204) 118.

[209] Matyas Bodig, 'Legal Doctrinal Scholarship and Interdisciplinary Engagement' (2015) 8(2) Erasmus Law Review 43.

[210] DJ Galligan, 'Legal Theory and Empirical Research' in Peter Cane and Herbert M Kritzer (eds), *The Oxford Handbook of Empirical Legal Research* (OUP 2010) 978.

Ayacutdars Protection Association and Others v Government of TN, Public Works Department and Others 2007 (1) LW 275 (Madras). The selection was based on their recognition as 'landmark' decisions in discussions relating to the environmental 'activism' in general and their role in shaping the discourse relating to water pollution in India in particular. In addition, all these cases were filed as public interest litigation or writ petitions, and were based on the violation or non-realisation of the fundamental right to life, which includes the CER. Further, they dealt with the problem of water pollution caused by industrial effluents, where the State Pollution Control Board was an implementing agency.

In order to obtain broader perspectives and insights, to better understand the underlying issues and to corroborate the doctrinal research findings, the researcher conducted semi-structured interviews[211] with petitioners and/or their lawyers, representatives of the relevant government departments, activists and civil society organisations, and researchers (individuals and institutions). The interviewees were identified based on the case selection process, and the adoption of a snowball sampling technique during the fieldwork.[212] These interviews were conducted from September 2015 to September 2016 in New Delhi, which is the national capital and the seat of the Supreme Court, the High Court of Delhi and the NGT, as well as in two states from where the three 'landmark' decisions originate, namely, the State of Rajasthan (the *Bicchri case*) and the State of Tamil Nadu (the *Vellore case* and the Tirupur case). Secondary sources such as commentaries in books and academic journals, as well as newspapers and reports hosted on various websites, were used to provide the background for, and to supplement, the fieldwork. Where the researcher was unable to arrange personal interviews with the interviewees, she relied on telephone or e-mail interviews.

1.5 Structure of the thesis

This thesis is divided into two parts. Part I comprises Chapters 2, 3 and 4 and focuses on the adjudication stage of environmental rights litigation relating to water

[211] Steinar Brinkmann and Svend Kvale, *InterViews: Leaning the Craft of Qualitative Research Interviewing* (Sage 2015) 6.

[212] Alan Bryman, *Social Research Methods* (OUP 2016) 415.

pollution/quality, explicitly or implicitly. Part II comprises Chapters 5, 6 and 7 and considers the implementation of court decisions in cases relating to water pollution/quality.

Chapter 2 concentrates on the engagement of international law – particularly international environmental law and international human rights law and to a limited extent, international water law – with the substantive and procedural aspects of the rights to environment, sanitation and water and the corresponding obligations of the State in the context of water pollution/quality. It provides the basis for contextualising the higher judiciary's approach, which forms the focus of the next two chapters. **Chapter 3** first reviews court decisions where the higher judiciary recognised the CER, and then sheds light on the determination of the scope and content of the CER with specific reference to cases relating to water pollution/quality. It also undertakes a detailed examination of the higher judiciary's engagement with the fundamental duty as well as other duties of citizens. **Chapter 4** first identifies the different sources of the duties of the State corresponding to the CER and then invokes the tripartite typology of obligations of the State to respect, protect and fulfil human rights, which is adopted by the CESCR, to critically engage with the nature, scope and content of the duties of the State, as determined by the higher judiciary.

Chapter 5 unpacks judicial remedies for the maintenance or improvement of water quality or the prevention or control water pollution that are addressed to the primary duty-bearer, that is the makers of laws (the legislature in the case of primary legislation and the executive in the case of secondary legislation) or implementers of laws and policies (the executive). **Chapter 6** sheds light on the rhetoric and reality of application of the polluter pays principle to grant judicial remedies for the remediation of water pollution that are primarily addressed to non-State actors as the polluters, and its implications. **Chapter 7** is concerned with the implementation of court decisions. The first part considers two internal factors that may influence the implementation of court decisions – coercive remedies directed at State and non-State actors, and monitoring. The second part focuses on the effectiveness of implementation of three 'landmark' court decisions in terms of their direct and material effects.

Chapter 8 summarises the key findings and practical implications. It concludes by identifying some pathways to extend the research agenda.

CHAPTER 2
LOCATING THE ENVIRONMENTAL RIGHTS OF INDIVIDUALS AND DUTIES OF THE STATE IN INTERNATIONAL LAW

Introduction

International law recognises the substantive and procedural aspects of the rights to environment, sanitation and water (the rights) or their components, explicitly or implicitly. It also elaborates their scope and content, often in terms of the duties or obligations of the State.[1] To a very limited extent, it recognises the duties and responsibilities of non-State actors. But international law's engagement with the issue of water pollution/quality and the link with the rights or their components and the corresponding duties or obligations of the State specifically remain underexplored.

International law has influenced the development of domestic law in several jurisdictions. In some cases, domestic law has occasioned the modification of existing norms, or guided the development of new norms of international law. In this context, this chapter identifies the scope and limits of the articulation of the rights in international law with reference to the issue of water pollution/quality and sets the stage for the ensuing discussion on environmental rights litigation relating to water pollution/quality in India. For this purpose, it adopts a legal positivist approach and focuses on international environmental law, international water law and international human rights law.

The first two sections of this chapter examine the extent to which international environmental/water law and international human rights law respectively address the link between water pollution/quality and the varied manifestations of the substantive aspects of the rights, their components and/or the corresponding duties or obligations of the State. The third section examines the procedural aspects of the rights and/or the duties or obligations of the State.

[1] The rest of this chapter employs the terms 'duties' and 'obligations' of the States in respect of international environmental law and international human rights law, respectively, and it uses the term 'State' instead of 'States'.

2.1 Substantive rights in international environmental/water law

This section first examines international environmental/water law's engagement with the link between water pollution/quality and the rights or their components. Then, it considers the extent to which it accommodates the right of the environment.

2.1.1 Adoption of an inconsistent rights approach

Legally binding instruments of international environmental law do not recognise the substantive aspects of the rights, explicitly or implicitly. Similarly, some of the non-binding instruments include no reference whatsoever to the rights. Instead, they use expressions such as 'prerequisite', [2] 'basic need', [3] 'entitlement', [4] or 'basic requirements'.[5] These terms are different from rights and different implications follow from their use. According to Eibe Riedel, basic needs are related to basic human rights but while the former relate to 'factual situations', the latter are 'normative precepts'.[6] Philippe Cullet observes that the formulation of water as a basic need/essential service is a partial indicator of the realisation of human rights.[7] The rest of this sub-section focuses on the other two forms of engagement with the rights, that is, their framing as explicit or derived rights.

[2] UN General Assembly, Historical Responsibility of States for the Preservation of Nature for Present and Future Generations, UN Doc A/RES/35/8 (30 October 1980).

[3] *Earth Summit, Agenda 21, The United Nations Programme of Action from Rio* (UN 1993) [Agenda 21] Chapter 18 ¶18.8.

[4] Rio Declaration on Environment and Development, *Report of the United Nations Conference on Environment and Development* (Rio de Janeiro, 3-14 June 1992), UN Doc A/CONF.151/26 (Vol. I) (12 August 1992) Annex I Principle 1. See also Programme of Action, *Report of the United Nations International Conference on Population and Development* (Cairo, 5-13 September 1994) (United Nations publication, Sales No. E.95.XIII.18) [1994 Programme of Action] Principle 2.

[5] Johannesburg Declaration on Sustainable Development, World Summit on Sustainable Development, UN Doc A/CONF.199/20 (4 September 2002) ¶18.

[6] Eibe Riedel, 'The Human Right to Water and General Comment No. 15' in Eibe Riedel and Peter Rothen (eds), *The Human Right to Water* (Berliner Wissenschafts-Verlag 2002) fn 23.

[7] Philippe Cullet, *Water Law, Poverty, and Development: Water Sector Reforms in India* (OUP 2009) 70.

Framing as explicit rights

The Mar del Plata Action Plan of 1979 includes the first explicit universal recognition of a right of access to drinking water in quantity and of quality equal to the basic needs of all peoples.[8] Agenda 21 refers to the right to water, as recognised in the Mar del Plata Action Plan, as 'a commonly agreed premise'.[9] In 1999, the United Nations (UN) General Assembly affirmed the right to 'clean water' as a fundamental human right in the realisation of the right to development.[10] These instruments do not recognise a distinct right to sanitation, perhaps because sanitation was viewed as a part of water at this time.

Some attempts were also made to recognise an explicit right to environment.[11] The Brundtland Report proposed: '[a]ll human beings have the fundamental right to an environment adequate for their health and well-being.'[12] Along similar lines, the Draft Principles on Human Rights and the Environment, which were prepared by an international group of experts in 1994 led by Ms Fatma Ksentini, included the principle that '[a]ll persons have the right to a secure, healthy and ecologically sound environment.'[13] More concretely, the 1999 Protocol on Water and Health, which was adopted under the auspices of the United Nations Economic Commission for Europe, recognises the rights and entitlements to water under private law and public law of natural and legal persons and institutions, whether in the public sector or the private sector.[14]

In 2018, the Special Rapporteur looking into the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment (the Special Rapporteur on environmental obligations) recognised the interdependence between

[8] *Report of the United Nations Water Conference* (Mar del Plata, 14-25 March 1977) (United Nations publication, Sales No. E.77.II.A12) Resolution II(a) p. 63.

[9] Agenda 21 Chapter 18 ¶18.47.

[10] UN General Assembly, The Right to Development, UN Doc A/RES/54/175, 17 December 1999 (15 February 2000) ¶12(a).

[11] Tim Hayward, 'Constitutional Environmental Rights: A Case for Political Analysis' (2000) 48(3) Political Studies 558, 559.

[12] World Commission on Environment and Development, *Our Common Future* (OUP 1987) 348.

[13] Draft Principles on Human Rights and the Environment, UN Doc E/CN.4/Sub.2/1994/9, Annex I (16 May 1994).

[14] Protocol on Water and Health to the 1992 Convention on the Protection and Use of Transboundary Watercourses and International Lakes, London, adopted 17 June 1999, UN Doc MP.WAT/AC.1/2000/1 (entered into force 4 August 2005) [1999 Protocol] art 5(m).

human rights and environmental protection. He made a recommendation to the UN Human Rights Committee (HRC) to consider supporting the recognition of the right to a healthy environment in a global instrument modelled on the rights to water and sanitation.[15]

Framing as derived rights

In 1968, the UN General Assembly underscored the consequent effects of impairment of the quality of the human environment on the condition of man and on his enjoyment of basic human rights.[16] In 1972, the Stockholm Declaration proclaimed that the environment is essential to human well-being and 'the enjoyment of basic human rights – even the right to life itself'.[17] This led to the principle that '[m]an has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being'.[18] Louis B Sohn speculates that the phrase 'an environment of a quality' conveys the existence of the right to an adequate environment.[19] According to Ms Ksentini, who was the Special Rapporteur for human rights and the environment, the recognition of the right to a healthy and decent environment in the Stockholm Declaration is inextricably linked to fundamental human rights, and the right-holder(s) are 'individuals alone or in association with others, communities, associations and other components of civil society, as well as peoples'.[20] However, she did not confine the adverse impacts of poor environmental quality on the enjoyment of the right to life to the extinguishment of life itself. She identified 'deterioration in living conditions' and 'risks for survival if not actually accompanied by

[15] Report of the Special Rapporteur on the Issue of Human Rights Obligations relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment, John H Knox, UN Doc A/HRC/37/59 (24 January 2018) [SR Report (2018)] ¶14 & ¶15.

[16] UN General Assembly, Problems of the Human Environment, UN Doc A/RES/2398 (XXII) (3 December 1968).

[17] Declaration of the United Nations Conference on the Human Environment, *Report of the United Nations Conference on the Human Environment* (Stockholm, 5-16 June 1972), UN Doc A/CONF.48.14.Rev1/Corr1 (15 December 1972) [Stockholm Declaration] ¶1.

[18] ibid Principle 1.

[19] Louis B Sohn, 'The Stockholm Declaration on the Human Environment' (1973) 14 Harvard International Law Journal 423, 455.

[20] Final Report of the Special Rapporteur for Human Rights and the Environment, Fatma Zohra Ksentini, UN Doc E/CN.4/Sub.2/1994/9 (6 July 1994) [Ksentini Report] ¶31.

deaths' as the outcome of 'assaults on the environment'.[21] This may be contrasted with the traditional approach towards the right to life in international human rights law (section 2.2.1).

In 1990, the UN General Assembly recognised the entitlement of 'all individuals' to 'live in an environment adequate for their health and well-being'.[22] But the link with human rights is evident. The resolution first reaffirmed Principle 1 of the Stockholm Declaration and 'recalled' or referred to the human right to an adequate standard of living and health.

Neither the Rio Declaration nor Agenda 21 derive the right to environment from human rights. However, Principle 3 of the Rio Declaration recognises the right to development and states that it 'must be fulfilled so as to equitably meet developmental and environmental needs of present and future generations.' According to Sueli Giorgetta, this expresses the evolution of the right to a clean environment, which is translated into the principle of sustainable development.[23] Others argue that the language used in the Stockholm Declaration and the Rio Declaration is couched in general terms and therefore too vague to be actionable.[24]

None of these instruments derive the rights to sanitation and water from human rights. According to Stephen McCaffrey, however, the Stockholm Declaration and Agenda 21 provide further grounds for the recognition of a right to water and the obligation of governments to use and manage resources so as to secure that right for their citizens.[25] McCaffrey also views Article 10(2) of the 1997 UN Convention on the Law of the Non-navigational Uses of International Watercourses[26] as expressing the fundamental idea

[21] ibid ¶175.

[22] UN General Assembly, Need to Ensure a Healthy Environment for the Well-Being of Individuals, UN Doc A/RES/45/94 (14 December 1990).

[23] Sueli Giorgetta, 'The Right to a Healthy Environment, Human Rights and Sustainable Development' (2002) 2(2) International Environmental Agreements 171, 182.

[24] See, for example, Dinah Shelton, 'What Happened in Rio to Human Rights?' (1992) 3(1) Yearbook of International Environmental Law 75.

[25] Stephen C McCaffrey, 'A Human Right to Water: Domestic and International Implications' (1992) 5(1) Georgetown International Environmental Law Review 1, 16.

[26] 1997 UN Convention on the Law of the Non-navigational Uses of International Watercourses, adopted 21 May 1997, GA Res 51/229, UN Doc A/51/869 (entered into force 17 August 2014) art 10(2) (stating that special regard shall be given to the 'requirements of vital human needs').

behind the right to water, namely, in making allocation decisions governments must not forget basic needs of humans for water.[27] According to him, the phrase 'vital human needs' refers to water that is required to 'sustain human life'.[28]

In contrast, the outcomes of the conferences on population and development in the 1990s explicitly reaffirm the right to an adequate standard of living for all individuals and their families, including water and sanitation.[29] Notably, this precedes General Comment No. 15 on the right to water (section 2.2.2). The Dublin Statement on Water and Sustainable Development, the key output of the International Conference on Water and Development, also recognises 'the basic human right of all human beings to have access to clean water and sanitation' subject to the payment of an 'affordable price'.[30] However, this conference was conceived as a technical conference although it was a part of the preparatory process of the Rio conference.[31] The Dublin Statement was forwarded to the participants in the Rio conference, but there is no mention of water in the Rio Declaration, and the UN General Assembly did not endorse the Dublin Statement.[32]

2.1.2 Absence of a right of the environment

International environmental law uses the term 'environment' to describe the wider natural environment as well as the narrower human environment. As early as in 1968, the UN General Assembly was only concerned with impairment of the quality of the human

[27] Stephen McCaffrey, 'The Human Right to Water' in Edith Brown Weiss, Laurence Boisson de Chazournes, and Nathalie Bernasconi-Osterwalder (eds), *Fresh Water and International Economic Law* (OUP 2002) 101.

[28] See Stephen McCaffrey, *The Law of International Watercourses: Non-Navigational Uses* (OUP 2001) 369. See also Owen McIntyre, *Environmental Protection of International Watercourses under International Law* (Ashgate Publishing Limited 2007).

[29] See 1994 Programme of Action Principle 2; UN-Habitat, The Habitat Agenda Goals and Principles, Commitments and the Global Plan of Action (UN-Habitat 1996) ¶11.

[30] The Dublin Statement on Water and Sustainable Development, International Conference on Water and the Environment: Development Issues for the 21st Century (Dublin, 31 January 1992), UN Doc A/CONF.151/PC/112 Principle 4.

[31] See generally Ken Conca, *Governing Water: Contentious Transnational Policies And Global Institution Building* (The MIT Press 2006) 140. See also Philippe Cullet, 'Is Water Policy the New Water Law? Rethinking the Place of Law in Water Sector Reforms' (2012) 43(2) IDS Bulletin 69, 70; Inga Winkler, 'The Human Right to Sanitation' (2016) 37(4) University of Pennsylvania Journal of International Law 1331, 1359-60.

[32] Cullet (n 31) 71.

environment. In contrast, the 1972 Stockholm Declaration identifies two aspects of the environment – natural and man-made,[33] although the preamble only refers to 'gross deficiencies, harmful to the physical, mental and social health of man, in the man-made environment, particularly in the living and working environment'.[34]

Most of the instruments adopt an anthropocentric approach and recognise the instrumental value of the natural environment or of environmental (water) quality for the enjoyment of human rights. This is evident from the titles of the key conferences: the 1972 United Nations Conference on the Human Environment, the 1992 United Nations Conference on the Environment and Development, the 2002 World Summit on Sustainable Development, and the 2012 United Nations Conference on Sustainable Development.

An examination of the substantive content of the non-binding instruments confirms the above observation. Principle 1 of the Stockholm Declaration proclaims the right (of man) to adequate conditions of life. Principle 3 states that '[t]he capacity of the earth to produce vital renewable resources must be maintained and, wherever practicable, restored or improved.' The use of the term 'vital' indicates an anthropocentric focus and the term 'wherever practicable' limits the scope of the provision.

The Brundtland Report and the UN General Assembly resolution of 1990 link the right and entitlement to environment, respectively to their adequacy for human health and well-being. The UN General Assembly also reaffirms Principle 1 of the Stockholm Declaration, which proclaims the right to adequate conditions of life. Further, scholars have argued that since the most immediate threats to health and well-being concern contamination of air, water and food,[35] the Brundtland Report is restricted to certain environmental concerns, that is, pollution, waste disposal, and other sorts of toxic contamination.[36] According to Hong Sik Cho and Ole W Pedersen, 'this formulation

[33] Stockholm Declaration ¶1.

[34] ibid ¶3.

[35] See James W Nickel, 'The Human Right to a Safe Environment: Philosophical Perspectives on Its Scope and Justification' (1993) 18(1) Yale Journal of International Law 281, 284-85; Hayward (n 11) 559.

[36] ibid.

arguably fails to capture all aspects of environmental concern, which may extend beyond anthropocentrism'.[37]

Chapter 18 of Agenda 21 perceives water as an integral part of the ecosystem but also as a natural resource and a social and economic good. It states that 'water resources have to be protected in order to satisfy and reconcile needs for water in human activities'. At the same time, 'the functioning of aquatic ecosystems and the perenniality of the [water] resources' has to be taken into account. Agenda 21 further prioritises 'the satisfaction of basic needs and the safeguarding of the ecosystems' in the development and use of water resources.[38] This equal emphasis on ecosystems and human needs may be attributed to the focus of the conference, that is, environment and development.[39]

Similarly, Guiding Principle No. 1 of the Dublin Statement acknowledges the importance of water for the environment (in addition to the sustenance of life and development) and calls for the adoption of a holistic approach for the effective management of water resources, which includes protection of natural ecosystems. However, the instrumental value of ecosystems is evident from the stated purpose of their protection, that is, to 'make their benefits available to society on a sustainable basis'.[40]

Thus, there is little engagement with the impact of poor environmental (water) quality on the natural environment itself. In other words, the right of the environment remains largely unrecognised. However, the requirement to consider the needs of present and future generations creates the opportunity to consider environmental aspects that may not have instrumental value for the present generation. The Stockholm Declaration states that man 'bears a solemn responsibility to protect and improve the environment', and recognises the need to safeguard natural resources of the earth, including water, and especially representative samples of natural ecosystems, which include aquatic and

[37] Hong Sik Cho and Ole W Pedersen, 'Environmental Rights and Future Generations' in Mark Tushnet, Thomas Fleiner, and Cheryl Saunders (eds), *Routledge Handbook of Constitutional Law* (Routledge 2013) 402.

[38] Agenda 21 Chapter 18 ¶18.8.

[39] See Salman MA Salman and Siobhan McInerney-Lankford, *The Human Right to Water: Legal and Policy Dimensions* (World Bank 2004) 10 fn 22.

[40] See The Action Agenda, International Conference on Water and the Environment: Development Issues for the 21st Century (Dublin, 31 January 1992) p.6.

marine ecosystems.[41] Similarly, Principle 3 of the Rio Declaration accommodates the environmental needs of the present and future generations. This approach also provides room for consideration of the inherent difficulty in confining the negative impacts of water pollution and/or poor water quality on human beings as well as the environment to specific spatial and temporal dimensions.

Further, some duties of the State accommodate the intrinsic value of the environment. The Stockholm Declaration requires the State to halt the discharge of substances, in such quantities or concentrations as to exceed the capacity of the environment to render them harmless, in order to ensure that *serious or irreversible damage is not inflicted upon ecosystems*, and to take all possible steps to prevent pollution of the seas by substances that are liable to *harm living resources and marine life* (emphasis added).[42] In addition, Principle 1 of the Rio Declaration entitles human beings to a healthy and productive life 'in harmony with nature' and creates some room for environmental considerations.

The 1997 UN Convention employs stronger language where it recognises that pollution of international watercourses may cause significant harm to the environment, including the living resources of the watercourse.[43] It also provides for the protection and preservation of the ecosystems of international watercourses as well as prevention of introduction of alien or new species, which may have detrimental effects on the ecosystems, and for protection and preservation of the marine environment, including estuaries.[44]

2.2 Substantive rights in international human rights law

This section first examines the recognition of the rights and the corresponding obligations of the State, which have a bearing on the issue of water pollution/quality, in international human rights law. It then evaluates their nature, scope and content.

[41] Stockholm Declaration Principles 1 & 2 respectively.

[42] ibid Principles 6 & 7 respectively.

[43] 1997 UN Convention art 21(2).

[44] ibid arts 20, 22 & 23 respectively.

2.2.1 Recognition of the rights

Binding instruments

The universally binding instruments of international human rights law do not recognise the rights to environment, sanitation or water. Explanations include the essential nature of water as a fundamental resource,[45] or the fact that quantity and quality of the available water was not a concern at the time of adoption of these instruments.[46] International human rights law had very little to say about environmental protection at that time,[47] and sanitation was a taboo subject.[48] Past attempts to read the right to water as 'a fundamental condition necessary to support life',[49] which is a right guaranteed by the Universal Declaration of Human Rights 1948 (UDHR) and the International Covenant on Civil and Political Rights 1966 (ICCPR),[50] received limited support on account of the limited scope and content of the right to life.[51] In any event, the right to life was viewed as a negative right against arbitrary deprivation of life. But as highlighted in the Ksentini Report of 1994, environmental degradation may irrevocably and adversely affect the quality of life and in some cases, ultimately lead to death (section 2.1.1).

Nevertheless the binding instruments implicitly accommodate some aspects of the man-made environment, as well as of sanitation and water. Article 25(1) of the UDHR

[45] See McCaffrey (1992) (n 25) 94; Peter H Gleick, 'The Human Right to Water' (1998) 1(5) Water Policy 487, 490.

[46] See Riedel, 'The Human Right to Water and General Comment No. 15' (n 6) 23; Inga T Winkler, *The Human Right to Water: Significance, Legal Status and Implications for Water Allocation* (Hart Publishing 2012) 42.

[47] Alan Boyle, 'The Role of International Human Rights Law in the Protection of the Environment' in Alan Boyle and Michael Anderson (eds), *Human Rights Approaches to Environmental Protection* (OUP 1996) 53.

[48] Sharmila L Murthy, 'The Human Right(s) to Water and Sanitation: History, Meaning and the Controversy over Privatization' (2013) 30(1) Berkeley Journal of International Law 89, 92.

[49] See Gleick (n 45) 492-93.

[50] Universal Declaration of Human Rights, adopted 10 December 1948, GA Res 217 (III), UN Doc A/RES.217(III) [UDHR] art 3; International Covenant on Civil and Political Rights, adopted 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) [ICCPR] art 6(1).

[51] See Riedel, 'The Human Right to Water and General Comment No. 15' (n 6) 24; McCaffrey (1992) (n 25) 11; Erik B Bluemel, 'The Implications of Formulating a Human Right to Water' (2004) 31(4) Ecology Law Quarterly 957, 968.

proclaims everyone's right to 'a standard of living adequate for the health and well-being of himself and his family, including food, clothing, housing'. The International Covenant on Economic, Social and Cultural Rights 1966 (ICESCR) bifurcates this right into two separate rights: Article 11(1) guarantees the right to an 'adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions', and Article 12(1) guarantees the right to 'enjoy the highest attainable standard of physical and mental health'.[52] Further, Article 12(2) enumerates the illustrative list of 'steps to be taken by the States parties…to achieve the full realization' of the right to health and includes the improvement of all aspects of environmental hygiene.

More significantly, limited rights to sanitation and water have been derived from the abovementioned ICESCR rights (section 2.2.3). But there is an overwhelming emphasis on the first part of Article 11(1) of the ICESCR. The second part has received lesser attention although '[a]dequate living conditions require water that is clean and drinkable, for, without it, numerous health hazards follow'.[53] This observation ought to extend to the rights to environment and sanitation as well.

Other binding instruments incorporate some components of the rights into ICESCR rights and/or the corresponding duties of the State. The Convention on the Elimination of All Forms of Discrimination Against Women 1979 (CEDAW) includes the right to 'enjoy adequate living conditions', particularly in relation to sanitation and water supply.[54] The Convention on the Rights of the Child 1989 (CRC) imposes a duty to provide children with 'clean drinking-water' in order to combat disease and malnutrition and to enjoy the right to the higher attainable standard of health and social protection.[55] The State is also required to consider 'the dangers and risks of environmental pollution', which translates

[52] International Covenant on Economic, Social and Cultural Rights, adopted 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976) [ICESCR].

[53] Riedel, 'The Human Right to Water and General Comment No. 15' (n 6) 15.

[54] Convention on the Elimination of All Forms of Discrimination Against Women, New York, adopted 18 December 1979, 1249 UNTS 14 (entered into force 3 September 1981) [CEDAW] art 14(2)(h).

[55] Convention on the Rights of the Child 1989, New York, adopted 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) [CRC] art 24(2)(c).

into a duty to protect the right to a healthy environment.[56] The appropriate steps to safeguard and promote the realisation of the right to social protection under the Convention on the Rights of Persons with Disabilities 2006 require measures to ensure equal access to clean water services.[57] However, these instruments are far from comprehensive.[58] The rights are not framed as universal human rights. They are derived from ICESCR rights and the instruments focus on women in rural areas, children, and persons with disabilities. The emphasis on 'clean' water recognises the quality dimension but it is restricted to drinking water. The word 'pollution' does not take into account depletion of water resources, for example, in order to realise the right to water.[59] Finally, there is greater emphasis on the duties of the State than on rights, and this aspect of international human rights law will be discussed in further detail in section 2.2.3.

Non-binding instruments

The Committee on Economic, Social and Cultural Rights (CESCR) provides an authoritative interpretation of the right to health in General Comment No. 14. The latter does not recognise the rights to environment, sanitation and water but it incorporates some of their components into the right to health. In General Comment No. 15, the CESCR explicitly recognises the right to water and incorporates some components of the environment and sanitation into this right. In 2010, partly as a response to the recommendations of the Special Rapporteur and the Independent Expert on the right to water and sanitation, the CESCR recognised a distinct right to sanitation.[60] General Comment Nos. 4 and 12 on the right to adequate housing and the right to food respectively

[56] Susan E Brice, 'Convention on the Rights of the Child: Using a Human Rights Instrument to Protect Against Environmental Threats' (1992) 7(2) Georgetown International Environmental Law Review 587, 588.

[57] Convention on the Rights of Persons with Disabilities 1996, New York, adopted 13 December 2006, 2515 UNTS 3 (entered into force 30 March 2007) art 28(2)(a).

[58] See Amanda Cahill, ''The Human Right to Water – A Right of Unique Status': The Legal Status and Normative Content of the Right to Water' (2005) 9(3) International Journal of Human Rights 389, 391; Takele Soboka Bulto, 'The Emergence of the Human Right to Water in International Human Rights Law: Invention or Discovery?' (2011) 12(2) Melbourne Journal of International Law 1, 8-9.

[59] Jonathan Verschuuren, 'The Right to Water as a Human Right or a Bird's Right: Does Cooperative Governance Offer a Way Out of a Conflict of Interests and Legal Complexity?' in Philippe Cullet, Alix Gowlland-Gualtieri, Roopa Madhav, and Usha Ramanathan (eds), *Water Governance in Motion: Towards Socially and Environmentally Sustainable Water Laws* (Foundation Books 2010) 363.

[60] See UN Committee on Economic, Social and Cultural Rights, Statement on the Right to Sanitation, UN Doc E/C12/2010/1 (19 November 2010) [CESCR Statement 2010] ¶7.

also incorporate components of the rights to environment, sanitation and water implicitly. All of these instruments are discussed in detail in section 2.2.2.

In 2010, the UN General Assembly and the UN HRC explicitly recognised the human right to 'safe and clean drinking water and sanitation',[61] and to 'safe drinking-water and sanitation',[62] respectively. This clubbing together of the rights, perhaps on account of the emphasis on water-based sanitation systems,[63] is problematised because of the differences between water and sanitation,[64] as well as the serious challenge of treatment and disposal of increasing quantities of wastewater from water-based sanitation systems. Subsequently, the UN General Assembly recognised water and sanitation as distinct human rights.[65]

It is noteworthy that the explicit right(s) to water and sanitation are derived from the rights to an adequate standard of living and health.[66] The right to sanitation is also integrally related to other rights, such as the rights to health, housing and water.[67] This means that non-realisation or violation of one of the ICESCR rights is a pre-condition for a claim relating to non-realisation or violation of the rights to water and sanitation.[68] As a result, only certain aspects of the rights will be protected and implemented. As Amanda Cahill

[61] UN General Assembly, The Human Right to Water and Sanitation, UN Doc A/64/L63/Rev1 (28 July 2010) [UN Res July 2010] ¶1. See also UN General Assembly, The Human Right to Safe Drinking Water and Sanitation, UN Doc A/Res/68/157 (12 February 2014) ¶1.

[62] UN Human Rights Council, Human Rights and Access to Safe Drinking Water and Sanitation, UN Doc A/HRC/RES/15/L14 (6 October 2010) [UN HRC Res Oct 2010] ¶3. The UN Human Rights Council has reaffirmed this right in several other resolutions.

[63] See, for example, Keri Ellis and Loretta Feris, 'The Right to Sanitation: Time to Delink from the Right to Water' (2014) 36(3) Human Rights Quarterly 607, 626-28.

[64] See, for example, Pedi Obani and Joyeeta Gupta, 'Human Right to Sanitation in the Legal and Non-legal Literature: The Need for Greater Synergy' (2016) 3(5) WIREs Water 678, 683-84. See also Malcolm Langford, César Rodríguez-Garavito, and Julieta Rossi, 'Introduction: From Jurisprudence to Compliance' in Malcolm Langford, César Rodríguez-Garavito, and Julieta Rossi (eds), *Social Rights Judgments and the Politics of Compliance: Making It Stick* (CUP 2017) 359-60.

[65] UN General Assembly, The Human Rights to Safe Drinking Water and Sanitation, UN Doc A/RES/70/169 (17 December 2015) [UN GA Res Dec 2015] ¶1.

[66] See General Comment No 15: The Right to Water (Articles 11 and 12 of the International Covenant on Economic, Social and Cultural Rights), UN Doc E/C12/2002/11 (26 November 2002) [GC-15] ¶11. See also UN HRC Res Oct 2010 ¶3; UN GA Res Dec 2015 ¶1.

[67] CESCR Statement 2010 ¶7.

[68] See Cahill (n 58) 394-96; Loretta Feris, 'The Human Right to Sanitation: A Critique on the Absence of Environmental Considerations' (2015) 24(1) Review of European Community and International Environmental Law 16, 19.

puts it, '[e]xisting substantive rights offer only a narrow scope of protection for individuals suffering form water pollution or deprivation of enough clean water'.[69] This practice prevents the recognition of the rights as independent human rights.[70] This also excludes a claim based on the precautionary principle where there is scientific uncertainty in respect of the negative impacts on ICESCR rights. Further, the scope of the rights cannot encompass harm/damage to the environment without any readily discernible negative impact on the ICESCR rights.

2.2.2 Obligations of the State

The CESCR has adopted the tripartite typology of obligations of the State relating to human rights, which include the rights to sanitation and water. The *obligation to respect* is understood as the negative duty of non-interference with the enjoyment of the right.[71] The *obligation to protect* requires the enactment and enforcement of all necessary and effective legislative and other measures to prevent third parties, including individuals, groups, corporations and other entities as well as agents acting under their authority, from interfering in any way with the enjoyment of the rights.[72] The *obligation to fulfil* requires the adoption of appropriate/necessary legislative, administrative, budgetary, judicial, promotional and other measures directed towards the full realisation of the rights.[73]

The obligation to fulfil further comprises obligations to *facilitate, provide and promote*.[74] The obligation to facilitate requires the adoption of measures to enable and assist individuals and communities to enjoy their rights.[75] The obligation to provide the rights is a last resort when individuals or a group are unable, for reasons beyond their control, to realise their rights themselves by the means at their disposal.[76] The obligation

[69] Cahill (n 58) 394.

[70] See Bulto (n 58) 304 (on the right to water).

[71] GC-14 ¶33; GC-15 ¶21; Report of the Independent Expert on the Issue of Human Rights Obligations Related to Access to Safe Drinking Water and Sanitation, Catarina de Albuquerque, UN Doc A/HRC/12/24 (1 July 2009) [IE Report (2009)] ¶41.

[72] GC-14 ¶33; GC-15 ¶23; IE Report (2009) ¶64.

[73] GC-14 ¶33; GC-15 ¶25; IE Report (2009) ¶64.

[74] GC-14 ¶33; GC-15 ¶25.

[75] GC-14 ¶37; GC-15 ¶25.

[76] ibid.

to promote 'refers to bringing about changes in the perception and understanding of human rights'.[77]

A violation of these obligations may result from an act of commission or a direct action of a State or other entities insufficiently regulated by a State, or an act of omission or failure of a State to take necessary measures arising from legal obligations.[78] However, unlike the obligations relating to the human rights in the ICCPR, the obligations relating to the human rights in the ICESCR or the rights derived therefrom are not of immediate effect. Instead Article 2(1) of the ICESCR sets out the principal general legal obligation of the State to take steps to progressively achieve the full realisation of the rights by all appropriate means, to the maximum of their available resources.[79] Section 2.2.3 and section 2.3 discuss the application of the tripartite typology to the obligations of the State corresponding to the rights to environment, sanitation and water in the specific context of water pollution/quality.

2.2.3 Scope and content of the rights

Water

The CESCR unequivocally recognises drinking water of a certain quality, that is 'safe' or 'safe and potable', as forming a part of the right to adequate housing and the right to health, respectively.[80] Safe and potable water is also a requirement for the 'improvement of all aspects of environmental hygiene',[81] which is linked to the man-made environment

[77] Magdalena Sepulveda Carmona, *Nature of the Obligations Under the International Covenant on Economic, Social and Cultural Rights* (Intersentia 2003) 164.

[78] GC-14 ¶48 & ¶49; GC-15 ¶42 & ¶43.

[79] See also UN General Assembly, 'The Human Right to Safe Drinking Water and Sanitation', UN Doc A/Res/68/157 (12 February 2014) [UN GA Res Feb 2014] ¶9; UN Human Rights Council, The Human Rights to Safe Drinking Water and Sanitation, UN Doc A/HRC/RES/33/10 (29 September 2016) ¶6; SR Report (2018) Annex ¶32.

[80] See General Comment No. 4: The Right to Adequate Housing (Article 11(1) of the International Covenant on Economic, Social and Cultural Rights) UN Doc E/1992/23 (13 December 1991) [GC-4] ¶8(b); General Comment No. 14: The Right to the Highest Attainable Standard of Health (Article 12 of the International Covenant on Economic, Social and Cultural Rights), UN Doc E/C12/2000/4 (11 August 2000) [GC-14] ¶4 & ¶¶11-12.

[81] GC-14 ¶15.

as well as to sanitation. But the CESCR does not clarify the meaning of 'safe' or 'safe and potable' water, and further confines it to drinking water for human beings.

In General Comment No. 15, which explicitly recognises the right to water, one of the factors for the interpretation of the adequacy[82] of the elements of the right is its quality or how 'safe' it is.[83] Human health is the referent for the determination of safe water, which is now defined as water that is 'free from micro-organisms, chemical substances, and radiological hazards that constitute a threat to a person's health'.[84] General Comment No. 15 also recognises that water is required for different uses and for the realisation of other ICESCR rights.[85] However, it prioritises the right to water of each person for personal and domestic uses,[86] and thus restricts the uses of water, which are likely to be protected from the impacts of water pollution/quality. These personal and domestic uses 'ordinarily include drinking, personal sanitation, washing of clothes, food preparation, personal and household hygiene'.[87] The use of the term 'ordinarily' suggests that in some situations, these uses may be expanded or restricted. General Comment No. 15 further specifies that water should be of 'an acceptable colour, odour, and taste for each personal or domestic use'.[88] This links water to its safety for personal or domestic uses only.[89]

Further, General Comment No. 15 recognises that access to water resources is essential for agriculture to realise the right to adequate food but it does not extend the right to water to agriculture. Instead, the CESCR relies on other provisions of the ICESCR to ensure access to water resources for agriculture.[90] Such an approach is not defensible where farmers in developing countries depend on untreated or partly treated sewage (implicating

[82] GC-15 ¶11.

[83] ibid ¶2. The UN resolutions recognise the right to water but do not elaborate its scope and content generally or of the terms 'safe' and 'clean' water specifically. See (n 61) & (n 62).

[84] GC-15 ¶12(b).

[85] ibid ¶6.

[86] ibid ¶2.

[87] ibid ¶12(a).

[88] ibid ¶12(b).

[89] See Owen McIntyre, 'Environmental Protection and the Human Right to Water – Complementarity and Tension' in Laura Westra, Colin L Soskolne, and Donald W Spady (eds), *Human Health and Ecological Integrity: Ethics, Law and Human Rights* (Routledge 2012) 226.

[90] GC-15 ¶7.

the rights to sanitation and water), and the purported adverse impacts of this practice on the rights to health and environment are a matter of grave concern. Although there is considerable focus on the individual dimensions of the right to water, General Comment No. 15 also recognises water as a public good.[91] The acknowledgment of the collective aspects provides some scope to incorporate the impacts of water pollution/quality on the community.

An examination of non-binding instruments also reveals that the scope and content of the right to water or its components are often framed as obligations of the State. General Comment No. 14 on the right to health imposes a core obligation to ensure access to safe and potable water.[92] Further, some of the obligations to respect, protect and fulfil the right to health specifically concern water and soil pollution.[93] The discharge of these obligations may also lead to the realisation of some components of the right to environment.

In order to ensure the safety of drinking water supplies, General Comment No. 15 expects the State to develop national standards based on the World Health Organisation's guidelines and to implement them properly.[94] It also calls for prioritisation of 'water resources required to prevent starvation and disease'.[95] This provides the basis for the protection of water resources, including the prevention or control of water pollution.

Several obligations, which fit into the tripartite typology of obligations relating to the right to water, specifically concern contamination or pollution of water supplies/resources as well as their diminution, which may exacerbate water pollution. The rest of this sub-section examines these obligations.

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[91] ibid ¶1.

[92] GC-14 ¶43(c). General Comment No. 15 calls for prioritisation of 'water required to meet the core obligations of each of the Covenant rights'. See GC-15 ¶6.

[93] GC-14 ¶34, ¶51 & ¶36.

[94] GC-15 fn 15. The relevant guidelines are World Health Organisation, *Guidelines for Drinking-water Quality* (4th edn WHO 2011).

[95] GC-15 ¶6.

The right to water includes freedom from interference, such as contamination of water supplies.[96] The corresponding *obligation to respect* requires the State to refrain from unlawfully diminishing or polluting water, for example, through State-owned waste facilities.[97] The obligation is violated where pollution and diminution (through diversion or depletion) of water resources affect human health.[98] Further, during armed conflicts, emergency situations and natural disasters, the obligation to respect extends to 'protection of the natural environment against widespread, long-term and severe damage'.[99] Such damage may result from water pollution or contamination or its diminution.

The *obligation to protect* requires the State to undertake measures to restrain third parties[100] from 'polluting and inequitably extracting from water resources, including natural sources, wells and other water distribution systems'.[101] The measures must protect water distribution systems, such as piped networks and wells, from interference, damage and destruction.[102] In particular, the State is required to ensure protection of indigenous peoples' access to water resources from pollution.[103] In addition, several entries in the illustrative list of comprehensive and integrated strategies and programmes, which the State is required to adopt to ensure the right to sufficient and safe water for present and future generations,[104] have a direct bearing on water pollution/quality.

The obligation to fulfil requires the State to adopt measures directed towards the full realisation of the right to water. Here, the *obligation to facilitate* requires that the national political and legal systems should give sufficient recognition to the right, preferably by

[96] ibid ¶10.

[97] ibid ¶21. Other examples include 'dumping of waste and sewage, the activities of State-controlled extractive industries, or licensing of projects, such as sewage treatment plants.' See Common Violations of the Human Rights to Water and Sanitation, Report of the Special Rapporteur on the Human Right to Safe Drinking Water and Sanitation, Catarina de Albuquerque, UN Doc A/HRC/27/55 (30 June 2014) [SR Report (2014)] ¶20.

[98] GC-15 ¶44(a).

[99] ibid ¶22.

[100] The third parties include those involved in the provision of water services or whose industrial or agricultural activities may have an adverse impact on the right to water. See SR Report (2014) ¶25.

[101] GC-15 ¶23. See also SR Report (2014) ¶31 fn 29.

[102] GC-15 ¶44(b).

[103] ibid ¶16(d). See also SR Report (2018) Annex Framework principle 15.

[104] GC-15 ¶28.

way of legislative implementation, and adopt a national strategy/policy and plan of action for its realisation.[105] Water quality ought to form a part of this regulatory framework.[106]

The State also has an obligation to facilitate improved and sustainable access to water, particularly in rural and deprived urban areas.[107] The WHO defines 'improved' sources of drinking water in terms of the type of technology and levels of services that are more likely to provide safe water than unimproved technologies, and 'sustainable' access in terms of environmental and functional sustainability.[108] General Comment No. 15 itself understands sustainability in terms of availability of water for present as well as future generations. The inverse relationship with water pollution/quality is apparent here.

The *obligation to provide* is relevant as a form of emergency relief, for example, after a natural disaster, but also in regard to people who live in such extreme poverty that they do not have sufficient means to pay for water services.[109] Here too, it is imperative to ensure the provision of water of a certain quality from an unpolluted source of water.

Sanitation

Neither General Comment No. 14 nor General Comment No. 15 recognises the right to sanitation. Instead, General Comment No. 14 recognises 'adequate sanitation and sanitation facilities' as one of the underlying determinants of health,[110] and the improvement of all aspects of environmental hygiene as comprising the requirement to ensure basic sanitation.[111] The inclusion of sanitation as a component of the right to health is informed by the recognition of lack of access to adequate sanitation as the primary

[105] ibid ¶26. See also GC-14 ¶36.

[106] Sujith Koonan and Adil Hasan Khan, 'Water, Health and Water Quality Regulation' in Philippe Cullet, Alix Gowlland-Gualtieri, Roopa Madhav, and Usha Ramanathan (eds), *Water Law for the Twenty-First Century – National and International Aspects of Water Law Reform in India* (Routledge 2010) 295.

[107] GC-15 ¶26.

[108] World Health Organisation, 'Population with - sustainable access to an improved water source (%) – access to improved sanitation (%)' <www.who.int/whosis/whostat2006ImprovedWaterImprovedSanitation.pdf>.

[109] Winkler (n 46) 111.

[110] GC-14 ¶4, ¶11 & ¶12.

[111] ibid ¶15.

cause of water contamination and water-related diseases.[112] However, no explanation is provided for the terms 'adequate sanitation and sanitation facilities' and 'basic sanitation'. According to General Comment No. 4, the right to adequate housing includes sanitation facilities and site drainage.[113] Their absence may lead to water pollution and/or poor water quality.

As in the case of the right to water, the scope and content of some of the components of the right to sanitation are framed as obligations of the State. General Comment No. 14 on the right to health imposes a specific obligation to fulfil and a core obligation to ensure equal access to basic sanitation.[114] General Comment No. 15 imposes a specific obligation to ensure access to adequate sanitation as a principal mechanism for the protection of quality of drinking water supplies and resources,[115] and a core obligation to prevent, treat and control water-related diseases.[116] This is directly related to the provision of safe water.[117] General Comment No. 15 also imposes an obligation to fulfil/provide, that is, to progressively extend safe sanitation services, particularly to rural and deprived urban areas.[118]

However, these instruments are silent in respect of the meaning of 'adequate' or 'basic' sanitation or 'safe sanitation services'. In a narrower context, the Joint Monitoring Programme considers excreta disposal systems as 'adequate' as long as they are private and separate human excreta from human contact.[119] The term 'basic' sanitation is defined as 'the disposal of human excreta to prevent disease and safeguard privacy and dignity'.[120] There is no requirement to treat human excreta. Similarly, General Comment No. 15 confines the definition of personal sanitation to disposal of human excreta.[121] But

[112] See GC-15 ¶1.

[113] GC-4 ¶8(b).

[114] GC-14 ¶36 & ¶43(c) respectively.

[115] GC-15 ¶29.

[116] ibid ¶37(i).

[117] Cullet (n 7) 54.

[118] GC-15 ¶29.

[119] See the Joint Monitoring Programme website: <www.wssinfo.org/en/122_definitions.html>.

[120] UNECE, International Year of Sanitation 2008, <www.unece.org/fileadmin/DAM/env/water/meetings/wgwh/Firstmeeting_2008/IYS.pdf>.

[121] GC-15 ¶2 r/w ¶12(a) & fn 13.

the exclusion of waste management may adversely affect the individual as well as collective dimensions of the right to sanitation,[122] besides compromising the enjoyment of the other rights.[123]

The CESCR recognised a distinct right to sanitation for the first time in 2010 but it did not elaborate the scope and content of the right generally or specifically with reference to wastewater management. However, as it adopted the definition of 'sanitation' prepared by the Independent Expert on the Issue of Human Rights Obligations Related to Access to Safe Drinking Water and Sanitation (Independent Expert),[124] that is, 'a system for the collection, transport, treatment and disposal or reuse of human excreta and associated hygiene',[125] this sub-section relies on this articulation of the right to sanitation and the corresponding obligations of the State as a benchmark.

Like General Comment No. 15, the Independent Expert highlights the importance of preventing human, animal and insect contact with, and emptying of places that collect, human excreta in order to ensure that sanitation facilities are hygienically safe and sustainable respectively.[126] Her definition of sanitation also recognises the importance of management, that is, collection, transport, treatment and disposal or reuse, of human excreta. The Independent Expert does not require the State to provide everyone with access to a sewerage system as the aim is not 'to dictate specific technology options', but she calls for 'context-specific solutions'.[127]

Like the Independent Expert, a resolution of the UN General Assembly encourages all States to encompass all aspects of sanitation, including wastewater treatment and reuse,

[122] Langford and two others, 'Introduction: From Jurisprudence to Compliance' (n 64) 368. See also Winkler (2016) (n 31) 1399.

[123] See generally Anna Zimmer, Inga T Winkler, and Catarina de Albuquerque, 'Governing Wastewater, Curbing Pollution, and Improving Water Quality for the Realization of Human Rights' (2014) 33(4) Waterlines 337.

[124] CESCR Statement 2010 ¶8.

[125] IE Report (2009) ¶63.

[126] ibid ¶73.

[127] ibid ¶67.

in the context of integrated water management.[128] The outcome document of the United Nations Conference on Sustainable Development, entitled "The Future We Want", also stresses the need to adopt measures to significantly reduce water pollution and increase water quality and significantly improve wastewater treatment.[129]

The Independent Expert applies the tripartite typology of obligations to the right to sanitation. This *inter alia* addresses the issue of water pollution/quality. The obligation to respect requires the State to refrain from 'measures which threaten or deny individuals or communities existing access to sanitation'.[130] Water disconnections affect waterborne sanitation, and forced evictions involve destruction of sanitation facilities.[131] Both are likely to result in water pollution and/or poor water quality. The obligation to respect also requires the State to 'ensure that the management of human excreta does not negatively impact on human rights'.[132] This implicitly recognises that the measures adopted for the realisation of one of the rights may threaten the realisation of the other rights.[133] However, the identification and implementation of necessary reconciliatory measures is left to the discretion of the State.

The obligation to protect requires the State to establish an effective regulatory framework where a private provider operates sanitation services.[134] Such a regulatory framework must require wastewater management. Wastewater management must also form an integral element of the obligation to facilitate, which requires the State to ensure access to safe sanitation for all, to ensure that the national political and legal systems give sufficient recognition to the right, preferably by way of legislative implementation, and

[128] UN General Assembly, Follow-up to the International Year of Sanitation, 2008, UN Doc A/RES/65/153 (20 December 2010) ¶6.

[129] UN General Assembly, The Future We Want, UN Doc A/RES/66/288 (11 September 2012) Annex ¶124.

[130] IE Report (2009) ¶64.

[131] Malcolm Langford, Jamie Bartram, and Virginia Roaf, 'The Human Right to Sanitation' in Malcolm Langford and Anna FS Russell (eds), *The Human Right to Water: Theory, Practice and Prospects* (CUP 2017) 367. The right to water includes freedom from interference, such as arbitrary disconnections. See GC-15 ¶10.

[132] IE Report (2009) ¶64.

[133] See Feris (n 68); Verschuuren, 'The Right to Water as a Human Right or a Bird's Right' (n 59); McIntyre, 'Environmental Protection and the Human Right to Water' (n 89).

[134] IE Report (2009) ¶64. See also SR Report (2014) ¶25.

to adopt a national strategy/policy and plan of action for the realisation of the right.[135] Similarly, the State cannot discharge its obligation to provide toilets, which arises in certain exceptional circumstances, such as extreme poverty or natural disasters,[136] without the provision of wastewater management.

Environment

As discussed previously, the right to environment is not explicitly recognised in international human rights law. General Comment No. 14 recognises 'a healthy environment',[137] and 'healthy…environmental conditions' as an underlying determinant of health.[138] According to Riedel, General Comment No. 15 did not engage with the right to environment because 'there was quite some dispute on this issue of environmental protection, …particularly given the breadth of the environmental aspects of water.'[139] Nevertheless, a narrow conceptualisation of the environment is incorporated where water is regarded as being necessary to ensure environmental hygiene in the context of the right to health.[140] Further, by recognising the connection between the rights to water and sanitation and human survival, life and dignity,[141] General Comment Nos. 14 and 15 as well as the Independent Expert have created room for the consideration of the impact of water pollution and/or poor water quality. Each of these provisions recognises the instrumental value of the environment.

Like the rights to sanitation and water, there is much greater elaboration of the scope and content of the components of the right to environment in terms of obligations of the State. The steps to be taken for the improvement of all aspects of environmental hygiene comprise 'the prevention and reduction of the population's exposure to harmful substances such as radiation and harmful chemicals or other detrimental environmental

[135] IE Report (2009) ¶64.

[136] ibid ¶67.

[137] GC-14 ¶4.

[138] ibid ¶11.

[139] Riedel, 'The Human Right to Water and General Comment No. 15' (n 6) 28.

[140] GC-15 ¶6.

[141] GC-14 ¶1; GC-15 ¶1 & ¶11; IE Report (2009) ¶41.

conditions that directly or indirectly impact upon human health'.[142] The heading of this provision, which distinguishes between natural and workplace environments while referring to the right to healthy environment, reflects an anthropocentric approach, which is a common feature of the instruments of international law discussed in the previous sections. Some of the obligations of the State relating to the right to health, which are discussed in the context of the right to water, are also relevant.

Similarly, several obligations relating to the right to water incorporate the instrumental value of the environment, but they remain silent in respect of the intrinsic value or the right of the environment.[143]

First, the obligation to protect requires the State to take steps to 'prevent threats to health from unsafe and toxic water conditions', to 'ensure that natural water resources are protected from contamination by harmful substances and pathogenic microbes', and to 'monitor and combat situations where aquatic eco-systems serve as a habitat for vectors of diseases wherever they pose a risk to human living environments'.[144] These provisions address the contamination or pollution of water, water resources or aquatic ecosystems but the concern is confined to threats to human life and health.

Second, the 'adequacy' of the right to water extends to the manner of its realisation, which must be 'sustainable, ensuring that the right can be realised for present and future generations'.[145] In order to discharge the obligation to fulfil, that is, to ensure safe water for present and future generations of human beings, the State is required to adopt 'comprehensive and integrated strategies and programmes'.[146] The inclusion of the interests of future generations provides room for some environmental considerations that may not be of instrumental value to the present generation. Further, the illustrative list of strategies and programmes concern the quantity and quality of water, which are often inter-related. Some of the strategies and programmes explicitly refer to broader

[142] GC-14 ¶15.

[143] See, for example, McIntyre, 'Environmental Protection and the Human Right to Water' (n 89) 226-27.

[144] GC-15 ¶8.

[145] ibid ¶11.

[146] ibid ¶28.

environmental dimensions, such as 'watersheds and water-related ecosystems' and 'natural-ecosystems watersheds'.

Third, the abovementioned illustrative list of strategies and programmes explicitly refers to 'human excreta' as the cause of contamination and acknowledges the link between water, sanitation and the environment. At the same time, the obligation to ensure access to basic sanitation does not extend to ensuring that sanitation is environmentally appropriate or sustainable,[147] or to protect broader ecological concerns.[148] The Independent Expert's definition of sanitation does not refer to non-human environmental considerations either.[149]

The CESCR refers to international environmental law in the context of the rights to health and water.[150] However, it does not engage with the content of international environmental law in order to substantiate the environmental aspects of the right to water.[151] In any case, as discussed in section 2.1.2, there is limited recognition of the right of the environment in international environmental law.

Water pollution and/or poor water quality are clearly implicated where General Comment No. 4 on the right to adequate housing states that 'housing should not be built on polluted sites nor in…proximity to pollution sources that threaten the right to health of the inhabitants.'[152] However, there is no obligation to prevent or control water pollution. Further, according to General Comment No. 12, the core content of the right to adequate food *inter alia* implies that food is 'free from adverse substances'.[153] The obligation to protect requires the adoption of protective measures to prevent contamination through 'bad environmental hygiene'.[154] In general parlance, 'environmental hygiene' links

[147] Feris (n 68) 18.

[148] ibid ¶25.

[149] McIntyre, 'Environmental Protection and the Human Right to Water' (n 89) 229.

[150] See GC-14 fn 13; GC-15 fn 5, fn 11 & fn 22 respectively.

[151] See also Bulto (n 58) 18.

[152] GC-4 ¶8(f).

[153] General Comment No. 12: The Right to Adequate Food (Article 11 of the International Covenant on Economic, Social and Cultural Rights), UN Doc E/C12/1999/5 (12 May 1999) [GC-12] ¶8.

[154] ibid ¶10.

environmental conditions and human health. At the very least, the State ought to address the implications of diseases linked to stagnant water. It may also adopt measures to prevent or control irrigation with untreated or partly treated effluents.

The 'Framework principles on human rights and the environment' also illustrate the influence of the tripartite typology of obligations.[155] The Special Rapporteur recognises the inevitability of some environmental harm but imposes an obligation to 'undertake due diligence to prevent such harm and reduce it as far as possible, and provide for remedies for any remaining harm'.[156] The State is also required to ensure that laws and policies take into account the segments of the population who are particularly vulnerable to or at risk from environmental harm because of their susceptibility to certain types of environmental harm, or denial of their human rights, or both.[157] The Special Rapporteur identifies such vulnerable segments of the population and gives examples of potential vulnerability, which is heightened *inter alia* due to their exposure to water pollution.[158]

2.3 Procedural rights and obligations of the State

International human rights law explicitly recognises the procedural rights of access to information, public participation in decision-making and access to remedies in the UDHR and the ICCPR.[159] CEDAW and CRC as well as non-binding instruments recognise these rights and/or impose corresponding obligations on the State. The ICESCR does not recognise the rights of access to information and public participation.

Insofar as international environmental law is concerned, the Rio Declaration embodies all the three procedural aspects without invoking the language of rights. A similar approach is evident in the 1999 Protocol on Water and Health. The parties to the Aarhus Convention, another binding regional agreement negotiated under the auspices of the

[155] SR Report (2018) Annex Framework principles 1 & 2 ¶5. See also Framework principle 3 ¶7; Framework principle 11 ¶31 & ¶33; Framework principle 12 ¶34 & ¶35.

[156] ibid Framework principles 1 & 2 ¶5.

[157] ibid Framework principle 14 ¶40.

[158] ibid ¶41.

[159] UDHR art 19 and ICCPR art 19(2) (on access to information); UDHR art 21 and ICCPR art 25(a) (on public participation in decision-making); UDHR art 4 and ICCPR art 2(3) (on access to remedies).

United Nations Economic Commission for Europe, agreed to guarantee the rights of access to information, public participation in decision-making, and access to justice in environmental matters in order to contribute to the protection of the right of every person of present and future generations to live in an environment adequate to his or her health and well-being.[160] It was subsequently opened for ratification to all States.

2.3.1 Access to information and beyond

Non-binding instruments of international human rights law draw a link between the procedural and substantive aspects of the rights. They recognise every individual's procedural right to seek, receive and impart information concerning health, water and sanitation issues as a part of the normative content of the corresponding substantive rights.[161] The Special Rapporteur on the right to water and sanitation links hygiene education to the substantive right to sanitation.[162] The Special Rapporteur on environmental obligations extends the right to access to environmental information.[163]

Some binding regional instruments elaborate the scope and content in terms of the duties of the State rather than as a right. Under the Aarhus Convention, public authorities are required to provide access to environmental information, which is requested by the public, to collect and update information relevant to its functions, and to disseminate specified types of environmental information.[164] The Special Rapporteur on environmental obligations imposes an obligation to collect, update and disseminate information about specified matters,[165] and to develop environmental education, awareness and information programmes for vulnerable or marginalised populations.[166] The 1999 Protocol on Water

[160] Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, Aarhus, adopted 25 June 1998, 2161 UNTS 447 (entered into force 30 October 2001) [Aarhus Convention].

[161] See GC-14 ¶11 & ¶12(b); GC-15 ¶12(c)(iv); Relationship between the Enjoyment of Economic, Social and Cultural Rights and the Promotion of the Realization of the Right to Drinking Water Supply and Sanitation, Final report of the Special Rapporteur, El Hadji Guisse, E/CN.4/Sub.2/2004/20 (14 July 2004) [SR Report (2004)] ¶49.

[162] SR Report (2004) ¶50.

[163] SR Report (2018) Annex Framework principle 7 ¶17.

[164] Aarhus Convention arts 4 & 5 respectively.

[165] SR Report (2018) Annex Framework principle 7 ¶18 & ¶19.

[166] ibid Framework principle 14 ¶44.

and Health requires the State to ensure that the results of water and effluent sampling carried out for the purpose of data collection are available to the public.[167]

In general, however, there is greater emphasis on the procedural duties of the State, which correspond to the substantive aspects of the rights. This reiterates the complementarity of the procedural and substantive aspects of the rights. Among binding instruments, the CRC requires the State to ensure that all segments of society 'are informed, have access to education and are supported in the use of basic knowledge of…hygiene and environmental sanitation',[168] and that the education of the child should be directed, inter alia, to 'the development of respect for the natural environment'.[169] Article 9 of the 1999 Protocol on Water and Health imposes a duty on the State to take steps to enhance public awareness regarding the rights and entitlements to water and corresponding obligations under law.

Non-binding instruments reveal a similar trend. Principle 10 of the Rio Declaration requires the State to provide each individual with 'appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities' and to 'facilitate and encourage public awareness…by making information widely available'.[170] General Comment No. 15 requires the relevant authorities to ensure timely and full disclosure of information on, and reasonable notice of, the proposed measures before the State or a third party undertakes any action that interferes with an individual's right to water.[171] General Comment No. 14 and the Independent Expert impose certain procedural obligations in respect of the right to health,[172] and the right to sanitation,[173] respectively.

[167] 1999 Protocol art 7(3) & art 5(i).

[168] CRC art 24(2)(e). The term 'environmental sanitation' indicates 'a broader conception of sanitation than mere excreta removal'. See Ellis and Feris (n 63) 617.

[169] CRC art 29(e). See also SR Report (2018) Annex Framework principle 6 ¶15.

[170] See also SR Report (2018) Annex Framework principle 6 ¶16.

[171] GC-15 ¶56.

[172] GC-14 ¶16.

[173] See IE Report (2009) ¶64, ¶66, ¶68 & ¶74.

The obligation to promote the right to water requires the State to 'take steps to ensure that there is appropriate education concerning the hygienic use of water, protection of water sources and methods to minimise water wastage'.[174] The obligations of comparable priority to core obligations in respect of the right to health include the provision of education and access to information concerning specified matters.[175]

Beyond the tripartite typology, there is an obligation to provide full and equal access to information concerning water, water services and the environment, which is held by public authorities or third parties to individuals and groups,[176] and concerning sanitation and hygiene as well as sanitation and its effect on health and the environment.[177] In addition to the procedural aspects of the rights, this may also indirectly ensure the realisation of some components of the substantive right to environment.

Finally, there is a clear link between access to information and public participation in decision-making. Principle 17 of the Rio Declaration imposes a duty to 'facilitate and encourage… participation by making information widely available.' Article 10 of the 1999 Protocol on Water and Health requires the State to make available information held by public authorities, which is reasonably needed to inform public discussion of specified matters. Non-binding instruments impose an obligation on the State to undertake prior impact assessment for proposed activities that are likely to have an adverse impact on the environment,[178] or on water quality.[179] According to the Special Rapporteur on the right to water and sanitation, impact assessments must be "in line with human rights standards",[180] and human rights impact assessments can prevent violations of human rights.[181] According to the Special Rapporteur on environmental obligations, the

[174] GC-15 ¶25.

[175] GC-14 ¶¶44(d) & (e).

[176] GC-15 ¶48.

[177] IE Report (2009) ¶66.

[178] See Rio Declaration Principle 17; SR Report (2018) Annex Framework principle 8 & Framework principle 9 ¶24.

[179] Report of the Special Rapporteur on the Human Right to Safe Drinking Water and Sanitation, UN Doc A/68/264 (5 August 2013) ¶73.

[180] ibid ¶32.

[181] SR Report (2014) ¶76.

procedure must consider the effect of the projects on human rights and provide for monitoring of the proposal as implemented.[182]

2.3.2 Public participation in decision-making and beyond

Some of the binding regional instruments recognise the right of public participation in decision-making. The Aarhus Convention guarantees the right in respect of decisions on specific activities, concerning plans, programmes and policies relating to the environment, and during the preparation of executive regulations and/or generally applicable legally binding normative instruments.[183] The 1999 Protocol on Water and Health requires that water-management plans shall make appropriate practical and/or other provisions for public participation, within a transparent and fair framework, and shall ensure that due account is taken of the outcome of the public participation.[184]

Insofar as international human rights law is concerned, CEDAW guarantees the right of women in rural areas to participate in 'the formulation of government policy and the implementation thereof' and 'the elaboration and implementation of development planning at all levels'.[185] These provisions are relevant as CEDAW incorporates some components of the rights to sanitation and water.

Some of the non-binding instruments link the procedural right with the substantive rights to health and water.[186] Similarly, the Special Rapporteur on environmental obligations recognises the right to participate in decision-making related to the environment, including the development of policies, laws, regulations, projects and activities.[187]

More often, however, non-binding instruments eschew the language of rights and identify public participation in decision-making as an obligation of the State. Further, the nature of the duty or obligation, that is, to 'enable', 'encourage', 'facilitate', 'take steps', reflects

[182] SR Report (2018) Annex Framework principle 8 ¶20 & ¶21.

[183] Aarhus Convention arts 6-8.

[184] 1999 Protocol art 6(v)(b). See also art 5(i).

[185] CEDAW art 7(b) & art 14(2)(a).

[186] See GC-14 ¶11; GC-15 ¶48.

[187] SR Report (2018) Annex Framework principle 9 ¶23.

the obligation to facilitate in the tripartite typology of obligations besides suggesting the incorporation of the concept of progressive realisation.

For instance, Principle 10 of the Rio Declaration simply recognises that '[e]nvironmental issues are best handled with participation of all concerned citizens, at the relevant level' and states that each individual shall have the opportunity to participate in decision-making processes. Other provisions recognise certain procedural duties of the State in this regard. Principle 17 imposes a duty to 'facilitate and encourage… participation'. Principles 20 and 22 impose a duty to enable 'full' and 'effective' participation of women and indigenous people and their communities, respectively in environmental management.[188] Even the Aarhus Convention elaborates the scope and content of the right in terms of the duties of the State.

Similarly, General Comment No. 15 describes public participation as a principle, which should be respected in the formulation and implementation of a national water strategy and plan of action.[189] It further provides that the national water strategy and plan of action should be devised, and periodically reviewed, on the basis of a participatory and transparent process.[190] Like the Rio Declaration, General Comment No. 15 requires the State to take steps to ensure the participation of women in decision-making processes concerning water resources and entitlements.[191] Where water services are operated or controlled by third parties, it is a part of the obligation to protect in the tripartite typology to establish a regulatory system that provides *inter alia* for 'genuine public participation'.[192]

The Independent Expert recognises participation as a vital aspect of meeting human rights obligations related to sanitation,[193] and recommends that the national plan on sanitation must ensure public participation.[194] Like General Comment No. 15, public participation

[188] ibid ¶26. See also Framework principle 14 ¶¶41(a) & (d) & ¶44.

[189] GC-15 ¶48.

[190] ibid ¶37(f).

[191] ibid ¶6(a).

[192] ibid ¶24.

[193] IE Report (2009) ¶71.

[194] ibid ¶81(c).

is not confined to the decision-making process; it extends to the implementation stage. There is a general duty to enable public participation in 'all processes related to the planning, construction, maintenance and monitoring of sanitation services.'[195] At the community level, there is a duty to create opportunities to enable input and active participation in the design and maintenance of low-cost sanitation systems rather than expensive sewerage networks.[196]

Further, before an action of the State or a third party interferes with an individual's substantive right to water, the relevant authorities should ensure opportunity for genuine consultation with the affected individuals.[197] There is no similar provision in respect of the collective right to water or the rights to health and sanitation.

2.3.3 Access to justice including remedies

Binding regional environmental/water law instruments establish a link between the duties of the State in respect of access to justice and the other two procedural aspects. The Aarhus Convention requires the State to provide a judicial review procedure in respect of request for information as well as access to information, and access to administrative and judicial review procedures in order to ensure the effectiveness of access to justice.[198] According to the 1999 Protocol on Water and Health, access to information and public participation in decision-making should be supplemented by appropriate access to judicial and administrative review of relevant decisions.[199] The Aarhus Convention also requires the State to provide a judicial review procedure to challenge the substantive and procedural legality of any decision, act or omission subject to the provisions of this Convention, and administrative or judicial procedures to challenge acts and omissions by private persons and public authorities which contravene provisions of national environmental laws. These procedures should provide adequate and effective remedies, including injunctive relief.

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[195] ibid ¶66.

[196] SR Report (2004) ¶50.

[197] GC-15 ¶56.

[198] Aarhus Convention art 9.

[199] 1999 Protocol art 5(i).

The non-binding instruments of international environmental law describe access to justice as a duty of the State without reference to a corresponding substantive right to environment. Principle 10 of the Rio Declaration mandates the provision of '[e]ffective access to judicial and administrative proceedings, including redress and remedy'. The Framework principles laid down by the Special Rapporteur require the State to provide access to judicial and other procedures for effective remedies for violations of human rights and obligations relating to the environment.[200] The obligation extends to access to effective remedies for individuals and indigenous peoples and other communal landowners against private actors, as well as government authorities, for failures to comply with the laws of the State relating to the environment.[201]

General Comment Nos. 14 and 15 recognise both the individual (any 'person' or 'persons') and the collective ('group' or 'groups') as right-holders with access to remedies in case of a violation of the rights to health and water.[202] Otherwise, access to justice including remedies is often described as the State's obligation to provide, which corresponds to the substantive rights, rather than as a procedural right. In this regard, General Comment No. 3 states that appropriate measures for the implementation of state obligations pursuant to Article 2(1) of the ICESCR might include the provision of judicial remedies with respect to justiciable rights.[203] Under General Comment No. 15, before the State or a third party carries out any action that interferes with an individual's right to water, the relevant authorities must ensure legal recourse and remedies for those affected and legal assistance for obtaining legal remedies.[204] There is no similar provision in respect of the collective right to water or the rights to health and sanitation. However, it is the obligation of the State to provide effective judicial or other appropriate remedies in cases of violations of the obligations corresponding to the right to sanitation.[205]

[200] SR Report (2018) Annex Framework principle 10 ¶27.

[201] ibid ¶¶28-30.

[202] GC-15 ¶55; GC-14 ¶59.

[203] General Comment No. 3: The Nature of State Parties Obligation (Article 2, para 1 of the International Covenant on Economic, Social and Cultural Rights), UN Doc/E/1991/23 (14 December 1990) ¶5.

[204] GC-15 ¶56.

[205] IE Report (2009) ¶64.

Conclusion

This chapter demonstrated the scope and limits of international law's articulation of the substantive and procedural aspects of the rights to environment, sanitation and water and/or the corresponding duties or obligations of the State in the context of water pollution/quality. It finds that several instruments recognise an explicit or implicit link between the rights or their components and the issue of water pollution/quality. Further, a few binding and several non-binding instruments have read certain components of the environment, sanitation and water into, or derived explicit but limited rights to sanitation and water from, certain ICESCR rights. The derivative nature of the rights may circumscribe the scope and content of the rights as well as a claim concerning their non-realisation or violation.

The articulation of the substantive aspects of the rights or their components is overtly anthropocentric and it generally relates to the quality of life, dignity, health and well-being of human beings. At the same time, the anthropocentric approach is itself limited; the scope of the rights is confined to the consideration of certain aspects only. The instrumental value of the environment is accommodated but there is a discernible absence of non-human considerations or the right of the environment.

Non-binding instruments incorporate the individual, collective and hybrid dimensions of the substantive and procedural aspects of the rights and/or the corresponding obligations. This is noteworthy in a context where the negative impacts of water pollution and/or poor water quality are often not confined to an individual or a particular community. At the same time, both substantive and procedural aspects of the rights are more likely to be framed in terms of core and general obligations of the State. This may be in deference to the principle of state sovereignty but the concept of progressive realisation gives the State a considerable margin of discretion in terms of enforcement.

Some of the instruments have broadened the scope of the procedural aspects of the rights. Access to information extends to education and public awareness and public participation includes implementation. This is a welcome development in a context where there is lack of awareness about water pollution/quality and the failure to involve the public in the implementation of policies, programmes and schemes leads to sub-optimal or negative

outcomes in terms of the prevention or control of water pollution and/or the maintenance or improvement of water quality.

In any case, international law offers a baseline for the examination of the recognition of the rights and the corresponding duties of the State, and determination of their nature, scope and content, in the context of water pollution/quality in India. This exercise forms the subject matter of the next two chapters on the recognition and determination of the rights and the corresponding duties of the State by the higher judiciary in India.

CHAPTER 3
RECOGNISING AND DETERMINING THE RIGHTS AND DUTIES OF CITIZENS

Introduction

Chapter 2 examined international law's engagement with the substantive and procedural aspects of the rights to environment, sanitation and water and the corresponding duties in the specific context of water pollution/quality. While international law can serve as a benchmark or provide guidance, the recognition of these rights, which is a declaration of the right-holder's claim to certain components of the environment, sanitation, and water, respectively, and the determination of their scope and content at the domestic level is a pre-condition for their judicial enforcement.

Neither the Constitution of India nor its negotiating history refers to these rights. The higher judiciary has been widely credited with the creative interpretation of certain constitutional provisions to read the constitutional environmental rights (CER) into the Constitution.[1] But scholars have found little evidence of the elaboration of the scope and content of the right to environment by the higher judiciary.[2] Philippe Cullet observes that 'courts have addressed some of the general lineaments of the content of the right [to water] in some cases' (emphasis added).[3] The right to sanitation has received even less attention.[4]

[1] See, for example, Michael R Anderson, 'Human Rights Approaches to Environmental Protection: An Overview' in Alan Boyle and Michael Anderson (eds), *Human Rights Approaches to Environmental Protection* (OUP 1996) 17; Philippe Cullet, 'Water Sector Reforms and Courts in India: Lessons from the Evolving Case Law' (2010) 19(3) Review of European Community and International Environmental Law 328; Sujith Koonan, 'Realising the Right to Sanitation in Rural Areas – Towards a New Framework' IELRC Policy Paper 2012-13 <www.ielrc.org/content/p1203.pdf>.

[2] See Michael R Anderson 'Individual Rights to Environmental Protection in India' in Alan Boyle and Michael Anderson (eds), *Human Rights Approaches to Environmental Protection* (OUP 1996) 216; Lavanya Rajamani, 'The Right to Environmental Protection in India: Many a Slip between the Cup and the Lip?' (2007) 16(3) Review of European Community and International Environmental Law 274, 278.

[3] See, for example, Cullet (n 1) 329.

[4] See, for example, Philippe Cullet, 'Policy as Law: Lessons from Sanitation Interventions in Rural India' (2018) 54(2) Stanford Journal of International Law 241.

While the higher judiciary ought to incorporate an element of flexibility to cater to the facts and circumstances of different cases, *de minimis* it should be possible to identify the lineaments of these rights with some certainty and clarity. As the adverse impacts of water pollution and/or poor water quality are not confined to human beings, it is also important to consider the extent to which the higher judiciary accommodates non-human (environmental) interests in this process. Further, in addition to the rights of citizens, the Constitution embodies and the higher judiciary elaborated certain duties of citizens. The examination of these duties is essential in order to appreciate the relative emphasis given to the rights and duties of citizens, and to the duties of the State, which are discussed in the next chapter.

The first section of this chapter examines the relevant features of the constitutional provisions that were subsequently interpreted by the higher judiciary to read the CER or their components into the Constitution. The next section examines the interpretive techniques used by the higher judiciary. The third section considers the manner in which the higher judiciary determined the scope and content of the CER, including their procedural aspects. The fourth section shifts away from an anthropocentric perspective to discuss the more environment-centric dimensions of the CER. In order to capture some of the more recent developments, this section also refers to decisions of the National Green Tribunal (NGT). The last section examines the higher judiciary's interpretation of the duties of citizens.

3.1 Unpacking the constitutional bases

The higher judiciary has interpreted constitutional provisions to read the CER or their components into the Constitution. This section examines these constitutional provisions and identifies some of their relevant features that are themselves the result of constitutional amendment or the higher judiciary's creative interpretation.

3.1.1 Fundamental right to life of citizens

Part III of the Constitution of India embodies the fundamental rights of every person but it does not include any of the CER. Article 21 of the Constitution guarantees the fundamental right to life and reads: '[N]o person shall be deprived of his life or personal

liberty except in accordance with the procedure established by law'. During the 1980s, the Court expanded the scope of the fundamental right to life beyond 'protection of limb or faculty' or 'physical existence'.[5] This is in contrast with the traditional, restricted interpretation of the right to life in Article 3 of the Universal Declaration of Human Rights (UDHR) and Article 6(1) of the International Covenant on Civil and Political Rights (ICCPR) (Chapter 2).

While the Constitution refers to dignity in the non-justiciable preamble, the higher judiciary took an expansive approach and developed substantial dignity jurisprudence. In *Maneka Gandhi v Union of India*, the Court observed that fundamental rights are 'calculated to protect the dignity of the individual and create conditions in which every human being can develop his personality to the fullest extent'.[6] In *Municipal Council, Ratlam v Shri Vardichan and Others*, the Court observed that 'decency and dignity are non-negotiable facets of human rights'.[7] The Court did not specifically refer to the fundamental right to life in these cases.

Scholars frequently cite *Francis Coralie Mullin v Administrator, Union Territory of Delhi and Others* as an example of the application of the concept of dignity by courts.[8] Here, the Court explicitly held that the fundamental right to life includes 'the right to live with human dignity and all that goes along with it, namely, the bare necessaries of life'.[9] This was followed by a list of the bare necessaries of life. The Court further recognised that 'animal existence' or only meeting 'animal needs' cannot ensure the right to life.[10] In *Chameli Singh and Others v State of Uttar Pradesh and Another*, the Court observed that a person's right to life is 'secured only when he is assured of all facilities to develop

[5] See *Francis Coralie Mullin v Administrator, Union Territory of Delhi and Others* (1981) 1 SCC 608 ¶7. See also *State of Himachal Pradesh and Another v Umed Ram Sharma and Others* (1986) 2 SCC 68 ¶11.

[6] (1978) 1 SCC 248 ¶4.

[7] (1980) 4 SCC 162 ¶15.

[8] Christopher McCrudden, 'Human Dignity and Judicial Interpretation of Human Rights' (2008) 19(4) The European Journal of Human Rights 655, 693. See also Dina Townsend, 'Taking Dignity Seriously? A Dignity Approach to Environmental Disputes before Human Rights Courts' (2015) 6(2) Journal of Human Rights and the Environment 204, 216.

[9] *Francis Coralie Mullin* (n 5) ¶8.

[10] ibid ¶7 (referring to *Kharak Singh v State of UP and Others* AIR 1963 SC 1295 ¶17) and *Chameli Singh and Others v State of Uttar Pradesh and Another* (1996) 2 SCC 549 ¶8 respectively.

himself and is freed from restrictions which inhibit his growth.'[11] The Court also held that the fundamental right to life embraces 'quality of life',[12] which has been subsequently described as 'all those aspects of life which go to make a man's life meaningful, complete and worth living.'[13]

Although these decisions emphasise the individual's fundamental right to life, they have paved the way for the subsequent inclusion of the CER and/or their components, including their individual and collective dimensions, in the Constitution by the higher judiciary (section 3.2). The list of 'bare necessaries of life' does not mention any of the CER but the use of the term 'such as' suggests that it is illustrative and it does not rule out the possibility of including the CER. This is similar to the expansive interpretation of the right to an adequate standard of living in Article 11 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) to include the rights to water and sanitation (Chapter 2). Water pollution and/or poor water quality may cause right-holders to lead an 'animal existence', and it may have an adverse impact on the CER and the development and growth of human beings. Further, a certain threshold of environmental/water quality is essential to guarantee a minimum quality of life.

3.1.2 Duties of the State

The State is the primary duty-bearer in respect of constitutionally guaranteed rights. In addition, certain duties of the State, which implicitly correspond to the CER, are laid down in the Directive Principles of State Policy (DPSP), which are embodied in Part IV of the Constitution. The DPSP are not 'enforceable by any court, but the principles therein laid down are nevertheless fundamental in the governance of the country and it shall be the duty of the State to apply these principles in making laws'.[14]

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[11] *Chameli Singh* (n 10) ¶8.

[12] See *State of Himachal Pradesh* (n 5) ¶11.

[13] *Dr Ashok v Union of India and Others* (1997) 5 SCC 10 ¶4.

[14] Constitution of India art 37. The Court interpreted the phrase 'fundamental in the governance of the country' to mean 'basic or essential, but it is used in the normative sense of setting, before the State, goals which it should try to achieve.' See *NK Bajpai v Union of India* (2014) 4 SCC 653 ¶19. The term 'State' includes the national, state, and local governments. See Constitution of India Part IV, art 36; Part III, art 12.

Although the DPSP set out in the Constitution as originally framed did not include any explicit reference to the environment, sanitation or water, some of them indirectly contributed to the realisation of certain socio-economic goals, including some of the CER in the context of water pollution/quality. Article 47 of the Constitution states: 'The State shall regard…the improvement of public health as among its primary duties.' Given the well-established connection between water pollution and poor water quality and human health, this constitutional provision provides a rationale for legislation. Article 39(b) of the Constitution states: 'The State shall, in particular, direct its policy towards securing that the ownership and control of the material resources of the community are so distributed as best to subserve the common good.' These 'material resources' include sources of surface water and groundwater, and water pollution and poor water quality compromise their ability to serve the common good.

The Constitution (Forty-Second Amendment) Act, 1976 led to the inclusion of an explicit reference to the environment in the DPSP. Article 48A of the Constitution states: 'The State shall endeavour to protect and improve the environment and to safeguard forests and wildlife of the country'. The parliamentary debates do not provide any reasons for the insertion of this provision but scholars highlight two factors: the growing awareness of the environmental crises in the country, and the desire to conform to the objectives of the Stockholm Declaration, the key outcome of the United Nations Conference on the Human Environment held in 1972.[15] Like Principle 5 of the Stockholm Declaration, which distinguishes between the natural and man-made environment (Chapter 2), judicial and scholarly interpretations of Article 48A of the Constitution attribute a wide meaning to the term 'environment'.[16]

Part IV of the Constitution now includes explicit references to health and the environment. These DPSP also extend to certain components of water and sanitation, given the very

[15] See Kilaparti Ramakrishna, 'The Emergence of Environmental Law in the Developing Countries: A Case Study of India' (1984-85) 12(4) Ecology Law Quarterly 907, 912-13; PM Prasad, 'Environment Protection: Role of Regulatory System in India' (2006) 41(13) Economic and Political Weekly 1278, 1278.

[16] See *Virender Gaur and Others v State of Haryana and Others* (1995) 2 SCC 577 ¶7 (observing that '[th]e word 'environment' is of broad spectrum which brings within its ambit "hygienic atmosphere and ecological balance"'). See also Bharat Desai, *Water Pollution in India: Law and Enforcement* (Lancer Books 1990) 41.

close link between the environment and public health on the one hand, and the quality of water and the manner of disposal of sanitation waste on the other. Nonetheless, it is important to acknowledge the limitations of the DPSP. First, the failure of the State to discharge its duty to apply the DPSP in making laws cannot be made the subject matter of judicial proceedings.[17] Second, although the use of the term 'shall' in Article 37 of the Constitution suggests that the DPSP are a mandatory obligation of the State, the programmatic/progressive nature of the DPSP is evident, for instance, from the use of the term 'regard' and 'endeavour' in Articles 47 and 48A of the Constitution, respectively.

3.1.3 Duties of citizens

The Constitution, as originally drafted, did not embody any duties of citizens. The constitutional amendment of 1976 led to the insertion of Part IVA in the Constitution – the section dealing with the fundamental duties of citizens. As a result, Article 51A(g) of the Constitution imposes a fundamental duty to 'protect and improve the natural environment including forests, lakes, rivers and wildlife and to have compassion for living creatures'. The use of the term 'including' implies that that the fundamental duty applies not only to lakes and rivers, which are sources of surface water, but also to groundwater sources as well as other sources of surface water that form part of the natural environment and may be vulnerable to pollution or deterioration of quality.

The parliamentary debates preceding the constitutional amendment do not discuss the reasons for the insertion of this provision. However, the provision resembles Principle 1 of the Stockholm Declaration, which states: '…he [man] bears a solemn responsibility to protect and improve the environment for present and future generations.' Unlike Article 48A of the Constitution, Article 51A(g) of the Constitution only refers to the 'natural' environment. However, like the DPSP, the fundamental duties are non-justiciable. This means that no one can compel a citizen to perform her or his fundamental duties by resorting to judicial proceedings.[18] According to Seervai, this provision:

> has been enacted under the mistaken belief that if Arts 14 to 32 confer fundamental rights on citizens, and Arts 38 to 51 impose "duties" on the State,

[17] See, for example, *Bandhua Mukti Morcha v Union of India and Others* (1984) 3 SCC 161 ¶10.

[18] *Surya Narain v Union of India* AIR 1982 Rajasthan 1.

> Fundamental Duties ought to be imposed on citizens…The newly added Chapter IVA is not law and, *a fortiori*, not supreme law…if fundamental duties are disregarded, nothing happens….[19]

Over the past years, however, judicial interpretation of this constitutional provision is progressively introducing an element of binding-ness, which is taken up and discussed in section 3.5.

3.2 Recognition of the rights or their components

This section examines the recognition of the CER or their components as a part of the Constitution by the higher judiciary. It is pertinent to mention that the recognition may be explicit or implicit, and some of these cases do not relate to environmental or water pollution/quality at all.

3.2.1 Fundamental right to life

The right to a healthy environment is one of the earliest formulations of any of the CER recognised by the higher judiciary as forming a part of the fundamental right to life. The Court traced the origins of the right to its decision in *Bandhua Mukti Morcha v Union of India and Others*.[20] In this case, the public interest litigant specifically alleged a violation of the fundamental right to life of bonded labourers. Although the Court did not explicitly refer to the right to a healthy environment, it highlighted the link between water and health and well-being, and between sanitation and the environment, and then issued directions *inter alia* in respect of the provision of drinking water and latrines and urinals.[21] Clearly, poor environmental and water quality underpinned this decision.

In *Rural Litigation and Entitlement Kendra, Dehradun and Others v State of UP and Others* (RLEK (1985)), the Court sought to protect and safeguard 'the right of the people

[19] HM Seervai, *Constitutional Law of India – A Critical Commentary* Volume 2 (4th edn Universal Law Publishing Co Pvt Ltd reprinted 2004) 2020. See also Peter E Quint, 'Reflections on the Constitutional Duties of Citizens (and Persons)' (3 March 2008) <http://digitalcommons.law.umaryland.edu/schmooze_papers/92/>.

[20] *AP Pollution Control Board II v Prof MV Nayudu (Retd) and Others* (2001) 2 SCC 62 [APPCB II] ¶7.

[21] *Bandhua* (n 17) ¶¶33-34.

to live in a healthy environment with minimal disturbance of ecological balance and without avoidable hazard to them, to their cattle, homes and agriculture and undue affectation of air, water and environment.'[22] Although the Court did not explicitly refer to the fundamental right to life, the latter was subsequently identified as the source of the right to live in a healthy environment.[23]

Subsequently, some cases concerning water pollution specifically or environmental issues generally explicitly or implicitly referred to the fundamental right to life, the rights to environment and water and/or the link between the two.

- In a case relating to pollution of the river Ganges, without reference to the CER, the Court noted that river pollution is affecting the life, health and ecology of the Indo-Gangetic plain.[24]
- In a case concerning pollution of surface water and groundwater, the Court observed that constitutional provisions, including the fundamental right to life, protect a person's right to clean water and pollution-free environment.[25] The source of the right was 'the inalienable common law right of clean environment', which was discussed in the context of the law of nuisance.
- In a case concerning the right to environment more generally, the Court traced both environmental aspects (which concern 'life') and human rights concerns (which concern 'liberty') to the fundamental right to life without reference to the right to environment.[26]

In addition to the abovementioned cases, the Court recognised the rights to environment and water in cases concerning the provision of housing for weaker sections of society. In *M/s Shantistar Builders v Narayan Khimalal Totame and Others*, the Court held that the

[22] (1985) 2 SCC 431 [RLEK (1985)] ¶12.

[23] See *T Damodhar Rao and Others v The Special Officer, Municipal Corporation of Hyderabad and Others* AIR 1987 Andhra Pradesh 171 ¶24 (observing that the Court entertained the case under Article 32 of the Constitution as involving a violation of the fundamental right to life).

[24] *MC Mehta v Union of India and Others* (1987) 4 SCC 463 [*Mehta* (Kanpur Tanneries)] ¶22. See also *MC Mehta (II) v Union of India and Others* (1988) 1 SCC 471 [*Mehta* (Kanpur Municipalities)]; *MC Mehta (Calcutta Tanneries' Matter) v Union of India and Others* (1997) 2 SCC 411.

[25] *Vellore Citizens' Welfare Forum v Union of India and Others* (1996) 5 SCC 647 ¶16.

[26] *AP Pollution Control Board v Prof MV Nayudu (Retd) and Others* (1999) 2 SCC 718 ¶57.

'right to life would take within its sweep…the right to decent environment.'[27] In *Chameli Singh and Others v State of Uttar Pradesh and Another*, the Court recognised the right to water and the right to a decent environment as 'basic human rights known to any civilised society', which are implied in the right to life.[28]

Even before the explicit recognition of the CER by the Supreme Court, some high courts had already recognised components of the CER as a part of the fundamental right to life. The High Court of Andhra Pradesh held that 'nature's gifts' were essential to enjoy, attain and fulfil the fundamental right to life.[29] In a case concerning the implementation of statutory provisions relating to sanitation facilities in urban areas, the High Court of Rajasthan explicitly observed that '[m]aintenance of health, preservation of the sanitation [sic] and environment falls within the purview of Article 21 of the Constitution'.[30]

Later, the higher judiciary explicitly started recognising that water is critical for the enjoyment of the fundamental right to life**.** Here, the baseline is physical existence and there is an immediate threat to survival.[31] According to the High Court of Kerala, 'sweet' water is a basic element, which sustains life.[32] The Supreme Court held that water is one of the most vital necessities having regard to the fundamental right to life.[33] The High Court of Rajasthan held that unpolluted ground water is essential for the existence of citizens.[34]

3.2.2 Fundamental right to a (quality) life with dignity

[27] (1990) 1 SCC 520 ¶9.

[28] *Chameli Singh* (n 10) ¶8.

[29] See *Damodhar Rao* (n 23) ¶24. Subsequently, the High Court of Rajasthan identified water, river and sea as 'nature's gifts'. See *Vijay Singh Puniya v State of Rajasthan and Others* AIR 2004 Rajasthan 1 ¶31.

[30] *LK Koolwal v State of Rajasthan and Others* AIR 1988 Rajasthan 2 ¶3.

[31] Anderson, 'Individual Rights to Environmental Protection in India' (n 1) 215.

[32] *Attakoya Thangal v Union of India* 1990 (1) KLT 580 ¶7. See also *MC Mehta v Kamal Nath and Others* (2000) 6 SCC 213 [Mehta-Nath II] ¶8.

[33] *MC Mehta v Union of India and Others* (2004) 12 SCC 118 ¶46.

[34] *Puniya* (n 29) ¶4.

The higher judiciary eschewed the traditional understanding of the fundamental right to life in a number of cases relating to environmental or water pollution/quality. As noted by Michael Anderson, immediate survival is not threatened in these cases and amenities are added to the baseline of physical existence.[35] The High Court of Andhra Pradesh held that a violation of Article 21 of the Constitution is not confined to 'total extinguishment of life'; it also included '[t]he slow poisoning by the polluted atmosphere caused by environmental pollution and spoilation'.[36] In a case concerning the right to sweet water, the High Court of Kerala observed that '[t]he right to life is much more than the right to animal existence and its attributes are many fold, as life itself.'[37]

In addition, the higher judiciary emphasised the importance of the quality of the fundamental right to life in a number of cases. Where the petitioner alleged that environmental/water pollution was creating a health hazard, the Court recognised the fundamental right 'to have the enjoyment of quality of life and living'.[38] The High Court of Karnataka observed that the right to 'qualitative life…is possible only in an environment of quality'.[39] More specifically, the Court held that the right to live (a quality life) includes the right of enjoyment of pollution-free water,[40] that water 'cannot be permitted to be misused or polluted so as to reduce the quality of life of others',[41] and that the protection of tanks and ponds leads to a proper and healthy environment, which in turn 'enables peoples to enjoy a quality life'.[42] Later it reiterated that the right to water is envisaged under Article 21 (quality of life).[43] The use of terms such as 'environment of quality', 'pollution-free water' and 'proper and healthy environment' does not provide a satisfactory explanation of what 'quality' of life entails.

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[35] See generally Anderson, 'Individual Rights to Environmental Protection in India' (n 1) 215.

[36] *Damodhar Rao* (n 23) ¶24.

[37] *Attakoya Thangal* (n 32) ¶7.

[38] See, for example, *Chhetriya Pardushan Mukti Sangharsh Samiti v State of UP and Others* (1990) 4 SCC 449 ¶8. See also *Subhash Kumar v State of Bihar and Others* (1991) 1 SCC 598 ¶7.

[39] *V Lakshmipathy v State of Karnataka* AIR 1992 Karnataka 57 ¶28.

[40] *Subhash Kumar* (n 38) ¶7.

[41] *Mehta* (2004) (n 33) ¶46.

[42] *Hinch Lal Tiwari v Kamala Devi and Others* (2001) 6 SCC 496 ¶13.

[43] *Susetha v State of Tamil Nadu and Others* (2006) 6 SCC 543 ¶14.

The higher judiciary also extended its dignity jurisprudence to accommodate a weak anthropocentric approach, which takes into account certain non-human interests. For instance, in *Virender Gaur and Others v State of Haryana and Others*, the Court held:

> …Enjoyment of life and its attainment including their right to life with human dignity encompasses within its ambit, the protection and preservation of environment, ecological balance free from pollution of air and water…it would be impossible to live with human dignity without a humane and healthy environment.[44]

In respect of this decision, Dina Townsend observes: 'The Indian Supreme Court has found that the circumstances of one's life extend to the environment and that a dignified life necessitates not only adequate environmental conditions, but also ecological balance.'[45] Arguably, in this case, the Court adopted a broad interpretation of the right to a 'healthy environment' as it was concerned with ecological balance or the health of the environment itself in addition to adequate environmental conditions necessary for dignified human life.

3.2.3 Reading constitutional provisions together

In addition to the expansive interpretation of the fundamental right to life, the higher judiciary read Parts III, IV and/or Part IVA of the Constitution together to recognise the CER or their components. First, the Court read the fundamental right to life with the DPSP. According to the Court, the right to live with human dignity 'derives its life breath from the Directive Principles'. [46] More specifically, the Court observed that the fundamental right to life must be read to include the right of citizens that corresponds to the duties of the State under Articles 47 and 48A of the Constitution.[47]

Second, the higher judiciary read the fundamental right to life with DPSP as well as the fundamental duty of citizens. The High Court of Andhra Pradesh referred to Articles 48A

[44] *Virender Gaur* (n 16) ¶10.

[45] Townsend (n 8) 217.

[46] *Bandhua* (n 17) ¶103.

[47] *Occupational Health and Safety Association v Union of India and Others* (2014) 3 **SCC** 547 ¶10.

and 51A(g) of the Constitution to hold that the fundamental right to life extends to the 'protection and preservation of nature's gifts'.[48] The Court described Articles 21, 47, 48A and 51A(g) of the Constitution as 'the constitutional mandate to protect and improve the environment'.[49] In *Vellore Citizens' Welfare Forum v Union of India and Others*, the Court observed that Articles 21, 48A and 51A(g) of the Constitution protect a person's right to clean water and pollution-free environment.[50] In other cases, the Court observed that Articles 48A and 51A(g) 'have to be considered in the light of Article 21 of the Constitution',[51] and they 'are to be kept in mind in understanding the scope and purport of fundamental rights guaranteed by the Constitution including Articles 14, 19 and 21 of the Constitution'.[52]

Third, the higher judiciary established a link between the DPSP and the fundamental duty of citizens. In *Intellectuals Forum, Tirupathi v State of Andhra Pradesh and Others*, the Court extended the duty of the State to apply the principles laid down in Article 51A(g) of the Constitution in making laws.[53] According to the Court, this provision is also to be kept in mind in understanding the various laws enacted by Parliament and the State Legislature.[54] This may be viewed as an attempt to empower the State to include fundamental duties of citizens in legislation and thus render them justiciable. This issue is considered in greater detail in section 3.5.

3.3 Determining the scope and content of the rights

This section examines the higher judiciary's attempts to determine the scope and content of the CER or their components in cases relating to water pollution/quality. It focuses on the rights to environment, sanitation and water generally, as well as the threshold of unacceptable pollution and the concepts of health hazard and disturbance. In addition to

[48] See *Damodhar Rao* (n 23) ¶24. See also *MK Janardhanam v The District Collector and Others* 2003 (1) LW 262 (Madras) ¶15.

[49] *Vellore* (n 25) ¶13. See also *MC Mehta v Union of India and Others* (Badhkal and Surajkund Lakes Matter) (1997) 3 SCC 715 [*Mehta* (Lakes)] ¶10; *Susetha* (n 43) ¶14.

[50] *Vellore* (n 25) ¶16.

[51] Mehta-Nath II (n 32) ¶8.

[52] *Intellectuals Forum, Tirupathi v State of Andhra Pradesh and Others* (2006) 3 SCC 549 ¶82.

[53] ibid.

[54] ibid.

these substantive aspects of the CER, this section considers the scope and content of the procedural aspects of the CER.

3.3.1 The right to a (healthy) environment

The determination of the scope and content of the right to environment hinges, first and foremost, on the higher judiciary's understanding of the term 'environment'. In a number of cases, courts rely on adjectives such as 'healthy', 'humane' or 'hygienic' to delimit the scope and content of the right. These different formulations of the right to environment link health and the environment but they can be viewed in two different ways.

The broad interpretation of the right to a healthy environment, as reflected in RLEK (1985), is not confined to individual, human health. It takes into account 'minimal disturbance of ecological balance' as well as avoidable hazard to 'cattle, homes and agriculture'. [55] It thus paves the way for a less anthropocentric approach that accommodates some non-human dimensions of a 'healthy environment'. It is also noteworthy that the petitioner in RLEK (1985) did not demonstrate any direct nexus with human health. [56] In contrast, the narrower interpretation of the right to a healthy environment, which is more frequently expressed by the higher judiciary, focuses on human health. The Court recognised that 'hygienic environment is an integral facet of right to healthy life', [57] and that 'a humane and healthy environment' is essential in order to live with dignity. [58] The Court also made an express link between water resources and the right to a healthy environment where it observed that the protection of tanks and ponds leads to a 'proper and healthy environment which enables people to enjoy a quality life'. [59]

Additionally, the recognition of a right to 'decent' environment in cases concerning the provision of housing for weaker sections of society[60] suggests that the Court is referring

[55] RLEK (1985) (n 22) ¶12.

[56] Anderson, 'Individual Rights to Environmental Protection in India' (n 1) 217.

[57] *Virender Gaur* (n 16) ¶7.

[58] ibid. See also *KM Chinnapa, TN Godavarman Thirumalpad v Union of India and Others* (2002) 10 SCC 606 ¶18.

[59] *Hinch Lal* (n 42) ¶13.

[60] See *Shantistar* (n 27); *Chameli Singh* (n 10).

to the man-made environment rather than the natural environment, and the focus here is exclusively on human health. Notwithstanding the limited scope and content of the right to environment in these cases, they are cited as precedents for the recognition of the right to environment more generally or in cases relating to environmental/water pollution or quality specifically.

3.3.2 The threshold of unacceptable environmental/water pollution

One formulation of the rights to environment and water is directly linked to pollution. It is expressed as the right to live in pollution-free environment,[61] or the right of enjoyment of pollution-free water[62] for the realisation of the fundamental right to life. Variations include 'fresh and non-contaminated water, which is not polluted'[63] and 'unpolluted ground water'.[64] At first glance, this formulation appears to encompass a zero tolerance approach towards water pollution. But the use of the terms 'minimal disturbance', 'avoidable hazard' and 'undue affectation' in RLEK (1985) suggests some tolerance of environmental degradation/pollution.[65] Similarly, in *MC Mehta and Others v Union of India and Others* (Stone crushers case), the Court acknowledged that '[e]nvironmental changes are the inevitable consequence of industrial development'.[66] In other words, the rights to pollution-free environment and water are not absolute - a certain level of pollution is accepted. In this formulation, freedom from pollution means the prevention and control of an elevated level of pollution.[67] This narrow understanding is reflected in court decisions.

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[61] See, for example, *MC Mehta and Others v Union of India and Others* (Stone crushers case) (1992) 3 SCC 256 [*Mehta* (1992)] ¶2. See also *Vellore* (n 25) ¶17; *C Kenchappa and Others v State of Karnataka and Others* 2000 (4) KLJ 1 (Division Bench) ¶12; *Thilakan v Circle Inspector of Police and Others* AIR 2008 Kerala 48 ¶17.

[62] See, for example, *Charan Lal Sahu and Others v Union of India and Others* (1990) 1 SCC 613 ¶137; *Subhash Kumar* (n 38) ¶7; *Dahanu Taluka Environment Protection Group v Bombay Suburban Electricity Supply Co Ltd* (1991) 2 SCC 539 ¶2; *Virender Gaur* (n 16) ¶7.

[63] *Dr KC Malhotra v State of MP and Others* AIR 1994 Madhya Pradesh 48 ¶15.

[64] *Puniya* (n 29) ¶31.

[65] RLEK (1985) (n 22) ¶12.

[66] *Mehta* (1992) (n 61) ¶2.

[67] See, for example, Rajamani (n 2) 279; Gitanjali Nain Gill, 'Human Rights and the Environment in India: Access through Public Interest Litigation' (2012) 14(3) Environmental Law Review 200, 205.

First, courts are willing to tolerate environmental/water pollution so long as it does not pose a threat to the quality of human life. The Court observed that water pollution cannot be permitted so as to reduce the quality of life of others.[68] Human health is identified as an indicator of quality of life. According to the Court, the threshold at which water pollution becomes unacceptable is where it damages environmental quality to such an extent that it becomes a health hazard to the residents of the area.[69] In another case, the Court specifically brought health hazards due to pollution within the scope of the fundamental right to life.[70] The High Court of Delhi equated a pollution-free river with freedom from 'dangers to the health of the citizens and visitors' and with fitness for human consumption.[71] Section 3.3.4 further discusses water pollution as a health hazard.

But the establishment of a link between water pollution on the one hand, and a reduction in the quality of human life or a hazard to human health on the other hand, is an evidentiary requirement. It is subject to the establishment of causation in a situation where the harm is often long-term and cumulative, and is, therefore, difficult to satisfy.[72] According to Lavanya Rajamani, courts have not provided any concrete guidance as to acceptable levels of pollution.[73]

An alternative is where existing pollution control laws provide the threshold of acceptable pollution. In *Subhash Kumar v State of Bihar and Others*, a requirement was laid down for approaching the Court: the endangerment or impairment of quality of life resulting from a violation of the right must be in derogation of (pollution-related) laws.[74] However, as Michael Anderson argues: 'On an extreme view, this might be read to reduce the constitutional right to a procedural enforcement of statutory standards.'[75]

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[68] *Mehta* (2004) (n 33) ¶46.

[69] *Mehta* (1992) (n 61) ¶ 2.

[70] *Ashok* (n 13) ¶5.

[71] *Baldev Singh Dhillon and Others v Union of India and Others* 64 (1996) DLT 329 ¶70.

[72] Sumudu Atapattu, 'The Right to a Healthy Life or the Right to Die Polluted?: The Emergence of a Human Right to a Healthy Environment Under International Law' (2002-2003) 16(1) Tulane Environmental Law Journal 65, 112.

[73] Rajamani (n 2) 279.

[74] *Subhash Kumar* (n 38) ¶7. See also *DD Vyas and Others v Ghaziabad Development Authority, Ghaziabad and Another* AIR 1993 Allahabad 57.

[75] Anderson, 'Individual Rights to Environmental Protection in India' (n 1) 217.

Third, reversible environmental damage resulting from water pollution may be permissible. In one case, the Court imposed a restriction that the utilisation of natural sources of water should not result in irreversible damage to the environment.[76] This raises a number of issues: What is reversible environmental damage? Who is responsible for its determination and reversal? When? Such a view also discounts the importance of the principle of prevention and the precautionary principle (Chapter 4).

Finally, the use of qualifying language with the duties of the State corresponding to the right to pollution-free water acknowledges the availability of limited resources to deal with environmental pollution and thus implicitly incorporates the idea of progressive realisation of the CER (Chapter 5, section 5.1.3). Examples includes a recommendation to keep the entire city, town or village free from water pollution once a week, as far as possible,[77] or the imposition of a duty to 'take effective steps' to protect the right to pollution free water.[78]

3.3.3 The right to water of a certain quality

The higher judiciary explicitly recognised a right to 'clean', 'pure', 'safe' or 'sweet' water, often in cases concerning poor quality of drinking water, which is a statutory or constitutional duty of public authorities. For this purpose, it either relied solely on the fundamental right to life or read the right with the DPSP as well as the fundamental duties of citizens.

In *Vellore*, the Court observed that Articles 21, 47, 48A and 51A(g) of the Constitution and statutory provisions in specific environmental legislation protect a person's right to clean water.[79] However, the contours of the right to drinking water of a certain quality are more frequently determined by high courts than the Supreme Court perhaps due to

[76] *Mehta* (2004) (n 33) ¶45.

[77] *Mehta* (Kanpur Municipalities) (n 24) ¶25.

[78] *Charan Lal Sahu* (n 62) ¶137. See also Anderson, 'Individual Rights to Environmental Protection in India' (n 1) 217 (observing that the Court stopped short of placing an absolute duty to deliver pollution free water).

[79] See, for example, *Vellore* (n 25) ¶16; APPCB II (n 20) ¶3.

the fact that water is a State subject under the Constitution, schemes in respect of water supply are implemented by the State Government, and statutory duties in respect of water supply are found in laws governing local bodies.

High courts recognised the right to clean or pure drinking water as a part of Article 21 of the Constitution in cases dealing with impurities in,[80] or high/excessive fluoride content of,[81] drinking water supplied by the authorities. The High Court of Allahabad recognised that pure water was necessary for the realisation of the right to lead a healthy life. It understood 'pure' water as water free of garbage, filth and toxic industrial effluents and sewage.[82] High courts have also interpreted 'pure and clean' rivers to mean that the water is drinkable and free of diseases.[83]

High courts also recognised the right to safe drinking water in cases relating to outbreak of diseases like cholera and gastroenteritis,[84] and non-supply of potable drinking water for more than three decades.[85] The High Court of Gujarat recognised safe water as a basic human right in a case concerning protection, preservation and improvement of water bodies and safeguarding them against encroachment.[86] But here too, the underlying basis was human interests; according to the court, safe water protects health, increases the sense of well-being and improves productivity. Another formulation - the right to sweet water - was recognised as an attribute of the fundamental right to life by the High Court of Kerala in cases challenging the administration's scheme for augmentation of water supply by extraction of groundwater using pumps, as it would lead to seepage or intrusion of salinity in the available water resources.[87]

[80] See, for example, *Shajimon Joseph and Another v State of Kerala* 2007 (1) KLT 368 ¶¶5-6.

[81] See, for example, *PR Subas Chandran v Govt of AP and Others* (2001) 5 ALD 771 ¶26; *Hamid Khan v State of MP and Others* AIR 1997 Madhya Pradesh 191 ¶6.

[82] *Mahendra Prasad Sonkar and Another v State of UP and Others* (2004) 57 Allahabad LR 176 ¶13.

[83] ibid. See also *Hamid Khan* (n 81) ¶6.

[84] *Wasim Ahmed Khan v Government of AP* 2002 (2) ALD 264 (Division Bench) ¶1 & ¶9.

[85] *Vishala Kochi Kudivella Samarkshana Samithi v State of Kerala* 2006 (1) KLT 919 ¶3.

[86] *Shailesh R Shah v State of Gujarat* (2002) 3 GLR 447 ¶9.

[87] See, for example, *Attakoya Thangal* (n 32) ¶7; *FK Hussain v Union of India and Others* AIR 1990 Kerala 321 ¶7.

In a majority of these cases, an elaboration of the scope and content of the right is either absent or it is inadequate. Perhaps high courts are deferring to the discretion of the authorities to adopt standards laid down by the World Health Organisation or the Bureau of Indian Standards. In addition, there is an overwhelming focus on the availability of drinking water of a certain quality for human use failing which water-borne diseases compromise the rights to life and health in particular. Non-human uses are largely neglected.

3.3.4 Health hazard or a disturbance that is hazardous to life

The higher judiciary identified water pollution or poor water quality as a hazard to human health and life in the context of the CER. In RLEK (1985), the Court identified 'hazard' to people as one feature of an unhealthy environment, which also includes 'undue affectation' of water.[88] Water pollution and/or poor water quality is an undue affectation of water. Further, although the Court did not provide any guidance on how to determine 'avoidable hazard', the dictionary meaning of the noun 'hazard' is something dangerous or risky.[89] Read with the term 'avoidable', which suggests that the danger or risk is known, an avoidable hazard provides the basis for the application of the principle of prevention, but this was not done.

While the abovementioned case focused on hazard in the context of the natural environment, the High Court of Rajasthan established a link between sanitation and hazard to the life of the citizens. It identified the acute sanitation problem in a city, which took the form of dirt and filth caused *inter alia* by buffaloes tied on the road, as hazardous to the life of citizens.[90] The court then held that the failure to maintain health, and to preserve sanitation and environment 'adversely affects the life of the citizen and it amounts to slow poisoning and reducing the life of the citizen because of the hazards created, if not checked.'[91] According to the court, 'insanitation' leads to an early death.[92]

[88] RLEK (1985) (n 22) ¶12.

[89] See Bryan A Garner (ed), *Black's Law Dictionary* (10th edn Thomson Reuters 2014) 834.

[90] *Koolwal* (n 30) ¶1.

[91] ibid ¶3.

[92] ibid ¶1.

Here, a link with the traditional, restricted interpretation of the fundamental right to life is discernible.

The higher judiciary also discussed water pollution or poor water quality in terms of a disturbance. The Court discussed the quality dimension of the right to water in terms of 'any disturbance of water' that would be hazardous to the fundamental right to life.[93] The High Court of Rajasthan observed that the actions of the owners of industrial units caused disturbance to ecological balance.[94] Although the higher judiciary did not elaborate the meaning of the terms 'disturbance' and 'hazardous' in these cases, the noun 'disturbance' refers to an interruption whereas the adjective 'hazardous' involves danger or risk. Statutory definitions also provide some guidance. Under the Water (Prevention and Control of Pollution) Act, 1974, a disturbance includes pollution or contamination of water. Effluents causing water pollution or resulting in poor water quality may fit in the definition of 'hazardous substance' under the Environment (Protection) Act, 1986.

3.3.5 The right to sanitation

During the early 1980s, the higher judiciary identified certain components of sanitation in cases relating to public nuisance and the statutory obligations of authorities in respect of water supply, health and/or sanitation. These were not public interest litigations and the petitioners did not allege a violation of the fundamental right to life. Nevertheless these cases are being highlighted because the statutory obligations in respect of sanitation provide guidance in determining the components of the right to sanitation. First, the higher judiciary associated the absence of toilet facilities with the widespread practice of open defecation by slum-dwellers and poor people on the roadside or on open land, and identified the construction of public toilets by the authorities as the solution.[95] Second, it acknowledged the problems resulting from the inadequacy of toilet facilities at the household level, such as old insanitary latrines,[96] and the absence or inadequacy of

[93] Mehta-Nath II (n 32) ¶8.

[94] *Puniya* (n 29) ¶31.

[95] See *Ratlam* (n 7) ¶2; *Malhotra* (n 63) ¶14; *Mehta* (Kanpur Municipalities) (n 24) ¶20.

[96] *Koolwal* (n 30) ¶1.

mechanisms for collection and transportation of human waste.[97] Third, the higher judiciary identified the discharge of untreated or partly treated human waste into the environment due to the absence or inadequacy of off-site[98] or on-site[99] treatment facilities for human waste as the cause of groundwater pollution or pollution of surface water bodies, or both. Finally, it dealt with the components of a broader definition of sanitation, namely solid waste,[100] and waste accumulated at dairies.[101]

In addition to considering statutory duties relating to sanitation, the higher judiciary established a link between the fundamental right to life or the right to health and sanitation or the right to sanitation. The Court observed that the right to life with human dignity cannot be enjoyed without sanitation.[102] The High Court of Rajasthan held that insanitation undermined maintenance of health and preservation of sanitation,[103] while the High Court of Gujarat recognised 'adequate sanitation' as a 'basic' human right, which protects health, increases the sense of well-being and improves productivity.[104] However, like non-binding instruments of international human rights law (Chapter 2), the higher judiciary is silent on the meaning of terms such as 'sanitation', 'insanitation' and 'adequate' sanitation. In both sets of cases – concerning statutory duties and a constitutional right - the overwhelming focus on human life and health represents a restrictive, anthropocentric approach towards the right to sanitation.

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[97] See *Ratlam* (n 7) ¶2 (drain pipes with flow of water); *Rampal and Others v State of Rajasthan and Others* AIR 1981 Rajasthan 121 ¶1 (proper drainage or sewers to remove and discharge domestic water); *Citizens Action Committee, Nagpur v Civil Surgeon, Mayo (General) Hospital, Nagpur and Others* AIR 1986 Bombay 136 ¶2 (drain pipes with flow of water to wash the filth); *Malhotra* (n 63) ¶14 (separate sewage line from which filthy water may flow out as well as covered drains); *Mehta* (Kanpur Municipalities) (n 24) ¶19 (sewers of proper size to carry sewage smoothly through the sewerage system and a sewerage line).

[98] *Mehta* (Kanpur Municipalities) (n 24) ¶17.

[99] *Uma Shanmugham v State of Kerala and Others* WP (Civil) No. 25617 of 2011 (High Court of Kerala, Judgment of 26 March 2014).

[100] See, for example, *Dr BL Wadehra v Union of India and Others* (1996) 2 SCC 594.

[101] *Mehta* (Kanpur Municipalities) (n 24) ¶18. See also *Koolwal* (n 30) ¶1.

[102] *Virender Gaur* (n 16) ¶7.

[103] *Koolwal* (n 30) ¶3.

[104] *Shailesh R Shah* (n 86) ¶9. See also *Bhagwati Foundation and Others v Commissioner of MCD and Others* MANU/DE/9649/2006 (High Court of Delhi, Judgment of 31 October 2006) ¶2 (observing that '[s]anitation is undoubtedly a basic service which is a right…').

3.3.6 Procedural aspects of the rights

The procedural aspects of the environmental rights are relevant for the realisation of their substantive aspects in cases relating to water pollution and/or poor water quality. The higher judiciary traced certain procedural aspects of the environment and sanitation to fundamental rights guaranteed under the Constitution. In a case that did not concern water pollution/quality specifically, the Court held that the right to information and community participation for protection of environment and human health flows from Article 21 of the Constitution.[105] Even before the explicit recognition of the right to information as part of the fundamental right to life, the High Court of Rajasthan relied on the fundamental right to speech and expression in Article 19(1)(g) of the Constitution to recognise the right to information/knowledge about the activities/functioning of the State and its reasons for withholding information 'in the matter of sanitation and other allied matter'.[106]

The procedural right of access to information is not restricted to ensuring that the right-holders are informed about their substantive rights and the corresponding duties of the State, or the issues that may affect the realisation of, or violate, their rights. It is also viewed as a medium to ensure the discharge of responsibilities/duties by the right-holders. The Court recognised the need to create awareness of laws and of the statutory obligations of citizens as a mechanism to facilitate compliance,[107] and environmental awareness to ensure 'people's voluntary participation in environmental management'.[108] The High Court of Rajasthan recognised a basic human right to 'education about hygiene' that protects health, increases the sense of well-being and improves productivity.[109]

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[105] *Research Foundation for Science Technology National Resource Policy v Union of India and Another* (2005) 10 SCC 510 ¶16. See also *Tirupur Dyeing Factory Owners' Association v Noyyal River Ayacutdars Protection Association* (2009) 9 SCC 737 ¶27 (referring to the previous decisions of the Court).

[106] *Koolwal* (n 30) ¶3.

[107] *Mehta* (1992) (n 61) ¶3.

[108] *Karnataka Industrial Areas Development Board v C Kenchappa and Others* (2006) 6 SCC 371 ¶67.

[109] *Koolwal* (n 30) ¶9.

Some of the high courts also established a link between the implicit procedural right of access to information (education) of other citizens and the explicit right of access to judicial remedies on the one hand, and the duties of citizens on the other hand. The High Court of Madhya Pradesh identified the duty of citizens to take all steps to ensure that the members of the downtrodden strata are given education to live in proper healthy conditions.[110] The High Court of Rajasthan interpreted the fundamental duty of citizens to protect and improve the environment as their right to bring actions and inactions to the notice of courts and to ensure performance of the obligatory and primary statutory duties of the State.[111] Section 3.5 discusses the duties of citizens in more detail.

3.4 Shifting the anthropocentric frontier towards the environment

The higher judiciary is cognizant of the difference between anthropocentricism and eco-centricism. [112] This section examines the extent to which it acknowledges and accommodates concerns relating to other species and ecosystems, and thus exhibits a weak(er) anthropocentric approach.

3.4.1 Strong anthropocentrism of the right to environment

During the early years of public interest litigation, the higher judiciary interpreted the fundamental right to life to accommodate certain formulations of the right to environment, which emphasised the instrumental value of the environment. One formulation was the right to preservation, protection or conservation of natural resources.[113] The term 'natural resources' clearly includes water. Courts described water generally and rivers specifically as 'gifts of nature',[114] rivers as 'natural wealth',[115] and

[110] *Malhotra* (n 63) ¶11.

[111] *Koolwal* (n 30) ¶2.

[112] See, for example, *TN Godavarman Thirumulpad v Union of India* (2012) 3 SCC 277 ¶17.

[113] See *Kinkri Devi and Another v State of Himachal Pradesh and Others* AIR 1988 Himachal Pradesh 4 ¶8; *Intellectuals Forum* (n 52) ¶86; *FK Hussain* (n 87) ¶10.

[114] Mehta-Nath II (n 32) ¶4. See also *Puniya* (n 29) ¶31; *Bhawani Shankar Satpathy and Others v State of Orissa* 1996 (II) OLR 546 ¶6; *Janardhanam* (n 48) ¶15.

[115] *State of Tamil Nadu v Hind Stone* (1981) 2 SCC 205 ¶6.

tanks and ponds as 'material resources of the community' and 'nature's bounty'.[116] However, a perusal of these decisions reveals that this formulation was clearly motivated by an interest in ensuring the availability of natural resources for human use. The other formulation was the right to protection and preservation of ecology,[117] the environment,[118] or nature's gifts,[119] and environmental protection.[120] But the higher judiciary did not specify what precisely the right entails.[121] More recently, the National Green Tribunal (NGT) held that the right to a decent environment, as envisaged under Article 21 of the Constitution, implies a right against environmental degradation, which is in the form of a right to protect the environment.[122]

3.4.2 Towards weak anthropocentrism

Some court decisions illustrate the willingness of the higher judiciary to accommodate some purely environmental concerns. The Court incorporated the principle of inter-generational equity, which recognises the rights of future generations to natural resources and the environment, and the corresponding duties of the present generation not to exhaust them and to develop, preserve and conserve them, into domestic law.[123] Although the principle is primarily concerned with the rights of future generations of human beings, it can provide the legal basis for the consideration of environmental interests beyond its instrumental value to the present generation.

The higher judiciary also viewed the rights to environment and water through the lens of ecology or ecological/environmental balance. This provides a broader perspective vis-à-vis the environment than the components of the right to environment discussed in section 3.4.1. In RLEK (1985), the Court identified 'minimal disturbance of ecological balance'

[116] *Hinch Lal* (n 42) ¶13.

[117] *Kinkri Devi* (n 113) ¶8.

[118] ibid. See also *Virender Gaur* (n 16) ¶7.

[119] See *Janardhanam* (n 48) ¶15.

[120] *Intellectuals Forum* (n 52) ¶86; *Virender Gaur* (n 16) ¶7.

[121] Rajamani (n 2) 278.

[122] See *M/s Sterlite Industries (India) Ltd v Tamil Nadu Pollution Control Board and Others* Appeal Nos. 57-58 of 2013 (NGT - Principal Bench, Judgment of 8 August 2013) ¶113.

[123] *Hind Stone* (n 115) ¶6. See also *Rural Litigation and Entitlement Kendra and Others v State of Uttar Pradesh and Others* 1986 Supp SCC 517 [RLEK (1986)] ¶19; *Intellectuals Forum* (n 52) ¶84.

as a component of the right to live in a healthy environment.[124] This suggests that the Court was considering the health of the environment itself. In other words, it recognised the intrinsic value of the environment. At the same time, this right of the environment does not extend to undisturbed ecological balance; it permits 'minimum disturbance'. This echoes judicial practice in respect of the rights to pollution-free environment and water (section 3.3.2).

The High Court of Andhra Pradesh followed this decision of the Court, but proceeded to observe that it is 'the legitimate duty of the Courts…to forbid all action of the State and the citizen from upsetting the environmental balance'.[125] Anderson describes this as an absolutist approach, which 'might offer a path to a less anthropocentric approach if the right contemplated recognises the physical and biological environment as an end in itself rather than as a means to human survival'.[126] It is pertinent to mention, however, that this case related to the conversion of land, which was reserved as a recreational zone, for construction of residences.

Subsequent decisions emphasised the instrumental value of the environment and limited the scope of the right of the environment. In *Narmada Bachao Andolan v Union of India and Others*, the Court explicitly linked ecology with the enjoyment of the fundamental right to life and the right to health that forms its part. It held that 'any threat to ecology can lead to violation of the right to enjoyment of a healthy life guaranteed under Article 21.'[127] Although the Court first mentioned 'any' threat to ecology, the more plausible reading is that the Court was only concerned with threats that violate the right to a healthy life.[128]

In another set of cases, the Court established a link between ecological balance and protection or preservation, and degradation or pollution, of natural resources such as water bodies. At the same time, it highlighted the adverse effects on either drinking water

[124] *RLEK* (1985) (n 22) ¶12. See also Mehta-Nath II (n 32) ¶¶9-10.

[125] *Damodhar Rao* (n 23) ¶25.

[126] Anderson, 'Individual Rights to Environmental Protection in India' (n 1) 217-18.

[127] (2000) 10 SCC 664 ¶1 & ¶77.

[128] See also Rajamani (n 2) 278.

supply or health or both, thus reflecting an instrumental approach. In the first category of cases, the Court observed that material resources of the community like tanks and ponds 'maintain delicate ecological balance',[129] and it identified several relevant factors for the purpose of maintenance of ecology including water quality and impact on human health.[130] In the second category of cases, the Court equated ecological balance with freedom from water pollution,[131] and observed that ecological balance may be disturbed 'either by running the industries or any other activity which has the effect of causing pollution in the environment'.[132] Along similar lines, the High Court of Rajasthan held that the emission of untreated wastewater by the industrial units had disturbed ecological balance by 'causing disturbance to one of the basic environmental elements, namely water'.[133]

3.4.3 Recognition of link between quantity and quality of the right to water

In the past decade, the higher judiciary began to acknowledge the inverse relationship between the quantity of water and water pollution or poor water quality of surface water sources. In *Comdr Sureshwar D Sinha and Others v Union of India and Others*, the Court directed the High Powered Committee of the government to release freshwater in the river Yamuna to maintain the minimum flow.[134] More recently, in *Manoj Misra v Union of India and Others*, another case concerning the river Yamuna, the NGT observed that the 'carrying capacity of the river has a direct co-relation to the availability of quantity of water'.[135] It directed certain state governments to fix the quantity of water that should be released throughout the year to ensure the environmental/minimum flow of the river Yamuna and the prevention and control of pollution, as well as to provide clean and wholesome water for the use of the residents of Delhi.[136] More generally, the High Court

[129] *Hinch Lal* (n 42) ¶13.

[130] *ND Jayal and Another v Union of India and Others* (2004) 9 SCC 362 ¶49, ¶53 & ¶55.

[131] *Virender Gaur* (n 16) ¶7.

[132] Mehta-Nath II (n 32) ¶10.

[133] *Puniya* (n 29) ¶31.

[134] WP (Civil) No. 537 of 1992 (Supreme Court of India, Order of 14 May 1999).

[135] *Manoj Misra v Union of India and Others* OA No. 6 of 2012 (NGT - Principal Bench, Judgment of 13 January 2015) [*Misra* (2015)] ¶85. See also Baldev *Singh* (n 71) ¶52.

[136] *Misra* (2015) (n 135) ¶73.

of Uttarakhand recognised the 'basic right' of all the rivers to maintain their purity and to maintain free and natural flow.[137]

Courts have also recognised the link between certain activities and the quantity of surface water. First, storm water drains – both natural and man-made – are intended to carry rainwater through drains into water bodies. They improve the assimilative capacity of rivers. The NGT has recognised that the conversion of storm water drains into storm and wastewater drains makes them a contributor to the problem of water pollution rather than a part of the solution where they lead to an increase in the quantity of available water.[138] Second, encroachments, stone crushing and sand mining operations in the riverbed and floodplain and siltation interfere with the maintenance of minimum environmental or natural flow of water. Courts have directed concerned authorities, for example, to put an end to development activities,[139] pay damages for the construction of semi-permanent or temporary structures on land in the floodplain of a river, [140] or to remove encroachments[141] that obstruct or interfere with the natural flow of water. Third, an increase in the availability of groundwater reduces the over-exploitation of surface water sources, thus increasing their assimilative capacity. Riverbeds and floodplains, as well as storm water drains, contribute to groundwater recharge. The High Court of Delhi accepted the petitioners' argument that 'the construction [of the Commonwealth Games Village] would have irreversible impact and cause permanent damage to the ecologically fragile environment of the river Yamuna, its bed, banks, basin and floodplain.'[142] The petitioners also highlighted the need to protect the health of the citizens, the river and the environment. [143] The NGT has also adjudicated cases concerning the covering or concretisation of storm water drains.[144]

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[137] *Lalit Miglani v State of Uttarakhand and Others* WP (Civil) No. 140 of 2015 (High Court of Uttarakhand, Judgment of 2 December 2016) ¶76.

[138] ibid ¶9.

[139] ibid ¶83.

[140] *Manoj Misra v Delhi Development Authority and Others* OA No. 65 of 2016 (NGT - Principal Bench, Order of 9 March 2016) [*Misra* (2016)] ¶7.

[141] See, for example, *MC Mehta v Kamal Nath and Others* (1997) 1 SCC 388 ¶21.

[142] *Rajendra Singh and Others v Government of NCT of Delhi and Others* WP (Civil) No. 7506 of 2007 (High Court of Delhi, Judgment of 3 November 2008) ¶6. However, the Supreme Court overturned the decision. See *Delhi Development Authority v Rajendra Singh and Others* (2009) 8 SCC 582.

[143] *Rajendra Singh* (n 142) ¶6.

[144] *Misra* (2015) (n 135) ¶61.

3.4.4 Weak(er) anthropocentrism and the right of the environment

Human interests remain a primary consideration in court decisions, and there is no explicit recognition of the right of the environment or nature or its components. At the same time, the higher judiciary recognised, and in some cases proceeded to accommodate, non-human interests. The Court identified water as one of the most vital necessities of life.[145] The High Court of Rajasthan recognised that water plays a key role for life on earth,[146] and described water as 'one of the basic environmental elements…which is so very necessary for existence of living creatures, including human beings, animals, birds, flora and fauna'.[147] The High Court of Delhi discussed the 'destruction of the bio-ecological system of river Yamuna'.[148] More recently, the NGT directly acknowledged the anthropocentric threats posed to non-human life in rivers. It observed that pollution threatens life of endangered aquatic species such as dolphins, turtles, etc.[149]

The recognition of the right of the environment or its components leads to the question of representation of right-holders in court proceedings relating to the non-realisation or violation of their right. The NGT recognised human beings as the legal representative of the environment on the basis of the fundamental duty of citizens and its interpretation of the parties to the dispute in an environmental litigation. In one case, after observing that environmental pollution affects every living being, the NGT highlighted the fundamental duty of every citizen under Article 51A(g) of the Constitution to protect and improve the environment 'having regard to all living creatures.'[150] In another case, the NGT identified a peculiar feature of environmental litigation, that is, the 'lis' (or the dispute) is between

[145] *Mehta* (2004) (n 33) ¶46.

[146] See, for example, *DM Singhvi v Union of India* AIR 2005 Rajasthan 280 ¶10.

[147] *Puniya* (n 29) ¶31.

[148] *Baldev Singh* (n 71) ¶54.

[149] *Krishan Kant Singh v National Ganga River Basin Authority* 2014 SCC Online NGT 2364 ¶1.

[150] *Sandeep Lahariya v State of MP and Others* OA No. 4 of 2013 (NGT - Central Zone Bench, Judgment of 11 November 2013) ¶19.

the environment and its alleged polluter.[151] According to the Tribunal, 'rivers, mountains, trees, birds, flora…speak through human beings.'[152]

Yet the more direct recognition of the right of the environment/nature and the identification of the representative of the right-holder can be traced to two decisions where the High Court of Uttarakhand invoked its *parens patriae* jurisdiction in order to preserve and conserve water resources, among other natural resources. The court granted the status of a living person, including all corresponding rights, duties and liabilities, to 'the Rivers Ganga and Yamuna, all their tributaries, streams, every natural water flowing with flow continuously or intermittently of these rivers',[153] and to glaciers, rivers, streams, rivulets, lakes, wetlands, springs and waterfalls in the State.[154] Then it declared certain authorities and individuals as the persons in *loco parentis* who were to act as the human face to protect, conserve and preserve these water resources, to uphold their status and to promote their health and well-being. Notwithstanding the potentially far-reaching implications of these decisions, operational issues persist. These two decisions do not elaborate the rights and duties of the water resources as legal persons, or the manner in which the persons in *loco parentis* are required to discharge their obligations.[155] Further, broad definitions of harm underpin the right and raise doubts about the successful implementation of these decisions.[156]

3.5 Duties of citizens

[151] *Mr SK Shetye and Another v Ministry of Environment and Forests and Others* OA No. 17(THC) of 2013 (NGT - Western Zone Bench, Judgment of 29 May 2014) ¶25.

[152] ibid.

[153] *Mohd Salim v State of Uttarakhand and Others* WP (PIL) No. 126 of 2014 (High Court of Uttarakhand, Order of 20 March 2017) ¶19. The Supreme Court subsequently stayed this order. See *State of Uttarakhand and Others v Mohd Salim and Others* SLP No. 16897 of 2017 (Supreme Court of India, Order of 7 July 2017).

[154] *Lalit Miglani v State of Uttarakhand and Others* CLMA No. 3003 of 2017 in WP (PIL) No. 140 of 2015 (High Court of Uttarakhand, Order of 30 March 2017).

[155] Erin L O'Donnell, 'At the Intersection of the Sacred and the Legal: Rights for Nature in Uttarakhand, India' (2017) 30(1) Journal of Environmental Law 135. See also Ashish Kothari and Shrishtee Bajpai, 'We Are the River, the River is Us' (2017) 52(37) Economic and Political Weekly 103; Shibani Ghosh, 'COMMENT: The River as Being' The Hindu (27 March 2017) <www.thehindu.com/opinion/op-ed/the-river-as-being/article17668210.ece>.

[156] O'Donnell (2017) (n 155); Kothari and Bajpai (n 155).

Citizens are the holders of the CER. Industries, operations and processes as well as individuals are also required to discharge certain statutory obligations, which can prevent or control water pollution and/or maintain or improve water quality. This section examines the sources from which the higher judiciary derived the duties of the right-holders, including the fundamental duty of citizens, as laid down in Article 51A(g) of the Constitution. In order to identify the nature of the duties, the section draws on the tripartite typology of obligations of the State relating to human rights (Chapter 2).

The higher judiciary established a clear link between the fundamental duty to protect and improve the natural environment under Article 51A(g) of the Constitution, the CER, and water pollution and/or poor water quality. The Court described this fundamental duty as a positive duty.[157] One way of discharging this duty is to draw the attention of the judiciary to cases of water pollution and/or poor water quality resulting from the action or inaction of the State or private actors.[158] This is similar to the positive obligation to protect human rights, which relates to the actions or inactions of third parties.

The fundamental duty to protect and improve the environment also displays the characteristics of the negative obligation to respect human rights, which is based on non-interference. According to the High Court of Rajasthan, this negative duty is breached by '[a]ny person who disturbs the ecological balance or degrades, pollutes and tinkers with the gifts of the nature such as air, water, river, sea and other elements of the nature…'.[159] The court held that the owners of the industrial units caused disturbance to the ecological balance by emitting untreated effluents and 'depriving the citizens of access to unpolluted ground water'.[160] The High Court of Gujarat held that the discharge of effluents from the petitioners' factories on public road and/or in the public drainage system runs contrary to the fundamental duty to protect the natural environment.[161]

[157] See *Mehta* (Lakes) (n 49) ¶10. See also Jona Razzaque, *Public Interest Environmental Litigation in India, Pakistan and Bangladesh* (Kluwer Law International 2004) 73.

[158] See, for example, RLEK (1986) (n 123) ¶20. See also *Koolwal* (n 30) ¶2; *Janardhanam* (n 48) ¶32.

[159] See *Puniya* (n 29) ¶31. See also Mehta-Nath II (n 32) ¶4 (where a similar argument was advanced by the petitioner).

[160] *Puniya* (n 29) ¶4.

[161] *M/s Abhilash Textile and Others v The Rajkot Municipal Corporation* AIR 1988 Gujarat 57 ¶7.

In some cases, the fundamental duty to protect and improve the environment encompasses both positive and negative characteristics. The Court observed that every citizen must undertake the fundamental duty to preserve the environment and to keep ecological balance unaffected.[162] The Court extended the scope of the fundamental duty to preserve and safeguard the rivers and lakes and all the other water resources of the country,[163] and to maintain hygienic environment.[164]

In a few cases, courts have extended the scope of the fundamental duty to have compassion for living creatures in Article 51A(g) of the Constitution to other human beings. According to the High Court of Bombay, this fundamental duty imposes an obligation on the devotees/pilgrims visiting a city not to create dirt and pollute/destroy the environment by open-defecation in open spaces and on the banks of a river.[165] This is akin to the negative obligation to respect human rights.

The higher judiciary also reinforced the duties of right-holders with basic concepts of environmental law, such as the principle of inter-generational equity and the public trust doctrine. In one case, the Court referred to the 'accepted social principle that all human beings have a…duty of ensuring that resources are conserved and preserved in such a way that present and future generations are aware of them equally'.[166] In another case, the Court acknowledged the inter-generational dimension of the public trust doctrine and imposed a positive obligation on every right-holder to use water and associated natural ecosystems in a manner that does not impair or diminish the long-term interest and enjoyment of future generations.[167]

[162] See, for example, RLEK (1986) (n 123) ¶20.

[163] *Kinkri Devi* (n 113) ¶6.

[164] *Virender Gaur* (n 16) ¶7.

[165] See *Campaign against Manual Scavenging v State of Maharashtra and Others* 2015 SCC OnLine Bombay 3834 ¶18 (referring to order of 3 July 2014). See generally, on compassion for other living beings, *State of West Bengal and Others v Sanjeevani Projects (P) Ltd and Others* (2006) 1 Cal HCN 241 ¶16(3).

[166] *Intellectuals Forum* (n 52) ¶84.

[167] See *Fomento Resorts and Hotels Limited and Another v Minguel Martins and Others* (2009) 3 SCC 571 ¶¶54-55.

Also in the context of the public trust doctrine, the High Court of Gujarat discussed the fundamental duty of the beneficiaries of the trust to protect and improve lakes and ponds.[168] The Court recognised the negative duty of the holder of land for agricultural purposes to respect the rights of his neighbors by not discharging effluents in such a manner so as to affect their right to use water for their own purposes or contaminating groundwater to cause damage to their agricultural fields.[169] However, courts did not extend the duties of right-holders to operationalise the polluter pays principle and to make them pay for the negative impacts of water pollution and/or poor water quality resulting from their actions, as is the case where statutory duties are violated.

In addition to establishing links between fundamental duties, the CER, and water quality, as well as reinforcing the duties of right-holders with concepts of environmental law, courts have identified certain other duties of citizens. The High Court of Punjab and Haryana identified the duty of citizens in respect of sustainable consumption and reuse of treated wastewater (rather than use of groundwater) for non-potable purposes.[170] The Court referred to the 'sacred duty of all those who reside or carry on business around the river Ganga to ensure the purity of Ganga'.[171] More generally, courts have referred to 'the task, social obligation…to preserve the environment and to keep ecological balance unaffected,[172] 'the natural law obligation to protect and preserve the environment'[173] and 'social duty to respect the nature, natural resources and protect environment and ecology'.[174]

Thus, the higher judiciary identified multiple sources of the duties. Usually, these duties support the realisation of the CER. However, the higher judiciary appears to be extending its creative interpretation of constitutional provisions to attach greater emphasis to the

[168] *Shailesh R Shah* (n 86) ¶29.

[169] *State of West Bengal v Kesoram Industries Ltd* (2004) 10 SCC 201 ¶388; *Madireddy Padma Rambabu and Others v District Forest Officer, EG District and Others* (2002) 3 ALT 57 ¶36.

[170] See, for example, *Sunil Singh v Ministry of Environment and Forests and Others* WP (Civil) No. 20032 of 2008 (High Court of Punjab & Haryana, Order of 24 December 2010).

[171] *Mehta* (Kanpur Tanneries) (n 24) ¶22.

[172] See, for example, RLEK (1986) (n 123) ¶20.

[173] *Techi Tagi Tara v Rajendra Singh Bhandari and Others* 2017 SCC OnLine Supreme Court 1165 ¶3.

[174] *Dattatraya Hari Mane and Others v State of Maharashtra and Others* 2014 SCC OnLine Bom 1657 (High Court of Bombay) ¶60.

discharge of certain duties by citizens as a corollary to the enjoyment of the justiciable CER. This is a matter of great concern if it results in shifting the regulatory burden from the government to the public and/or the dilution of the accountability of the government in respect of the discharge of its duties (Chapter 4).

Conclusion

This chapter focuses on the recognition of the CER by the higher judiciary generally, and the determination of their scope and content in cases relating to water pollution/quality specifically. It finds that the higher judiciary does not operate in a legal vacuum. The recognition of the CER or their components as a part of the constitutional schema is attributable to the creative interpretation of three sets of constitutional provisions, namely fundamental rights, the DPSP and the fundamental duties of citizens.

The higher judiciary also determined the scope and content of the CER or their components. The Court's expansion of the scope of the fundamental right to life beyond actual deprivation of life played a key role in cases relating to water pollution/quality where death is not the only adverse impact. However, the adoption of a (selective) anthropocentric approach limits the potential of environmental rights litigation as a solution to the problem of water pollution. The rights to pollution-free environment and water are a misnomer. The higher judiciary identified referents for the acceptable level of pollution. It relied on adjectives to describe the rights to environment and water without elaborating their meaning. Often high courts recognised the right to water in cases relating to the poor quality of drinking water supply, which is a constitutional or statutory duty of the State. The higher judiciary identified an unhealthy environment and the failure to preserve the environment and sanitation as a hazard, and water pollution as a hazardous disturbance. However, this was not followed by an explicit or implicit reference to the principle of prevention. Sanitation was recognised as a component of the statutory duties of authorities as well as a right. In the former case, it was narrowly defined, and there was no elaboration of its scope and content in the latter case.

The higher judiciary is gradually expanding the scope and content of the CER or their components to accommodate purely environmental considerations, such as the right of the environment. But an anthropocentric approach is discernible in most cases; human

life and health form the primary focus and the environment has instrumental value. This illustrates the limits of the rights-based approach in achieving environmental objectives.

The higher judiciary also fleshed out the duties of right-holders from multiple sources - the Constitution, legislation, basic concepts of environmental law, natural law and even the social contract. To the extent that these duties are viewed as non-justiciable responsibilities of citizens, they can support the realisation of the measures adopted by the State for the discharge of its duties corresponding to the CER. But they cannot form a precondition for, or a justification for the failure of, the State to discharge its duties. Similarly, the higher judiciary determined the scope and content of the procedural right to information with reference to fundamental rights as well as a precursor for the discharge of statutory or fundamental duties by citizens.

The State is the primary duty-bearer in respect of the CER. The recognition of the CER and the determination of their scope and content must be followed by identification of the duty-bearers and determination of the nature, scope and content of their duties corresponding to the rights. The next chapter examines the higher judiciary's engagement with this aspect.

CHAPTER 4
IDENTIFYING AND DETERMINING THE DUTIES OF THE STATE

Introduction

Chapter 3 examined the recognition of the constitutional environmental rights (CER) and the determination of their scope and content by the higher judiciary. The identification of the corresponding duties as well as duty-bearers is essential in order to grant judicial remedies that guarantee the rights or redress their non-realisation or violation and ensure the prevention and control of water pollution and/or the maintenance and improvement of water quality. The duty-bearers corresponding to socio-economic rights, which include the CER, are the state and private individuals and entities.[1] In cases alleging a violation of one or more of the CER and raising the issue of water pollution and/or poor water quality, which are filed as writ petitions under Article 32 or Article 226 of the Constitution of India, the State[2] is identified as the primary duty-bearer. Ministries of the Central Government, departments of the State Government, the Central Pollution Control Board, the State Pollution Control Board or the Pollution Control Committee, or local authorities, among others, are identified as the first respondent. Non-State actors - polluting industries or individuals - may be included as additional respondents.

This chapter sheds light on the duties of the State corresponding to the CER, explicitly or implicitly, which have a bearing on water pollution and/or poor water quality, as well as the nature, scope and content of these duties, as determined by the higher judiciary. It analyses these duties through the lens of the tripartite typology of obligations of the State relating to human rights (Chapter 2, section 2.2.2) (the tripartite typology). The duties of citizens were discussed in Chapter 3, while the duties of non-State actors underpin some of the judicial remedies discussed in Chapters 5 and 6.

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[1] See Tim Hayward, 'Constitutional Environmental Rights: A Case for Political Analysis' in Andrew Light and Amer De Shalit (eds), *Moral and Political Reasoning in Environmental Practice* (The MIT Press 2003) 111.

[2] The Constitution of India defines the 'State' as follows:

> …unless the context otherwise requires, the State includes the Government and Parliament of India and the Government and the Legislature of each of the States and all local or other authorities within the territory of India or under the control of the Government of India.

See Constitution of India art 12.

The first section outlines the sources of law in respect of the duties of the State and the reasons for relying on the tripartite typology as the analytical framework. Based on the interpretation of constitutional and statutory provisions by the higher judiciary, the next section examines the substantive aspects of the duties of the State. The third section focuses on the higher judiciary's engagement with certain basic concepts of environmental law in order to elaborate the duties of the State. In addition to the substantive aspects of the CER, the higher judiciary identified the duties of the State that complement or substitute the procedural aspects of the CER. This forms the subject matter of the last section.

4.1 Sources of the duties

The duties of the State corresponding to the CER, which have a bearing on water pollution and/or poor water quality, can be traced to at least two sources of law, which were also discussed in Chapter 3. All of these duties do not explicitly correspond to the CER but their performance contributes to the realisation of the CER or provides the basis for redress in case of their violation, besides ensuring the prevention and control of water pollution and/or the maintenance and improvement of water quality.

First, certain duties of the State are laid down in the Directive Principles of State Policy (DPSP) embodied in Part IV of the Constitution. According to Article 37 of the Constitution, the DPSP are to be applied in the making of domestic legislation. At the very least, the State is required to discharge its constitutional duty to 'direct its policy towards securing that the ownership and control of the material resources of the community are so distributed as best to sub-serve the common good' (Article 39(b) of the Constitution), to improve public health (Article 47 of the Constitution), and to protect and improve the environment (Article 48A of the Constitution) by enacting appropriate laws and ensuring their implementation.

The Environment (Protection) Act, 1986 (EPA) and the Water (Prevention and Control of Pollution) Act, 1974 (WPCPA) as well as the secondary legislation made thereunder are enacted in furtherance of the constitutional duty to protect and improve the

environment.[3] Specifically, the EPA provides for the protection and improvement of the environment, while the WPCPA provides for the prevention and control of water pollution and the maintenance or restoration of wholesomeness of water. Legislation also ensures that the ownership and control of water resources, which are material resources of the community, sub-serve the common good. The laws governing local authorities and public health laws, which are enacted by State Governments in the exercise of the power vested in them by Article 246 read with List II of the Seventh Schedule of the Constitution, discharge the constitutional duty to improve public health and to protect and improve the environment. These laws were discussed in Chapter 1, section 1.2.2.

Second, the higher judiciary traced the duties of the State, which correspond to the fundamental right to life, to legislation. In one case, the Court directed the State to implement legislation, which invest 'the right to live with basic human dignity with concrete reality and content', as inaction would amount to denial of the fundamental right.[4] As discussed in Chapter 3, the higher judiciary's expansive interpretation of Article 21 of the Constitution as well as a combined reading of Parts III, IV and IVA of the Constitution led to the inclusion of the CER in the Constitution. So, the duties of the State corresponding to the CER can be traced to existing legislation that contribute to the realisation or redress violation(s) of the fundamental right to life.

The higher judiciary identified two additional sources of the duties of the State. Water is an integral component of environmental law and many of the principles of environmental law, such as prevention, precaution and intra- and inter-generational equity, the public doctrine as well as the concept of sustainable development (together, basic concepts) apply to cases relating to water pollution and/or poor water quality. The creativity of the Supreme Court is evident from the manner in which it read these basic concepts of environmental law into domestic environmental jurisprudence – as a part of Article 21 of the Constitution and/or the EPA/WPCPA – by relying on their understanding in international environmental law and/or in other jurisdictions.[5] The higher judiciary

[3] See *Research Foundation for Science (18) v Union of India and Another* (2005) 13 SCC 186 ¶26. See also Shyam Divan and Armin Rosencranz, *Environmental Law and Policy in India: Cases, Materials and Statutes* (2nd edn Impression OUP 2002) 59.

[4] *Bandhua Mukti Morcha v Union of India and Others* (1984) 3 SCC 161 ¶10.

[5] See *Vellore Citizens' Welfare Forum v Union of India and Others* (1996) 5 SCC 647 ¶11 (precautionary principle) & ¶¶10-14 (sustainable development); *State of Himachal Pradesh v Ganesh Wood Products*

directed the State to follow these basic concepts, or to ensure that they are not violated, while discharging its constitutional and statutory duties, which correspond to the CER. Further, as discussed in Chapter 2, international law identifies the obligations of the State corresponding to the procedural aspects of the rights to environment, sanitation and water, especially the duty to promote, in the tripartite typology. The higher judiciary also weighed in on these procedural aspects of the duties of the State.

Chapter 2 illustrated the wide acceptance and application of the tripartite typology in international human rights law. But the higher judiciary does not refer to, or apply international human rights law often, especially in relation to socio-economic rights.[6] Further, opinion is divided in respect of the extent of the higher judiciary's engagement with the tripartite typology. Writing about the right to water, some authors are of the view that courts in India have dealt with all three types of obligations.[7] According to others, there is an overwhelming focus on certain obligations.[8] Nevertheless scholars consider General Comments as a relevant framework for analysis and for the further development of certain rights.[9] Therefore, this chapter relies on the tripartite typology as a baseline to examine the relative development of domestic jurisprudence in respect of the duties of the State corresponding to the CER in cases relating to water pollution/quality.

To recall, the tripartite typology comprises the following obligations:

- The negative *obligation to respect* is understood as the traditional duty of non-interference with the enjoyment of the rights.[10]

(1995) 6 SCC 363 ¶46 (inter-generational equity); *MC Mehta v Kamal Nath and Others* (1997) 1 SCC 388 ¶25 [Mehta-Nath I] (public trust doctrine).

[6] S Muralidhar, 'Judicial Enforcement of Economic and Social Rights: The Indian Scenario' in Fons Coomans (ed), *Justiciability of Economic and Social Rights – Experiences from Domestic Systems* (Intersentia 2006) 367.

[7] See Inga T Winkler, *The Human Right to Water: Significance, Legal Status and Implications for Water Allocation* (Hart Publishing 2012) 243.

[8] Anonymous, 'Note: What Price for the Priceless?: Implementing the Justiciability of the Right to Water' (2007) 120(4) Harvard Law Review 1067, 1085. See also Alix Gowlland Gualtieri, 'International Human Rights Aspects of Water Law Reforms' in Philippe Cullet, Alix Gowlland-Gualtieri, Roopa Madhav, and Usha Ramanathan (eds) *Water Law for the Twenty-First Century: National and International Aspects of Water Law Reform in India* (Routledge 2010) 249.

[9] See, for example, Philippe Cullet, *Water Law, Poverty, and Development – Water Sector Reforms in India* (OUP 2009) 54 (referring to General Comment No. 15 on the right to water).

[10] Matthew CR Craven, *The International Covenant on Economic, Social and Cultural Rights: A Perspective on Its Development* (OUP 1995) 109; Asbjørn Eide, 'Economic, Social and Cultural Rights

- The positive *obligation to protect* requires the State to prevent third parties from interfering with the enjoyment of the rights.[11]
- The positive *obligation to fulfil* requires the State to adopt necessary measures for the full realisation of the rights.[12] It further comprises of three obligations:
    - The *obligation to facilitate* requires the State to take positive measures in order to enable and assist individuals and communities to enjoy their rights.[13]
    - The State has an *obligation to provide* the rights as a last resort when individuals or a group are unable, for reasons beyond their control, to realise their rights themselves by the means at their disposal.[14]
    - The *obligation to promote* 'refers to bringing about changes in the perception and understanding of human rights'.[15]

4.2 Substantive duties, the tripartite typology and beyond

This section examines the nature, scope and content of the constitutional and statutory duties of the State, which have a bearing on water pollution and/or poor water quality in India, and correspond to the CER, explicitly or implicitly, through the lens of the tripartite typology, as reflected in the decisions of the higher judiciary.

4.2.1 Article 21 of the Constitution and the negative duty to respect

The higher judiciary recognised the duty to respect the rights to environment and water, albeit in a few cases, and linked it to the traditional manifestation of the fundamental right to life as a negative right. The Court held that the recognition of the right to a healthy

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as Human Rights' in Asbjørn Eide, Catarina Krause, and Allan Rosas (eds), *Economic, Social and Cultural Rights: A Textbook* (2nd edn Martinus Nijhoff 2001) 23.

[11] Craven (n 10) 109; Eide (n 10) 24.

[12] ibid.

[13] Sandra Fredman, *Human Rights Transformed: Positive Rights and Positive Duties* (OUP 2008) 69.

[14] See Henry Shue, *Basic Rights: Subsistence, Affluence and US Foreign Policy* (2nd edn Princeton University Press 1996) 57; Eide (n 10) 24; Craven (n 10) 109.

[15] Magdalena Sepulveda Carmona, *Nature of the Obligations Under the International Covenant on Economic, Social and Cultural Rights* (Intersentia 2003) 164.

environment imposes a duty not to cause more than minimal disturbance of ecological balance,[16] or adversely affect (in any serious way) ecology, ecological balance or the environment.[17] As in the case of the right to pollution-free environment and water (Chapter 3, section 3.3.2), the Court appears to envisage a threshold at which the duty applies – it permits minimal disturbance of ecological balance and activities that do not adversely and seriously affect ecology, ecological balance or the environment. In another case, a scheme for groundwater extraction, which was evolved by the administration to augment drinking water supply, was challenged on the ground that it would lead to seepage or intrusion of salt water in the available water resources and infringe the rights under Article 21 of the Constitution.[18] The High Court of Kerala held that 'the administrative agency cannot be permitted to function in such a manner as to make inroads, into the fundamental right under Article 21.'[19] At the same time, the State was not required to undertake any action to change the status of the 'environment', 'ecology', 'ecological balance' or 'water bodies', where they are already degraded or polluted. This limits the contribution of the duty to respect to the realisation of the CER or to redress their violation.

4.2.2 Article 48A of the Constitution, the duty to protect and beyond

Article 48A of the Constitution states: 'The State shall endeavour to protect and improve the environment'. In common parlance, to 'protect' something means to keep it safe from harm or damage, and to 'improve' something means to make it better. In other words, Article 48A of the Constitution imposes both positive and negative duties on the State. Accordingly, the higher judiciary's interpretation of the nature, scope and content of the duties of the State under this constitutional provision, individually and collectively, reflects the positive and negative elements of the tripartite typology.

[16] See *Rural Litigation and Entitlement Kendra, Dehradun and Others v State of UP and Others* (1985) 2 SCC 431 ¶12.

[17] See *Rural Litigation and Entitlement Kendra and Others v State of Uttar Pradesh and Others* 1986 Supp SCC 517 [RLEK (1986)] ¶10, ¶19 & ¶20.

[18] *FK Hussain v Union of India and Others* AIR 1990 Kerala 321 ¶2.

[19] ibid ¶7.

The most direct expression of the constitutional duty of the State takes the form of the duty to protect the environment[20] and ecological balance,[21] which includes water sources, from the actions of third parties. The Court stipulated that it is the duty of the State 'to take effective steps to protect the guaranteed constitutional rights', which include the right to pollution free water.[22] The higher judiciary also reiterated the statutory duty of the State in respect of management of industrial effluents before final disposal into water bodies. It linked this duty to the duty of the State to protect sources of drinking water from pollution,[23] and to 'keep the rivers in the country pure and clean so that the water there is drinkable and free of diseases'.[24] The High Court of Rajasthan held that the duty to protect the health of the residents who live in unhygienic conditions required the State to close unauthorised slaughterhouses in residential areas.[25]

In addition, the Court relied on the constitutional duty of urban local bodies in respect of 'public health, sanitation conservancy and solid waste management' to hold them responsible for the operation of common effluent treatment plants for industrial effluents.[26] The discharge of this constitutional duty involves the positive duty to protect the CER from the actions of third parties in terms of the tripartite typology, as well as the positive duty to fulfil the CER, which is viewed as an element of the tripartite typology as well as beyond it. All of these pronouncements reflect the preventive function of the duty to protect in the tripartite typology.

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[20] See *Virender Gaur and Others v State of Haryana and Others* (1995) 2 SCC 577 ¶7. See also *Vellore* (n 5) ¶20; *Hinch Lal Tiwari v Kamala Devi* (2001) 6 SCC 496 ¶14; *Kinkri Devi and Another v State of Himachal Pradesh and Others* AIR 1988 Himachal Pradesh 4 ¶6.

[21] See generally *Indian Council for Enviro-Legal Action v Union of India and Others* (1996) 5 SCC 281 [ICELA (1996)].

[22] *Charan Lal Sahu and Others v Union of India and Others* (1990) 1 SCC 613 ¶137 (concurring opinion of KN Singh, J).

[23] See, for example, *Vellore* (n 5) ¶20. See also *AP Pollution Control Board II v Prof MV Nayudu (Retd) and Others* (2001) 2 SCC 62 [APPCB II] ¶45. See also *PR Subas Chandran v Govt of AP and Others* (2001) 5 ALD 771 (Division Bench) ¶26 (holding that 'the role of the State to …protect water from getting polluted' is 'a fundamental Directive Principle in the governance of the State' as well as 'a penumbral right under Article 21 of the Constitution').

[24] *Mahendra Prasad Sonkar and Another v State of UP and Others* (2004) 57 Allahabad LR 176 ¶13.

[25] *Residents of Sanjay Nagar and Others v State of Rajasthan and Others* AIR 2004 Rajasthan 116 ¶11.

[26] See *Paryavaran Suraksha Samiti and Another v Union of India and Others* (2017) 5 SCC 326 ¶10. This obligation is laid down in item 6 of the Twelfth Schedule of the Constitution.

Second, the higher judiciary identified certain positive duties of the State that do not fit within the tripartite typology. This is perhaps unsurprising given that Article 48A of the Constitution engages more directly with the right to environment than the tripartite typology. It does not merely impose a duty to protect; it also includes a duty to improve the environment. Based on a combined reading of the phrase 'protect and improve' in Article 48A of the Constitution, the High Court of Madras observed that the provision 'appears to contemplate affirmative governmental action to improve the quality of the environment and not just to preserve the environment in its degraded form.'[27] This interpretation of the duty stands in sharp contrast with the negative duty to respect, which is restricted to preservation of the environment in its degraded form. The court also introduced some elements of the duty to fulfil the CER, as understood within the tripartite typology, but went further in terms of the scope of the positive duty.

Third, like the use of different adjectives as prefixes to describe the rights to environment and water, the higher judiciary used different verbs to describe the duties of the State under Article 48A of the Constitution. In addition to the verbs 'protect' and 'improve', which are explicitly stated in Article 48A of the Constitution, the higher judiciary relied on the verbs 'maintain', 'promote', 'preserve', 'retain', 'develop', 'ensure' and 'safeguard'. Such use may appear to widen the scope of the duties beyond the tripartite typology. However, most of these verbs are synonyms for the verb 'protect' used in Article 48A of the Constitution and therefore, the discharge of the duties of the State, although described differently, may require the adoption of similar measures.

The higher judiciary recognised the duty to maintain ecological balance,[28] natural resources providing for water shortage facilities,[29] or the nature and character of the wetlands in their present form.[30] *Prima facie*, the duty to maintain suggests that there should be no interference with the *status quo* akin to the negative duty to respect and the positive duty to protect from the actions of third parties. But the courts also imposed

[27] *MK Janardhanam v The District Collector and Others* 2003 (1) LW 262 (Madras) ¶26.

[28] See *Virender Gaur* (n 20) ¶7; *Hinch Lal Tiwari* (n 20) ¶14. See also *L Krishnan v State of Tamil Nadu and Others* 2005 (3) LW 313 (Madras) ¶8.

[29] *L Krishnan* (n 28) ¶6.

[30] *People United for Better Living in Calcutta – Public and Another v State of West Bengal and Others* AIR 1993 Calcutta 215 [PUBLIC] ¶42.

certain other positive duties on the State, for instance, to take preventive measures such as stopping the encroachment of the wetland area and to remove unlawful encroachments from the water bodies,[31] and to maintain unpolluted water or tolerable standard of water by ensuring that the water quality parameters laid down in the statutory provisions are attained by third parties.[32] The maintenance of sanitation and of healthy conditions imposes a negative duty to respect the existing conditions as well as a positive duty to ensure that they do not deteriorate due to the actions of third parties.[33]

The Court also expanded the 'constitutional imperative' on the State and local government to take adequate measures to promote the environment.[34] It equated the duty to promote environmental protection with the duty to maintain 'the environment as a whole'.[35] Here, the Court's understanding of the 'duty to promote' was different from the duty to promote that forms part of the tripartite typology. This illustrates the limitation of excessive focus on the use of particular terminology rather than considering the facts and circumstances of the case.

In some cases, the Court highlighted the constitutional duty of the State to preserve ecology,[36] ecological balance,[37] the identity of natural lakes,[38] and rivers and lakes and all the other water resources of the country.[39] In other cases, without referring to the 'constitutional imperative', the Court elaborated the duty of the State to preserve the environment and to keep ecological balance unaffected,[40] and to ensure conservation and preservation of natural resources.[41] Especially in the context of water resources, the Court

[31] ibid. See also *L Krishnan* (n 28) ¶6.

[32] *News Item "Hindustan Times" AQFM Yamuna v Central Pollution Control Board and Another* (2004) 9 SCC 577 ¶1.

[33] See, for example, *Rampal and Others v State of Rajasthan and Others* AIR 1981 Rajasthan 121 ¶3.

[34] *Virender Gaur* (n 20) ¶7.

[35] ibid.

[36] *Residents of Sanjay Nagar* (n 25) ¶9.

[37] *Dahanu Taluka Environment Protection Group v Bombay Suburban Electricity Supply Co Ltd* (1991) 2 SCC 539 ¶2. See also *Virender Gaur* (n 20) ¶7.

[38] *TN Godavarman Thirumulpad (99) v Union of India and Others* (2006) 5 SCC 47 ¶13.

[39] *Kinkri Devi* (n 20) ¶6.

[40] See, for example, RLEK (1986) (n 17) ¶20.

[41] See *Intellectuals Forum, Tirupathi v State of Andhra Pradesh and Others* (2006) 3 SCC 549 ¶84.

recognised the duty of the State to retain water bodies to include protection and restoration of natural water storage resources.[42] In another case, it imposed a positive duty to develop a pond that was falling in disuse, on the State.[43]

The Court further interpreted Article 48A of the Constitution to impose a duty to ensure and safeguard proper environment.[44] Here, it is pertinent to mention that the terms 'protect' and 'safeguard' are synonyms although Article 48A of the Constitution uses the former for the environment and the latter for forests and wild life. The duty to ensure imposes positive duties upon the State.[45] It requires the State to make certain that there is a proper environment.[46] The term 'proper' generally means 'suitable or appropriate',[47] and the placement of the adjective 'proper' before environment alludes to a certain level of environmental quality. At the same time, this is a subjective assessment and the higher judiciary has not clarified the standard in respect of the desired environmental quality. The duty to safeguard involves a duty to protect the proper environment from harm or damage as well as a duty to prevent harm or damage to the environment.[48] More specifically, the High Court of Himachal Pradesh highlighted the duty of the State to safeguard the rivers and lakes and all the other water resources of the country.[49]

Fourth, the Court identified two components of the environment that form the subject matter of the constitutional duty of the State – natural and man-made environment.[50] But there is little discussion of the ecological dimension of the duty. In one case, the Court acknowledged that in addition to providing a better environment for the public at large, discharge of the duty to develop a pond that was falling in disuse would prevent ecological disaster.[51] *Prima facie*, the duty to keep the environment, ecology and/or

[42] *Mrs Susetha v State of TN and Others* (2006) 6 SCC 543 ¶14 & ¶17.

[43] See, for example, *Hinch Lal Tiwari* (n 20) ¶13.

[44] *Virender Gaur* (n 20) ¶7.

[45] Carmona (n 15) 135.

[46] *Virender Gaur* (n 20) ¶7.

[47] Bryan A Garner (ed), *Black's Law Dictionary* (10th edn Thomson Reuters 2014) 1410.

[48] *Virender Gaur* (n 20) ¶7.

[49] *Kinkri Devi* (n 20) ¶6.

[50] *Virender Gaur* (n 20) ¶7.

[51] *Hinch Lal Tiwari* (n 20) ¶13.

ecological balance 'unaffected'[52] may imply a duty to protect ecological balance in its pure form, that is, regardless of the value to human beings. This is different from conservation or preservation, which has a distinctly anthropocentric focus. However, in this particular case, the use of the term 'unaffected' was qualified – it referred to adverse or serious effects.[53]

Finally, it is important to remember that Article 48A of the Constitution is not the only source of the constitutional duty of the State in respect of the CER. The duty of the State to improve public health, as laid down in Article 47 of the Constitution, has been interpreted to imply a duty to preserve public health.[54] This is similar to the combined reading of the duty to 'protect and improve' in Article 48A of the Constitution, and imposes both positive and negative duties.

4.2.3 The DPSP and the duties to facilitate and provide

The tripartite typology includes the obligation to fulfil, which further comprises of three obligations: to facilitate, provide and promote human rights. The higher judiciary recognised the duties to facilitate and to provide the CER in some cases drawing upon the constitutional duties of the State as set out in the DPSP. The High Court of Andhra Pradesh observed that Article 47 of the Constitution, which regards improvement of public health as one of the primary duties of the State, 'assign[s] a positive role to help people realise their rights and needs.'[55] Similarly, the Court interpreted Articles 39(b), 47 and 48A of the Constitution to individually and 'collectively cast a duty on the State to secure the health of the people, improve public health and protect and improve the environment.'[56] The higher judiciary also recognised the duty to provide the rights to sanitation and water to certain individuals and groups drawing upon the Constitution and

[52] RLEK (1986) (n 17) ¶10 & ¶19.

[53] ibid.

[54] See *MC Mehta v State of Orissa and Others* AIR 1992 Orissa 225 ¶9.

[55] *PR Subas Chandran* (n 23) ¶27. See also *Hamid Khan v State of MP and Others* AIR 1997 Madhya Pradesh 191 ¶6; *Shajimon Joseph and Another v State of Kerala* 2007 (1) KLT 368 ¶¶5-6.

[56] *MC Mehta v Union of India* (CNG case) (2002) 4 SCC 356 ¶1. See also *PR Subas Chandran* (n 23) ¶23 (drawing a link between Articles 47 and 48A of the Constitution, the High Court observed that 'community health [Article 47] would become a reality only when the State endeavours to protect and improve the environment…').

legislation as sources. The Court directed the municipal authorities to construct public latrines to ensure basic sanitation in a case where open defecation by slum dwellers led to insanitary conditions and posed a threat to human health and well-being.[57] The High Court of Andhra Pradesh held that the constitutional duty of the State to provide clean drinking water includes supply of water with optimum fluoride content through tankers where the regular sources were contaminated.[58] Some cases where the higher judiciary's understanding of the duty to provide extended beyond the tripartite typology are discussed in the next sub-section. The duty to promote is discussed in section 4.4, which addresses the procedural aspects of the CER.

4.2.4 The duty to provide beyond the tripartite typology

The tripartite typology imposes an obligation to provide certain rights as a last resort. But the reality in developing countries such as India is that a majority of the population cannot enjoy socio-economic rights, which include the CER, without the proactive involvement of the State. In other words, the discharge of the duty to provide the CER is not contingent upon the failure of the State to discharge the duties to respect and protect the CER, as envisaged in the tripartite typology.[59] This led the higher judiciary to identify a duty to provide the CER, particularly components of the rights to water and sanitation, thus inverting the tripartite typology.

The duty is linked to existing legislation, the fundamental right to life or the DPSP. One source of this duty is environmental laws.[60] The higher judiciary also established a link between the laws governing local bodies and the legal entitlements to civic amenities or the fundamental right of dignified human living.[61] In a case concerning the closure of illegal and unauthorised slaughterhouses in a residential area, the High Court of Rajasthan recognised the constitutional duty of the State to provide a clean environment under

[57] *Municipal Council, Ratlam v Shri Vardichan and Others* (1980) 4 SCC 162 ¶23(2).

[58] See, for example, *PR Subas Chandran* (n 23) ¶33(1).

[59] Eide (n 10) 23-24.

[60] See, for example, APPCB II (n 23) ¶44 (observing that 'the fundamental objective of the statute [WPCPA] is to provide clean drinking water to the citizens'.).

[61] See *Citizens Action Committee, Nagpur v Civil Surgeon, Mayo (General) Hospital, Nagpur and Others* AIR 1986 Bombay 136 ¶7 & ¶9 and *Dr KC Malhotra v State of MP and Others* AIR 1994 Madhya Pradesh 48 ¶13 respectively.

Articles 21 and 48A of the Constitution.[62] In some cases, the higher judiciary established an implicit link between the duty to provide the right to water and the entitlements or rights of citizens. For instance, the Court held that the statutory duty of the State Government to provide pure drinking water is 'absolutely essential to the health and well-being of the workmen'.[63] In other cases, after explicitly recognising the right to water, the higher judiciary recognised the duty of the State to provide clean,[64] pure,[65] unpolluted,[66] or safe[67] drinking water.

The higher judiciary also clarified the scope of the duty of the State in some cases. The High Court of Allahabad imposed a duty on the concerned authorities to get the water tested regularly by chemical analysts to find out whether it is potable and does not contain any germs or harmful chemicals.[68] In the context of river pollution, and in order to discharge the duty of the State to provide clean water of a certain quality, the Court sought suggestions to 'increase the capacity of the sewage treatment plants and other allied matters'.[69] In addition to ensuring the quality aspect of the right to water, such measures may also contribute to the enjoyment of the other CER.

Solid and liquid waste management forms an integral component of the duty to provide the right to sanitation. The Court indirectly recognised this duty where it held that the collection and disposal of waste generated from various sources in the city formed part of the statutory duty of urban local authorities to 'scavenge and clean the city'.[70] The higher judiciary also reiterated the statutory duty to provide sanitation facilities, including drainage and sewerage network and waste treatment facilities (Chapter 5, section 5.1). It

[62] *Residents of Sanjay Nagar* (n 25) ¶9.

[63] *Bandhua Mukti Morcha* (n 4) ¶8.

[64] APPCB II (n 23) ¶3. See also *PR Subas Chandran* (n 23) ¶26.

[65] See *Ramji Patel and Others v Nagrik Upbhokta Marg Darshak Manch and Others* (2000) 3 SCC 29 ¶23. See also *Hamid Khan* (n 55) ¶6.

[66] See *Hamid Khan* (n 55) ¶6; *Dhanajirao Jivarao Jadhav and Others v State of Maharashtra and Others* (1998) 2 Maharashtra LJ 462 ¶20; *Perumatty Grama Panchayat v State of Kerala* 2004 (1) KLT 731 ¶13.

[67] See *Wasim Ahmed Khan v Government of AP* 2002 (2) ALD 264 (Division Bench) ¶9; *Vishala Kochi Kudivella Samrakshana Samithi v State of Kerala* 2006 (1) KLT 919 ¶3.

[68] *SK Garg v State of UP and Others* AIR 1999 Allahabad 41 ¶11.

[69] *News Item Published in Hindustan Times Titled "And Quiet Flows the Maily Yamuna", In Re* (2009) 17 SCC 720 [AQFMY (2009a)] ¶5.

[70] *Dr BL Wadehra v Union of India and Others* (1996) 2 SCC 594 ¶22.

also considered the failure of the State to discharge its discretionary statutory duty to establish and maintain a farm or factory for sewage disposal, as the cause of river pollution.[71] This may be viewed as a failure to discharge the duty to provide the CER. Similarly, the higher judiciary, and more recently the NGT, directed the State to introduce measures for maintenance of environmental flow in rivers and groundwater recharge (Chapter 3, section 3.4.3), which may increase the quantity of water available in the water bodies and improve the assimilative capacity of the water bodies, and contribute to the discharge of the duty to provide the CER.

The higher judiciary identified two additional aspects of the duty to provide the CER that are not envisaged under the tripartite typology. First, in some situations, the measures introduced by the State to discharge the duty to provide the CER may result in a violation. In a case where consumption of drinking water supplied by the State Government from hand pumps with excessive fluoride content resulted in skeletal or dental fluorosis, the High Court of Madhya Pradesh held the State responsible 'for not taking proper precaution to provide proper drinking water to the citizens.'[72] In another case, the High Court of Kerala observed that a scheme for groundwater extraction, which was evolved by the administration to augment drinking water supply, cannot be allowed to compromise the right to sweet water under Article 21 of the Constitution.[73] Second, a failure to discharge the duty to provide may result in a claim for compensation for any harm or damage resulting from water pollution to the right-holder(s). Where the citizens suffered harm or injury due to the failure of the State to discharge its duty to provide the right to water, the High Court of Madhya Pradesh held that it is the duty of the State to provide the best remedy at its expense.[74] In contrast, the higher judiciary dismissed the litigants' concerns about negative impacts, including water pollution, resulting from the construction and use or improper use of measures for the management of human waste, that is sewage treatment plants.[75]

[71] See *Dhanajirao Jivarao Jadhav* (n 66) ¶24.

[72] *Hamid Khan* (n 55) ¶6.

[73] *FK Hussain* (n 18) ¶2. See also *Attakoya Thangal v Union of India* 1990 (1) KLT 580.

[74] *Hamid Khan* (n 55) ¶7.

[75] See, for example, *Jai Narain and Others v Union of India and Others* (1996) 1 SCC 9.

4.3 Substantive duties and basic concepts of environmental law

David Takacs observes that courts direct the State to bear the basic concepts of environmental law (section 4.1) in mind while discharging its constitutional or statutory duties.[76] This section examines the higher judiciary's engagement with these basic concepts as the source of the duties of the State in cases relating to water pollution and/or poor water quality and/or corresponding to the CER, explicitly or implicitly.

4.3.1 The principles of prevention and precaution

The principle of prevention, as understood in international environmental law, requires 'the prevention of damage to the environment, and otherwise to reduce, limit or control activities that might cause or risk such damage'.[77] The Court recognised the possibility of asking the government to discharge its positive duty to protect the CER from the actions of third parties, for example, by preventing water pollution.[78] The principle of prevention is also implicit where the High Court of Kerala restrained the government from implementing a scheme for groundwater extraction to augment drinking water supply until adequate restrictions and safeguards were finalised.[79] In this case, there was an apprehension that the scheme would lead to seepage or intrusion of salt water in the available water resources. This decision embodies the State's negative duty to respect, or to not interfere with the right to water.

The precautionary principle, which builds on the principle of prevention, requires that measures must be taken to avert environmental harm even in situations where scientific knowledge is not conclusive as to the exact impacts of a planned activity.[80] The

[76] See generally David Takacs, 'Water Sector Reforms and Principles of International Environmental Law' in Philippe Cullet, Alix Gowlland-Gualtieri, Roopa Madhav, and Usha Ramanathan (eds) *Water Law for the Twenty-First Century: National and International Aspects of Water Law Reform in India* (Routledge 2010) 280.

[77] See, for example, Philippe Sands and Jacqueline Peel, *Principles of International Environmental Law* (3rd edn CUP 2012) 200.

[78] See, for example, *Subhash Kumar v State of Bihar and Others* (1991) 1 SCC 598 ¶7.

[79] See *FK Hussain* (n 18) ¶¶11-12.

[80] See Rio Declaration on Environment and Development, *Report of the United Nations Conference on Environment and Development* (Rio de Janeiro, 3-14 June 1992), UN Doc A/CONF.151/26 (Vol. I) (12 August 1992) Annex I Principle 15.

precautionary principle, as elaborated by the Court in *Vellore Citizens' Welfare Forum v Union of India and Others*, incorporated the principle of prevention. The Court *inter alia* observed that:

- 'Environmental measures – by the State Government and the statutory authorities – must anticipate, prevent and attack the causes of environmental degradation';
- 'Where there are threats of serious and irreversible damage, lack of scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation'.[81]

In both situations, the Court imposed a positive duty on the State to take measures - the only distinguishing feature is the presence or absence of scientific uncertainty.

In terms of the tripartite typology, the application of the precautionary principle most closely resembles the positive duty to protect the CER from the actions of third parties. But the duty to respect is equally applicable where the actions of the State itself may result in the non-realisation or violation of the CER. The duty to take measures may also correspond to the duty to facilitate and the duty to provide the CER, as understood in the tripartite typology, as well as the broader understanding of the duty to provide the CER, as discussed in section 4.2.4.

In practice, there are many more cases where the higher judiciary based the duty of the State implicitly on the principle of prevention although it expressly invoked the precautionary principle in situations where there was no scientific uncertainty as to the risk or the activity's negative impact on environmental/water quality.[82] In one case, the Court elaborated on the preventative measure to be undertaken by the State in the discharge of its positive duty, that is, to reserve a certain percentage of water in water bodies to maintain its assimilative capacity, which is essential to dilute the pollution load.[83] In another case, after noting that the precautionary principle is applicable where

[81] *Vellore* (n 5) ¶11.

[82] See, for example, *S Jagannath v Union of India and Others* (1997) 2 SCC 87; *MC Mehta (Calcutta Tanneries' Matter) v Union of India and Others* (1997) 2 SCC 411 [*Mehta* (Calcutta Tanneries)]; *MC Mehta (Badkhal and Surajkund Lakes Matter) v Union of India and Others* (1997) 2 SCC 715 [*Mehta* (Lakes)]; APPCB II (n 23).

[83] See, for example, *Comdr Sureshwar D Sinha v Union of India* WP (Civil) No. 537 of 1992 (Supreme Court of India, Order of 14 May 1999) cited in Ritwick Dutta, *The Unquiet River – An Overview of Select Decisions of the Courts on the River Yamuna* (PEACE Institute Charitable Trust 2009) 15 (ordering that a

'there is a state of uncertainty due to lack of data or material about the extent of damage or pollution likely to be caused', the Court identified the duty of the State to take mitigation measures to offset the known adverse effect on ecology or the environment of setting up an industry.[84]

4.3.2 The public trust doctrine

According to the public trust doctrine, the State is the trustee, and the public at large the beneficiary, of all natural resources, which are meant for public use and enjoyment.[85] The High Court of Kerala identified the constitutional right to life and the statutory duty of rural bodies as the source of the positive and negative duties of the State as the trustee.[86] In terms of the tripartite typology, the public trust doctrine imposes a negative duty to refrain from interfering with the natural resources. According to the Court, the State must ensure that the natural resources retain their natural characteristic.[87] The Court imposed a duty on the State not to convert the natural resources into private ownership or for commercial gains/purposes or any other use,[88] 'if such transfer affects public interest'.[89] This includes non-conversion of the land under the lakes and ponds to any use that may alter their character as water-bodies.[90]

The public trust doctrine also incorporates the positive duty to protect natural resources from the actions of third parties, as described in the tripartite typology. According to the Court, it imposes a positive duty to protect the natural resources for public use and enjoyment or for the benefit of the general public.[91] The High Court of Gujarat recognised

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minimum flow of 10 cumec must be allowed to flow throughout the river Yamuna). See also Cullet (2009) (n 9) 209.

[84] *Narmada Bachao Andolan v Union of India and Others* (2000) 10 SCC 664 ¶123. See also *MC Mehta v Union of India and Others* (2004) 12 SCC 114 ¶48.

[85] Mehta-Nath I (n 5) ¶34.

[86] See *Perumatty Grama Panchayat* (n 66) ¶13.

[87] Mehta-Nath I (n 5) ¶23.

[88] ibid ¶34. See also *Intellectuals Forum* (n 41) ¶76; *Fomento Resorts & Hotels Limited and Another v Minguel Martins and Others* (2009) 3 SCC 571 ¶53.

[89] *Fomento Resorts* (n 88) ¶¶53-54.

[90] *Shailesh R Shah v State of Gujarat* (2002) 3 GLR 447 ¶18.

[91] Mehta Nath I (n 85) ¶34. See also *Fomento Resorts* (n 88) ¶53.

the duty of the State to prevent the abuse of natural resources, including the extinction of lakes, ponds, reservoirs and streams.[92] Specifically, in the context of water resources, the higher judiciary emphasised the duty of the state to protect and preserve tanks,[93] to protect groundwater against excessive exploitation,[94] and to preserve natural resources and to protect the 'common heritage of lakes, ponds, reservoirs and streams'.[95] The High Court of Madhya Pradesh reminded the State of its fiduciary duty of care and responsibility to protect water bodies.[96] However, all the duties of the State flowing from the public trust doctrine cannot be strictly categorised in terms of the tripartite typology. The duty to protect also requires the effective management of natural resources.[97] The High Court of Gujarat recognised the duty of the State to rejuvenate lakes, ponds, reservoirs and streams.[98] Similarly, the High Court of Madras reminded the State of its duty to restore the land back to its original position.[99]

4.3.3 The principle of inter-generational equity

The principle of inter-generational equity imposes a duty on each generation towards future generations 'to pass on the natural and cultural resources of the planet in no worse condition than received and to provide reasonable access to the legacy for the present generation.'[100] The principle of inter-generational equity is closely linked to the other principles of environmental law as well as to the public trust doctrine. The failure of the trustee to retain the natural resources will result in their non-availability for the use of present and future beneficiaries.[101] The precautionary principle also embodies an inter-

[92] *Shailesh R Shah* (n 90) ¶16.

[93] *Intellectuals Forum* (n 41) ¶67.

[94] *Perumatty Grama Panchayat* (n 66) ¶13.

[95] *Shailesh R Shah* (n 90) ¶16.

[96] See *TK Shanmugam v State of Tamil Nadu and Others* 2015 (5) LW 397 (Full Bench) (Madras) ¶40; *L Krishnan* (n 28) ¶14.

[97] *Fomento Resorts* (n 88) ¶53.

[98] *Shailesh R Shah* (n 90) ¶16.

[99] See *TK Shanmugam* (n 96) ¶40; *L Krishnan* (n 28) ¶14.

[100] Edith Brown Weiss, *In Fairness to Future Generations: International Law, Common Patrimony, and Intergenerational Equity* (Dobbs Ferry 1989) 37-8.

[101] Catherine Redgwell, *Intergenerational Trusts and Environmental Protection* (Manchester University Press 1999) 71.

temporal dimension.[102] This may relate to scientific uncertainty concerning the occurrence and impacts of water pollution and the difficulty or impossibility of reversing the resulting environmental harm or damage in the future.[103]

The higher judiciary's observations in respect of the principle of inter-generational equity impose duties on the State, which include a positive duty to protect the CER from the actions of third parties in terms of the tripartite typology as well as a positive duty to undertake the necessary measures. First, the principle means that natural resources are 'not to be frittered away or exhausted by one generation'.[104] Second, '[e]very generation owes a duty to all succeeding generations to develop and conserve the natural resources of the nation in the best possible way.'[105] Third, the principle provides a rationale for the enactment of anti-pollution laws by the State in furtherance of its constitutional duty to protect and improve the environment.[106] As discussed in Chapter 2, the positive duty to protect can be discharged by the enactment and implementation of laws. In addition, the Court referred to the 'accepted social principle' that the reason for the imposition of the duty to conserve and preserve natural resources on all human beings is to ensure that present and future generations are equally aware of the natural resources.[107] This resembles the duty to promote human rights.

4.3.4 The concept of sustainable development

The higher judiciary has read the abovementioned principles as well as the public trust doctrine into the concept of sustainable development.[108] According to the Court, sustainable development highlights the need to strike a balance between environmental

[102] Jona Razzaque, *Public Interest Environmental Litigation in India, Pakistan and Bangladesh* (Kluwer Law International 2004) 343.

[103] See PUBLIC (n 30) ¶2.

[104] See *State of Tamil Nadu v Hind Stone* (1981) 2 SCC 205 ¶6. See also RLEK (1986) (n 17) ¶19; *Intellectuals Forum* (n 41) ¶84.

[105] *Hind Stone* (n 104) ¶6.

[106] See ICELA (1996) (n 21) ¶26.

[107] *Intellectuals Forum* (n 41) ¶84.

[108] See, for example, *Vellore* (n 5) ¶14 (precautionary principle); *ND Jayal and Another v Union of India and Others* (2004) 9 SCC 362 ¶25 (principle of intergenerational equity, precautionary principle and public trust doctrine).

protection and development.[109] The Court further interpreted sustainable development to mean 'what type or extent of development can take place which can be sustained by nature/ecology with or without mitigation'.[110] In addition to the right to environment, the Court also read the right to development into the fundamental right to life and then proceeded to observe that both of these fundamental rights form a part of sustainable development.[111] This translates into the imposition of duties in respect of both these rights.

Overall, the concept of sustainable development imposes a positive duty on the State to undertake a balancing exercise while leaving the details to its discretion. In a context where the duties of the State exert an overwhelming influence on the scope and content of the CER, the concept of sustainable development restricts the prospective of the abovementioned principles, as well as the public trust doctrine, to contribute to the realisation of the CER.[112] The discharge of duties flowing from the concept of sustainable development may hamper the realisation of the CER. It may also undermine the potential of environmental rights litigation to achieve the objective of a certain level of environmental (water) quality.

4.4 Procedural duties

Chapter 2 highlighted the link between the substantive and procedural aspects of the rights to environment, sanitation and water in international law. This section considers the higher judiciary's engagement with the duties of the State relating to access to information and public participation, with or without reference to the corresponding rights. It does not consider the duties relating to access to judicial remedies as this aspect is partly addressed via the development of public interest environmental litigation (Chapter 1, section 1.2.3).

[109] See, for example, *Vellore* (n 5) ¶10; *ND Jayal* (n 108) ¶25.

[110] *Narmada Bachao Andolan* (n 84) ¶123.

[111] *ND Jayal* (n 108) ¶23 & ¶25.

[112] See generally Michael R Anderson, 'Human Rights Approaches to Environmental Protection: An Overview' in Alan Boyle and Michael Anderson (eds), *Human Rights Approaches to Environmental Protection* (OUP 1996) 17.

4.4.1 Collection and dissemination of information

The problem of water pollution and/or poor water quality is exacerbated by the inadequacy or lack of information or awareness about the problem and the existing regulatory framework to address it, including the substantive and procedural aspects of the CER and the corresponding duties. The procedural right of access to information and the corresponding duties of the State provide a basis for the realisation of the substantive aspects of the CER and ensuring accountability of the government. From the perspective of the tripartite typology, access to information forms the backbone of the duty to promote, which *inter alia* requires the State to disseminate information and educate people about the substantive and procedural aspects of the rights.[113]

Collection of information by the authorities

A component of the procedural right of access to information is the collection of information by the State about the causes and effects of water pollution and/or poor water quality. The discharge of this duty may also facilitate dissemination of this information among decision-makers and implementers and ensure the enactment and implementation of context-specific laws. The higher judiciary has triggered information or data gathering by the authorities where it sought details about the issues raised by the petitioner(s) and the measures taken by the authorities to address them.

In respect of the issues raised by the petitioner(s), the higher judiciary required court-appointed committees or committees appointed by the government in compliance with the higher judiciary's directions to further study the problem of water pollution in the affected area.[114] CER litigation also provided the impetus for an information gathering exercise for the identification of water bodies,[115] lakes,[116] and floodplain of a river,[117]

[113] Carmona (n 15) 166-67.

[114] See, for example, *Vellore* (n 5); *Jagannath* (82); Mehta (Calcutta Tanneries) (n 82).

[115] *Shailesh R Shah* (n 90) ¶39.

[116] *Vinod Kumar Jain v Govt of NCT of Delhi and Another* WP (Civil) No. 3502 of 2002 (High Court of Delhi, Judgment of 9 May 2007).

[117] *Manoj Misra v Union of India and Others* OA No. 6 of 2012 (NGT - Principal Bench, Judgment of 13 January 2015).

etc. In respect of the measures taken by the authorities to address the issue, in a case concerning the management of municipal solid waste, the Court directed the concerned authorities to give information about garbage dumping places and garbage collection centres and the steps being taken to keep those places clean and tidy, as well as the statutory duties and functions of various authorities in regard to sanitation.[118] The Court also directed authorities to file affidavits, for example, addressing the problem of water pollution and its present status, as well as the plan of action and the specific measures required.[119] Further, it assessed the quality of the information provided by the authorities in their affidavits, and where it was found to be unsatisfactory, the higher judiciary directed the authorities to file detailed affidavits.[120]

Dissemination of information to the public

It is the constitutional and statutory duty of the State to ensure access to information, subject to certain restrictions,[121] but citizens may be unable to exercise their right where they are unaware of the existence of the information. Therefore, the State must disseminate information about the causes and effects of water pollution and/or poor water quality, and the regulatory framework for the prevention, control and abatement of water pollution and the maintenance or improvement of water quality. The Court identified this duty of the State in respect of formal and informal environmental education,[122] as well as dissemination of environmental information among members of the public through different channels.[123] It acknowledged that awareness of laws and the issues they seek to

[118] *BL Wadehra* (n 70) ¶3 & ¶12. See also *Vinod Kumar Jain* (n 116).

[119] *News Item Published in Hindustan Times Titled "And Quiet Flows the Maily Yamuna", In Re* (2009) 17 SCC 708 [AQFMY (2009b)] ¶2 (referring to order of 11 October 2000). See also *News Item Published in Hindustan Times Titled "And Quiet Flows the Maily Yamuna", In Re* (2012) 13 SCC 736 ¶1.6.

[120] See, for example, some of the orders issued by the Court and reported in AQFMY (2009b) (n 119); AQFMY (2009a) (n 69); *News Item Published in Hindustan Times Titled "And Quiet Flows the Maily Yamuna", In Re* (2009) 17 SCC 545. See also *NOIDA Sector 14 Residents Welfare Association and Others v State of Delhi and Others* (2012) 13 SCC 786.

[121] See Constitution of India art 19(1)(a) (guaranteeing the freedom of speech and expression) and the Right to Information Act 2005 respectively.

[122] *MC Mehta (II) v Union of India and Others* (1988) 1 SCC 471 [*Mehta* (Kanpur Municipalities)] ¶24. See also *MC Mehta v Union of India and Others* (1992) 1 SCC 358 [*Mehta* (1992)] ¶6(4); *Karnataka Industrial Areas Development Board v C Kenchappa and Others* (2006) 6 SCC 371 ¶67.

[123] See *Mehta* (Kanpur Municipalities) (n 122) ¶25 (organisation of annual 'keep the city/town/village clean' week); *Mehta* (1992) (n 122) ¶¶6(1)-(2) (all cinema halls, touring cinemas and video parlours to exhibit slides/messages on environment in each show & show film on various aspects of environment and pollution in cinema halls).

address (such as pollution), as well as their voluntary acceptance by the people, is essential for their effective enforcement.[124] According to the Court, the citizens also need to be made aware of their statutory duties and liabilities.[125] Therefore, the higher judiciary directed the concerned authorities to use different media as means of public awareness and information sharing about environmental quality and existing environmental laws.[126]

The higher judiciary also established a link between the State's duty to promote the CER, especially through the right to information, and the performance of duties by right-holders, especially the citizen's fundamental duty to protect and improve the environment. The duty to promote is implicit in the duty of the State to educate people about the use of groundwater from bore wells,[127] and to train local people in using and keeping public toilets in clean condition.[128] At a more general level, the higher judiciary highlighted the duty of the State to educate the inhabitants of the locality and the members of society to 'live with appropriate awareness and to take all measures' to prevent water pollution,[129] to take steps to educate the members of the downtrodden strata to live in proper healthy conditions,[130] and to teach children about the need to maintain cleanliness in and around their homes.[131]

4.4.2 Public participation

The higher judiciary has addressed the procedural duty of the State relating to public participation. The Court imposed a positive duty on the State to formulate necessary programmes to motivate public participation for environmental protection and human

[124] *Mehta* (1992) (n 122) ¶5.

[125] *BL Wadehra* (n 70) ¶24(6).

[126] See *Mehta* (1992) (n 122) ¶5 (television, radio and cinema hall); *Wasim Ahmed* (n 67) ¶¶10-11 and *Dhanajirao Jivarao Jadhav* (n 66) ¶23(i) (print and electronic media including advertisements in local newspapers); *BL Wadehra* (n 70) ¶¶24(6)-(7) (announcements through public television and public address system).

[127] *PR Subas Chandran* (n 23) ¶33(5).

[128] *Ratlam* (n 57) ¶23(2).

[129] *Malhotra* (n 61) ¶16.

[130] ibid ¶11.

[131] *Mehta* (Kanpur Municipalities) (n 122) ¶ 24.

health.[132] However, the details of the 'necessary programmes' were left entirely at the discretion of the State. It is also unclear whether these programmes will pertain to public participation in the decision-making phase or the implementation phase. Further, the higher judiciary considered issues concerning the duty of government authorities to follow the prescribed procedure under the Environmental Impact Assessment Notification 2006 for conducting the public consultation process in respect of the environmental impact of certain proposed projects, which may include water pollution.[133] However, reliance on a statutory duty as the overarching framework restricts the scope and content of the duty to ensure public participation. First, the absence of public participation in the prescription of effluent treatment standards and effluent disposal methods under environmental laws or in the implementation of the provisions of laws relating to local bodies remains unquestioned. Second, public participation is only envisaged in respect of certain categories of projects under the specific legislation. Third, public participation can be excluded in certain cases under the specific legislation. Finally, the duty does not extend to the implementation stage.

Conclusion

This chapter sheds light on the duties of the State corresponding to the CER, explicitly or implicitly, which have a bearing on water pollution and/or poor water quality, as determined by the higher judiciary. It finds that the higher judiciary focuses more on the duties of the State than on the scope and content of the substantive as well as procedural aspects of the CER. In this respect, its practice resembles international law (Chapter 2). This results in the transformation of the rhetoric of a rights-based approach into the reality of a duties-based approach and undermines the potential gains of a rights-based approach.

The higher judiciary incorporated some elements of the tripartite typology of obligations relating to human rights, as envisaged under international human rights law, but implicitly. There was an overlap among the substantive duties of the State corresponding

[132] *Research Foundation for Science Technology National Resource Policy v Union of India and Another* (2005) 10 SCC 510 ¶42.

[133] See Lavanya Rajamani and Shibani Ghosh, 'Public Participation in Indian Environmental Law' in Lila Barrera-Hernandez, Barry Barton, Lee Godden, Alastair Lucas, and Anita Rønne (eds), *Sharing the Costs and Benefits of Energy and Resource Activity: Legal Change and Impact on Communities* (OUP 2016) 402-03.

to the tripartite typology, the typology was inverted, and the nature, scope and content of the duties of the State were expanded beyond the typology. Further, the higher judiciary incorporated the basic concepts of environmental law into constitutional and statutory provisions in order to buttress the duties of the State, which captured the different components of the tripartite typology but also went beyond it. However, the potential contribution of the basic concepts of environmental law is ultimately circumscribed by the concept of sustainable development.

The higher judiciary's engagement with the procedural duties of the State is more restrictive than in non-binding instruments of international law (Chapter 2, section 2.3). It focused on the procedural duty of the State in respect of access to information, which also forms a part of the obligation to promote in the tripartite typology. In addition, it identified a duty of the State to collect information, which is also relevant in terms of the links between the substantive and procedural aspects of the rights. The higher judiciary limited the duty relating to public participation to decision-making, and discussed it largely in the context of a statutory mandate. The review of court decisions also suggests that the higher judiciary envisages two main objectives of the procedural duties of the State: to ensure the accountability of the State in terms of discharging duties corresponding to the substantive aspects of the CER, and the discharge of constitutional, statutory and other duties by citizens.

The recognition of the CER, the identification of the corresponding duties of the State, and the determination of the nature, scope and content of both does not automatically translate into judicial enforcement of the CER. The next step is the grant of remedies by the higher judiciary, which are directed at the State and non-State polluters. These judicial remedies form the subject matter of the next two chapters.

CHAPTER 5
ENFORCING THE RIGHTS: REMEDIES DIRECTED AT THE STATE

Introduction

Chapters 3 and 4 considered the recognition of the constitutional environmental rights (CER), the identification of the corresponding duties of the State, as well as the determination of the nature, scope and content of both by the higher judiciary. In itself, this exercise can play an important symbolic role. It also sets the stage for judicial enforcement of the rights. At the same time, it is necessary to examine judicial remedies in order to gauge the manner in which, and the extent to which, environmental rights litigation contributes to the realisation of the claim of right-holders or redress of the violation of their rights, as well as to the prevention or control of water pollution and/or the maintenance or improvement of water quality. Judicial remedies may also have implications for the rights and duties of non-parties to the litigation.

In particular, the nature, strength, and complexity of judicial remedies may influence the implementation of court orders or judgments (court decisions).[1] In principle, the rhetoric of remedies may satisfy the claims of right-holders but the reality of implementation, non-implementation or poor implementation may leave them empty-handed or dissatisfied. Judicial remedies thus have a direct bearing on the legitimacy of the judiciary – in the eyes of the right-holder(s) and the duty-bearer(s) including the other branches of government and non-State actors. In this context, this chapter examines the judicial remedies that are addressed to the State and its instrumentalities as primary duty-bearers.

The first two sections examine cases where the petitioners seek implementation of the constitutional or statutory duties of the authorities. The third section examines cases where the rights-remedies continuum is ruptured or where the higher judiciary relies on basic concepts of environmental law or on experts to craft judicial remedies. The final

[1] César Rodríguez-Garavito and Diana Rodríguez-Franco, *Radical Deprivation on Trial: The Impact of Judicial Activism on Socioeconomic Rights in the Global South* (CUP 2015) 16.

section considers mandatory remedies, recommendations/suggestions and hortatory statements.

5.1 Constitutional or statutory mandate: provision of public services

This section examines cases where the petitioners seek implementation of constitutional or statutory duties to provide public services like water, sanitation and public health by the authorities.

5.1.1 Weak remedies

The judicial remedies in some cases were narrow and specific, that is, the higher judiciary identified the right-holders and the duty-bearers. In other cases, the remedies were general and vague. In both situations, judicial remedies were mandatory, but they were not detailed. The higher judiciary did not usurp executive functions and take over the administration of the statutory mandate, as contended by the critics of judicial enforcement of socio-economic rights including the CER. A deferential approach and the idea of progressive realisation were implicit in these cases. The choice of measures and the time period for implementation were left entirely to the government, and no consequences in case of non-implementation were specified.

The first broad category of cases comprised two sub-categories. In cases relating to the failure of urban local bodies to discharge their statutory duty or of the government to discharge its constitutional duty corresponding to the fundamental right to life, they were directed by high courts to ensure water supply to the residents of a city, a district or a State.[2] But the courts did not specify the level of water quality, choosing to use adjectives such as 'pure', 'potable', or 'safe' water instead. In cases involving public nuisance, the higher judiciary directed urban local bodies to discharge their statutory duties in respect

[2] See, for directions to State Government, *Wasim Ahmed Khan v Government of AP* 2002 (2) ALD 264 (Division Bench) ¶9; *Mahendra Prasad Sonkar and Another v State of UP and Others* (2004) 57 Allahabad LR 176 ¶15; *Vishala Kochi Kudivella Samrakshana Samithi v State of Kerala* 2006 (1) KLT 919 ¶4. See, for directions to urban local bodies, *Dhanajirao Jivarao Jadhav and Others v State of Maharashtra and Others* (1998) 2 Maharashtra LJ 462 ¶23(i); *Ambala Urban Estate Welfare Society v Haryana Urban Development Authority and Another* AIR 1994 Punjab & Haryana 288 ¶30.

of sanitation and health.[3] In some of these cases, high courts directed the urban local bodies to protect drinking water supply by ensuring that the drinking water pipeline is not contaminated, and by repairing or replacing water pipes etc.[4]

The second broad category of cases concerned the adverse impacts of water pollution on the supply of drinking water, which was the result of the discharge of untreated or partly treated effluents into water bodies or on land by polluters, and of the authorities to discharge their statutory mandate. In *MC Mehta (II) v Union of India and Others*, the Court directed the urban local body to discharge its statutory duty and to lay a sewerage line wherever it was not constructed.[5] The higher judiciary also directed the authorities to prevent the entry of sewage water through the storm water drain into water bodies,[6] or to provide basic amenities including drainage, sewerage and adequate potable water.[7]

The constitutional duty of the State formed the basis of the remedy in some cases where there was also a presumption of immediate implementation as opposed to progressive realisation. In a case where indiscriminate dumping of hazardous waste adversely affected the supply of drinking water, the Court directed the State Government to take 'expeditious steps' for the realisation of the right to water.[8] In other cases, the higher judiciary directed the concerned authorities to take immediate steps to make alternative arrangements for the supply of drinking water to the right-holders who were adversely affected by pollution or poor quality of surface water or groundwater sources of their water supply.[9] Such piecemeal arrangements may ensure the supply of water in the short

[3] *Municipal Council, Ratlam v Shri Vardichan and Others* (1980) 4 SCC 162 ¶6, ¶16 & ¶23(2); *MC Mehta (II) v Union of India and Others* (1988) 1 SCC 471 [*Mehta* (Kanpur Municipalities)] ¶¶9-20. See also *Rampal and Others v State of Rajasthan and Others* AIR 1981 Rajasthan 121 ¶6; *LK Koolwal v State of Rajasthan and Others* AIR 1988 Rajasthan 2 ¶10; *Dr KC Malhotra v State of MP and Others* AIR 1994 Madhya Pradesh 48 ¶16; *Vinod Chandra Varma v State of UP and Others* AIR 1999 Allahabad 108 ¶3. See also *Bombay Environment Action Group and Another v State of Maharashtra and Others* (2007) 1 BCR 721 [BEAG (2007)] *Bombay Environment Action Group and Another v State of Maharashtra and Others* (2007) 1 BCR 721 [BEAG (2007)].

[4] See *Malhotra* (n 3) ¶16; *Wasim Ahmed* (n 2) ¶12.

[5] *Mehta* (Kanpur Municipalities) (n 3) ¶19.

[6] ibid. See also *Nirbhai Singh v State of Punjab and Others* ILR (2012) 2 Punjab & Haryana 916.

[7] *Ambala Urban Estate* (n 2) ¶30.

[8] *Research Foundation for Science (16) v Union of India and Another* (2005) 13 SCC 668 ¶¶1-2.

[9] See, for example, *Indian Council for Enviro-Legal Action v Union of India and Others* (1996) 3 SCC 212 [Bicchri] ¶16. See also *Hamid Khan v State of MP and Others* AIR 1997 Madhya Pradesh 191 ¶9; *PR Subas Chandran v Govt of AP and Others* (2001) 5 ALD 771 (Division Bench) ¶6.

term, but they may be erratic and promote dependence or charity instead of a right to water in the long-term.

The third broad category of cases concerned improper disposal of human waste in particular. The High Court of Andhra Pradesh directed the concerned authorities to immediately get a septic tank built and commissioned and to repair the open rainwater drain into which raw faecal matter was being let.[10] High courts also directed the authorities to take action where water pollution resulted from discharge from soakage pits into drains, which was permitted by the authority (in violation of the law),[11] or into lakes instead of soakage pits, which was not permitted by the authority.[12]

The fourth category of cases concerned the constitutional and statutory obligations of the government in respect of water bodies other than rivers, such as lakes, ponds, tanks and wetlands. The higher judiciary ordered the government to maintain the nature and character of existing water bodies,[13] to restore water bodies, which had been converted to other uses to their original position and to maintain them,[14] and to prevent or vacate or remove the structures or encroachments from water bodies.[15] However, it did not tell the government how to perform its duty – explicitly or implicitly; they were expected to act in accordance with the existing laws.[16] The higher judiciary does not appear to have considered that there may be a legal vacuum for dealing with this situation.

5.1.2 Towards moderate remedies

[10] See, for example, *K Srinivasan and Others v Executive Officer, Cantonment Board, Secunderabad* 2000 (1) ALT 353 ¶46.

[11] *M/s Ajay Construction and Others v Kakateeya Nagar Co-operative Housing Society Ltd and Others* AIR 1991 Andhra Pradesh 294 ¶31.

[12] *Bombay Environmental Action Group and Another v State of Maharashtra and Others* (1999) 2 BCR 243 [BEAG (1999)] ¶4 & ¶6.

[13] See *Susetha v State of TN and Others* (2006) 6 SCC 543 ¶25. See also *People United for Better Living in Calcutta – Public and Another v State of West Bengal and Others* AIR 1993 Calcutta 215 [PUBLIC] ¶42; *Shailesh R Shah v State of Gujarat and Others* (2002) 3 GLH 642 ¶24(B).

[14] See *Hinch Lal Tiwari v Kamala Devi and Others* (2001) 6 SCC 496 ¶14; *Intellectuals Forum, Tirupathi v State of AP and Others* (2006) 3 SCC 549 ¶96. See also *Shailesh R Shah* (n 13) ¶24(D); *L Krishnan v State of TN* 2005 (3) LW 313 (Madras) ¶14.

[15] See *Hinch Lal* (n 14) ¶14; PUBLIC (n 13) ¶42; *Shailesh R Shah* (n 13) ¶24(F); *Krishnan* (n 14) ¶14.

[16] For an exception, see *Shailesh R Shah* (n 13) ¶24.

In several cases, the higher judiciary strengthened weak remedies in different ways. First, it identified measures for the realisation of the CER or to prevent their violation. The Court identified supply of fresh water in tanks or pipes as a measure,[17] and the High Court of Madhya Pradesh directed the district collector to immediately seal all tube wells with excessive fluoride content and to undertake a survey in the other affected villages.[18]

Second, the higher judiciary recognised the limits of its expertise and adopted a dialogic approach. In *Municipal Council, Ratlam v Shri Vardichan and Others*, the Court first permitted the respondents to put forward schemes and proposals in regard to their estimated cost, which were prepared by experts, and then ascertained their feasibility and likely cost.[19] The Court's approach was pragmatic. It observed: 'what is important is to see that the worst aspects of the insanitary conditions are eliminated, not that a showy scheme beyond the means of the municipality must be undertaken and half done'.[20]

Third, in some cases discussed in section 5.1.1, the higher judiciary exerted some pressure on the government in order to ensure that deadlines are met. For instance, it prescribed the time frame within which the authorities were required to perform their constitutional or statutory duties, to finalise and implement new water supply projects, to accelerate the progress of, and complete and commission, ongoing projects, or to formulate a scheme for repairing or replacing old water pipes.

Fourth, the higher judiciary reiterated the monitoring function of the authorities while instituting processes to ensure accountability. The High Court of Bombay directed the municipal corporation to periodically monitor the level of river pollution and to publish the reports in the local newspaper every two months, as well as to constitute a committee of experts to monitor supply of unpolluted potable water to the city.[21]

[17] *Research Foundation for Science (16)* (n 8) ¶¶1-2.

[18] *Hamid Khan* (n 9) ¶¶7-9.

[19] *Ratlam* (n 3) ¶¶21-22.

[20] ibid ¶22.

[21] *Dhanajirao* (n 2) ¶23(i) & ¶23(v) respectively.

Fifth, the higher judiciary recognised the issues of fragmentation and lack of coordination among government departments, which often impede the discharge of statutory duties, and directed the constitution of a committee or joint action in respect of water pollution without specifying the measures.[22] The High Court of Bombay adopted a more intrusive approach and highlighted the need to ensure that different statutory authorities or agencies including the State Government implement one comprehensive plan to prevent river pollution based on reports prepared by an expert institution instead of devising their own methods for this purpose.[23]

Sixth, the higher judiciary postponed the implementation of measures proposed by the authorities because they did not appear to be satisfactory. The High Court of Kerala stopped the implementation of a government scheme to augment water supply by using pumps to extract groundwater, as prayed for by the petitioner.[24] The court was not opposed to the scheme *per se*. It directed the competent ministries of the Central Government to consider the matter and to issue appropriate directions. The decision exhibits a practical and precautionary approach as well as recognition of the court's limited expertise.

Finally, where the higher judiciary granted weak remedies such as declaration of rights without remedies and reposed confidence in the assurance of the authorities that they are undertaking or will undertake the necessary measures (section 5.3.1), it issued some detailed directions to the authorities motivated perhaps by the desire not to send the petitioners away empty-handed and/or to ensure that justice is seen to be done. In one case, the High Court of Andhra Pradesh directed the authorities to provide grievance redress mechanisms to members of the public and to open more laboratories and conduct regular testing of water samples.[25] In another case, the court directed the government to take certain immediate steps, including identification of such villages and supply of water with optimum fluoride content through water tankers till completion of project/schemes

[22] See *MC Mehta v State of Orissa and Others* AIR 1992 Orissa 225 [Mehta-Orissa] ¶10; BEAG (1999) (n 12) ¶¶29(a)-(b); *Dhanajirao* (n 2) ¶23(ii).

[23] *Dattatraya Hari Mane and Others v State of Maharashtra and Others* 2014 SCC OnLine Bom 1657 (High Court of Bombay) ¶25.

[24] *FK Hussain v Union of India and Others* AIR 1990 Kerala 321 ¶12.

[25] *Wasim Ahmed* (n 2) ¶¶10-11.

undertaken by the government, provision of special medical care free of cost to all the affected people by involving NGOs, and if necessary, taking steps to close down the bore wells where the problem is endemic.[26] The judicial remedies in these cases also encompassed a procedural aspect, that is, access to information, as the authorities were directed to inform members of the public (through advertisements in newspapers) about the availability of the control room and the laboratories in the first case,[27] and to educate people about the use of groundwater from bore wells in the second case.[28]

5.1.3 Accommodating the idea of progressive realisation

In a number of cases decided during the 1980s and 1990s, the higher judiciary refused to accept resource constraints such as non-availability of funds, inadequacy or inefficiency of staff or insufficiency of infrastructure as an excuse for the failure of the State to perform their statutory duties in respect of water supply, drainage and sanitation.[29] This refusal lends credence to the capacity objection to judicial enforcement of socio-economic rights.

In *Ratlam*, the Court observed that 'human rights under Part III of the Constitution have to be respected by the State regardless of budgetary provision'.[30] Along similar lines, in response to the submission of the local authority regarding the difficulty of cleaning the entire city within the stipulated period, the High Court of Rajasthan clarified that it was not its duty to see whether the funds are available or not;[31] it is for the local authority to see how to raise resources.[32] The court gave the legislature the liberty to scrap an enacted law that cannot be implemented but it observed that 'the law which remains on the statutory books will have to be implemented, particularly when it relates to primary

[26] *Subas Chandran* (n 9) ¶¶33(1)-(5).

[27] *Wasim Ahmed* (n 2) ¶10.

[28] *Subas Chandran* (n 9) ¶33(5).

[29] See, for example, *Ratlam* (n 3) ¶15. See also *Koolwal* (n 3) ¶6; Mehta-Orissa (n 22) ¶9; *Wasim Ahmed* (n 2) ¶9; *Bhawani Shankar Satpathy and Others v State of Orissa* 1996 (II) OLR 546 ¶7; *Vishala Kochi* (n 2) ¶3.

[30] *Ratlam* (n 3) ¶12.

[31] *Koolwal* (n 3) ¶10.

[32] ibid ¶6.

duty.'[33] In some other cases, the higher judiciary directed the State Government to provide the necessary funds to the local authority for the discharge of statutory duties.[34]

The higher judiciary also directed the authorities to prioritise the realisation of the CER in their budgetary allocations. In *Ratlam*, for instance, the Court directed the municipality to 'slim its budget on low priority items and elitist projects to use the savings on sanitation and public health'.[35] The High Court of Kerala held:

> …every Government, which has its priorities right, should give foremost importance to providing safe drinking water even at the cost of other development programmes…Ways and means have to be found out at all costs with utmost expediency instead of restricting action in that regard to mere lip service.[36]

The High Court of Orissa made similar observations in respect of health.[37] These cases may be viewed as examples of the judiciary pushing the executive, leading to the democratic legitimacy objection.

At the same time, in most of these cases, the higher judiciary recognised the constraints faced by the government. This may be viewed as an implicit acknowledgment of the idea of progressive realisation. In *Ratlam*, the Court observed: '…law is realistic and not idealistic and what cannot be performed under given circumstances cannot be prescribed as a norm to be carried out.' Therefore, the Court was willing to revise the order of the lower court to make it workable.[38] Some accommodation of the idea of progressive realisation is also implicit in decisions of high courts. In one case, the High Court of Madhya Pradesh permitted the authorities to undertake the exercise of providing free medical treatment to fluorosis-affected villagers 'in phases if not possible to be undertaken simultaneously, so that all people could get proper treatment in the due course of time'.[39] At the same time, the authorities were directed to complete the exercise, as far

[33] ibid ¶9.

[34] *Ratlam* (n 3) ¶24. See also *Hamid Khan* (n 9) ¶10.

[35] *Ratlam* (n 3) ¶24.

[36] *Vishala Kochi* (n 2) ¶3. See also *Wasim Ahmed* (n 2) ¶8.

[37] *Bhawani Shankar* (n 29) ¶7.

[38] *Ratlam* (n 3) ¶20.

[39] *Hamid Khan* (n 9) ¶10.

as possible, within a period of one year.[40] In another case, it asked the local authorities to take all steps to ensure that potable water is not contaminated and polluted if the drain cannot be covered for circumstances beyond their control.[41] The High Court of Andhra Pradesh recognised the limited availability of water resources and financial resources but directed the government to complete the project of repairing or replacing old water pipes 'as soon as possible'.[42] But in response to the petitioner's prayer for a general declaration that the action/inaction of the State Government in not providing safe drinking water and not preventing the outbreak of cholera and gastro-enteritis diseases was illegal and unconstitutional, the court held:

> …in a State or rather a country where growth of population is in geometrical proportion and the natural resources are not only static but depleting or made to deplete, it will be only utopian to issue a direction as desired by the petitioner.[43]

These decisions illustrate the classic conundrum facing socio-economic rights. There is a tension between ensuring the realisation of rights or redress of their violation on the one hand, and recognising the practical limitations within which the government operates. At the same time, these decisions represent attempts to find a balance by nudging the government towards action.

5.2 Statutory mandate: prevention or control of water pollution

This section examines cases involving the implementation of statutory duties relating to the prevention or control of water pollution.

5.2.1 Establishment and operation of pollution control devices

Weak remedies

The higher judiciary granted weak but specific and mandatory remedies to nudge the

[40] ibid.

[41] *Malhotra* (n 3) ¶16.

[42] *Wasim Ahmed* (n 2) ¶12 & ¶8 respectively.

[43] ibid ¶7.

statutory authorities into action in a vast majority of cases relating to the adverse effects of past or existing water pollution resulting from the discharge of industrial effluents in excess of the prescribed standards. It directed the State Pollution Control Board (SPCB) to discharge its statutory mandate and to ensure that industrial units establish and operate pollution control devices to their satisfaction,[44] or to inspect the operation of pollution control devices and take action if the discharged effluents do not conform to the prescribed standards.[45] In some cases, the higher judiciary identified the polluting units; in others, it left this task to the government. It is pertinent to mention that this task may involve a large-scale information gathering exercise because all the units do not apply for statutory consents and therefore do not form a part of the record while other units do not produce what they have statutory consents for. This may delay implementation of the court decision.

The higher judiciary left it open to the authorities to determine the appropriate measures for the discharge of their statutory mandate. In one case, the Court observed: 'All that the Court is concerned with is to ensure and direct that the parameters laid down under statutory provisions with regard to the quality of the water are attained.'[46] In any event, compliance with the prescribed standards may fail to arrest water pollution. But judicial deference to the executive in the matter of standard setting translates into a refusal to adopt a more proactive approach. A less deferential approach is evident where the higher judiciary ordered urban local bodies to construct common effluent treatment plants (CETP) for small-scale industries and/or units facing financial hardship.[47] However, this may well be viewed as a gap-filling exercise as it led to a specific government policy.

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[44] See *MC Mehta v Union of India and Others* (1987) 4 SCC 463 [*Mehta* (Kanpur Tanneries)] ¶17; *MC Mehta (Calcutta Tanneries' Matter) v Union of India and Others* (1997) 2 SCC 411 [*Mehta* (Calcutta Tanneries)] ¶20(6); *Tirupur Dyeing Factory Owners Association v Noyyal River Ayacutdars Protection Association and Others* (2009) 9 SCC 737 ¶33 & ¶36. See also *Mathew Lukose v Kerala State Pollution Control Board* 1990 (2) KLT 686 ¶22; *Karur Taluk Noyyal Canal Agriculturists Association v TNPCB and Others* WP (Civil) No. 1649 of 1996 (High Court of Madras, Judgment and Order of 26 February 1998).

[45] See, for example, *MC Mehta v Kamal Nath and Others* (1997) 1 SCC 388 [Mehta-Nath I] ¶39(6). See also *Dhanajirao* (n 2) ¶23(ii).

[46] *New Item Hindustan Times AQFM Yamuna v CPCB and Another* (2004) 9 SCC 577 ¶1.

[47] See, for example, *Mehta* (Calcutta Tanneries) (n 44) ¶7. See also *Vijay Singh Puniya v Rajasthan State Board for the Prevention and Control of Water Pollution and Others* AIR 2003 Rajasthan 286 ¶47.

In most cases, judicial remedies did not challenge the exercise of the statutory power by the SPCB to grant consent to establish and operate industrial units or effluent treatment facilities.[48] Recently, however, the Court directed SPCB to issue notices to all units, which require consent to operate, to make their primary effluent treatment plant (ETP) fully functional within a specified time period, to carry out inspections (prioritising severely and critically polluted industries) to verify that they are functional, to restrain further industrial activity in case of failure, and to take action against defaulting units that continue their operations.[49]

By and large, the higher judiciary adopted a deferential approach in respect of establishment and operation of facilities for treatment of sewage. Court decisions reiterated the statutory duties of urban local bodies to establish and operate sewage treatment facilities and directed them to submit their proposal for a sewage treatment plant (STP) to the SPCB,[50] or to set up a new STP, [51] or to upgrade an existing STP and make it functional,[52] or to set up a new STP if necessary and desirable.[53] The High Court of Delhi directed the Pollution Control Committee to check/monitor all the STP from time to time to ensure that they are functioning in accordance with the prescribed standards and to inform the local body upon finding any defect/deficiency or if treated sewage does not conform to the prescribed standards.[54] In most cases, there is no mention of any consequences in case of non-implementation.

Concerns have been raised in respect of the adverse effects of measures for the management of human waste for the realisation of the right to sanitation on the enjoyment of other rights. The higher judiciary's deferential approach is also evident from the outcome of challenges to the establishment of STP and related infrastructure. The High

[48] But see *Bhavani River v Sakthi Sugars Ltd Re:* (1998) 6 SCC 335 ¶3 (where the Court was 'somewhat unhappy about the manner in which the pollution control board gave its consent unmindful of the grave consequences.')

[49] *Paryavaran Suraksha Samiti and Another v Union of India and Others* (2017) 5 SCC 326 ¶¶4-6.

[50] See, for example, *Mehta* (Kanpur Municipalities) (n 3) ¶17.

[51] BEAG (2007) (n 3) ¶¶72(c)-(d).

[52] *Paryavaran Suraksha Samiti* (n 49) ¶12.

[53] Mehta-Orissa (n 22) ¶10.

[54] *Vinod Kumar Jain v Secretary, Ministry of Environment and Others* 2012 SCC OnLine Del 5055 (High Court of Delhi) ¶10.

Court of Delhi refused to interfere with the decision concerning the location of a STP on the ground that it is a matter of administrative/executive discretion.[55] The higher judiciary dismissed challenges to the acquisition of land for the establishment of a STP on the ground of urgency, which may relate to their utmost public and national importance for health and supply of pure water,[56] or that construction is undertaken under projects funded by the Central Government, which may withdraw its approval and sanction in case of delay.[57] The High Court of Karnataka dismissed challenges to the establishment and operation of STP near residential areas on health and environmental grounds on the ground that they are not a health hazard and that they will remove water pollution.[58] High courts refused to prevent the construction of the pumping station, which forms part of the underground drainage/sewerage system that leads to the STP, because it was pursuant to an order of the Supreme Court,[59] or that there would be no stagnation of water, it did not pose a health hazard, and that the project served larger public interest by protecting rivers from pollution or contamination by sewerage water.[60]

Towards moderate remedies

Just like cases relating to the provision of public services, in a number of cases, the higher judiciary adopted a less deferential approach to strengthen some of the weak remedies. It introduced a measure of accountability by imposing a deadline for the discharge of the statutory duties. The Court directed the State Government/Union Territory to complete the setting up of new CETP within a specified time period.[61] Not only did the High Court of Bombay direct higher officers of the SPCB to make periodic visits to industrial units

[55] See *Gramin Uthan Avam Jankalyan Samiti v Govt of NCT of Delhi and Others* WP (Civil) No. 6526 of 2007 (High Court of Delhi, Judgment of 8 February 2008).

[56] See *MC Mehta and Another v Union of India and Others* WP (Civil) No. 4677 of 1985 (Supreme Court of India, Order of 21 April 1995).

[57] See *K Ganapathi S/o Muthaiah v The District Collector* WP (Civil) No. 34172 of 1998 (High Court of Andhra Pradesh, Judgment of 6 April 2005).

[58] See, for example, *Capt MV Subbarayappa v Bharat Electronics Employees Co-operative House Building Society Ltd* ILR 1990 Karnataka 390 ¶¶10-12.

[59] See, for example, *Ganapathysubramanian and Others v Secretary, Dept. of Municipal Administration, Government of Tamil Nadu and Others* (High Court of Madras, Order of 10 March 2005) <http://www.indiankanoon.org/doc/199610/>.

[60] See, for example, *P Chandrasekar v Government of Tamil Nadu and Others* (High Court of Madras, Judgment of 12 September 2007) <http://www.indiankanoon.org/doc/1787294/>.

[61] *Paryavaran Suraksha Samiti* (n 49) ¶8.

in order to detect any connivance on the part of the concerned persons and to take immediate action, they were also required to submit an inspection report to the committee of experts constituted by the court.[62] Similarly, in cases concerning establishment and operation of sewage treatment plants discussed above, the higher judiciary imposed a deadline for submission of proposals to the SPCB and for completion of the work. In *Paryavaran Suraksha Samiti and Another v Union of India and Others*, the Court also mentioned the consequences in case of non-compliance.[63] However, this case represents an exception.

As discussed above, the higher judiciary is generally reluctant to interfere with the government's selection of STPs as the most appropriate measure to address the problem of water pollution resulting from domestic effluents. In a few cases, however, it was implicitly recognised that STPs are not the only available technology for treatment of wastewater; alternatives exist. For instance, the Court ordered a state government to acquire necessary land in different cities through which the river passes, for oxidation ponds.[64] In addition, the higher judiciary is cognizant that measures proposed for the realisation of some of the CER may undermine the realisation of other CER. In a case where the petitioners expressed the fear that the proposed open drainage work/sewerage drain water line to take sewerage water from the village across the lake would result in mixing of drainage water with drinking water, the High Court of Madras relied on the observations of the Court relating to the public trust doctrine in *MC Mehta v Kamal Nath and Others* (Mehta-Nath I), [65] and directed the respondents not to dig up or damage/demolish any part of the lake, its bunds, inlets and walls for this purpose.[66]

5.2.2 Closure and/or relocation of polluting units

In some cases, the higher judiciary exercised the statutory power of the authorities to order closure of, or disconnection of water supply to, the polluting industrial units,

[62] *Dhanajirao* (n 2) ¶23(ii).

[63] For an exception, see *Paryavaran Suraksha Samiti* (n 49) ¶¶13-15.

[64] *Vineet Kumar Mathur v Union of India and Others* (2002) 10 SCC ¶573.

[65] Mehta-Nath I (n 45).

[66] *Federation of Pammal and Nagalkeni Welfare Association and Another v The District Collector, Kancheepuram and Others* (2005) 4 Madras LJ 1.

operations or processes.[67] The Court justified its closure order mainly on two grounds: first, there should be a remedy for every breach of a right, and second, the statutory authorities are not taking adequate steps to rectify the commission of a public nuisance or other wrongful act, which is affecting or is likely to affect the public.[68] *Prima facie* judicial remedies directing the closure/relocation of polluting industrial units, dairies and slaughterhouses suggest that the higher judiciary is taking over the function of statutory authorities. However, the higher judiciary's approach towards polluting units differs, depending on whether they are industries, or dairies and slaughterhouses. While closure orders against dairies and slaughterhouses came into immediate effect,[69] the higher judiciary granted leeway to polluting industrial units by providing alternatives to permanent closure, thus diluting the strength of the remedy. This may be attributed to the view that permanent closure of operating industries is the last resort,[70] which is reminiscent of the persuasive approach adopted by statutory authorities towards industrial units.

The resulting judicial remedies have taken at least three different forms. First, the Court directed closure but permitted the polluting industrial units to restart operations after establishing and operating pollution control devices in accordance with the statutory requirements,[71] or after undertaking the prescribed remedial measures.[72] Second, the higher judiciary offered relocation as an alternative to permanent closure and permitted polluting industrial units to shift to another location in the same area or to another area or complex equipped with pollution control devices. In some cases, they left it to the authorities to undertake the necessary measures for relocation within a specified time

[67] See, for example, Bicchri (n 9) ¶70(2); *Mehta* (Kanpur Tanneries) (n 44) ¶14; *Vellore Citizens' Welfare Forum v Union of India and Others* (1996) 5 SCC 647 ¶¶25(4)-(7). See also *Pravinbhai Jashbhai Patel and Another v State of Gujarat and Others* (1995) 2 GLH 352 ¶145; *Noyyal River Ayacutdars Protection Association and Others v Government of TN, Public Works Department and Others* 2007 (1) LW 275 (Madras).

[68] *Mehta* (Kanpur Tanneries) (n 44) ¶14.

[69] For dairies, see *Ramji Patel and Others v Nagrik Upbhokta Marg Darshak Manch and Others* (2000) 3 SCC 29; *Milkmen Colony Vikas Samiti v State of Rajasthan and Others* (2007) 2 SCC 713. For slaughterhouses, see *MC Mehta v Union of India* (2002) 9 SCC 574. See also *Residents of Sanjay Nagar and others v State of Rajasthan and Others* AIR 2004 Rajasthan 116.

[70] See, for example, *Pravinbhai* (n 67) ¶135.

[71] Bicchri (n 9) ¶70(2). See also *Mehta* (Kanpur Tanneries) (n 44) ¶14; *Vellore* (n 67) ¶25(8).

[72] *In Re: Bhavani River – Sakthi Sugars Ltd: Re* (1998) 2 SCC 601 ¶7 & ¶10.

period.[73] In other cases, the remedies raise the issue of creation of industrial relocation policy - an executive function - by the judiciary.[74] In *MC Mehta v Union of India and Others* (*Mehta* (Calcutta Tanneries)), the Court directed the State Government to set up a single window facility consisting of all the concerned departments to act as a nodal agency.[75] But none of these cases discussed the possibility of non-availability of alternative land for the relocation of the polluters. Third, the Court permitted polluting industrial units to continue operations for a specified period in their current location until relocation.[76] The reported decision does not suggest that any conditions were imposed to prevent or control water pollution resulting from the continuance of the polluting units.

Unlike polluting industries, dairies or slaughterhouses, the failure of local bodies to discharge their statutory obligations is unlikely to result in specific and mandatory judicial remedies directing closure or disconnection of electricity or water supply to sewage treatment plants. Local bodies cannot be shut down in case of failure to comply with laws.[77] Although the law governing urban local bodies provided for the supersession of urban local bodies by the State Government, the High Court of Bombay did not issue mandatory orders directing the exercise of this statutory power. Instead, it relied on weak remedies in the form of hortatory statements expecting the government to take appropriate action.[78]

5.2.3 Injunctions

The objective of negative or positive injunctions is to stop (prevent and control) environmental degradation including water pollution.[79] Injunctions represent a weak remedy where they simply reinforce the implementation of government orders, which are

[73] See *Puniya* (n 47) ¶48(1). See also *Mehta* (Kanpur Tanneries) (n 44) ¶18; *Ramji Patel* (n 69) ¶3; *Milkmen Colony* (n 69) ¶32(2); *Sanjay Nagar* (n 69) ¶13.

[74] Shyam Divan and Armin Rosencranz, *Environmental Law and Policy in India: Cases, Materials and Statutes* (2nd edn Impression OUP 2002) 225; Shubhankar Dam and Vivek Tewary, 'Polluting Environment, Polluting Constitution: Is a 'Polluted' Constitution Worse Than A Polluted Environment?' (2005) 17(3) Journal of Environmental Law 383, 390.

[75] *Mehta* (Calcutta Tanneries) (n 44) ¶¶20(7)-(9).

[76] ibid ¶20(6).

[77] MC Mehta, *In the Public Interest* (Prakriti Publications 2009) 92.

[78] See, for example, BEAG (2007) (n 3) ¶72(d).

[79] James R May and Erin Daly, *Global Environmental Constitutionalism* (CUP 2015) 152.

issued in exercise of statutory powers. In *Vellore Citizens' Welfare Forum v Union of India and Others*, the Court imposed a total ban on the setting up of certain highly polluting industries within one kilometre from the embankments of specific water sources.[80] In addition, the Court directed the State Government and the Central Government not to permit the setting up of further tanneries in the State.[81]

The approach is less deferential where the higher judiciary restrained the authorities from undertaking certain activities, which may promote the realisation of certain components of the CER for some rights-holders in the short-term but adversely affect the realisation of this and other components of the CER for a greater number of rights-holders in the long-term. The High Court of Kerala restrained the administration from implementing a scheme to augment water supply by using pumps to extract groundwater. However, the order was subject to the approval of the scheme by a competent ministry of the Central Government.[82]

The higher judiciary also granted injunctive relief to prevent the occurrence of water pollution in the future. It prohibited any polluting activities within 10 km radius of two lakes,[83] any type of construction within a five kilometres radius of two lakes,[84] and any further construction in the area of two tanks.[85] The High Court of Calcutta restrained the State Government from reclaiming any further wetland and prohibited the grant of permission to any person for the purpose of changing the use of the land.[86] These weak remedies appear to be implicitly based on the principle of prevention and the precautionary principle. However, some of these remedies may require a change in policy (and not just a change in practice) and lead to concerns that the doctrine of separation of powers is being violated.[87]

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[80] See, for example, *Vellore* (n 67) ¶22 & ¶25(10). See also *Noyyal* (n 67).

[81] *Vellore* (n 67) ¶7 (referring to order of 9 April 1996).

[82] *Hussain* (n 24) ¶12. See also *Attakoya* (n 24).

[83] *Andhra Pradesh Pollution Control Board II v Prof (Retd) MV Nayudu* (2001) 2 SCC 62 [APPCB II] ¶75.

[84] *MC Mehta v Union of India* (1996) 8 SCC 462 ¶8. See also *MC Mehta (Badhkal and Surajkund Lakes Matter) v Union of India and Others* (1997) 3 SCC 715 [*Mehta* (Lakes)] ¶10.

[85] *Intellectuals Forum* (n 14) ¶96.

[86] PUBLIC (n 13) ¶42.

[87] May and Daly (n 79) 155.

The varying criteria governing the use of injunctions as a remedy raises the issue of certainty in respect of judicial reasoning. In order to grant an injunction, courts must weigh, evaluate and balance the competing interests of the parties. This may partially safeguard their interests, as well as the interests of non-parties.[88] But the higher judiciary did not apply a uniform standard in respect of the acceptable level of harm. In some cases, it adopted the 'reasonable person's test' to determine the risk of harm to the environment or human health.[89] In other cases, it is unclear whether a standard has been followed at all.

5.3 Judicial creativity in crafting remedies

This section examines two broad categories of judicial remedies in cases relating to water pollution and/or poor water quality: (i) that do not conform to the rights-remedy continuum and (ii) that are based on external sources such as basic concepts of environmental law or the recommendations or suggestions of experts.

5.3.1 Declaration of rights-without-remedies

The higher judiciary may grant 'rights without remedies'. As discussed in Chapter 3, it may adopt a deferential approach and simply recognise the CER and/or declare their violation without providing a remedy. This may be attributed to several reasons.

The higher judiciary may be satisfied with the efforts of the government to address the problem. In a case where the petitioner raised the issue of depleting water quality on account of indiscriminate extraction and uncontrolled use of groundwater by various companies, the High Court of Calcutta was 'convinced about the *bona fides* of the State Government as well as the other authorities'.[90] Based on the Statement of Objects and

[88] Abram Chayes, 'The Role of the Judge in Public Law Litigation' (1976) 89(7) Harvard Law Review 1281, 1292-93.

[89] See, for example, APPCB II (n 83) ¶64. See also *AP Pollution Control Board v Prof MV Nayudu (Retd) and Others* (1999) 2 SCC 718 ¶35.

[90] *Howrah Gantantrik Nagarik Samity and Others v State of West Bengal and Others* 2005 SCC OnLine Cal 257 (High Court of Calcutta) ¶8.

Reasons and a cursory reading of the Bill introduced by the State Government for management, control and regulation of groundwater, the court observed that 'the State Government appears to be extremely serious in the matter of groundwater preservation'.[91] The court did not adjudicate upon issues like toxicity or depletion or contamination of groundwater either because it was 'convinced that a proper authority is being created for the management of groundwater'.[92]

Alternatively, the higher judiciary may be convinced that the government was (or became) cognizant of the issue and was acting on it notwithstanding the slow rate of progress. In a case where the petitioner was concerned about the inaction of the State Government in not providing safe drinking water and not preventing the outbreak of cholera and gastroenteritis in the State,[93] the High Court of Andhra Pradesh found the State Government's 'response and reaction…to be very positive and responsible'.[94] According to the court, '[i]n a way, the purpose of filing the writ petition can be said to have been served. The authorities of the concerned departments were alerted and the quality of the water was maintained.'[95] According to Videh Upadhyay, the weak remedy allowed the court to recognise a strong right to clean water.[96] In terms of Cunningham's classification of the different functions of courts in collaborative litigation (Chapter 1, section 1.3.2), the court functioned as an ombudsman in this case by bringing the issue to the attention of the responsible authorities. In another case, the petitioner prayed for a declaration that the action/inaction of the authorities in permitting the villagers to consume water with high fluoride content (due to geogenic sources) and not providing them with water containing fluoride within the permissible limits was unconstitutional. The High Court of Andhra Pradesh observed that the State Government was 'taking all steps/measures to combat the problem of fluorosis – both long-term and short-term, and to evolve/implement such projects which would ensure supply of drinking water with

[91] ibid ¶11.

[92] ibid ¶¶10-11.

[93] *Wasim Ahmed* (n 2) ¶1.

[94] ibid ¶4.

[95] ibid ¶6.

[96] Videh Upadhyay, 'Water Laws in India – Emerging Issues and Concerns in a Rights Based Perspective' in Infrastructure Development Finance Company (ed), *India Infrastructure Report 2011 – Water: Policy and Performance for Sustainable Development* (OUP 2011) 58.

optimum fluoride content', and it found 'no reason to doubt the sincerity of the Government in their endeavour to complete the various projects…within a reasonable time'.[97]

The higher judiciary may also refuse to issue directions against government authorities in the absence of a prescribed duty to act. For instance, the High Court of Madhya Pradesh declined to act against the responsible officers of the State Government who had failed to detect the problem earlier because the guidelines for testing of water quality did not require a fluoride test to be conducted.[98]

5.3.2 Remedies without rights

Interim orders

In a number of cases, the higher judiciary granted remedies without rights in the form of interim orders without determining the question of rights. First, many of the judicial remedies in cases relating to past or existing water pollution that are discussed in this chapter were issued as interim orders or directions as a reaction to the urgency or immediacy of the need for some relief and/or the petitioners' prayer for prevention of water pollution. While interim orders directing the authorities to discharge their constitutional and/or statutory mandate represented weak remedies in the first instance, they were progressively strengthened in some cases as a response to implementation failure. Such interim orders also permitted the higher judiciary to retain the case on board and to monitor implementation (Chapter 7).

Second, the precautionary principle formed the basis of an ad interim order to prevent water pollution pending a scientific study of the issue by an expert committee in a case where the Court imposed an immediate countrywide ban on the production, use and sale of a pesticide that allegedly resulted in water pollution, and directed the statutory authorities to seize the permit given to its manufacturers.[99] Such a remedy appears to be

[97] *Subas Chandran* (n 9) ¶28.

[98] *Hamid Khan* (n 9) ¶7.

[99] *Democratic Youth Federation of India v Union of India and Others* (2011) 15 SCC 530 ¶6.

based on the principle of prevention and/or the precautionary principle, which have been read into Article 21 of the Constitution, although this is not explicitly stated in the decision.

Third, the higher judiciary issued interim orders in the form of permanent injunctions to prevent water pollution. These include orders directing the authorities not to permit the setting up of further tanneries in a state,[100] or any industry or construction of any type on the area at least up to 500 metres from the sea water at the maximum high tide,[101] or to make any type of construction or manner of interference with the flow of the river or the embankment of the river.[102] Some of these remedies that may be viewed as strong remedies resemble statutory powers of the authorities to restrict areas in which industries, operations or processes are prohibited or subject to certain safeguards.

Fourth, interim orders were intended to temporarily fill gaps in legislation and to nudge the other branches of government to take necessary action. The High Court of Gujarat issued an interim order as a precautionary measure prescribing the distance from the lake/pond on which no construction is permitted. Subsequently, the State Government framed regulations in this regard.[103] Regarding such interim orders, a former Chief Justice of India observed:

> The role of the Court, however, can at best be of temporary duration, for ultimately it is the function of the Legislature or of the Government to frame policies and provide for their implementation on a permanent basis.[104]

In addition to interim orders, the higher judiciary issued remedies beyond the petition without determining whether or not rights exist and/or should be granted.

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[100] *Vellore* (n 67) ¶7.

[101] *Indian Council for Enviro-Legal Action v Union of India and Others* (1996) 5 SCC 281 [ICELA (CRZ) II] ¶22 (referring to an interim order). Subsequently, this interim order was modified. See *Indian Council for Enviro-Legal Action v Union of India and Others* (1995) 3 SCC 77 [ICELA (CRZ) I] ¶1.

[102] Mehta-Nath I (n 45) ¶16.

[103] *Shailesh R Shah* (n 13) ¶23.

[104] RS Pathak, 'Human Rights and the Development of the Environmental Law in India' (1988) 14(3) Commonwealth Law Bulletin 1171, 1178-79.

Remedies beyond the petition

The higher judiciary relied on its expansive writ jurisdiction to issue remedies that extended beyond the scope of the case before it in terms of geographical area, parties or the relief claimed.

First, it expanded the scope of the remedies to other areas in the same city, state or region that were not named in the original petition.[105] A valid justification in cases relating to river pollution is the ineffectiveness of judicial remedies that do not apply to upstream and/or downstream areas. This may be contrasted with the stance of the Court in *Indian Council for Enviro-Legal Action v Union of India and Others* (the Bicchri case) where it refused to expand its jurisdiction to cover water pollution caused by other units in downstream villages and confined the judicial remedies to the areas and the respondent units, which formed the subject matter of the petition.[106]

Second, the remedies addressed parties that were not represented in court. In one case, the Court's rationale for issuing such an *ex parte* order without hearing the States that were not named as respondents in the petition was the general acceptance that 'protection of environment and keeping it free of pollution is an indispensable necessity for life to survive on earth'.[107] Such cases raise the issue of violation of the principle of natural justice that grants an opportunity to be heard to the persons/entities likely to be affected by a court decision.

Third, the higher judiciary granted remedies that went beyond what was prayed for by the petitioners. In one case, although the issue of pollution was not raised by the petitioner or discussed in the judgment, the Court issued directions to the polluter and the SPCB.[108] Similarly, in Mehta-Nath I, while the petition concerned the activities of one motel, the Court directed the SPCB not to permit the discharge of untreated effluent into the river,

[105] See, for example, *Ratlam* (n 3) ¶24; *Mehta* (Kanpur Municipalities) (n 3) ¶26. See also *Koolwal* (n 3) ¶10; *Mahendra Prasad* (n 2) ¶5 & ¶14; *Vinod Chandra* (n 4) ¶3.

[106] Bicchri (n 9) ¶55.

[107] *MC Mehta v Union of India and Others* (1992) 1 SCC 358 [*Mehta* (1992)] ¶6(4).

[108] Mehta-Nath I (n 45) ¶39(6).

to inspect all the hotels/institutions/factories in the area, and to take action against the ones discharging untreated effluent/waste into the river.[109] In cases concerning maintenance or restoration of water bodies other than rivers, high courts have issued directions beyond what is prayed for by the petitioners at the village or State level.[110]

Fourth, several of the abovementioned interim orders also reflected this aspect of the 'remedies without rights' approach. They were collective or systemic in nature, and their application was not confined to the subject of the petition before the higher judiciary. From the right-holders' perspective, these orders may succeed in preventing or controlling water pollution due to similar causes or activities in other areas as well. At the same time, the conversion of individual/collective cases seeking appropriate remedies into structural cases that necessitate systemic remedies raises questions about the scope of judicial enforcement of the CER as well as implementation of court decisions.

5.3.3 Basic concepts of environmental law

The Court relied on basic concepts of environmental law – such as the polluter pays principle, the precautionary principle, the public trust doctrine as well as the concept of sustainable development - to grant remedies in some cases. In the Bicchri case, the Court referred to the polluter pays principle before directing the Central Government to impose the cost of remedial measures upon polluting industrial units.[111] In Mehta-Nath I, the Court held that the public trust doctrine is a part of the law of the land and that the State Government committed patent breach of public trust by leasing ecologically fragile land to the motel management, and then it cancelled the lease,[112] which led to construction in the river bed and on the riverbank and to water pollution. The precautionary principle explicitly or implicitly formed the basis of several interim orders discussed in section 5.3.2. Alternatively, the higher judiciary specifically directed the authorities to implement some of these concepts. In *Vellore*, for instance, the Court directed the authority to be

[109] ibid ¶39(7).

[110] See *Susetha* (n 13) ¶25 and *Krishnan* (n 14) ¶14 respectively.

[111] Bicchri (n 9) ¶69(V).

[112] Mehta-Nath I (n 45) ¶36 & ¶¶39(1)-(2).

constituted by the Central Government to apply the precautionary principle and the polluter pays principle.[113]

A perusal of these decisions reveals the absence of a clear articulation of the content of these concepts that transcends a broad level of abstraction. To some extent, the polluter pays principle appears to be more clearly fleshed out than the other principles, as in *Vellore*. Further, the Court has not applied these concepts consistently.[114] It has also conflated the principle of prevention (which applies in case of scientific certainty) and the precautionary principle (which applies in the case of scientific uncertainty).[115] In some cases, the Court applied these concepts without expressly referring to them. The Court's direction to the SPCB to refuse applications for consent to establish new industrial units unless they have made adequate provision for treatment of effluents may be viewed as an implicit application of the principle of prevention.[116] In fact, these concepts may provide the Court with a justification for its inability to grant the relief that is requested by the petitioners. For instance, the balancing exercise that informs the concept of sustainable development (Chapter 4) and the varied interpretations of the polluter pays principle (Chapter 6) dilute the strength of the judicial remedies and permit the polluters to continue with business-as-usual.

5.3.4 Overcoming the expertise deficit

The higher judiciary recognises the limits of its expertise and relies on inputs from experts, often in the form of recommendations and suggestions, to inform the decision-making process. It directed institutions with technical or scientific expertise such as the National Environmental Engineering Research Institute (NEERI), the Ministry of Environment and Forests through the Central Pollution Control Board (CPCB) and/or SPCB to study the problem and to recommend/suggest measures. This was often followed by a direction to the authorities/industrial units to comply with the recommendations in a

[113] *Vellore* (n 67) ¶25(2).

[114] Geetanjoy Sahu, 'Implications of Indian Supreme Court's Innovations for Environmental Jurisprudence' (2008) 4(1) Law, Environment and Development Journal 375, 385. See also Lavanya Rajamani, 'The Right to Environmental Protection in India: Many a Slip between the Cup and the Lip?' (2007) 16(3) Review of European Community and International Environmental Law 274, 282-84.

[115] See Rajamani (n 114) 283-84.

[116] *Mehta* (Kanpur Municipalities) (n 3) ¶23.

time-bound manner.[117] This course of action helps to overcome the capacity objection to some extent and gives the higher judiciary the confidence to grant strong, detailed and specific remedies. Judicial remedies based on the recommendations of expert committees may also promote dialogue among different branches of government. It is also pertinent to mention that in some cases, the higher judiciary did not appoint expert committees until after sufficient time elapsed and the authorities failed to submit a report in respect of requested information and/or measures to address the problem.[118] Such orders also initiated an information gathering exercise and enhanced the accountability of the authorities. In one case, the Court first directed NEERI to prepare a report indicating the long-term measures which can be taken in relation to supply of drinking water as well as sewerage and drainage system and disposal of solid waste in a city, and then asked the State Government to indicate the projects undertaken by it in relation to these three issues.[119]

And yet, these very remedies may subject the higher judiciary to the criticism that they are stepping into the shoes of the other branches of government.[120] Concerns have also been expressed that this practice may create 'a parallel structure of decision-making deep within the area of executive competence',[121] and perpetuate 'government inactivity' because it 'gives the executive a pretext for further inaction, or makes action seem futile because judges will decide in any event'.[122] From the perspective of the right-holders, there is a concern that the independence of expert institutions may be compromised in a situation where a majority of them are subject to government control.

[117] See, for example, *Vellore* (n 67); *S Jagannath v Union of India and Others* (1997) 2 SCC 87; *Indian Council for Enviro-Legal Action v Union of India and Others* (2011) 12 SCC 739; *MC Mehta v Union of India and Others* (1997) 11 SCC 312; NOIDA RWA (n 45). See also *FK Hussain* (n 24); *Noyyal* (n 67).

[118] See, for example, *Shailesh R Shah* (n 13) ¶4.

[119] *DK Joshi v Chief Secretary, State of UP and Others* (1999) 9 SCC 578 ¶1.

[120] See generally Jamie Cassels, 'Judicial Activism and Public Interest Litigation in India: Attempting the Impossible?' (1989) 37(3) American Journal of Comparative Law 495, 506. See specifically J Mijin Cha, 'A Critical Examination of the Environmental Jurisprudence of the Courts of India' (2005) 10(2) Albany Law Environmental Outlook 197, 212-13.

[121] Sandra Fredman, *Human Rights Transformed: Positive Rights and Positive Duties* (OUP 2008) 135.

[122] ibid.

As an alternative, the higher judiciary directed government authorities to constitute a committee in order to identify measures to address the problem.[123] Although such directions appear to epitomise a weak remedy representing a deferential approach, in some respect, they are more aptly described as a moderate remedy. The higher judiciary specified the terms of reference, membership and the time frame for establishing the committee. In some of these cases, the authorities were directed to take necessary action in accordance with the report of the committee.[124] Some of these committees were also empowered to discharge the duties and functions of statutory authorities.[125] This is not a deferential approach but it is practical where the statutory authorities have failed to discharge their functions.

5.4 Mandatory, recommendatory or hortatory remedies

This section examines judicial remedies that are mandatory or hortatory or framed as recommendations or suggestions based on the nature of the action required and the branch of government to whom it is addressed.

5.4.1 Remedies that require lawmaking

Primary legislation: non-interference

In some cases, the petitioners sought directions to the legislature to enact legislation but the higher judiciary recognised that it cannot issue such directions. This is partly attributable to deference to the legislature, and partly to recognition of the fact that the legislature has enough difficulties passing legislation initiated from within, let alone responding to court decisions.[126] The deferential approach may extend to cases involving secondary or delegated legislation. In a case where the issue of blockage of free flow of water in a lake due to the discharge of effluents from three sources was raised, the Court

[123] See, for example, Mehta-Orissa (n 22) ¶10; *Bhawani Shankar* (n 29) ¶8; *Mahendra Prasad* (n 2) ¶15; *Subas Chandran* (n 9) ¶33(7); *Dhanajirao* (n 2) ¶23(v).

[124] *Bhawani Shankar* (n 29) ¶8; *Subas Chandran* (n 9) ¶33(7).

[125] See Mehta-Orissa (n 22) ¶10; *Mahendra Prasad* (n 2) ¶¶15-16.

[126] Daniel M Brinks, 'Solving the Problem of (Non)compliance in Social and Economic Rights Litigation' in Malcolm Langford, César Rodríguez-Garavito, and Julieta Rossi (eds), *Social Rights Judgments and the Politics of Compliance: Making It Stick* (CUP 2017) 494.

observed that it was not open to it to determine the order of priority of regulation by the notification issued by the government.[127]

Secondary legislation: mandatory orders

Shyam Divan observes that '[j]udges are far less deferential to subordinate legislation than to parliamentary enactments.'[128] In some cases, the higher judiciary issued mandatory orders to the government to enact secondary legislation on the basis of statutory provisions. In *Vellore*, the Court relied on section 3(3) of the EPA to issue mandatory orders to the Central Government to constitute an authority to address the issue of water pollution.[129] However, after laying down the mandate of the authority in general terms, the Court proceeded to increase the specificity of its direction. Instead of leaving it to the Central Government to determine the nature and scope of the powers of the authority, the Court conferred all the necessary powers and specified them in detail. The High Court of Gujarat directed the State Government to 'take steps to get the standards of water quality of lakes and ponds prescribed by the concerned authority under the law, and devise mechanism for periodic monitoring of the quality of water'.[130]

As in the case of court-appointed expert committees (section 5.3.4), the Court also transferred some statutory powers of the SPCB to the authority, or granted certain powers to it that bypass statutory procedure under the WPCPA. In *Vellore*, the Court vested the authority with the power to direct the closure of an industry in case of non-payment of the amount of compensation, to permit the reopening of the polluting tanneries rather than requiring the consent of the SPCB, and to order the permanent closure or relocation of the tanneries that failed to obtain consent from the SPCB or all the tanneries operating within a certain area.[131] The Court also empowered the authority to direct relocation of polluting industrial units, a power traditionally exercised by the government.[132] However,

[127] *TN Godavarman Thirumulpad (99) v Union of India* (2006) 5 SCC 47 ¶16.

[128] Shyam Divan, 'A Mistake of Judgment' Down to Earth (30 April 2002) <www.downtoearth.org.in/blog/a-mistake-of---judgment-14470>.

[129] *Vellore* (n 67) ¶25. See also *S Jagannath v Union of India and Others* (1997) 2 SCC 87 ¶52.

[130] *Shailesh R Shah* (n 13) ¶24(C).

[131] *Vellore* (n 67) ¶25(4) & ¶¶25(9)-(10).

[132] ibid ¶¶25(9)-(10).

the judgment was silent in respect of the provision of an alternative site for relocation, which means that the authority has to coordinate with the concerned departments of the State Government. Such directions raise the concern of judicial overreach.

In *Mehta* (Calcutta Tanneries), the Court issued a mandatory order to the State Government to appoint an authority without any statutory basis.[133] The mandate was similar to that of the authority in *Vellore* and in *S Jagannath v Union of India and Others*. Here, though, the judicial remedy was specific and the mandate was restricted to the areas affected by the polluting activities of tannery clusters in four areas situated in the eastern fringe of Calcutta.

In some cases, the Court issued mandatory orders to the executive to enact secondary legislation and even selected the legislative basis. In *MC Mehta v Union of India and Others*, it relied on the EPA to override the Central Government's concern that the legislative action required, that is, a central legislation in respect of groundwater, may not be permissible as water is a State subject under the Constitution.[134] The Court directed the constitution of the existing Central Groundwater Board as an Authority to regulate and control groundwater management and development in the country.[135] The judicial remedy was based on the petitioner's prayer. However, according to Ramaswamy Iyer, the desirability of the outcome, given the groundwater crisis in the country, does not assuage concerns relating to judicial activism.[136]

The Court also issued mandatory orders to the government that require enactment of secondary legislation without a statutory basis. In a case where the petitioner specifically sought a direction to the government to make greater effort to spread environmental awareness, the Court directed the Central Government to issue appropriate directions to State Governments and Union Territories to enforce the exhibition of slides containing messages on the environment in all cinema halls, touring cinemas and video parlours as

[133] See *Mehta* (Calcutta Tanneries) (n 44) ¶¶20(14)-(20).

[134] (1997) 11 SCC 312 ¶4.

[135] ibid ¶9.

[136] Ramaswamy R Iyer, 'Some Constitutional Dilemmas' (2006) 41(21) Economic and Political Weekly 2064, 2068.

a condition of their license, and to make environment a compulsory subject in schools and colleges.[137]

Primary or secondary legislation: recommendations/suggestions

The higher judiciary recommended or suggested to the legislature to frame certain types of laws but did not mandate the same. In the Bicchri case, the Court directed the Central Government to 'consider' 'the advisability of strengthening the environment protection machinery both at the Centre and the States and provide them more teeth'.[138] The Court also asked the Central Government to study and examine the suggestion made by the counsel for the respondent industries to 'constitute, by proper legislation, environmental courts all over the country' 'in depth from all angles before taking any action'.[139] The approach was deferential although the Court expressed some views in respect of the two suggestions.

In some cases, instead of issuing a mandatory order based on statutory provisions, the higher judiciary granted wide discretion to the government authorities and suggested the constitution of an authority. For instance, in a case concerning the poor implementation of the Coastal Regulation Zone (CRZ) Notification 1991 and the Management Plans, based on the petitioner's prayer,[140] the Court directed the Central Government to 'consider' setting up a National Coastal Management Authority and a State Coastal Management Authority in each State or zone because the SPCB are overworked.[141] Here, the Court left the specification of the powers and functions of the authorities to the Central Government (unlike in *Vellore* and *Jagannath*).

The higher judiciary also left it to the authorities to consider the enactment of other delegated legislation but the intensity of the recommendation varies. In one case, the High

[137] *Mehta* (1992) (n 107) ¶6(1) & ¶6(4). See also *Mehta* (Kanpur Municipalities) (n 3) ¶24.

[138] Bicchri (n 9) ¶70(7).

[139] ibid ¶47 & ¶70(6). See also *Lalit Miglani v State of Uttarakhand and Others* WP (PIL) No. 140 of 2015 (High Court of Uttarakhand, Judgment of 2 December 2016) ¶79(W) (recommending/suggesting the enactment of a national law to save the river Ganga from extinction).

[140] ICELA (CRZ) I (n 101) ¶2.

[141] ICELA (CRZ) II (n 101) ¶47(3).

Court of Kerala asked the Central Government to 'consider' prescription of standards for effluents, an environmental audit to precede licensing of an industry, and the creation of a national environment agency with powers in areas of planning, enforcement and sanctions.[142] The court gave some examples of provisions for prescription of standards. In another case, the court left it to the discretion of the government, by using the words 'if considered necessary', to make statutory regulations and to set up a responsible agency for monitoring the functioning of the system set up.[143] In the former case, the High Court strengthened its recommendation by providing examples, while in the latter case the measures were left entirely to the government.

But it is not always clear whether the judicial remedy is mandatory or intended as a suggestion. In the Bicchri case, after recommending certain measures, the Courts specified the manner of implementation, thus introducing elements of a binding order. It first asked the Central Government to consider treating all chemical industries (including existing industries), which are mainly responsible for environmental pollution, as a separate category and to scrutinise their establishment and functioning more rigorously. Then, the Court observed that the advisability of allowing the establishment of water-intensive industries in arid areas required examination. It then reminded the Central Government of its statutory power under the EPA to issue appropriate directions in the interest of environment and asked it to ensure the implementation of such directions and directed the Central Government and the SPCB to report to the Court on progress in implementation.[144]

5.4.2 Remedies that require policymaking, or implementation of existing laws

Non-interference

The higher judiciary refused to issue mandatory orders that may interfere with the government's policymaking powers. In one case, where the petitioner proposed certain

[142] *Mathew Lukose* (n 44) ¶23.

[143] *FK Hussain* (n 24) ¶12.

[144] Bicchri (n 9) ¶¶70(4)-(5).

solutions to combat the problem of drinking water supply, the High Court of Andhra Pradesh declined to issue any directions in respect of whether to supply water to the affected villages through existing or new pipelines or whether water should be released from one project or the other on the ground that these are matters to be decided by the State Government.[145] In another case where the petitioner requested the setting up of an expert body in order to ensure compliance with judicial directions and that No Objection Certificates are not wrongly given, the High Court of Gujarat distinguished between the powers of courts to issue a mandatory order to enforce an existing environmental law and to direct the government to formulate a particular policy or scheme.[146] According to the court, it could only make a recommendation or suggestion 'which the State Government will, no doubt, consider with all the seriousness which it deserves'.[147]

Recommendations/suggestions

In some cases, the higher judiciary adopted a deferential approach in respect of the executive's power to make policies and confined itself to making recommendations or suggestions for the consideration of the authorities, either on their own or based on the report of experts. The Court asked the Central Government to consider the desirability of organising 'Keep the city/town/village clean week' throughout the country.[148] In another case, the Court made a suggestion to the Central Government to involve the national radio and television channel in environmental education.[149] Based on the suggestion of the Member Secretary of the SPCB, the High Court of Andhra Pradesh directed the State Government to 'consider' the feasibility of evacuating people to safer places by planning and undertaking a rehabilitation and resettlement programme.[150]

In a few cases, the higher judiciary strengthened the suggestions, for examples, by imposing deadlines. The Court relied on constitutional provisions to hold that it was open

[145] *Subas Chandran* (n 9) ¶1 & ¶3.

[146] *Pravinbhai* (n 67) ¶¶146-147.

[147] ibid ¶¶145-146.

[148] *Mehta* (Kanpur Municipalities) (n 3) ¶25.

[149] *Mehta* (1992) (n 107) ¶6.

[150] *Subas Chandran* (n 9) ¶33(6).

to the municipalities and/or local bodies to evolve norms, supervised by the State Government/Union Territory, to recover funds for the purpose of generating finances to install and run all CETP. The tone of this order appears to be recommendatory but then the Court specified a date on or before which the norms must be finalised so that they can be implemented with effect from the next financial year, failing which the State Government/Union Territory shall bear the cost.[151] Similarly, the High Court of Andhra Pradesh first expected but then ordered the State Government to keep the deadline mentioned in its action plan to provide safe drinking water to all the people in the State by the year 2005.[152]

A similar approach is evident from decisions where the authorities are directed to undertake certain measures to ensure statutory compliance. In *Mehta* (Calcutta Tanneries), for instance, the Court suggested that the cost of construction of the CETP should be initially funded by the government or from some other source provided by the government, and later an effluent charge can be levied on the tanneries for reimbursing this amount in a phased manner. Subsequently, the Court strengthened the force of its suggestion thus converting it into a mandatory order.[153]

Hortatory statements

Instead of making recommendations/suggestions to the authorities, the higher judiciary adopted a conciliatory approach and issued hortatory statements in some cases. Such statements may indicate recognition of the limits of judicial power.[154]

First, such statements were made in cases where the higher judiciary reposed faith in government action. In a case raising the issue of depleting water level and water quality on account of indiscriminate extraction and uncontrolled use of groundwater by various companies, after being 'convinced about the *bona fides* of the State Government as well as the other authorities', the High Court of Calcutta expressed the hope that 'the State

[151] *Paryavaran Suraksha Samiti* (n 49) ¶10.

[152] *Wasim Ahmed* (n 2) ¶9.

[153] *Mehta* (Calcutta Tanneries) (n 44) ¶¶7-10.

[154] May and Daly (n 79) ¶163.

would take very firm steps to see that the general public get clear and uncontaminated water'. [155] In respect of CETP, which were already under construction, the Court expressed the hope and expectation that the government will complete them within the postulated timelines.[156]

Second, such statements follow an expression of the need for urgent/immediate action. In a lake pollution case, the Court first observed that 'some preventive and remedial measures [need] to be taken on war footing, as any delay would cause further degradation and complicate the matters' and listed the steps that 'deserve to be taken urgently' based on the findings and recommendations of a Court-appointed Commissioner.[157] The Court then expressed the hope that all the concerned authorities would take such concerted steps.[158]

Third, hortatory statements follow an expression of appreciation for the measures undertaken by the authorities. After noting that the municipal corporation had taken immediate remedial steps after the filing of the petition and started supplying potable water to the residents, the High Court of Bombay expressed the hope that it would keep constant vigil in association with the members of the committee of experts to be appointed by it pursuant to the court's directions to ensure the supply of unpolluted water.[159]

Conclusion

This chapter examined the judicial remedies directed at the State as the constitutional or statutory duty-bearer or the law- or policy-maker. It finds that the higher judiciary adopted a deferential approach and granted weak remedies in a number of cases relating to the implementation of constitutional or statutory duties. Judicial remedies were also weak where the higher judiciary issued recommendations or suggestions or made hortatory statements, based on the nature of the action required (primary or secondary law-making

[155] *Howrah Gantantrik* (n 90) ¶8.

[156] *Paryavaran Suraksha Samiti* (n 49) ¶8.

[157] *Dr Ajay Singh Rawat v Union of India and Others* (1995) 3 SCC 266 ¶7.

[158] ibid ¶8.

[159] *Dhanajirao* (n 2) ¶26.

or policymaking) and the branch of government to whom they are addressed (legislature or executive).

The higher judiciary strengthened some of the weak remedies in cases relating to the implementation of constitutional or statutory duties by highlighting the urgency or immediacy of the situation or imposing a deadline for implementation, specifying the measures to be undertaken, etc. The higher judiciary also declared rights without granting remedies or granted weak or strong remedies before declaring rights. The complexity of remedies without rights that extend beyond the petition may pose implementation challenges.

Sometimes judicial remedies were based on basic concepts of environmental law. However, these concepts were not clearly articulated and they were often applied inconsistently and sometimes implicitly. The balancing exercise inherent in the concept of sustainable development precluded the grant of relief that is requested by the petitioners in some cases. The higher judiciary also relied on another external source - the recommendations or suggestions of experts (government institutions or court-appointed) - to overcome the expertise deficit and to grant specific, detailed, mandatory and prescriptive remedies. In a number of cases, this was the result of the failure of the government to address the situation. In some cases, the higher judiciary adopted a more deferential approach and directed the government to constitute a committee in order to identify suitable measures but specified the committee's terms of reference etc.

Overall, in a majority of cases, the judicial remedies are positive in nature and they require government action. The higher judiciary strengthened weak remedies to some extent to nudge the government towards action while implicitly recognising the objections to judicial enforcement of socio-economic rights and to ensure that the right-holders are not left remediless. At the same time, the higher judiciary's approach is consistently inconsistent and uncertain, which raises the issue of judicial legitimacy from the perspective of the right-holders and duty-bearers.

There is a direct relationship between the nature, strength and complexity of judicial remedies and the implementation of court decisions. Before examining this aspect in Chapter 7, the next chapter focuses on judicial remedies awarding compensation and/or

damages for water pollution caused by non-State actors, which are prayed for by the right-holders or their representatives in a majority of environmental rights litigation.

CHAPTER 6
ENFORCING THE RIGHTS:
REMEDIES DIRECTED AT NON-STATE POLLUTERS

Introduction

Chapter 5 focused on judicial remedies for the prevention or control of water pollution and/or the maintenance or improvement of water quality that are primarily directed at the State as the law- or policy-makers, or as constitutional or statutory duty-bearers. Judicial remedies may also take the form of compensation for the loss suffered by specific right-holders and/or of damages for restoration of the affected environment. These remedies are often directed at non-State actors as the polluters, although they may extend to the State in some cases.

There are several mechanisms for the determination of liability of polluters for loss and damage resulting from water pollution, but as Hans Christian Bugge argues: 'rules on liability and compensation for pollution damage are often claimed to be a fulfilment of the PPP [polluter pays principle]' (emphasis added).[1] The polluter pays principle provides a common frame of reference and permits a more focused and manageable case-law search and nuanced analysis of the results. Although it forms an integral part of the toolkit of domestic environmental law, there is no detailed examination of its application by courts in India. For these reasons, this chapter relies on the polluter pays principle to examine the remedies in respect of loss and damages in cases relating to water pollution before the Supreme Court of India (the Court) and high courts (together, the higher judiciary) and more recently, the National Green Tribunal (NGT).

The first section discusses the extent of inclusion of the 'polluter pays principle', express or implied, in the domestic law framework. The next two sections are concerned with the operationalisation of the principle. They deal with the identification of the polluter and the threshold of liability, and the functions of liability and the scope of the polluter's liability respectively. The fourth section considers the different approaches for the

[1] Hans Christian Bugge, 'The Polluter Pays Principle: Dilemmas of Justice in National and International Contexts' in Jonas Ebbesson and Phoebe Okowa (eds), *Environmental Law and Justice in Context* (CUP 2009) 420.

assessment of loss to victims and environmental harm, and the determination of compensation and damages, while the fifth section examines who pays what and for what purpose.

6.1 The polluter pays principle: domestic perspectives

Before examining the application of the polluter pays principle as the mechanism for the determination of liability by the higher judiciary and the NGT in cases relating to water pollution, this sub-section examines two relevant sources of domestic law.

6.1.1 Tort law

Polluters were held liable for the damage resulting from their activities, for instance, as a remedy under tort law, much before the express incorporation of the polluter pays principle into domestic environmental jurisprudence.[2] However, under tort law, the affected party is required to prove the fault of the polluter, which is a heavy burden to discharge. Further, the polluter is not liable to pay damages for environmental harm, which is neither reasonably foreseeable nor avoidable.[3]

In contrast, under the no-fault or strict liability principle, there is no requirement to prove the polluter's fault. It is based on the following rule laid down in *Rylands v Fletcher*:

> We think that the true rule of the law is, that the person who, for his own purposes, brings on his lands and collects and keeps there anything likely to do mischief if it escapes, must keep it at his peril, and if he does not do so, is prima facie answerable for all the damages which is the natural consequence of its escape.[4]

The polluter is liable for damages resulting from its activities regardless of the amount of

[2] See, for example, *JC Galstaun v Dunia Lal Seal* (1905) 9 CWN 612; *Ram Baj Singh v Babulal* AIR 1982 Allahabad 285; *Mukesh Textile Mills (P) Ltd v HR Subramanya Sastry* AIR 1987 Karnataka 87.

[3] Nicolas de Sadeleer, *Environmental Principles: From Political Slogans to Legal Rules* (OUP 2002) 50. See also Kathleen Segerson, 'Liability for Environmental Damages' in Henk Folmer and Gabel H Landis (eds), *Principles of Environmental and Resource Economics: A Guide for Students and Decision-Makers* (Edward Elgar Publishing 2000) 421 & 430.

[4] (1868) LR 3 HL 330 (House of Lords) (Blackburn, J.).

care exercised in conducting them.[5]

Courts in India have relied on the strict liability principle to award compensation and damages for water pollution.[6] However, the application of this principle is subject to a number of exceptions, such as an act of God, an act of a third party, plaintiff's own fault, plaintiff's consent, natural use of land and exclusion of rule by statute or statutory authority. Further, the liability may be limited in amount and the definition of damage tends to be narrow.

6.1.2 Environmental laws

Until recently, domestic environmental laws did not explicitly invoke the polluter pays principle. Arguably, a version of the principle is implicit in the provisions of the Environment (Protection) Act, 1986 (EPA) and the Water (Prevention and Control of Pollution) Act, 1974 (WPCPA) that envisage punitive remedies in the form of imprisonment or fine or both for non-compliance with certain provisions.[7] Here, the polluter pays for non-compliance with or contravention of statutory provisions rather than for its polluting activities.

Domestic environmental laws also include provisions that incorporate the partial internalisation of environmental costs approach in respect of potential and/or existing pollution. In other words, the polluter is not held responsible for all the pollution resulting from its activities. For instance, while granting consents to establish and to operate an industry, operation or process to a person, the State Pollution Control Board (SPCB) may require the execution of some work.[8] But the law recognises the possibility that the person (potential polluter) may not undertake the prescribed measures and it may direct the SPCB to execute the work in this case.[9]

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[5] Segerson (n 3) 421.

[6] Shyam Divan and Armin Rosencranz, *Environmental Law and Policy in India* (2nd edn Impression OUP 2002) 105.

[7] The Environment (Protection) Act, 1986 [EPA] s 15. See also The Water (Prevention and Control of Pollution) Act, 1974 [WPCPA] ss 41-45A.

[8] WPCPA s 30(1).

[9] ibid s 30(2).

Similarly, a court may direct removal of the polluting matter while making an order restraining a person from polluting the water in any stream or well, but in case of non-compliance, it may authorise the SPCB to undertake this task instead.[10] Further, the prescribed authorities or agencies are required to take remedial measures to prevent or mitigate environmental pollution, which occurs or is apprehended to occur as a result of the discharge of an environmental pollutant, which is in excess of the prescribed standards and is due to any accident or other unforeseen event.[11] This provision may perform a preventive function by encouraging the authorities to ensure better implementation of other statutory provisions that are preventive in nature.

In each of these three situations, the designated statutory authority can recover the expenses incurred by it from the polluter as arrears of land revenue or of public demand.[12] While the polluter who should be held liable for the pollution may eventually pay subject to the ability of the authority to recover the expenses incurred by it, the authority pays in the first instance by undertaking the measures to prevent or mitigate the pollution. This is similar to the government/public pays principle discussed in section 6.5.1.

Further, the EPA empowers the Central Government to 'take all such measures as it deems necessary or expedient for the purpose of protecting and improving the quality of the environment and preventing, controlling and abating environmental pollution', as well as to issue directions.[13] The Court relied on these statutory provisions to direct the Central Government to assess loss to the victims of water pollution and harm to the environment and to determine compensation and damages payable by the polluter (section 6.4.1).

Following the Bhopal gas tragedy of 2/3 December 1984, questions were raised about the extent of liability of corporations in the event that any injurious liquid or gas escapes, on account of negligence or otherwise, and the remedies to secure payment of damages to

[10] ibid ss 33(3)(i) & (ii) respectively.

[11] EPA s 9.

[12] ibid. See also WPCPA s 30(3) & s 33(4).

[13] EPA s 3 & s 5 respectively.

the affected persons. In order to overcome the limitations of the strict liability principle, particularly in the context of the pending claims of the victims of the Bhopal gas tragedy, in *MC Mehta and Another v Union of India and Others* (the Oleum gas leak case), a Constitution Bench of the Court held:

> where an enterprise is engaged in a hazardous or inherently dangerous activity resulting, for example, in escape of toxic gas the enterprise is strictly and absolutely liable to compensate all those who are affected by the accident.[14]

Further, absolute liability 'is not subject to any of the exceptions which operate vis-à-vis the tortious principle of strict liability under the rule in *Rylands v Fletcher*'.[15]

The Public Liability Insurance Act 1991, which was enacted following the Bhopal gas tragedy, imposes no-fault liability on owners of undertakings handling any hazardous substance under the EPA. The owners are required to take out insurance policies for the purpose of providing immediate relief where the occurrence of an accident while handling any hazardous substance results in death or injury or damage to the property of persons (other than workmen).[16] Although the polluter is required to pay compensation, the amount is abysmally low, there is a cap on the insurance policy, and the liability does not extend to damage to the environment.[17]

The incorporation of the 'polluter pays principle' into domestic environmental jurisprudence is widely attributed to the Supreme Court.[18] The principle was invoked in a number of cases, either with reference to its formulation in international environmental law or as a more general idea that the polluter should pay. While the Court did not refer to the existing statutory provisions in a consistent manner, the National Green Tribunal Act 2010 (NGT Act) specifically requires the NGT to apply the polluter pays principle.[19]

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[14] (1987) 1 SCC 395 ¶31.

[15] ibid.

[16] The Public Liability Insurance Act, 1991 s 4(1) & s 3(1).

[17] Usha Ramanathan, 'Business and Human Rights – The India Paper' (International Environmental Law Research Centre n.d.) <www.ielrc.org/content/w0102.pdf>.

[18] See, for example, Lavanya Rajamani, 'The Right to Environmental Protection in India: Many a Slip Between the Cup and the Lip?' (2007) 16(3) Review of European Community and International Environmental Law 274, 279; Geetanjoy Sahu, 'Implications of Indian Supreme Court's Innovations for Environmental Jurisprudence' (2008) 4(1) Law Environment and Development Journal 375, 384.

[19] The National Green Tribunal Act, 2010 s 20.

The NGT is empowered to provide 'relief and compensation to the victims of pollution and other environmental damage', 'restitution of property damaged' and 'restitution of the environment for such area or areas',[20] and to divide the compensation or relief payable under separate heads specified in Schedule II having regard to the damage to public health, property and the environment.[21] In case of an accident, the NGT Act applies the principle of no fault liability and provides for apportionment of liability where pollution is the combined or resultant effect of an accident or the adverse impact of several activities, operations and processes.[22] However, the jurisdiction of the NGT is confined to the seven enactments specified in Schedule I, which include the EPA and the WPCPA.[23]

6.2 Operationalising the principle: identifying the polluter and acceptable pollution

This section examines the manner in which the higher judiciary and the NGT identified the polluter and the conditions under which the polluter pays principle will be triggered.

6.2.1 Identification of the polluter

In a majority of cases, the polluter is either an industry or a local government authority that discharged its liquid and/or solid waste into water bodies or on land. The Court identified 'those who have been responsible for disturbing the ecological balance either by running the industries or any other activity which has the effect of causing pollution in the environment' as the polluter and awarded damages against them.[24] This chapter focuses on non-State polluters because local bodies are not held liable for compensation/damages in most cases.

[20] ibid s 15(1).

[21] ibid s 15(4).

[22] ibid ss 17(2) & (3).

[23] ibid s 15(1) & s 17(1).

[24] *MC Mehta v Kamal Nath and Others* (2000) 6 SCC 213 [Mehta-Nath II] ¶10.

In the case of goods or other items, the producer is the polluter.[25] But the polluter may also be the consumer of the goods. Further, although non-point sources of water pollution include open defecation and encroachment, neither the higher judiciary nor the NGT has extended the term polluter to hold the government responsible for water pollution resulting from its failure to realise the right to sanitation (which leads to the practice of open defecation) or to prevent encroachments.

The polluter may be an individual or a collective.[26] The higher judiciary considered a number of cases where water pollution was the result of the activities of a number of industries, which were located in an industrial complex or a cluster (as in the case of small-scale industries).[27] Similarly, a number of local government authorities were responsible for the discharge of untreated or partly treated sewage effluents, which ultimately resulted in water pollution.[28]

The NGT expanded the scope of the polluter pays principle to include the public or the community at large.[29] It also identified the public as the polluter in order to collect fees for operation and maintenance of the infrastructure for management of municipal solid waste.[30] This is more appropriately described as an application of the partial internalisation of cost approach rather than liability (section 6.3), and confirms the economic foundation of the 'legal' formulation of the polluter pays principle. In some cases, the higher judiciary and the NGT singled out the poor members of the public or the community as polluters (section 6.5.1).

The identification of the polluter(s) is not always a straightforward task. The

[25] *Research Foundation for Science (18) v Union of India and Another* (2005) 13 SCC 186 ¶29.

[26] de Sadeleer (n 3) ¶57.

[27] See, for example, *Indian Council for Enviro-Legal Action and Others v Union of India and Others* (1996) 3 SCC 212 [Bicchri]; *Vijay Singh Puniya v State of Rajasthan and Others* AIR 2004 Rajasthan 1.

[28] See, for example, *MC Mehta v State of Orissa and Others* AIR 1992 Orissa 225.

[29] See, for example, *Manoj Misra v Union of India and Others* OA No. 6 of 2012 (NGT - Principal Bench, Judgment of 13 January 2015) [*Misra* (2015)].

[30] See, for example, *Gaurav Jain v State of Punjab and Others* OA No. 106 of 2013 (NGT - Principal Bench, Order of 3 September 2013); *Subhas Datta v Union of India and Others* OA No. 110 of 2013 (NGT - Principal Bench, Order of 22 October 2013); *Manoj Misra v Union of India and Others* OA No. 6 of 2012 (NGT - Principal Bench, Order of 8 May 2015).

responsibility for an activity that is the source of water pollution may be distributed among different actors, and in some cases, it is difficult to determine whose action or inaction led to pollution.[31] To overcome this difficulty, in one case, the NGT extended the chain of responsibility from the owner of the entity or property that caused water pollution as a result of disposal of construction waste to the contractor, sub-contractor or agent who actually undertakes the activities, such as transportation and disposal of waste that results in water pollution.[32]

de Sadeleer describes two other scenarios in which the identification of the polluter may pose a challenge. One is the case of diffuse (sources of) pollution where multiple causes may produce a single effect.[33] This is the case where water pollution is caused by domestic and industrial effluents from cities in upstream areas and agricultural run-off from villages in downstream areas. The second scenario involves the identification of the person or entity responsible for the production of the polluting matter rather than the person who actually produces the pollution by using (or consuming) the polluting matter.[34] This is the case where farmers use pesticides or untreated or partly treated domestic sewage in their fields.

6.2.2 The threshold of unacceptable pollution

The higher judiciary did not invoke the polluter pays principle in every instance of environmental harm or damage, hold the polluter liable for pollution and direct it to pay. The polluter pays principle was triggered only when certain conditions were satisfied.

First, the higher judiciary held that the polluting activity must exceed the threshold of the

[31] de Sadeleer (n 3) 41.

[32] See, for example, *Manoj Misra v Union of India and Others* OA No. 6 of 2012 (NGT - Principal Bench, Interim order of 22 July 2013) [*Misra* (2013)]; *Paryavaran Mitra and Others v Gujarat Pollution Control Board and Others* Application No. 131 of 2013 (NGT - Western Zone Bench, Judgment of 20 December 2013); *Vimal Bhai v Tehri Hydro Development Corporation and Others* OA No. 197 of 2016 (MA No. 376 of 2016) (NGT - Principal Bench, Judgement of 13 April 2017).

[33] de Sadeleer (n 3) 41.

[34] ibid 42.

prescribed standards in the domestic environmental laws, and result in damage.[35] The latter requirement was discussed in *Deepak Nitrite v State of Gujarat and Others*,[36] an appeal against a decision where the discharge of industrial effluents in excess of the prescribed statutory parameters led to a presumption of water pollution although there was no resultant loss, injury or damage.[37] The Court observed that 'compensation to be awarded must have some broad correlation…with the harm caused by it [the industries]' (emphasis added).[38]

The Court first stated the 'legal position' that 'if there is a finding that there has been degradation of environment or any damage caused to any of the victims by the activities of the industrial units certainly damages have to be paid'.[39] Then, it held that it would not be correct 'to say that mere violation of the law in not observing the norms would result in degradation of environment'.[40] But in some instances, given the delayed observance or cumulative effect of the impacts of pollution, such an approach may allow the polluters to escape liability and leave the right-holders without a remedy.

The second scenario is where the risk or apprehension of environmental degradation or pollution necessitates the application of the precautionary principle (where there is uncertainty),[41] and/or the principle of prevention (where there is certainty).[42] In *Research Foundation for Science (18) v Union of India and Another*, the Court confined the observation in *Deepak Nitrite* that 'to say that mere violation of the law in not observing the norms would result in degradation of environment would not be correct' to the facts of that case.[43] According to the Court, *Deepak Nitrite* did not lay down a proposition that the application of the polluter pays principle requires actual environmental degradation.

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[35] See, for example, *Pravinbhai Jashbhai Patel and Another v State of Gujarat and Others* (1995) 2 GLH 352.

[36] (2004) 6 SCC 402.

[37] See *Deepak Nitrite Ltd v Ajit D Padiwal and Others* (1997) 1 GLH 1062. See also *Pravinbhai* (n 35).

[38] *Deepak Nitrite* (2004) (n 36) ¶6.

[39] ibid.

[40] ibid.

[41] de Sadeleer (n 3) 40-41.

[42] ibid 61.

[43] *Research Foundation* (n 25) ¶30 referring to *Deepak Nitrite* (2004) (n 36) ¶6.

The Court distinguished the case before it on the ground that the offending activities had the potential to degrade the environment. In other words, the Court applied the principle of prevention. In contrast, in *Deepak Nitrite*, the Court was dealing with the discharge of effluents by industries in excess of the prescribed parameters but in the absence of a finding of environmental degradation.[44] Even then, in the second scenario, the polluter pays principle cannot be applied where the possible harmful effects of a discharge are *excusably unknown* to the polluter as they are totally unknown even to the scientific community.[45]

In any case, from a scientific point of view, degradation relates more closely to the introduction of a polluting substance into the ecosystem than to crossing a threshold of irreversibility.[46] Therefore, the third scenario involves damage even though the discharge of effluents by individual units does not exceed the prescribed standards; in other words, the discharge is authorised,[47] the cumulative impacts of the authorised industrial activities of individual units exceed the threshold or the prescribed standard is inadequate. This raises the question: who should be held liable for compensation to rights-holders and for damages for restoration of the environment?

de Sadeleer argues that the polluter pays principle should give rise to liability for residual damage because of the inadequacy of discharge thresholds.[48] The 'regulatory compliance defence', that is, the pollution is in compliance with the laws and regulations, counters this argument.[49] Alternatively, the public or the government will have to bear 'the cost of clean-up measures' and 'there is no incentive for the polluters to reduce the harmfulness or quantity of their polluting emissions even further.'[50] But if the government pays with the taxpayers' money, it ultimately amounts to the public or the victims being held liable for the pollution caused by the polluter (section 6.5.1).

[44] *Deepak Nitrite* (2004) (n 36) ¶1.

[45] Bugge (n 1) 422.

[46] de Sadeleer (n 3) 37.

[47] ibid 38-41.

[48] ibid 37.

[49] Bugge (n 1) 422.

[50] de Sadeleer (n 3) 40.

In the absence of statutory provisions, the victims of water pollution may be left without a remedy unless the higher judiciary engages in some creativity. But this practice is not free from criticism either as it undermines the certainty of law. Alternatively, the statutory requirement that the prescribed standards must be exceeded must be relaxed, or cumulative negative environmental impacts of individually authorised discharges must be regulated.

The fourth scenario is where the existing statutory framework does not address all sources of water pollution. Examples include non-point sources such as agricultural run-off and open defecation that remain largely unregulated. In a majority of cases, the higher judiciary and the NGT tend to link the application of the polluter pays principle to violations of existing laws, thus circumscribing its invocation to impose compensation and/or damages as a remedy in respect of other sources of water pollution. There are some exceptions however, such as cases relating to open defecation, which are problematic for other reasons (section 6.5.1).

6.3 Operationalising the principle: the question of liability

This section examines the curative and preventive functions and the nature of liability, which set the stage for the operationalisation of the polluter pays principle in cases relating to water pollution.

6.3.1 Functions of liability

Curative function

The imposition of liability can perform a curative function by holding the polluter responsible for environmental damage and for payment of compensation to the victims.[51] By awarding remedies to victims of water pollution, courts can promote the realisation of the CER of individuals and communities. It is settled law in India that the 'one who

[51] ibid 37.

pollutes the environment must pay to reverse the damage caused by his acts'.[52] This payment is to be used for restitution of the environment or ecology,[53] or restoration of ecological balance.[54] This reflects the polluter pays principle defined in a wider sense, which corresponds to the full internalisation of externalities and covers ecological damage in its entirety.[55] As noted by Geetanjoy Sahu, the imposition of liability for environmental damages and costs for restoration of the environment may also contribute to the recognition and enforcement of the right of the environment.[56]

Preventive function

The imposition of liability may carry out a preventive function where it incentivises the adoption of measures to reduce or pre-empt environmental damage.[57] The award of damages or compensation may modify the behaviour of the polluter and others and deter them from engaging in similar polluting activities in the future.[58] In other words, it may encourage the polluter to undertake necessary measures to stop the polluting activity and to prevent the recurrence of damage in the future.[59]

The Court recognises this preventative aspect. In the Oleum gas leak case, the Court correlated 'the measure of compensation' to 'the magnitude and capacity of the enterprise because such compensation must have a deterrent effect'.[60] This so-called deep pockets concept has been subsequently applied to award exemplary damages in cases involving

[52] See *MC Mehta v Kamal Nath and Others* (1997) 1 SCC 388 [Mehta-Nath I] ¶38 & ¶39(3); Mehta-Nath II (n 24) ¶24; *MC Mehta (Calcutta Tanneries' Matter) v Union of India and Others* (1997) 2 SCC 411 ¶19.

[53] See, for example, Mehta-Nath I (n 52) ¶39(3); Mehta-Nath II (n 24) ¶9, ¶10 & ¶24.

[54] See, for example, *Research Foundation* (n 25) ¶29; *Puniya* (n 27) ¶31.

[55] J Pezzey, 'Market Mechanisms of Pollution Control: "Polluter-pays", Economic and Practical Aspects' in R Kerri Turner (ed), *Sustainable Environmental Management: Principles and Practice* (Westview Press 1988) 190. See also de Sadeleer (n 3) 43.

[56] Sahu (n 18) 380.

[57] Segerson (n 3) 421.

[58] de Sadeleer (n 3) 37; Jamie Cassels, 'Judicial Activism and Public Interest Litigation in India: Attempting the Impossible?' (1989) 37(3) American Journal of Comparative Law 495, 505.

[59] de Sadeleer (n 3) 58.

[60] Oleum gas leak case (n 14) ¶32.

water pollution (section 6.4.2).[61] The application of the government pays principle where the government is directed to pay compensation or damages instead of the polluter on account of the latter's failure or inability to pay can also perform a preventive function (section 6.5.1).

6.3.2 Nature of liability

In 1996, the Court discussed the nature of the liability of the polluter in two landmark cases relating to water pollution. In *Indian Council for Enviro-Legal Action and Others v Union of India and Others* (the Bicchri case), a case where the discharge of highly toxic effluents from chemical industries resulted in water pollution, the Court examined the question of liability from two angles: the absolute liability principle and the polluter pays principle.[62] After opining that 'any principle evolved in this behalf [i.e. to determine the liability of the polluters] should be simple, practical and suited to the conditions obtaining in this country' (emphasis added),[63] the Court referred to the absolute liability principle, which was laid down in the Oleum gas leak case (section 6.1.2).[64]

The Court held that the polluters were absolutely liable to compensate for the harm caused by them to the villagers in the affected area, and to the environment, that is, the soil and underground water. They were required to remove the pollutants lying in the affected area and to pay the cost of the remedial measures for environmental restoration.[65] This interpretation of the polluter pays principle goes beyond the formulation of the principle in international environmental law, which limits the liability of the polluter.[66] In addition, it reflects the full cost internalisation approach where the polluter also internalises the

[61] See, for example, *Sterlite Industries (India) Ltd v Union of India and Others* (2013) 4 SCC 575; *Him Privesh Environment Protection Society and Another v State of Himachal Pradesh and Others* CWP No. 586 of 2012 and CWPIL No. 15 of 2009 (High Court of Himachal Pradesh, Judgment of 4 May 2012); *Krishna Kant Singh v National Ganga River Basin Authority* 2014 SCC Online NGT 2364.

[62] Bicchri (n 27) ¶¶58-67.

[63] ibid ¶65.

[64] ibid ¶¶59-60.

[65] ibid ¶66.

[66] See Patricia Birnie, Alan Boyle, and Catherine Redgwell, *International Law and the Environment* (OUP 2009) 324. See also Michael R Anderson, 'International Environmental Law in Indian Courts' (1998) 7(1) Review of European Community and International Environmental Law 21, 27.

cost of damage resulting from the pollution.

The Court also concluded that the polluter pays principle is stated in 'absolute' terms in the Oleum gas leak case.[67] This suggests that the Court recognised the distinction between the absolute liability principle, which applies to inherently dangerous or hazardous activities, and the polluter pays principle, which applies more broadly to different cases of pollution, irrespective of the hazardous nature of the polluting activity.[68]

In *Vellore Citizens' Welfare Forum v Union of India and Others*, a case where the discharge of toxic effluents from tanneries and other industries resulted in water pollution, the Court reiterated that absolute liability for harm to the environment extends to compensating the victims of pollution and paying the cost of reversing the damaged environment'.[69] What is a matter of concern is that in *Vellore*, the Court appears to have blurred the distinction made in the Bicchri case among different types of polluting activities, that is, whether or not they are hazardous and inherently dangerous, and endorsed the absolute liability of the polluter so long as the polluting activity resulted in harm or damage.[70] The distinction among different types of polluting activities has serious implications for the nature and extent of liability and ought to form a central element of the decision-making process.

6.4 Assessment and determination of loss/compensation and environmental damage

This section examines the higher judiciary and the NGT's approach to the assessment of loss and environmental damage resulting from water pollution and the determination of compensation and/or damages payable by the polluter.

[67] Bicchri (n 27) ¶69(V). See also Anderson (n 66) 27.

[68] Divan and Rosencranz (n 6) 111 & 590.

[69] (1996) 5 SCC 647 ¶12. See also *Research Foundation* (n 25) ¶31 (observing that the absolute liability principle applies to the payment of compensation to affected persons).

[70] Divan and Rosencranz (n 6) 111 & 590. See also *The All India Skin and Hide Tanners and Merchants Association v The Loss of Ecology (Prevention and Payment of Compensation) Authority and Others* 2010 SCC OnLine Madras 1179 (High Court of Madras) ¶ 9.

6.4.1 Outsourcing the task

In a number of cases, the higher judiciary either directed the government/authorities to undertake the task of assessment and determination, or appointed committees for this purpose. In some cases, this approach was based on the higher judiciary's recognition of its lack of expertise; in other cases, it reflected a deferential approach to the executive that has the mandate to implement environmental laws. In both sets of cases, the approach challenges the criticism of judicial enforcement of socio-economic rights.

The Court's approach in the Bicchri case was largely deferential. The Court first highlighted the Central Government's failure to discharge the statutory duty to levy and recover the cost of remedial measures to improve and restore the environment as the reason for issuing 'appropriate directions to it to take necessary measures'.[71] The Court then directed the Central Government (through the Ministry of Environment and Forests (MoEF)) to determine the amount required for carrying out the remedial measures,[72] and to exercise its statutory power to give directions for 'the removal of sludge, for undertaking remedial measures and also to impose the cost of remedial measures on the offending industry and utilise the amount so recovered for carrying out remedial measures'.[73]

In *Vellore*, the Court first directed the Central Government (through the MoEF) to exercise its statutory power and constitute an authority before 30 September 1996.[74] The Court noted that it was doing the work of the authority, which should have been constituted by the Central Government under the EPA.[75] Then the Court proceeded to issue specific directions in respect of the membership of the authority. The authority was to be 'headed by a retired Judge of the High Court and it *may* have other members –

[71] Bicchri (n 27) ¶60 footnote **.

[72] ibid ¶70(1).

[73] ibid ¶60. The Court derived its authority to issue the necessary directions to the Central Government from its earlier decision in *Indian Council for Enviro-Legal Action v Union of India and Others* (1995) 3 SCC 77.

[74] See *Vellore* (n 69) ¶25(1). See also *S Jagannath v Union of India and Others* (1997) 2 SCC 87 ¶52(1).

[75] *Vellore* (n 69) ¶20.

preferably with expertise in the field of pollution control and environment protection – to be appointed by the Central Government' (emphasis added).[76]

The Court also laid down the authority's terms of reference.[77] It was first required (a) to assess the loss to ecology/environment in the affected areas and to determine the amount of compensation as the cost of reversing the damaged environment and (b) to identify the victims of water pollution (individuals/families) and to assess the compensation payable to them with the help of expert opinion and after giving opportunity to the polluters. Then, it was required to prepare the statement showing the total amount to be recovered, the names of the polluters from whom the amount was to be recovered, the amount to be recovered from each polluter, the persons to whom the compensation was to be paid, and the amount payable to each of them. The Collector/District Magistrate of the concerned area was responsible for recovering the amount from the polluters, if necessary as arrears of land revenue.[78] However, the Court did not specify a time period for the completion of this exercise.

In addition, the authority was directed to frame scheme(s) for reversing the damage caused to the ecology and environment by pollution in the State in consultation with expert bodies like the National Environmental Engineering Research Institute (NEERI), CPCB and SPCB. The State Government was responsible for the execution of the scheme(s) under the supervision of the Central Government. The expenditure was to be met from the Environment Protection Fund (which comprised pollution fine and compensation amount received from the polluters) and other sources provided by the State Government and the Central Government.[79]

These judicial remedies do not appear to impose any additional and cumbersome requirements that differ from any similar orders that may have been issued by the government itself. They seem to be underpinned by considerations of efficiency, or a desire to prevent delay in the constitution and operationalisation of the authority, and the

[76] ibid ¶20 r/w ¶25(1). See also *Jagannath* (n 74) ¶52(1).

[77] ibid.

[78] *Vellore* (n 69) ¶¶25(2)-(3); *Jagannath* (n 74) ¶¶52(11)-(12).

[79] *Vellore* (n 69) ¶¶25(6)-(7); *Jagannath* (n 74) ¶52(15).

determination of remedial measures. Of course, questions can still be raised about the adverse effect of such judicial initiatives (if they become a practice) on the exercise of functions that fall within the domain of the executive.

In a third category of cases, without reference to any statutory power, the Court directed the State Government to appoint an authority/commissioner.[80] This is more problematic and one may question why the direction was issued to the State Government rather than the Central Government, which is empowered to exercise this statutory power. Arguably, the area that formed the subject matter of the petition was more localised, that is, four areas identified on the fringe of the city of Calcutta but this was also the situation in the Bicchri case.

The Court's approach was practical where it directed the Collector - who is the government authority functioning at the local level and is more likely to be aware of the ground realities - to constitute a committee to quantify the loss.[81] Similarly, the NGT admitted that it lacks a loss assessment mechanism,[82] and directed the Collector to constitute a committee to undertake this exercise instead.[83]

In some cases, the higher judiciary relied on expert bodies such as NEERI and the SPCB to determine the damages payable by the polluter.[84] In a case dealing with river pollution caused due to a cultural festival, the NGT directed a committee, which was set up in another matter dealing with pollution of the river more broadly,[85] to assess the loss and determine the damages payable by the organiser of the event.[86] On the one hand, the

[80] See *Mehta* (Calcutta Tanneries) (n 52) ¶¶20(14)-(16) & ¶¶20(19)-(20). See also *Ishwar Singh v State of Haryana and Others* AIR 1996 Punjab & Haryana 30 ¶46(5).

[81] See *Indian Council for Enviro Legal Action and Others v Union of India and Others* 1995 (6) SCALE 578 ¶9.

[82] *Janardan Kundalikrao Pharande and Others v Ministry of Environment and Forests and Others* Application No. 7 of 2014 (NGT - Western Zone Bench, Judgment of 16 May 2014) ¶49.

[83] ibid ¶51.

[84] See Mehta-Nath I (n 52) ¶39(3); *Bhavani River – Sakthi Sugars Ltd Re:* (1998) 6 SCC 335 ¶4. See also *Karur Taluk Noyyal Canal Agriculturists Association v TNPCB and Others* WP (Civil) No. 1649 of 1996 (High Court of Madras, Judgment and Order of 26 February 1998).

[85] *Misra* (2015) (n 29).

[86] See *Manoj Misra v Delhi Development Authority and Others* OA No. 65 of 2016 (NGT - Principal Bench, Order of 9 March 2016) [Art of Living case].

involvement of experts may ensure a more accurate assessment of the damages. On the other hand, there are concerns relating to their capture by the polluter due to the latter's political and economic influence, which may undermine the effectiveness of the judicial remedies for the right-holders.

6.4.2 Determination by the higher judiciary

The Court acknowledges its power to award compensation for loss due to environmental disturbance (which includes water pollution) and damages for restoration of ecological balance in order to enforce fundamental rights.[87] Even in the Bicchri case, the Court briefly raised the question of its own competence to impose and recover cost of all measures including remedial measures (or award damages against private parties) in order to ensure the observance of law and its orders as a part of enforcement of fundamental rights. Although the Court did not express a final opinion,[88] it did not rule out the possibility that it could award damages.[89]

More concretely, the higher judiciary applied the 'percentage of turnover' formula to determine the quantum of compensation/damages payable by the polluter.[90] On the one hand, this formula 'may be a proper measure' in a given case because 'the method to be adopted in awarding damages on the basis of "polluter-to-pay" principle has got to be practical, simple and easy in application'.[91] On the other hand, it may not contribute to the realisation of the CER where it becomes difficult to access information about the annual turnover of the polluting industry.[92] The formula may also fail to have the requisite deterrent effect on polluters if the 'percentage of turnover' awarded as damages is not high enough.

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[87] See, for example, Mehta-Nath II (n 24) ¶9 & ¶24.

[88] Bicchri (n 27) ¶60 footnote **.

[89] ibid ¶60.

[90] See, for example, *Pravinbhai* (n 35). See also *Deepak Nitrite* (1997) (n 37). The Supreme Court allowed an appeal against this order but for different reasons. See *Deepak Nitrite* (2004) (n 36).

[91] *Deepak Nitrite* (2004) (n 36) ¶6. The language reflects the earlier observation of the Court in Bicchri (n 27) ¶65.

[92] See, for example, *Rajiv Narayan v Union of India and Others* MA No. 44 of 2013 in OA No. 36 of 2012 (NGT - Principal Bench).

Another issue relates to the apportionment of the amount among polluters with different annual turnover. In one case, the High Court of Rajasthan included polluters with different annual turnovers within the same band for the purpose of determination of liability, that is, they were required to pay the same amount irrespective of differences in their annual turnover.[93] This was viewed as discriminatory, arbitrary or violative of the equal protection guarantee under Article 14 of the Constitution of India.[94] The Division Bench of the High Court varied the formula and ordered each of the units to pay the same percentage of their turnover.[95] The NGT has overcome this problem by apportioning the amount of compensation among the polluters in accordance with section 17 of the NGT Act.[96]

In addition to compensation and/or damages, the higher judiciary imposed punitive or exemplary damages or pollution fine on the polluter(s). The aim and purpose of exemplary damages was considered to be 'almost similar' to the punitive remedies provided in environmental laws (section 6.1.2), that is, to punish the polluter and to deter the polluter as well as others from causing pollution in the future.[97] In this manner, exemplary damages perform a preventive function, which may contribute to the enjoyment of the CER by existing and future right-holders. However, there are different considerations for the imposition of a "fine" upon a person guilty of committing an offence under a law and the award of exemplary damages in that the former must be preceded by compliance with statutory procedures.[98] Exemplary damages are also different from compensation to victims of water pollution and/or damages for restoration of the damaged environment, although a polluter can be held liable to pay both.[99]

[93] See *Vijay Singh Puniya v Rajasthan State Board for the Prevention and Control of Water Pollution and Others* AIR 2003 Rajasthan 286.

[94] Divan and Rosencranz (n 6) 231.

[95] See *Puniya* (n 27) ¶30.

[96] See, for example, *Ramdas Janardan Koli and Others v Secretary, Ministry of Environment and Forests and Others* OA No. 19 of 2013 (NGT - Western Zone Bench, Judgment of 27 February 2015) ¶¶67-70.

[97] See, for example, Mehta-Nath II (n 24) ¶24; *MC Mehta v Kamal Nath and Others* (2002) 3 SCC 653 [Mehta-Nath III] ¶9.

[98] ibid.

[99] See Mehta-Nath II (n 24) ¶24.

The Court's rationale for the imposition of the absolute liability principle in the Oleum gas leak case (section 6.1.2) appears to form the basis for the levy of exemplary damages, that is, the nature and extent of the offending activity, the nature of the offending party, and the intention behind such activity.[100] As a result, the Court considered the magnitude, capacity and prosperity of the polluter and the deterrent effect of the damages as relevant factors and held the polluting unit liable for exemplary damages for causing environmental pollution and for operating the unit without renewal of statutory consents.[101]

In some cases, the polluters were held liable for the payment of a pollution fine. While acknowledging that pollution control measures may exist now, the basis of this liability was past pollution, which had affected people and resulted in environmental degradation.[102] Here, the higher judiciary did not apply the term "fine" *stricto sensu* as understood in laws but rather in addition to compensation or damages payable by the polluter, although the amount of the pollution fine was to be used for the same purpose and the procedure for collection and the outcome in case of non-payment were identical. Subsequently, however, the Court held that a pollution fine cannot be imposed under writ jurisdiction; it can be imposed only if it is prescribed in a statute, and the polluter is found guilty of contravention of the statutory provisions after fair trial in a competent court.[103] Notwithstanding the bona fide reasons for the imposition of a pollution fine, this is a more jurisprudentially sound approach. It can also reduce the issuance of inconsistent and discretionary orders.

Neither exemplary damages nor pollution fines provide relief to the victims of water pollution. But they may contribute to environmental remediation and/or lead to behaviour change, which prevents the occurrence of similar events in the future and guarantees the CER of present and future generations. Of course, this is contingent upon the cost of compliance being greater than the cost of non-compliance.

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[100] *Research Foundation* (n 25) ¶31.

[101] *Sterlite* (n 61) ¶¶45-47. See also, *Him Privesh* (n 61) ¶100 & ¶106; *Krishna Kant* (n 61) ¶51.

[102] See *Vellore* (n 69) ¶21 & ¶25(6). See also *Mehta* (Calcutta Tanneries) (n 52) ¶20(19); *Puniya* (n 27) ¶31.

[103] See Mehta-Nath II (n 24) ¶¶17-19 & ¶22.

More recently, the NGT determined the amount of compensation and/or damages to be paid by the polluter in accordance with the provisions of the NGT Act, while acknowledging the practical impossibility of determining environmental compensation with exactitude and relying on 'guess work' instead.[104] In some cases, however, it directed the polluter to pay lump sum compensation.[105] This is a regressive approach because far from imposing absolute liability for environmental harm, lump sum compensation fails to even hold the polluter strictly liable for causing environmental damage. The curative dimension of the polluter pays principle is completely sidelined here and the principle is applied in a manner that may fail to address the question of liability altogether.

6.4.3 The third possibility: non-determination

The Bicchri case represents the rare occasion where the Court neither outsourced the task of determining the loss to victims of water pollution in the affected areas nor undertook the exercise itself. Instead, the Court left it open to the individuals or organisations acting on their behalf to institute civil proceedings for this purpose.[106]

Here, the Court appears to be influenced by its earlier decision in the Oleum gas leak case.[107] In the latter case, the Court described the power of the judiciary to award compensation as remedial relief against a violation of fundamental rights in proceedings under Article 32 of the Constitution as an exceptional remedy in appropriate cases and observed that 'ordinarily' the right to claim compensation for infringement of a fundamental right should be enforced through the civil courts.[108] Another reason for directing the victims and their representatives to institute civil proceedings was that the industry concerned was not 'State' within the meaning of Article 12 of the Constitution.[109]

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[104] *Misra* (2015) (n 29) ¶94(vi)(e); *Krishna Kant* (n 61) ¶51.

[105] See, for example, *Misra* (2013) (n 32); *Invertis University and Others v Union of India and Others* Application No. 185 of 2013 (NGT - Principal Bench, Judgment of 24 October 2013).

[106] Bicchri (n 27) ¶70(3).

[107] ibid ¶60 footnote **.

[108] Oleum gas leak case (n 14) ¶7.

[109] ibid ¶33.

The effectiveness of such a weak judicial remedy for the right-holders is questionable given the delays that are a common feature of civil proceedings, among other concerns. This concern is borne out from the fact that more than two decades after the judgment in the Bicchri case, the civil suit for compensation is still languishing in the local court (Chapter 7).

6.5 Judicial remedies: Who pays what? What is it used for?

This section examines the different types of judicial remedies following the determination of the polluter's liability in terms of who pays, what is paid, and how is it used. This has a direct bearing on the effectiveness of the remedies in terms of compensating the loss of the victims and restoration of environmental damage resulting from water pollution.

6.5.1 The shifting frame of the polluter and the payer

The polluter pays principle does not mean that the polluter can 'pollute and pay'.[110] The reason, as noted by the High Court of Gujarat, is that 'this will prompt the continued violation of the law by payment of money. In a sense, this would legalise the violation.'[111] The court problematised the acceptance of such a practice where the pollution results in a violation of the fundamental right to life.[112] Subsequent judicial practice evidences different trends however.

Pay-and-pollute principle

First, the higher judiciary invoked the principle to impose a fine on the polluter or to ask it to pay damages or compensation for past pollution but then permitted it to continue operations. In one case, even after accepting that the polluter had misrepresented and suppressed material facts in its petition, the Court observed that the closure of its plant

[110] See *Research Foundation* (n 25) ¶29.

[111] *Pravinbhai* (n 35) ¶118.

[112] ibid.

would be against public interest.[113] In another case, the High Court of Himachal Pradesh noted that damages should not bring the polluter to a halt.[114] The preventive function of the polluter pays principle cannot be served if the polluter is permitted to pay and 'continue polluting with impunity'.[115] It is also pertinent to mention that the higher judiciary granted such leeway only to certain types of plants/units.

Second, in a number of cases, the polluter was directed to pay for restoration of the environment but the government authorities were required to undertake the necessary measures.[116] This represents a version of the traditional redistributive function of the polluter pays principle, which requires the polluter to internalise the social cost borne by the public authorities for prevention and control of pollution, thus accepting the inevitability of pollution and allowing the polluter to pay and pollute.[117] Further, it is possible that the amount that the polluter is directed to pay may not be adequate for undertaking the required level of environmental restoration. Of course, this also raises issues relating to the process of assessment of environmental damage and determination of liability (section 6.5.3).

Third, the Court and the NGT permitted the potential polluter to continue with activities, which are likely to result in environmental pollution in the future, subject to the advance payment of a specified amount. The origins of this practice may be traced to a direction of the Court that required the management of a unit involved in the manufacture and processing of hazardous chemicals and gases to furnish a bank guarantee, which was to be encashed in case death or injury is caused by the release of chlorine gas within a three-year period.[118] More recently, instead of stopping a cultural event, which was likely to have an adverse impact on the floodplain of the river Yamuna, the NGT permitted the organisers to proceed on the condition that they would deposit the amount of

[113] *Sterlite* (n 61) ¶48.

[114] *Him Privesh* (n 61) ¶106.

[115] de Sadeleer (n 3) 36. See also Sahu (n 18) 385.

[116] Bicchri (n 27) ¶67. See also *Vellore* (n 69); *Jagannath* (n 74); *Mehta* (Calcutta Tanneries) (n 52); *Karur Taluk* (n 84).

[117] de Sadeleer (n 3) 35.

[118] *MC Mehta and Another v Union of India and Others* (1986) 2 SCC 176 ¶20(11).

compensation for potential environmental damage.[119] This case represents a missed opportunity to apply the principle of prevention. At the very least, the NGT ought to have considered the extent of reversibility of the potential environmental damage.

The limited application of the pay-and-pollute principle may be justified in order to permit the continuance of hazardous but essential industrial activities while ensuring that they internalise the cost of potential environmental damage. Of course, the determination of 'essential' industrial activities raises a number of issues. Such limited application may also encourage the potential polluter to adopt preventive or precautionary measures while carrying out the activities in order to minimise the risk or probability of occurrence of environmental damage, if the amount of compensation adequately captures the cost of restoration. Alternatively, it may allow the polluter to pay and pollute so long as the amount of compensation is lower than the cost of the preventive/precautionary measures that it is required to undertake to avoid the potential environmental damage.

The government (public) pays principle

The polluter is not always a non-State actor or a local body that discharges untreated or partly treated solid or liquid waste into water bodies or on land. In some situations, the higher judiciary and the NGT extended the polluter pays principle to government/public authorities.

First, the Court directed the government to pay a portion of the total compensation amount to the victims of water pollution and subsequently recover it from the polluter in order to ensure timely payment.[120] According to Aruna Venkat, in a way, the Court imposed a 'no fault' liability on the State, which may act as an incentive for the concerned authorities to exercise their statutory powers and discharge their statutory duties in the future.[121] This has also been described as the government pays principle.[122]

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[119] Art of Living case (n 86).

[120] See, for example, *Indian Council for Enviro-Legal Action and Others v Union of India and Others* (2007) 15 SCC 633 ¶2.

[121] Aruna Venkat, *Environmental Law and Policy* (PHI Learning Private Limited 2011) 229.

[122] See Barbara Luppi, Francesco Parisi, and Shruti Rajagopalan, 'The Rise and Fall of the Polluter-Pays Principle in Developing Countries' (2012) 32(1) International Review of Law and Economics 135, 136.

Second, the NGT held the government and statutory authorities liable to pay environmental compensation for dereliction of statutory duties, which led to environmental degradation and/or pollution as a result of the polluting activities of non-State actors.[123] Similarly, a SPCB and its Regional Officer were identified as polluters because of their failure to furnish correct information, which prevented the NGT from taking appropriate action to prevent pollution by a distillery unit.[124] Such remedies can also perform an important preventive function vis-à-vis the discharge of statutory powers, duties and functions by the authorities in the future.

Finally, where the government is directed to undertake measures for environmental restoration, the amount paid by the polluter may not be adequate and the government may have to spend an additional sum in order to restore the environment to an acceptable level.

Notwithstanding the potential preventive function of the government pays principle, it is important to recognise that the source of government funds includes the money collected from the taxpayers who are also the right-holders and sometimes the victims of water pollution. In other words, the government pays principle gets converted into the public or victim pays principle. As a result, judicial remedies fail to perform the curative function of imposing liability on the polluter and ensuring the remediation of the loss suffered by the victims of water pollution.

The poor pay principle

Judicial remedies may reflect pre-conceived notions where the polluters belong to particular economic backgrounds. This may be based on an implicit presumption that their contribution crosses the acceptable threshold of pollution and results in harm or damage without requiring any actual evidence (unlike in the case of industrial units as polluters) or courts may be invoking the principle of prevention.

[123] See, for example, *Rohit Choudhary v Union of India and Others* Application No. 38 of 2011 (NGT - Principal Bench, Judgment of 7 September 2012); *Invertis University* (n 105); Art of Living case (n 86); *Tapesh Bhardwaj v UP State Pollution Control Board and Others* OA No. 596 of 2016 (NGT - Principal Bench, Judgment of 13 April 2017).

[124] See *M/s Cox India Ltd v MP Pollution Control Board and Another* Application No. 10 of 2013 (NGT - Central Zone Bench, Judgment and Order of 9 May 2013).

In cases where a slum dweller or an encroacher or squatter on public land was identified as the polluter, the higher judiciary ordered their removal from their place of residence in the city as the cost of pollution and ecological problems resulting from the unhygienic conditions created by them.[125] In most of these cases, while displacement is preceded by state-supported violence, it is not followed by rehabilitation. In a few cases, like polluting industries, they may receive government assistance for relocation. However, unlike closure of polluting industries, which is viewed as the last resort (Chapter 5, section 5.2.2), the removal of encroachers or squatters is usually viewed as an urgent measure to prevent and control environmental/water pollution. More recently, the NGT started asking the poor polluters to actually pay. It directed the polluter defecating on the railway track or on railway properties,[126] or in or around any water body or the floodplain of a river,[127] to pay a sum of Rs. 5000 per offence. This is a substantial sum of money given the earning capacity of the section of the urban population that is likely to resort to open defecation!

These cases illustrate that the polluter pays principle does not address the justice dimension – formal or substantive. The higher judiciary and the NGT do not appear to have sufficiently considered the fundamental condition of poverty, which confronts a majority of the citizens of India. These cases also illustrate the approach of the judiciary, which prioritises the CER of some citizens over those of others. Although judicial action against polluters is guided by 'public interest', the latter is often confined to the interest of certain members of the public and the extent to which they are affected by the polluting activities. The notion of 'public interest' also determines the degree of acceptable risk or pollution and it is invoked to justify the continuance or discontinuance of particular activities. In addition, the cost of non-compliance is greater than the cost of compliance, which is often a key challenge in ensuring the effectiveness of implementation of judicial remedies directed at industrial polluters.

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[125] See, for example, *Almitra H Patel and Another v Union of India and Others* (2000) 2 SCC 679; *Delhi Development Authority v Rajendra Singh and Others* (2009) 8 SCC 582. See also *Wazirpur Bartan Nirman Sangh v Union of India and Others* 103 (2003) DLT 654.

[126] See, for example, *Saloni Singh and Another v Union of India and Others* OA No. 141 of 2014 (NGT - Principal Bench, Order of 18 November 2014).

[127] See *Manoj Misra v Union of India and Others* OA No. 6 of 2012 (NGT - Principal Bench, Order of 19 May 2017).

6.5.2 Compensation to victims

None of these cases required the polluter to disburse the amount of compensation directly to the victims of water pollution. In some cases, the amount had to be deposited in an 'Environment Protection Fund' and used for compensating the affected persons as identified by the court-appointed authority.[128] On the one hand, this may ensure fair and equitable distribution of the amount paid by the polluter. This will of course depend on the level of the government that is involved in the process – the lesser the distance between the affected area and the responsible authority, the more likely it is that the process will be fair and equitable. On the other hand, concerns relating to delay, corruption and capture by certain interest groups may undermine the fairness and equity of this process. These observations are equally applicable to environmental restoration.

6.5.3 Extent of environmental restoration

The polluter pays principle holds the polluter responsible for repairing damage to the environment.[129] In some cases, the higher judiciary or the NGT directed the polluter to remove the polluting matter and to reverse the water pollution caused by its activity or to restore the water body to its original condition.[130] In order to ensure timely implementation, they specified the period within which this work is to be undertaken and the consequences in the event of default. In respect of the latter, in one case, the NGT directed that the polluter would be liable to pay an amount, which shall be used by a committee appointed by it for this purpose and also for taking protective measures.[131] This may dilute the effectiveness of the remedy unless the amount that the polluter is required to pay in the event of default is higher than the cost of undertaking the measures. At the same time, neither the higher judiciary nor the NGT provided any guidance to

[128] *Vellore* (n 69) ¶25(6); *Jagannath* (n 74) ¶52(14); *Mehta* (Calcutta Tanneries) (n 52) ¶20(19).

[129] Bicchri (n 27) ¶67.

[130] See, for example, Bicchri (n 27) ¶66; *Indian Council for Enviro-Legal Action v Union of India* WP (Civil) No. 967 of 1989 with WP (Civil) No. 94 of 1990 (Supreme Court of India, Order of 17 February 1992) cited in *Indian Council for Enviro-Legal Action v Union of India and Others* (2011) 12 SCC 739 ¶1; Mehta-Nath I (n 52) ¶39(3). See also *Vimal Bhai* (n 32) ¶20(5).

[131] *Vimal Bhai* (n 32) ¶20(5).

determine the former state or original condition to which the environment or the water body should be restored or the extent of reversal of damage/pollution. Perhaps this is not possible and therefore, the necessary efforts will be based on an approximation.[132]

In other cases, the polluter is not required to undertake environmental restoration but only to deposit the cost of carrying out the measures with a public authority. In some cases, the Court identified the authorities responsible for the execution of the measures formulated by a court-appointed expert or authority. For instance, the Central Government (through the MoEF) was required to carry out all the necessary remedial measures determined by NEERI to restore the soil, water sources and the environment in general of the affected area to its former state,[133] or for execution of scheme(s) for restoring the damaged environment,[134] or reversing the damage caused to the ecology and environment by pollution.[135] In other cases, the Court specified the measures and identified the government authorities that were required to undertake them in the affected area. For instance, it directed the Department of Irrigation and Public Health of the State Government to undertake flood protection works.[136]

However, the use of the amount paid by the polluter(s) is not always confined to restoration of the damaged environment, which formed the subject matter of the litigation. The amount deposited in the 'Environment Protection Fund' was to be used by the State Government for the execution of scheme(s) for reversing the damage caused to the ecology and environment by pollution in the State of Tamil Nadu or in the coastal States/Union Territories.[137] The High Court of Gujarat directed the government to undertake works of socio-economic upliftment of the villages and for the betterment of their educational, medical and veterinary facilities and agriculture and livestock.[138] Other similar measures included the creation of common facilities such as schools, hospitals,

[132] de Sadeleer (n 3) 43.

[133] Bicchri (n 27) ¶70(1).

[134] *Vellore* (n 69) ¶25(6); *Jagannath* (n 74) ¶52(14).

[135] *Mehta* (Calcutta Tanneries) (n 52) ¶¶20(17)-(20).

[136] Mehta-Nath III (n 97) ¶9.

[137] See *Vellore* (n 69) ¶25(7); *Jagannath* (n 74) ¶52(15). Other sources of funds were to be provided by the State Government and the Central Government. See also *Cox India* (n 124) ¶34(4).

[138] *Pravinbhai* (n 35) ¶135B(xii).

community halls, tube wells etc. and improvement of the ecology and the environment,[139] or the construction of Common Effluent Treatment Plants in order to prevent further damage to the ground water and to arrest use of untreated water for growing crops and vegetables.[140] The NGT retained oversight of the use of the amount by the authorities for 'betterment of the environment and for other purposes' or for environmental protection.[141]

Venkat describes these remedies as 'a kind of socio-economic developmental cess' that fail to provide any remedy to the victims of water pollution or to the affected environment.[142] In other words, such remedies may not contribute to the curative function of the polluter pays principle. At the same time, they may promote the realisation of the collective rights of a larger group of existing and potential victims who are not represented before the court. It is also pertinent to note that such systemic and general remedies are more likely to be awarded in cases where the petitioner(s) do not specifically seek individual and specific relief.

Further, as an alternative to actual payment, courts may impose other pollution prevention and control measures. For example, the NGT ordered a polluter to plant a certain number of trees within a specified period and to maintain them for a specified period as an interim measure.[143] To some extent, this form of general relief may contribute to environmental protection in the long-term. But it does not perform either a curative function or a preventive function. In any case, the polluter pays principle does not account for the disturbance of ecological balance or the equilibrium between its biotic and abiotic elements.[144] Further, it is not possible to reverse irreversible damage and to restore the environment. A preventive or precautionary approach is more appropriate here.[145]

[139] *Him Privesh* (n 61) ¶¶104-106.

[140] *Puniya* (n 27) ¶31.

[141] See *Tapesh Bhardwaj* (n 123) ¶18. See also *Vimal Bhai* (n 32).

[142] Venkat (n 121) 235.

[143] See, for example, *Cox India* (n 124) ¶34(4).

[144] de Sadeleer (n 3) 43-44.

[145] ibid 44.

Conclusion

This chapter focused on judicial remedies directed at non-State actors for the remediation of water pollution through the lens of the polluter pays principle. The nature of the remedies is positive, specific and detailed in terms of identification of the polluters and the required action, and they are mandatory. But the remedies are not always specific, detailed and clear in terms of the action required, particularly in terms of the measures to be undertaken for environmental restoration, or the time period within which the exercise of assessment of loss and damages and determination of compensation and damages must be carried out, the amount paid by the polluters or recovered from them by the government, and the required measures for environmental measures undertaken by the government. In terms of strength of the remedies, in most cases, they are moderate or strong.

These judicial remedies may provide succour to the right-holders who are represented before the court as well as to other right-holders. They may also lead to the reversal of some of the known and reversible environmental damage resulting from the polluting activity, thus protecting the CER of the right-holders before and outside the court and of future generations, besides promoting the right of the environment to some extent. Further, they may prevent the occurrence of water pollution in the future because of their deterrent effect on the polluter as well as others and/or because they compel the authorities to take their statutory mandate more seriously. However, the former will depend on how much is the polluter directed to pay and on what conditions, and more fundamentally whether the polluter is directed to pay at all. In respect of the latter, the government may pass on the cost to the taxpayers who are the right-holders and the victims of water pollution.

In order to grant these judicial remedies, courts are required to perform a number of complex tasks including the identification of the polluter and the threshold of unacceptable pollution, and the assessment of loss and environmental harm and determination of compensation and damages. These tasks raise a number of issues such as the nature of the relationship between the judiciary and the executive, the reconfiguration of the polluter pays principle, and the extent to which loss and damage

are actually remediated and/or remediable. Further, the relative strength of the judicial remedies addressed to different types of polluters (for example, poor individuals or communities versus industrial units) and the absence of certain types of polluters (for example, the urban rich and middle class) from the process highlight the significance of the visibility of pollution and the invocation of selective anthropocentricity (in the form of 'the public interest') by courts.

These judicial remedies also illustrate the similarities and differences between the external and domestic approach to the polluter pays principle. The judicial remedies are progressive as they go beyond the partial cost internationalisation approach. At the same time, they incorporate a cap on the liability of the polluter, no requirement to pay in some cases and the conflation of the public interest and continuance of business-as-usual. They do not embrace the full internalisation of environmental costs approach either as achieving an 'acceptable state' of the environment remains the primary objective. This represents the adoption of an inherently anthropocentric approach.

More fundamentally, this chapter exposes the limits of a principle of environmental economics with cost-effectiveness as its foundation for remediation of violations of the CER of individuals and the collective, and environmental restoration. All of these factors influence the implementation of court decisions and their effectiveness, which are discussed in the next chapter.

CHAPTER 7
IMPLEMENTING COURT DECISIONS

Introduction

Courts can influence the implementation of their decisions (orders or judgments). These internal factors include features of the court decision and the nature and strength of the implementation mechanisms employed by courts.[1] Chapters 5 and 6 examined judicial remedies in cases relating to water pollution/quality that were directed at State and non-State actors respectively. This chapter focuses on two implementation mechanisms employed by courts – coercive remedies and monitoring of implementation. Implementation is also mediated by external factors relating to the other branches of government, the litigants, civil society, the media, public opinion, and broader political economy factors but these do not form the subject matter of this chapter.

Ultimately, the effectiveness of court decisions can be assessed in terms of achieving the stated objectives of the remedy granted by the court and/or addressing the problems that led to the litigation.[2] The effectiveness of court decisions in environmental rights litigation relating to water pollution/quality depends on the extent to which they redress the violation, or promote the realisation, of the constitutional environmental rights (CER). As a result, or additionally, they may guarantee environmental protection by preventing the occurrence of future pollution, controlling existing pollution and/or to remedying loss and damage resulting from past pollution. They may also result in the maintenance or improvement of water quality.

[1] See James F Spriggs II, 'Explaining Federal Bureaucratic Compliance with Supreme Court Decisions' (1997) 50(3) Political Research Quarterly 567, 570-72; Diana Kapiszewski and Matthew M Taylor, 'Compliance: Conceptualising, Measuring, and Explaining Adherence to Judicial Rulings' (2013) 38(4) Law & Social Inquiry 803, 819-22 (highlighting various attributes of court rulings). See also César Rodríguez-Garavito, 'Beyond the Courtroom: The Impact of Judicial Activism on Socioeconomic Rights in Latin America' (2011) 89(7) Texas Law Review 1669, 1676 (highlighting the importance of monitoring by the courts); Malcolm Langford, César Rodríguez-Garavito, and Julieta Rossi, 'Introduction: From Jurisprudence to Compliance' in Malcolm Langford, César Rodríguez-Garavito, and Julieta Rossi (eds), *Social Rights Judgments and the Politics of Compliance: Making It Stick* (CUP 2017) 14-15 & 25 (highlighting the judicial choice of remedies and the broader enforcement powers of courts).

[2] Yasuhiro Shigeta, *International Judicial Control of Environmental Protection: Standard Setting, Compliance Control and the Development of International Environmental Law by the International Judiciary* (Kluwer Law International 2010) 18.

This chapter is divided into two sections. The first section examines the extent to which the higher judiciary relies on coercive remedies and monitoring to facilitate implementation of court decisions in cases relating to water pollution/quality. The second section examines the extent of implementation of court decisions and their effectiveness with reference to three 'landmark' decisions of the higher judiciary.

7.1 The influence of internal factors

7.1.1 Coercive remedies

This section examines the higher judiciary's use of its power to punish for civil contempt, as well as other coercive remedies, such as penalty payment, closure orders and recovery as arrears of land revenue, to facilitate implementation of court decisions in cases relating to water pollution/quality.

Where the respondent is the State

In *Municipal Council, Ratlam v Shri Vardichan and Others*, the Court was willing to consider action to punish for contempt if the officer responsible for overseeing implementation reported wilful breach of the Court's order by any of the officers.[3] In *Uttar Pradesh Pollution Control Board v Mohan Meakins Ltd and Others*, the Court found the officials of the SPCB guilty of contempt of court for permitting a brewery to discharge untreated effluents into a river beyond the deadline imposed by it and reprimanded them.[4] The High Court of Delhi imposed a fine on the respondent authorities for non-compliance with an earlier order directing them to rectify all broken sewer lines in a part of the city and to ensure that no sewage flows into storm water drains.[5] The respondent authorities were also awarded a suspended sentence of imprisonment, that is, a sentence which is not put into immediate effect, in case of their failure to stop the entire flow of sewage into storm water drains within three months.[6] The High Court of Madras

[3] (1980) 4 SCC 162 ¶23(5). See also *Dr BL Wadehra v Union of India and Others* (1996) 2 SCC 594 ¶12; *MC Mehta (Calcutta Tanneries' Matter) v Union of India and Others* (1997) 2 SCC 411 ¶3.

[4] (2000) 2 SCALE 532.

[5] *KD Sharma and Others v BM Dhaul, Chief Engineer (Retd), Delhi Jal Board and Others* (2008) 155 DLT 263 ¶10.

[6] ibid.

directed the SPCB to furnish the list of names of the officers who were in charge of affairs during the relevant time when CETP/IETP/units failed to comply with the court's orders and the SPCB's directions so that appropriate actions may be taken against them.[7]

In most cases, however, the higher judiciary is reluctant to issue a contempt notice to the authorities that are responsible for implementation of its decisions.[8] Even after being prima facie satisfied that the State actors had made no effort to comply with its directions, the higher judiciary did not issue contempt notice to the State Government,[9] and to the SPCB 'for the present' as there was 'partial though not effective' compliance instead of 'total' compliance.[10] The latter observation suggests that courts expect 'effective' and 'total' implementation of their decisions in the future, although the meaning of these terms is not explained. In another case, although the High Court of Bombay threatened action against two municipal councils in case of failure to install sewage treatment plants within a six-month deadline,[11] no such action was actually taken.[12]

Alternatively, the higher judiciary may issue a notice of contempt against the authorities but then revoke it because they are satisfied with the explanation for non-implementation.[13] In one case, the Court accepted the unconditional apology of the contemnors '[i]n view of the explanation put forward by them and the several circumstances stated by them…'. The Court gave another opportunity to the contemnors to comply after administering a 'severe' warning that repetition of any such violation shall be viewed seriously.[14] Such an approach may encourage the authorities to delay

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[7] *Noyyal River Ayacutdars Protection Association v S Ramasundaram and Others* Contempt Petition Nos. 1013 and 1068 of 2010 (High Court of Madras, Judgment of 28 January 2011) [*Noyyal* (2011)] ¶53(x).

[8] See Bharat Desai, 'Enforcement of the Right to Environment Protection Through Public Interest Litigation in India' (1993) 33 Indian Journal of International Law 27, 37; PM Prasad, 'Environmental Protection: The Role of Liability System in India' (2004) 39(3) Economic and Political Weekly 257, 267.

[9] *Mehta* (Calcutta Tanneries) (n 3) ¶6 (referring to order of 9 September 1994).

[10] *Noyyal* (2011) (n 7) ¶46. The high court decided to keep 'the contempt petition pending with a view to monitor the entire matter'. ibid ¶53.

[11] *Bombay Environmental Action Group and Another v State of Maharashtra and Others* (2007) 1 BCR 721 [BEAG (2007)].

[12] See, for example, Rahul Chandawarkar, 'Satara Collector Orders Probe into Panchgani STP Scam' Daily News and Analysis (4 May 2011) <www.dnaindia.com/mumbai/report-satara-collector-orders-probe-into-panchgani-stp-scam-1539266>.

[13] Prasad (n 8) 267.

[14] *Vineet Kumar Mathur v Union of India and Others* (1996) 1 SCC 119 ¶22.

implementation of court decisions and to adopt a wait-and-watch approach until they are actually hauled up for contempt.[15]

The higher judiciary may 'pass strictures against concerned authorities, ask for personal appearance and explanation of officials, extend time limit for compliance…'.[16] In one case, the Court issued a show cause notice as to why an appropriate fine should not be levied for non-implementation of its order. However, it was willing to take a lenient view if there was a significant improvement in water quality in the interregnum.[17] In another case, the Court granted additional time to the authorities to file affidavits, failing which it directed the presence of the senior-most officer and clarified that it will be compelled to impose exemplary costs personally recoverable from the officers.[18]

Instead of acting on the petitioner's request to initiate contempt proceedings, the High Court of Madhya Pradesh directed the authorities to conduct an inspection and submit a detailed report including suggestions.[19] In some cases, the higher judiciary directed the superior authorities to exercise their supervisory/ disciplinary powers over their subordinates to ensure implementation.[20] In *Ratlam*, for example, the Court directed the magistrate to 'inspect the progress of the work [to implement court directions] every three months broadly to be satisfied that the order is being implemented bona fide. Breaches will be visited with the penalty of Section 188 IPC' (emphasis added).[21]

The National Green Tribunal (NGT) is much more willing to exercise its power under section 26 of the National Green Tribunal Act, 2010 to impose imprisonment or a fine on Commissioners of a Municipal Corporation as well as the Corporation itself for failure to

[15] Shubhankar Dam and Vivek Tewary, 'Polluting Environment, Polluting Constitution: Is a 'Polluted' Constitution Worse than a Polluted Environment' (2005) 17(3) Journal of Environmental Law 383, 393.

[16] Desai (n 8) 37.

[17] *News Item "Hindustan Times" AQFM Yamuna v CPCB and Another* (2000) 10 SCC 587 ¶7.

[18] *NOIDA Sector 14 Residents Welfare Association and Others v State of Delhi and Others* (2012) 13 SCC 786 ¶2.6 & ¶3.

[19] *Bakir Ali Rangwala v Mr Malay Shrivastava* Contempt Case No. 64 of 2016 (High Court of Madhya Pradesh, Order of 3 March 2016).

[20] *MC Mehta v Union of India and Others* (2004) 1 SCC 571 ¶6. See also *Vinod Chandra Varma v State of UP and Others* AIR 1999 Allahabad 108 ¶3.

[21] *Ratlam* (n 3) ¶22.

comply with its order,[22] to require personal explanations for non-compliance from government officials,[23] or to impose exemplary costs for failure to file an adequate response.[24]

Where the respondents are private actors

The Court expressed its willingness to initiate contempt of court proceedings against polluting industries and/or their senior management. In *Vellore Citizens' Welfare Forum v Union of India and Others*, the Court held that the tanneries that fail to deposit the pollution fine before the specified date shall be liable for contempt of court.[25] The tanneries deposited the pollution fine. Arguably, the fear of being held in contempt ensured compliance.

In *Vineet Kumar Mathur v Union of India*, the Court invoked its contempt power against the Managing Director and the Chief Executive Officer of a polluting unit, refused to accept the unconditional apology tendered by them, found them guilty and directed them to deposit a compensatory fine within four weeks or undergo simple imprisonment for a period of one month.[26] This decision was attributed to the defiant attitude of the contemnors evidenced by the nature of the violation, which was knowing, deliberate and pre-planned.[27] In cases where the contemnor is a State actor, courts are unlikely to attribute similar *mala fide* and more likely to accept their unconditional apology.

As in cases where the contemnor is a government authority, judicial practice suggests that private actors are punished for contempt of court as the last resort. The High Court of Gujarat diluted the strength of the punishment and compromised its deterrent effect. In the first instance, the court adopted a strict approach and held the respondents guilty of

[22] *Invertis University and Others v Union of India and Others* Original Application No. 186 of 2013 (NGT - Principal Bench, Judgment of 24 October 2013).

[23] *M/s Cox India Limited v Madhya Pradesh Pollution Control Board* Original Application No. 52 of 2014 (NGT - Central Zone Bench, Order of 9 May 2013).

[24] *Vajubhai Arsibhai Dodiya v Gujarat Pollution Control Board* Application No. 64 of 2012 (NGT - Western Zone Bench, Judgment of 31 October 2013).

[25] (1996) 5 SCC 647 ¶25(6).

[26] (1996) 7 SCC 714 ¶¶10-11.

[27] ibid ¶10.

deliberate breach and ordered them to undergo imprisonment and to pay a fine (and undergo further imprisonment in case of default). But the court was willing to suspend the sentence subject to undertakings being filed by the contemnor unit and its managing director to obey the law.[28]

As an alternative to contempt proceedings, the higher judiciary awarded a range of coercive remedies. In 2011, the Court came down heavily on the polluting industry for its failure to comply with the 1996 judgment in *Indian Council for Enviro-Legal Action v Union of India and Others* (the Bicchri case). The Court directed payment of the cost of remediation by keeping the litigation alive for almost 15 years, the original remedial amount along with compound interest at the rate of 12 per cent per annum from the date of the previous judgment to the date on which the amount is paid or recovered, as well as the costs of litigation and costs in both interlocutory applications.[29]

The higher judiciary also imposed penalty payment as a condition for the extension of the time limit for compliance. In *Noyyal River Ayacutdars Protection Association v The Government of Tamil Nadu and Others*, the High Court of Madras permitted the polluting CETPs to continue operations up to a specified date while they achieve Zero Liquid Discharge (ZLD) of trade effluents subject to payment of an ascending fine on pro rata basis for every litre of effluent discharge.[30]

Alternatively, the higher judiciary ordered closure of non-complying polluting industries. In *Vellore*, the Court authorised the authority constituted by the Central Government pursuant to its order to direct the closure of the polluting industry in case of the owner's evasion or refusal to pay the compensation.[31] It also directed the forthwith closure of tanneries that failed to pay the pollution fine before the specified date.[32] Similarly, in *Noyyal*, the High Court of Madras directed the SPCB to close and disconnect the power

[28] *Suo Motu v Bhavna Textile Pvt Ltd* (1997) 2 GLH 760 ¶10.

[29] *Indian Council for Enviro-Legal Action v Union of India and Others* (2011) 8 SCC 161 [Bicchri II] ¶¶199-203.

[30] 2007 (1) LW 275 (Madras) ¶30(a).

[31] *Vellore* (n 25) ¶25(4).

[32] ibid ¶25(6).

supply to CETP and the member units that commit any default in payment of fine.[33] This is different from the statutory power of the SPCB to direct closure of polluting units, which has been exercised by the higher judiciary in some cases (Chapter 5).

In some cases, the Court empowered the authorities responsible for implementation of court decisions to secure the property and monies of the polluting industries.[34] In the Bicchri case, the Court empowered the Central Government to recover the amount required for remedial measures from the polluting industries in accordance with law.[35] In *Vellore*, in case the tanneries failed to pay the pollution fine before a specified date, the Court directed the Collector/District Magistrate to recover the same as arrears of land revenue in accordance with the procedure laid down under the Tamil Nadu Revenue Recovery Act.[36] In *Indian Council for Enviro-Legal Action and Others v Union of India and Others* (Bicchri II), the Court held that the failure of the polluters to pay the amount and costs within two months would result in its recovery as arrears of land revenue.[37]

The implementation of each of these coercive remedies poses a challenge. Even where implemented, these remedies may be inadequate to achieve the desired result. For instance, penalties may not deter the polluters in the future where the cost of non-compliance is lower than the cost of compliance. Closure orders may be temporary in nature. Permanent closure orders may deprive the workers of any means of livelihood. This is particularly problematic where some of the workers are former agriculturists whose sources of irrigation water were polluted by the very same polluting units. The recovery of the amount as arrears of land revenue may not be expedient, particularly where there are other claimants.

7.1.2 Court monitoring

[33] *Noyyal* (n 30) ¶30(a).

[34] Langford and two others, 'Introduction' (n 1) 10.

[35] *Indian Council for Enviro-Legal Action and Others v Union of India and Others* (1996) 3 SCC 212 [Bicchri] ¶70(1).

[36] *Vellore* (n 25) ¶25(6).

[37] Bicchri II (n 29) ¶203.

This section examines the monitoring of implementation of court decisions by the higher judiciary with reference to César Rodríguez-Garavito and Diana Rodríguez-Franco's categorisation of strong, moderate or weak monitoring (Chapter 1, section 1.3.2).

Strong monitoring

The clearest example of strong monitoring by the higher judiciary (particularly the Supreme Court) is continuing mandamus.[38] Here, the higher judiciary does not direct the executive agencies or authorities to perform their constitutional and/or statutory duties and dispose of the petition. Instead, it keeps the case open, issues a series of comprehensive, mandatory interim orders and directions periodically, and monitors implementation. The concerned agencies or authorities are required to ensure implementation within a specified time frame and to submit progress reports to the higher judiciary at specified intervals. This may lead to modification of previous, or passing of further, orders and directions and their implementation before the higher judiciary passes a final order or judgment.

The Court has exercised its supervisory jurisdiction in a number of cases relating to water pollution.[39] Initially, it granted considerable leeway to the authorities to discharge their constitutional and/or statutory duties. The failure of the authorities led to the issuance of stronger remedies and monitoring of their implementation by the Court. The Court may also view strong monitoring as an application of the idea of progressive realisation to local conditions, without actually using the term.[40] The higher judiciary also appointed agencies or constituted committees or commissions to undertake the task of monitoring. In *Noyyal*, the High Court of Madras constituted an expert committee and a monitoring

[38] See generally S Muralidhar, 'Judicial Enforcement of Economic and Social Rights: The Indian Scenario' in Fons Coomans (ed), *Justiciability of Economic and Social Rights – Experiences from Domestic Systems* (Intersentia 2006); Rohan J Alva, 'Continuing Mandamus: A Sufficient Protector of Socio-Economic Rights in India' (2014) 44 Hong Kong Law Journal 207; Mihika Poddar and Bhavya Nahar, ''Continuing Mandamus' – A Judicial Innovation to Bridge the Right-Remedy Gap' (2017) 10 National University of Juridical Sciences Law Review 555.

[39] See, for example, *MC Mehta v Union of India and Others* (1987) 4 SCC 463 [*Mehta* (Kanpur Tanneries)]; *MC Mehta (II) v Union of India and Others* (1988) 1 SCC 471 [*Mehta* (Kanpur Municipalities)]; *Mehta* (Calcutta Tanneries) (n 3); *Vellore* (n 25); *News Item Published in Hindustan Times Titled "And Quiet Flows the Maily Yamuna", In Re* (2004) 7 SCC 638.

[40] James R May and Erin Daly, *Global Environmental Constitutionalism* (CUP 2015) 161-63.

committee and directed them to submit a progress report to the court from time to time,[41] which then formed the basis of further orders and directions.

Malcolm Langford et al. highlight the importance of judicial monitoring of implementation for collective cases where political will is lacking, the state lacks the capacity to implement (for example, on account of coordination problems posed by the presence of multiple respondents) and/or there is strong mobilisation.[42] One or more of these features are visible in the cases where the higher judiciary engages in strong monitoring.

At the same time, strong monitoring of implementation may expose the higher judiciary to a serious concern relating to judicial oversight, that is, the substitution of judicial governance for executive governance. Lavanya Rajamani takes note of the 'debilitating effects on the executive's confidence, its ability to act proactively, and to discharge its function' and 'in extreme cases, destabilize institutions, governance, procedures and trust in systems'.[43] Further, as observed by Shyam Divan, this form of judicial activism may increase the authorities' dependence on courts instead of improving their performance, strengthening them or increasing their capability to discharge their responsibilities.[44]

The Court is not unaware of some of these concerns. In *DK Joshi v Chief Secretary, State of UP and Others*, for instance, it adopted a long-term perspective before disposing of the writ petition, which had been pending for seven years and where 'there has been adequate monitoring'. It directed the State Government to set up a monitoring committee to 'look into the effective functioning of the several public authorities responsible for supply of drinking water, providing sewerage and providing adequate measures for disposal of solid waste'.[45]

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[41] *Noyyal* (n 30) ¶9, ¶11 & ¶30(s).

[42] Langford and two others, 'Introduction' (n 1) 25.

[43] Lavanya Rajamani, 'Public Interest Environmental Litigation in India: Exploring Issues of Access, Participation, Equity, Effectiveness and Sustainability' (2007) 19(3) Journal of Environmental Law 293, 315 & 319.

[44] Shyam Divan, 'A Mistake of Judgment' Down to Earth (30 April 2002) <www.downtoearth.org.in/blog/a-mistake-of---judgment-14470>.

[45] (1999) 9 SCC 578 ¶2.

Moderate monitoring

The key difference between strong and moderate monitoring is that in the latter case, the higher judiciary disposes the case; in other words, moderate monitoring takes places in the post-judgment phase. There are different possibilities. First, the higher judiciary monitored implementation itself or appointed an agency for this purpose. In *Ratlam*, the Court ordered that it would act as a watchdog for the implementation of a scheme and oversee its actual execution.[46] The High Court of Rajasthan appointed commissioners to conduct an inspection and to submit a report, for instance, about implementation of the statutory duty to maintain sanitation by the urban local body.[47]

Second, the Court transferred the responsibility of monitoring to high courts or the NGT. In some cases, the Court transferred the responsibility for monitoring to the special 'Green Bench' of high courts based on the view that high courts are in a better position to monitor environmental matters.[48] However, the lack of interest of high courts in ensuring implementation may undermine the purpose of such transfer.[49] For instance, in *Vellore*, the High Court of Madras allowed more than 10,000 applications for extension of time to deposit the amount of compensation and damages, which were filed by the polluting tanneries.[50] In some other cases, due to time constraints, among other factors, the Court referred the implementation of a number of cases relating to water pollution/quality, where it had been monitoring the implementation of its orders and directions for several years, to the NGT.[51] The NGT was required to submit an interim report every six months to the Court to give an idea as to the progress made and difficulties, if any, and the

[46] *Ratlam* (n 3) ¶¶20-21.

[47] *LK Koolwal v State of Rajasthan and Others* AIR 1988 Rajasthan 2 ¶10. See also *Mahendra Prasad Sonkar and Another v State of UP and Others* (2004) 57 Allahabad LR 176 ¶18.

[48] See *Vellore* (n 25) ¶26; *Mehta* (Calcutta Tanneries) (n 3) ¶21.

[49] See, for example, Telephone communication with Mr PS Subrahmanian, Honorary Secretary, Vellore Citizens' Welfare Forum (VCWF), Chennai (16 August 2016). See also Geetanjoy Sahu, 'Implementation of Environmental Judgments in Context: A Comparative Analysis of Dahanu Thermal Power Plant Pollution Case in Maharashtra and Vellore Leather Industrial Pollution Case in Tamil Nadu' (2010) 6(2) Law, Environment and Development Journal 335, 352.

[50] Telephone communication with Mr PS Subrahmanian, Honorary Secretary, VCWF, Chennai (16 August 2016).

[51] See, for example, *MC Mehta v Union of India and Others* (2015) 12 SCC 764 ¶18.

petitioner was granted liberty to approach the Court if he/she had any grievances in consonance with law. Similarly, in 2016, twenty years after the Court's judgment in *Vellore*, the High Court of Madras ordered the winding up of the Authority and the transfer of 28000 claims that were pending before it to the Southern Zone Bench of the NGT.[52] It remains to be seen whether the NGT will be more effective in disposing of this huge volume of claims given that absence of members is bringing the NGT to a standstill.[53]

Third, the higher judiciary tasked a committee with monitoring implementation of its decisions. For this purpose, the High Court of Bombay appointed a monitoring committee without a statutory basis, and expanded its membership and mandate.[54] Other high courts directed the government to constitute a monitoring committee but specified its membership and terms of reference.[55] In one of these cases, the committee was required to submit detailed periodic progress/action reports to the court and the case was listed to monitor its working.[56]

The ineffectiveness of monitoring of implementation of court decisions may compel the higher judiciary to transfer the responsibility to a government-appointed committee. In *News Item Published in Hindustan Times Titled "And Quiet Flows the Maily Yamuna"*, *In Re*, the Court acknowledged that 'monitoring in the last more than 4 years has not resulted in improving the quality of water'. The Court then proceeded to direct the constitution of a high level committee comprising specified officers of the Central and State government to prepare an action plan and to submit it before the Court within a specified time period.[57] Here, the Court appears to be reposing faith in the higher echelons of government to ensure implementation of court decisions by the responsible authorities.

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[52] See *Vellore Citizens' Welfare Forum v Union of India and Others* (2016) 4 Madras LJ 25.

[53] SV Krishna Chaitanya, 'National Green Tribunal Left Headless, Farmers to File Contempt Case in Madras High Court' The New Indian Express (22 November 2017) <www.newindianexpress.com/states/tamil-nadu/2017/nov/22/national-green-tribunal-left-headless-farmers-to-file-contempt-case-in-madras-high-court-1707543.html>.

[54] BEAG (2007) (n 11) ¶¶51(h- (i).

[55] *Sonkar* (n 47) ¶¶15-16 & ¶23; *Dattatraya Hari Mane and Others v State of Maharashtra and Others* 2014 SCC OnLine Bom 1657 (High Court of Bombay) ¶¶33(V)-(IX).

[56] *Dattatraya Hari Mane* (n 55) ¶33(IX).

[57] (2004) 8 SCC 638 ¶4.

Other possibilities include cases where the Court handed over the responsibility of monitoring to an existing statutory authority constituted pursuant to its directions while retaining the power to take action in case of non-compliance,[58] or empowered an authority appointed by the government pursuant to its directions to take action in case of non-implementation.[59]

Finally, the higher judiciary directed the implementing authorities to submit periodic progress reports. The High Court of Jharkhand directed the authorities to file affidavits setting out the steps taken by them for implementation and listed the petition for further consideration thereafter.[60] In the Bicchri case, the Court directed the Central Government and the SPCB to file quarterly progress reports,[61] but the Court did not list the case for a perusal of these reports.[62] In *Paryavaran Surakhsa Samiti v Union of India and Others*, the Court laid down a rigid implementation schedule for the responsible authorities and directed them to furnish the collected data to the concerned bench of the NGT.[63]

Weak monitoring

The higher judiciary disposed some cases without making provision for any form of monitoring. The High Court of Gujarat refused to establish a permanent expert body to ensure implementation as it would have no sanction in law and it would impinge upon statutory obligations.[64] In one case, the Court relied on the authorities to ensure implementation of the statutory mandate.[65] In some cases, the higher judiciary granted

[58] *Sector 14 Residents' Welfare Association and Others v State of Delhi and Others* (1999) 1 SCC 161 ¶8 & ¶9 respectively.

[59] See, for example, *Vellore* (n 25); *S Jagannath v Union of India and Others* (1997) 2 SCC 87.

[60] *Rakesh Kumar Jha v Jharkhand State Housing Board and Others* 2003 (3) JCR 745 ¶9. See also *Residents of Sanjay Nagar and others v State of Rajasthan and Others* AIR 2004 Rajasthan 116 ¶13 & ¶16; *Vinod Chandra* (n 20) ¶3.

[61] Bicchri (n 35) ¶70(5).

[62] Personal communication with Mr MC Mehta, Advocate, New Delhi (3 August 2016).

[63] (2017) 5 SCC 326 ¶¶13-14.

[64] *Pravinbhai Jashbhai Patel and Another v State of Gujarat and Others* (1995) 2 GLH 352 ¶147.

[65] See, for example, *Wadehra* (n 3) ¶12.

liberty to the authorities to approach it in case of difficulty in implementation.[66] In some other cases, the Court directed the government authorities to appoint an authority *inter alia* to ensure implementation. The direction was mandatory and based on a statutory provision,[67] or it was first framed as a suggestion without a statutory basis, and then strengthened.[68] In both situations, the Court determined the membership (including non-government representatives) of the committee, the frequency of meetings and the terms of reference but it did not impose any reporting requirement. Finally, after acknowledging the practical constraints faced by the government,[69] or taking note of non-implementation of previous directions,[70] the higher judiciary relied on hortatory language and expressed the hope that the government will implement its directions.

7.2 Implementation and effectiveness of selected court decisions

This section adopts a multiple case study approach to examine the implementation of three 'landmark' decisions (see Chapter 1, section 1.4.4 for justification) with reference to the remedies awarded by the higher judiciary (*what* is to be done, by *when* and by *whom*), which are discussed in Chapters 5 and 6.[71] It focuses primarily on the direct and material effects of the selected decisions. These effects are direct as they were required by the judgment and they involve a material change in the situation or conduct of the relevant actors in the case, including the parties, beneficiaries and any other targets.[72]

7.2.1 Supply of drinking water

In the Bicchri case and in *Vellore*, the Court implicitly recognised the right to water of the affected right-holders and issued interim orders directing the authorities to supply

[66] See *NOIDA Sector 14 Residents Welfare Association and Others v State of Delhi and Others* (1999) 1 SCC 161 ¶9. See also *Dhanajirao Jivarao Jadhav and Others v State of Maharashtra and Others* (1998) 2 Maharashtra LJ 462 ¶23(iv); *PR Subas Chandran v Govt of AP and Others* (2001) 5 ALD 771 ¶6.

[67] See *Vellore* (n 25); *Jagannath* (n 59); *Mehta* (Calcutta Tanneries) (n 3).

[68] See *Dr Ajay Singh Rawat v Union of India and Others* (1995) 3 SCC 266 ¶8.

[69] ibid ¶2.

[70] *MK Janardhanam v The District Collector and Others* 2003 (1) LW 262 (Madras) ¶31.

[71] See generally Langford and two others, 'Introduction' (n 1) 6.

[72] César Rodríguez-Garavito and Diana Rodríguez-Franco, *Radical Deprivation on Trial: The Impact of Judicial Activism on Socioeconomic Rights in the Global South* (CUP 2015) 19-20.

water to them.[73] However, the judgments are silent in respect of implementation of these interim orders.

In the Bicchri case, the Government of Rajasthan has not completed the work of laying down pipelines for the purpose of supplying drinking water to the affected villages.[74] The Water Supply Department has constructed dugwells in the river and tanks in the eight hamlets but this is not a good arrangement.[75] In these circumstances, the affected villagers depend on erratic and limited water supply through a tanker, which is provided by Hindustan Zinc Limited (HZL), a public sector firm with a unit situated near Bicchri village.[76] This supply was based on a request made by one of HZL's consultants several years before the Court rendered its judgment,[77] rather than any arrangement made by the government pursuant to the Court's order. The alternative is the consumption of polluted groundwater in the wells. In *Vellore*, the Environment and Forests Department of the Government of Tamil Nadu made a submission before the Court that the Government was making alternative arrangements for the supply of drinking water.[78] However, according to the Secretary of the petitioner organisation, 'these interim orders were honoured more in the breach'.[79] The villagers continue to rely on polluted sources of drinking water or on arrangements made by local rural bodies.[80]

7.2.2 Prevention and control of water pollution

[73] See, for example, Bicchri (n 35) ¶16 (referring to interim order of 11 December 1989); *Vellore Citizens' Welfare Forum v Union of India and Others* WP (Civil) No. 914 of 1991 (Supreme Court of India, Interlocutory Order of 20 April 1992).

[74] 'Not Quite in Order' Down to Earth (14 May 1997) <www.downtoearth.org.in/coverage/not-quite-in-order-23696>.

[75] Personal communication with Mr Manna Ram Dangi, Advocate, Udaipur (25 June 2016).

[76] Personal communication with a villager in Bicchri village, Udaipur district (24 June 2016).

[77] Uday Shankar, 'Disappearing Act' Down to Earth (15 July 1993) <www.downtoearth.org.in/coverage/disappearing-act-31153>; Anil Agarwal, 'There's Something Rotten' Down to Earth (30 April 1996) <www.downtoearth.org.in/blog/theres-something-rotten-25906>.

[78] *Vellore* (n 25) ¶2.

[79] Telephone communication with Mr PS Subrahmanian, Honorary Secretary, VCWF, Chennai (16 August 2016). See also Asha Krishnakumar, 'A Crusader's Success' Frontline (11 August 1995) 122 [Krishnakumar 1995b].

[80] E-mail communication with Mr PS Subrahmanian, Honorary Secretary, VCWF, Chennai (30 July 2018).

The MoEF, through the CPCB, has included tanneries (the source of water pollution in the Palar basin in *Vellore*) and yarn/textile processing involving any effluent/emission generating processes including bleaching and dyeing (the source of water pollution in the Noyyal basin in *Noyyal*) in the 'red category of industries' or heavily polluting industries. This criterion, which was in operation at the time of filing of the writ petitions, required compliance with certain statutory requirements. While the State Government and the SPCB had been persuading the polluting industries to comply with the statutory requirements for several years,[81] the interim orders passed by the higher judiciary are recognised as catalysts for compliance.[82]

The interim order of 1 May 1995 in *Vellore*, which directed the immediate closure of polluting tanneries that did not comply with statutory requirements, 'made the State Government initiate action on a war footing' and expedited the process of saving the major leather belt.[83] The SPCB promoted, and the State Government facilitated, the establishment of CETPs for the majority of the units who could not afford to establish individual ETPs. According to Geetanjoy Sahu, after the Court's judgment in 1996, all the industries in Vellore district either became part of CETPs or installed ETPs to treat the effluents, and the SPCB closed down many polluting industries for not setting up ETP.[84]

In *Karur Taluk Noyyal Canal Agriculturists Association v TNPCB and Others*, the High Court of Madras directed the SPCB to take appropriate steps to ensure that no pollution was caused by the polluting industries and that these industries were not allowed to function except in accordance with rules and regulations specified by law.[85] Non-compliance with these directions led to the filing of another writ petition by a different agriculturists' association. In *Noyyal*, the High Court of Madras ordered the closure of,

[81] *Vellore* (n 25) ¶4; *Noyyal* (n 30) ¶8.

[82] S Janakrajan, 'Approaching IWRM through Multi-Stakeholders' Dialogue: Some Experiences from South India' in Peter P Mollinga, Ajaya Dixit, and Kusum Athukorala (eds), *Integrated Water Resources Management: Global Theory, Emerging Practice and Local Needs* (Sage Publications 2006) 290; Asha Krishnakumar, 'Elusive Plants' Frontline (11 August 1995) 121 [Krishnakumar 1995a].

[83] Krishnakumar (1995a) (n 82) 121-22.

[84] Geetanjoy Sahu, *Environmental Jurisprudence and the Supreme Court* (Orient BlackSwan 2014) 135.

[85] WP (Civil) No. 1649 of 1996 (High Court of Madras, Judgment and Order of 26 February 1998) cited in *Noyyal* (n 30) ¶5.

and disconnection of power supply to, all dyeing and bleaching industries in Tirupur that failed to achieve ZLD of the effluents by a specified date.[86]

There are several instances of non-implementation of *Noyyal* by the SPCB.[87] Instead of closing the defaulting units, it issued show-cause notices. Instead of removing unauthorised production machinery in the units, it submitted an affidavit admitting that the discharge from the units exceeded permissible levels. Further, its field officers did not inspect the CETPs on the ground of pendency of an appeal against the High Court's order.

This state-of-affairs led the agriculturists' association in *Noyyal* to file contempt petitions against the government authorities and the polluting units. In 2011, the High Court directed the closure of, and disconnection of power supply to, more than 700 CETP, ETP and dyeing and bleaching units in the Tirupur knitwear cluster. The units were permitted to commence operations after they achieve ZLD norms by a specified date based on the inspection report of each CETP/IETP/unit by a team of members nominated by the SPCB along with the court-appointed monitoring committee.[88]

According to the SPCB, from the year 2003 onwards, out of 754 units in Tirupur, 437 smaller units are treating the effluent in 18 CETPs with ZLD system and 91 larger units have set up individual ETP with ZLD system while the remaining 226 units are under closure.[89] According to a news report, as of 2014, 18 CETP, covering around 35 dyeing units, were in operation under trial basis for more than two years apart from 52 individual plants functioning in Tirupur. However, between 2011 and 2014, the SPCB unearthed more than 300 units who were engaging in illegal operations and discharging untreated effluents into water bodies and on land.[90]

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[86] *Noyyal* (n 30) ¶30(a).

[87] Sumana Narayanan, 'Tirupur Dyeing Units Told to Close' Down to Earth (28 February 2011) <www.downtoearth.org.in/news/tirupur-dyeing-units-told-to-close-33025>.

[88] *Noyyal* (2011) (n 7) ¶¶53(i)-(iii).

[89] Government of Tamil Nadu, Department of Environment, State of Environment Report (2016) 13 <www.tnenvis.nic.in/WriteReadData/LatestNewsData/SoERTN_MSE_Final_Jan_27_2016%20%281%29.pdf>.

[90] R Vimal Kumar, 'Pollution of Noyyal Continues Unabated' The Hindu (11 February 2014) <www.thehindu.com/news/national/tamil-nadu/pollution-of-noyyal-continues-unabated/article5674550.ece>.

There has been partial implementation of these court decisions as a number of units have established ETPs or become members of CETPs. But certain technical and practical limitations undermine the effectiveness of implementation of court decisions in preventing or controlling water pollution, and realising the CER of right-holders and/or the right of the environment. In a number of cases, the CETP/ETP is either not operated to treat the effluent, which leads to the discharge of untreated effluent into water bodies or on land,[91] or the treated effluent does not comply with the statutorily prescribed standards.[92] In some cases, they are operated only in case of an inspection. The units cite high cost – of running CETP and of treatment – as a reason, partly due to relocation of some units.[93] The absence of effective law enforcement and monitoring mechanisms serves as another incentive for non-operation. Further, these pollution control devices are not designed to treat TDS, which is a major water pollutant.[94]

As a result, water of the rivers remains polluted and compromises the rights to water, health and livelihood. The gravity of the situation can be gathered from the fact that as of 2016, Vellore district is on the list of seven critically polluting areas in which the MoEF's moratorium on environmental clearance for industrial clusters continues,[95] and there is little improvement in the water quality of river Noyyal.[96]

In any case, proper implementation of closure orders may prevent or control water pollution but the legacy of past pollution, which contaminates land and water, remains. The irreversible and irremediable adverse effects of toxic sludge (a by-product of

[91] Sahu (n 84) 136.

[92] On *Vellore*, see Sahu (n 84) 136; Janakrajan (n 82) 298; Asha Krishnakumar, 'An Award and Despair' (2002) 19(16) Frontline (3-16 August 2002) <www.frontline.in/static/html/fl1916/19160930.htm> [Krishnakumar (2002)]. On Tirupur, see Dorai Kannan and Santhi Kanna, 'Industrial Pollution and Economic Compensation: A Study of Down Stream Villages in Noyyal River, Tirupur, Tamil Nadu, South India' MSc Thesis submitted to Linköping University, The Tema Institute, Department of Water and Environmental Studies (2008) <www.diva-portal.org/smash/get/diva2:223033/FULLTEXT02.pdf> 6.

[93] M Rajshekhar, 'Can the Courts Save India's Rivers from Pollution? Tirupur Shows the Answer is No' Scroll (30 August 2016) <https://scroll.in/article/812470/can-the-courts-save-indias-rivers-from-pollution-tirupur-shows-the-answer-is-no>.

[94] Janakrajan, 'Approaching IWRM through Multi-Stakeholders' Dialogue' (n 82) 290.

[95] Special Correspondent, 'Plea to Implement Supreme Court Directions on Pollutions by Tanneries' The Hindu (13 May 2016) <www.thehindu.com/todays-paper/tp-national/tp-tamilnadu/plea-to-implement-sc-directions-on-pollutions-by-tanneries/article5637840.ece>.

[96] TS Subramanian, 'Wastelands of the Noyyal' Frontline (16 February 2018) <www.frontline.in/the-nation/wastelands-of-the-noyyal/article10055526.ece>.

industrial activities) on land and groundwater and of polluted groundwater are a serious concern. In the Bicchri case, instead of implementing the Court's interim orders in respect of storage of the sludge that had accumulated in the area,[97] both the SPCB and the respondent industries tried to pass on the responsibility to the other. The Court had to pass another set of interim orders to start the work of entombment,[98] and the sludge was buried in cement pits in the factory premises.[99] Although the respondent industries offered to undertake the de-watering of 69 polluted wells,[100] it did not prove possible.[101] In addition to the prohibitive cost of cleaning the polluted groundwater, doubts have been expressed about the feasibility and practicality of the proposed measures.[102]

7.2.3 Remedying loss and damage

An important measure of the effectiveness of implementation of court decisions is whether or not the polluters pay compensation for the loss or injury suffered by the victims and damages for remediation of environmental damage on account of water pollution.

The Bicchri case

The Court did not entertain the compensation claim for the loss suffered by the villagers in the affected area or levy exemplary damages on the polluting units (to be paid to the affected villagers) to deter other units from causing water pollution in the future.[103] Instead, the Court left it 'open to them [the villagers] or any organization on their behalf

[97] Bicchri (n 35) ¶17 (referring to order of 5 March 1990). See also *Indian Council for Enviro-Legal Action v Union of India and Others* (2011) 12 SCC 737 ¶6; Bicchri (n 35) ¶19.

[98] Bicchri (n 35) ¶23.

[99] Shankar (n 77).

[100] Bicchri (n 35) ¶17 (referring to order of 5 March 1990)

[101] ibid ¶19.

[102] 'The Verdict' Down to Earth (15 May 1997) <www.downtoearth.org.in/coverage/the-verdict-23702>; 'Not Quite in Order' (n 74); Anju Sharma and Rajat Banerji, 'The Blind Court' Down to Earth (7 June 2015) <www.downtoearth.org.in/coverage/the-blind-court-25812>. See also M Tiwari and R Mahapatra, 'What Goes Down Must Come Up' Down to Earth (31 August 1999) <www.rainwaterharvesting.org/crisis/groundwater-pollution.htm>.

[103] Agarwal (n 77); 'Not Quite in Order' (n 74).

to institute suits in the appropriate civil court' (emphasis added).[104] The Court appears to have overlooked the fundamental limitations of a civil suit: high transaction costs,[105] and lack of competence of lower courts to handle such technical and complex issues,[106] among others. Nevertheless, the villagers organised themselves as *Paryavaran Avam Manav Vikas Sansthan* (or the Environment and Human Development Institute) and filed a civil suit before the Court of the Additional District Judge, Udaipur in December 1997 claiming damages of approximately Rs. 28.48 crore with interest @ 18 per cent per annum.[107] So far, they have not been awarded any compensation.[108]

Although the Court did not compensate the victims of water pollution, it empowered the Central Government (through the MoEF) to determine the amount required to undertake remedial measures for environmental restoration, recover/realise the amount from offending polluters, and undertake the remedial measures.[109] Therefore, it is suggested that the Court adopted a 'biocentric' approach.[110] In accordance with the procedure set out by the Court,[111] the relevant parts of NEERI's report setting out the cost estimates were deemed to be the show-cause notice to the respondent industries who submitted a report prepared by their experts. After hearing these experts who did not furnish any information on the cost estimates, the Committee of Experts constituted by the MoEF pursuant to the Court's decision concluded that NEERI's estimates would be the minimum cost of remedial measures and the Court treated the Committee's decision as final.[112]

[104] Bicchri (n 35) ¶70(3).

[105] Gitanjali Nain Gill, 'Human Rights and the Environment in India: Access through Public Interest Litigation' (2012) 14(3) Environment Law Review 200, 216.

[106] 'Not Quite in Order' (n 74).

[107] *Paryavaran Avam Manav Vikas Sansthan v Hindustan Agro Chemicals Ltd and Others* Case No. 1 of 1999 (Court of Additional District Magistrate, Udaipur).

[108] Personal communication with Mr Manna Ram Dangi, Advocate, Udaipur (25 June 2016).

[109] Bicchri (n 35) ¶67.

[110] Sharma and Banerji (n 102).

[111] Bicchri (n 35) ¶67 & ¶70(1).

[112] *Indian Council for Enviro-Legal Action v Union of India and Others* (2011) 12 SCC 752.

This was followed by the adoption of an aggressively litigious strategy by the respondent industries to delay implementation of the judgment for over 15 years.[113] The Court described this as an 'abuse of the process of law' and 'a very serious matter concerning the sanctity and credibility of the judicial system in general and of the Apex Court in particular'.[114] Such conduct confirms Sahu's observation that the 'haves' interfere in implementation of courts decisions in order to delay implementation.[115] Gitanjali Gill describes this as an attempt to exploit the uneven resource capacity of the parties by 'exhausting the resources, energy and determination of the local community'.[116]

In case of the respondent industries' failure to pay the amount for remedial measures, the Court ordered the immediate attachment of their factories, plant, machinery and all other immovable assets.[117] Accordingly, the SPCB sealed their plants.[118] However, the failure of the respondent industries to comply with the Court's orders directing disclosure of assets, delayed the sale of the attached properties and realisation of the costs for remedial measures.[119] Concern has also been raised about the Court's failure to determine the financial status of the owner of the respondent industries (who later pleaded bankruptcy) and the adequacy of the immovable assets to pay for the remedial measures.[120] Eventually, the attached properties were sold for a paltry sum of Rs. five lakh, which is insufficient to pay for the remedial measures estimated to cost Rs. 40 crore.[121] In any event, this amount is being used first to settle the unpaid wages of the workers of one of the respondent industries.[122]

[113] Bicchri II (n 29) ¶4.

[114] ibid ¶1.

[115] Sahu (n 84) 127-28.

[116] Gill (n 105) 216.

[117] Bicchri (n 35) ¶70(1).

[118] Bicchri II (n 29) ¶34.

[119] ibid ¶80.

[120] 'Miseries Galore' Down to Earth (30 April 1996) <www.downtoearth.org.in/coverage/miseries-galore-25816>. See also Gill (n 105) 217.

[121] Tiwari and Mahapatra (n 102).

[122] Personal communication with an official of the Rajasthan State Pollution Control Board, Jaipur (28 June 2016).

The MoEF got a feasibility study conducted for remediation of the contaminated environment in the village and surrounding areas through a consortium of consultants, that is, NEERI and M/s SENES Consultants Ltd., Canada.[123] However, it was unable to undertake the remedial measures on account of the failure of the respondent industries to pay, and of the MoEF to recover, the amount required for this purpose.[124] In 2011, in the Bicchri II case, the Court observed: '...till date the polluters…have taken no steps to ecologically restore the entire village and its surrounding areas or complied with the directions of this Court at all.'[125]

News reports published immediately following the judgment in 1996 highlighted the absence of implementation.[126] The groundwater in the wells in the immediate vicinity of the polluting units was still dark brown in colour (visible pollution) while groundwater further away from the polluting units was beginning to lose colour (invisible pollution). There was no safe natural source of drinking water in the village. Most of the land affected by the polluted groundwater remained barren or with substantially low production. A visit to village Bicchri in June 2016 confirmed these findings and found that more than twenty years after the judgment, no direct and material effects are visible on the ground.

The Tamil Nadu cases

The Central Government (through the MoEF) implemented the Court's directions in respect of the constitution of the Authority.[127] It constituted the Loss of Ecology (Prevention and Payments of Compensation) Authority for the State of Tamil Nadu (Authority) before 30 September 1996 with a Chairperson (a retired High Court judge) and three members – the Secretary, Department of Environment, Government of Tamil Nadu, the Member Secretary, CPCB and a person to be appointed by the Central

[123] Rajasthan State Pollution Control Board, Action Taken Report of the Rajasthan State Pollution Control Board as on 30.06.2015

<http://environment.rajasthan.gov.in/content/dam/environment/RPCB/Reports%20n%20Papers/Contents%20of%20ATR%202015%20(08.08.16)%20.pdf>.

[124] Sanjay Parikh, 'Development of Environmental Law: A Critical Appraisal' Paper presented at the National Consultation on Critiquing Judicial Trends on Environmental Law, Human Rights Law Network, New Delhi, 23-24 February 2008.

[125] Bicchri II (n 29) ¶4.

[126] See Sharma and Banerji (n 102); 'Miseries Galore' (n 120); 'Not Quite in Order' (n 74).

[127] *Vellore* (n 25) ¶20 r/w ¶25(1).

Government.[128] Notwithstanding its timely constitution, the Authority could not start functioning due to certain administrative problems.[129] It finally started functioning from 23 September 1998,[130] after the petitioner organisation in *Vellore* moved the High Court of Madras.[131]

In principle, the Authority adhered to the terms of reference set out by the Court,[132] and awarded compensation to victims of water pollution and damages for remediation of environmental degradation caused by the tanneries in Vellore and the dyeing and bleaching units in Tirupur. In both cases, the Authority supplied a list of affected farmers and polluting industries to the concerned District Collectors to recover the amount of compensation from the polluting industries and to distribute it to the affected farmers.

However, a number of problems have been identified with the award of the Authority in both cases. First, several right-holders and duty-bearers are excluded from the assessment process due to the large number of polluters and victims.[133] Second, the method used for collection of data limits liability to tangible environmental costs such as loss of agricultural production.[134] It does not take into account deterioration in the value of land.[135] The exclusive emphasis on land (crops and wells) translates into the exclusion of other use-benefits.[136] It does not consider latent social and health effects, such as the refusal of families to marry their daughters into affected villages without a source of drinking water supply,[137] and the increasing rate of infertility among the residents of

[128] Loss of Ecology (Prevention and Payments of Compensation) Notification SO 671 (E) dated 30 September 1996.

[129] L Venkatachalam, 'Damage Assessment and Compensation to Farmers: Lessons from Verdict of Loss of Ecology Authority in Tamil Nadu' (2005) 40(15) Economic and Political Weekly 1556.

[130] *Vellore District Environment Monitoring Committee v The District Collector and Others* WP Nos. 8335 of 2008 and 19017 of 2009 (High Court of Madras, Judgment of 28 January 2010) [VDEMC] ¶6.

[131] Telephone communication with Mr PS Subrahmanian, Honorary Secretary, VCWF, Chennai (16 August 2016).

[132] *Vellore* (n 25) ¶25(2) & ¶¶25(6)-(7).

[133] Krishnakumar (2002) (n 92).

[134] ibid. See also *Noyyal* (n 30) ¶28.

[135] ibid.

[136] Venkatachalam (n 129) 1558.

[137] Bharat Lal Seth and Sumana Narayanan, 'Towards Zero Discharge' Down to Earth (25 August 2015) <www.downtoearth.org.in/coverage/towards-zero-discharge-33489>.

villages downstream of the river Noyyal.[138] Third, the awards highlight the difficulty of quantifying and calculating environmental damages. In Vellore, the economic valuation methodology excluded damage to human health, livelihood (livestock, fishing, fruit orchards) and biodiversity.[139] In Tirupur, the Authority did not assess loss to, and restoration of, ecology.[140] Some of these problems formed the grounds of challenge to the awards before the High Court of Madras.

Further, in principle, the Authority adhered to the Court's direction to seek the help of expert opinion.[141] In practice, in Vellore, it only used data furnished by the Revenue Department and the SPCB.[142] In Tirupur, it relied selectively on studies conducted by the experts at the University who assisted the Authority. However, there was no discussion with the affected right-holders in what Sahu describes as an undemocratic and non-transparent decision-making process.[143] The Authority missed an opportunity to evolve a more decentralised approach to the decision-making process to ensure the effective implementation of the law.[144]

Palar river basin (Vellore)

The Authority, which was the first Court-appointed authority tasked with undertaking such an exercise, took almost three years to examine the issue of the pollution caused by tanneries located in six districts - Vellore, Dindigul, Kancheepuram, Tiruvallur, Erode and Tiruchi. The award of 7 March 2001 covered the period between 21 August 1991 (date of filing the PIL before the Court) and 31 December 1998 (date of the Court's order seeking production and effluent discharge data from the tanneries).[145]

[138] MC Rajan, 'Polluted Noyyal River in Tamil Nadu is Turning Land and People Barren' India Today (23 July 2012) <www.indiatoday.in/india/south/story/polluted-noyyal-river-tamil-nadu-turning-land-and-people-barren-110780-2012-07-23>.

[139] Venkatachalam (n 129) 1557 referring to Krishnakumar (2002) (n 92).

[140] *Noyyal* (n 30) ¶28.

[141] *Vellore* (n 25) ¶25(2).

[142] Krishnakumar (2002) (n 92).

[143] Sahu (n 84) 138.

[144] ibid.

[145] VDEMC (n 130) ¶7.

The Authority directed 621 tanners in two districts to pay Rs. 30.75 crore as compensation to 36,056 individuals in respect of 17,170 hectares of agricultural land.[146] Subsequently, the High Court permitted 334 tanners to pay the amount of compensation in instalments.[147] As of 2010, only 347 out of 547 industries had paid the compensation amount and that compensation had been fully distributed only in a few *talukas* (a sub-division of a district).[148]

In any event, the affected right-holders and their representatives are not satisfied with the award. According to the Secretary of the petitioner organisation, the period considered for compensation is arbitrary. The tanneries had been polluting long before 1991 and continue to do so. According to him, compensation needs to be given from the day the land was affected until such time when it is restored to at least close to its original value.[149] It is pertinent to mention that in its award, the Authority had clarified that the liability to compensate affected individuals continued till the damage caused to the ecology and environment by pollution is reversed.[150] At the same time, from the perspective of assessment of loss and determination of compensation, it is difficult to identify when discharge of effluents from tanneries in excess of the prescribed standards started causing harm to the right-holders and their land.

It is also argued that the compensation awarded by the Authority is very low compared to the loss suffered.[151] The Authority did not take into account a scientific study in respect of yield loss in respect of different crops and resulting income loss, which was prepared by the Department of Agricultural Sciences, Tamil Nadu Agricultural University, Coimbatore (TNAU) for the Authority.[152] This is also important from the perspective of

[146] S Gopikrishna Warrier, 'Six-month Extension for Loss of Ecology Authority' The Hindu Business Line (15 April 2002) <www.thehindubusinessline.com/2002/04/15/stories/2002041501521300.htm>; Krishnakumar (2002) (n 92).

[147] *All India Skin and Hide Tanners and Merchants Association v The Loss of Ecology (Prevention and Payment of Compensation) Authority and Others* WP No. 7015 of 2000 (High Court of Madras, Order of 22 March 2002).

[148] Sahu (n 49) 344-45.

[149] Telephone communication with Mr PS Subrahmanian, Honorary Secretary, VCWF, Chennai (9 April 2018).

[150] VDEMC (n 130) ¶7.

[151] Krishnakumar (2002) (n 92).

[152] ibid.

ensuring transparency and accountability and highlights the need to ensure that the Authority's selective reliance (or not) on the studies undertaken by experts is supported by reasons. Another criticism of the award is that it excluded certain districts completely, certain villages and farmers in covered districts,[153] certain farmers in covered villages, and certain land of covered farmers.[154]

Insofar as remediation of environmental damage is concerned, TNAU identified the schemes for Vellore district at a cost of Rs. 122 crore after discussions with various government departments.[155] The Authority suggested schemes in its award of 7 March 2001 and forwarded them to the State Government for implementation.[156] After several representations by the tanners, the Authority stipulated that only three per cent of the total cost of the schemes is to be borne by the 731 tanners,[157] because 'they will have to spend much larger amounts to ensure that further ecological damage is prevented'.[158] In other words, the polluting units were let off the hook for past pollution insofar as it affected the environment.

As per an order of 5 April 2005, the Collector of Vellore formed a District-Level Working Committee on Reversal of Ecology to implement the schemes but none of them had materialised (as of September 2013).[159] In 2010, the High Court of Madras took note of 'complete slackness on the part of the Government in implementing the said Scheme'.[160] Apparently, the Department of Environment is of the view that any scheme for reversal

[153] The High Court of Madras directed the Authority to make an award in respect of compensation payable to other individuals affected by the same 547 polluters in Vellore district as were identified in the original award. See *Vellore Citizens' Welfare Forum v Union of India and Others* WP No. 23291 of 2006 (High Court of Madras, Order of 20 December 2007).

[154] Krishnakumar (2002) (n 92); Sahu (n 49) 346.

[155] PVV Murthi, 'Reversal of Ecology in Palar Basin a Non-starter' The Hindu (20 September 2013) <www.thehindu.com/news/national/tamil-nadu/reversal-of-ecology-in-palar-basin-a-nonstarter/article5147042.ece>.

[156] Warrier (n 146).

[157] Krishnakumar (2002) (n 92).

[158] Warrier (n 146).

[159] Murthi (n 155).

[160] VDEMC (n 130) ¶14.

of ecological harm/degradation in the Palar basin could be implemented only after completely stopping the pollution of the river by the tannery effluents.[161]

Noyyal river basin (Tirupur)

While *Karur* was pending before the High Court of Madras, the Authority took *suo motu* cognisance of the pollution caused by the discharge of effluents by the dyeing and bleaching units/industries located in Tirupur taluk and its vicinity in the Noyyal river basin. The Centre for Environmental Studies, Anna University assisted the Authority.[162] In its award of 17 December 2004, the Authority granted a compensation of Rs. 24,79,98,548 to 28,596 affected farmers (including 535 members of the Noyyal River Ayacutdars Protection Association) in 68 villages in seven taluks in Coimbatore, Erode and Karur districts for the period from 28 August 1996 (date of filing the writ petition in *Karur*) to 31 December 2004.[163] It is pertinent to contrast this amount with Anna University's assessment of the loss suffered by the farmers (almost Rs. 115 crore).[164]

The issues with the award are similar to those discussed in the context of *Vellore*. In some cases, the compensation awarded by the Authority was meagre (for example, Rs. 49 or Rs. 412.50 per hectare). The criteria for payment of compensation was not individual crops raised by an affected individual but on the basis of a uniform rate for a village falling in a certain category of environmental degradation (loss in production for predominant crops).[165] Further, the Authority assessed loss only for the period 30 August 1996 to 31 December 2004. Therefore, the award was challenged in writ petitions before the High Court of Madras.[166]

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[161] Murthi (n 155).

[162] *M Ramasamy v The Chief Secretary, Government of Tamil Nadu and Others* WP No. 2790 of 2012 (High Court of Madras, Order of 1 November 2012) ¶7.

[163] *Noyyal* (n 30) ¶28.

[164] ibid.

[165] ibid ¶¶27-28. See also V Sridhar, 'The Farmers' Plight' 22(17) Frontline (13-26 August 2005) <www.frontline.in/static/html/fl2217/stories/20050826004512000.htm>.

[166] *Ramasamy* (n 162) ¶8.

The payment of compensation to the victims was delayed because the polluting units also filed writ petitions challenging the award.[167] As of 2006, the polluting units in Tirupur had deposited only the first instalment of Rs. 1.80 crore and the balance amount had not been paid.[168] Therefore, in *Noyyal*, the High Court directed the respondents to deposit the remaining amount of compensation awarded by the Authority in two installments.[169] They were also directed to deposit a sum of Rs. 12 crore as ad-hoc compensation towards the estimated loss for the three subsequent years.[170] However, there was no discussion of loss suffered before 30 August 1996. In another case, the High Court disagreed with the criteria for payment of compensation and directed the Authority to adjudicate each of the claims independently.[171]

In *Karur*, pursuant to the polluting industries' undertaking to pay for cleaning up the Orathapalayam dam, the High Court directed the SPCB to determine the required amount.[172] For this reason, the Authority did not award damages for environmental restoration.[173] The SPCB communicated the amount to the polluting industries in 2003 but the latter did not deposit the same.[174] In *Noyyal*, the court issued an interim order of 14 July 2004 recording the submission of the respondent units that they will pay a sum of Rs. six crore out of Rs. 12.5 crore in three installments within six months, but they only deposited Rs. four crore.[175] Therefore, the court directed the respondent units to deposit the balance amount in two equal installments.[176] As of 2012, the polluting units had paid Rs. 75 crore, which included a sum of Rs. 25 crore deposited in the High Court to the credit of WP No. 29791 of 2003 (pursuant to interim order of 10 August 2007), Rs. 42.02

[167] Kannan and Kanna (n 92) 42.

[168] *Noyyal* (n 30) ¶28.

[169] ibid ¶¶30(c)-(d).

[170] ibid.

[171] *KK Subramaniam and Others v Loss of Ecology (Prevention and Payment of Compensation) Authority and Others* (2010) 3 Madras LJ 1087.

[172] *Noyyal* (n 30) ¶5 (referring to final order of 26 February 1998).

[173] Paul P Appasamy and Prakash Nelliyat, 'Compensating the Loss of Ecosystem Services Due to Pollution in Noyyal River Basin, Tamil Nadu' Working Paper 14/206, Madras School of Economics (2007) <http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.390.7995&rep=rep1&type=pdf>.

[174] *Noyyal* (n 30) ¶7 (referring to SPCB's letter of 14 August 2003).

[175] ibid ¶29.

[176] ibid ¶30(b).

crore with accrued interest collected towards the fine amount and Rs. 7.64 crore ordered towards ad hoc compensation available with the District Collector, Tirupur.[177]

This case also highlights another important contributory factor to non-implementation, that is, the claims of number of affected right-holders, many of whom were not parties to the initial court proceedings. The State Government issued a Government Order and advanced interest-bearing amount of Rs. 75 crore to the SPCB for disbursement to 535 members of the agriculturists' association that had approached the High Court in 2006. When another group of affected right-holders challenged the disbursement of Rs. 24 crore by the association to 360 farmers, the High Court quashed the Government Order and ordered recovery of this amount.[178] Subsequently, the Supreme Court directed the State Government not to recover the amount.[179]

7.2.4 Other mandatory directions and recommendations

In *Vellore*, the Court issued a number of mandatory directions concerning the establishment and operation of specific or all industries in the State of Tamil Nadu to specified respondents. Some of these industries were not parties to the court proceedings. First, the Court directed the State Government to strictly enforce a Government Order prohibiting establishment of any polluting industry closer than a specified distance from the embankment of water sources, and not to permit the setting up of any new industry listed in Annexure I within the prohibited area.[180] In 2017, a news report revealed that the SPCB had permitted 12 member (dyeing) units of a CETP in Tirupur, which were located within the prohibited area, to run without consent for six years.[181] Second, the Court directed the State Government and the Central Government not to permit the setting up

[177] Ramasamy (n 162) ¶9.

[178] ibid ¶88.

[179] Rajasekaran RKI, 'SC Order gives Succour for Farmers Affected by Noyyal River Pollution' Times of India (7 February 2018) <https://timesofindia.indiatimes.com/city/coimbatore/sc-order-gives-succour-for-farmers-affected-by-noyyal-river-pollution/articleshow/62811917.cms>.

[180] *Vellore* (n 25) ¶22 & ¶25(10).

[181] SV Krishna Chaitanya, 'TNPCB Caught Bending Noyyal Effluent Rules' The New Indian Express (17 May 2017) <www.newindianexpress.com/states/tamil-nadu/2017/may/17/tnpcb-caught-bending-noyyal-effluent-rules-1605649.html>.

of further tanneries in the State.[182] Accordingly, the State Government banned the issue of fresh tannery licenses.[183] However, the organisation of the Annual India International Leather Fair in Chennai, which *inter alia* encourages leather exports and the setting up of further tanneries in the State, casts some doubt on the continuing implementation of this order.[184] Third, the Court directed all the industries in the State of Tamil Nadu to comply with the permissible level of TDS as stipulated by the SPCB (2,100 ppm or mg/litre), and to maintain the quality of ambient waters.[185] Non-implementation is evident from official statements. In 2010, the Chief Secretary, Environment and Forest Department, State Government admitted that the TDS level in the effluents discharged from tanneries, whether before or after treatment, exceeded 12,000 ppm.[186] In 2012, the Chief Secretary admitted before the Court that the TDS level in the effluent discharged from the CETP was in the range of 4,500-18,000 mg/litre.[187] However, these admissions did not lead to closure orders in respect of the polluting industries in exercise of the statutory power of the SPCB under the WPCPA.

In the Bicchri case, the Court made a number of recommendations to the Central Government. [188] However, the recommendation to consider treating all chemical industries as a separate category has not translated into a secondary legislation, policy or scheme dealing specifically with the location of and restrictions on chemical industries. Continuing non-enforcement of statutory provisions raises doubts about the implementation of the recommendation asking the Central Government to consider strengthening the environment protection machinery at the Centre and the States and to provide them more teeth, as well as to conduct an environmental audit. In contrast, while it is difficult to attribute government actions to the Court's suggestion regarding

[182] *Vellore* (n 25) ¶7 (referring to interim order of 9 April 1996).

[183] Krishnakumar (1995a) (n 82) 121.

[184] Telephone communication with Mr PS Subrahmanian, Honorary Secretary, VCWF, Chennai (16 August 2016).

[185] *Vellore* (n 25) ¶24 & ¶25(11).

[186] Telephone communication with Mr PS Subrahmanian, Honorary Secretary, VCWF, Chennai (16 August 2016). See also Special Correspondent, 'Plea to Close Tanneries' The Hindu (22 September 2010) <www.thehindu.com/todays-paper/tp-national/tp-tamilnadu/Plea-to-close-tanneries/article16038752.ece>.

[187] *Vellore District Environment Monitoring Committee v The District Collector and Others* SLP (Civil) No. 23633-634 of 2010 (Supreme Court of India, Affidavit of 4 May 2012).

[188] Bicchri (n 35) ¶70(4) & ¶¶70(6)-(7).

establishment of environmental courts, some causality may be implied where almost 25 years after the court decision, the NGT was constituted on 18 October 2010 pursuant to the NGT Act.

Conclusion

This chapter focused on the implementation of court decisions in cases relating to water pollution/quality. It finds that the higher judiciary was reluctant to invoke its power to punish for contempt of court. Instead, it granted considerable leeway to State actors. Non-State actors (such as industrial polluters) were also likely to be let off the hook after paying a fine and submitting an undertaking to comply. The higher judiciary granted other coercive remedies such as penalty payment, closure or recovery as arrears of land revenue against non-State polluters but questions of implementation and its effectiveness persist. Insofar as monitoring of implementation of court decisions is concerned, the higher judiciary, especially the Supreme Court, engaged in strong monitoring of implementation of its decisions where the remedies were not restricted to a particular right-holder or a group of right-holders. Often, strong monitoring was not the immediate response; the higher judiciary resorted to it after the implementing authorities failed to discharge their constitutional and statutory duties and it was compelled to strengthen the remedies. In the case of moderate monitoring, the higher judiciary adopted a more deferential approach or showed greater willingness to rely on other monitoring mechanisms. In the case of weak monitoring, the higher judiciary left implementation entirely in the hands of the authorities.

An examination of the implementation of court decisions in three ‘landmark’ cases reveals a spectrum of full, partial or no implementation of judicial remedies. The State failed to discharge its duty to protect the right to environment and water from the activities of the polluting industries, and the duty to fulfil the right to water. As a result, the right-holders were compelled to rely on polluted drinking water or make alternative arrangements. Court directions to prevent water pollution by prohibiting the establishment and operation of certain industries were not implemented. The grant of permission to re-open closed polluting units subject to the fulfilment of statutory requirements led to the establishment of pollution control devices but not to their

operation in accordance with the prescribed standards. The closure of polluting units did not remediate the adverse effects of past pollution on water and land. The prohibitive cost of remediation and uncertainty about appropriateness and effectiveness of remediation measures posed additional problems. Finally, there was little remediation of the loss suffered by right-holders on account of past pollution, and environmental restoration remained a pipedream.

The effectiveness of implementation of court decisions in the three ‘landmark’ cases, in terms of their direct and material effects on the right-holders and/or the environment, is questionable. In fact, water pollution has exacerbated and continued non-implementation or partial or poor implementation may embolden polluters in the future. This will compromise the realisation of the CER and lead to their violation, besides adversely affecting the right of the environment itself.

CHAPTER 8
CONCLUSION AND WAY FORWARD

8.1 Summary of findings

The objective of this thesis was to examine the potential and limits of environmental rights litigation as a solution to the problem of water pollution in India. For this purpose, it focused on the adjudication and implementation stages generally, and the recognition of the substantive rights to environment, sanitation and water (constitutional environmental rights or CER), the determination of their scope and content, the corresponding duties of the State, the procedural aspects of these rights and the corresponding duties, the judicial remedies, and the effectiveness of implementation of court decisions specifically. While acknowledging their interplay, the rest of this section summarises the findings in respect of each of these components.

8.1.1 Recognition of strong substantive CER

The features of the strong CER, as recognised by the higher judiciary, can be contrasted with comparable developments in international law. First, the explicit recognition of the rights to water and sanitation by the higher judiciary occurred prior in time to their recognition in non-binding instruments of international human rights law. Further, the higher judiciary recognised an explicit constitutional right to a healthy environment even before the rights to water and sanitation whereas international law is yet to recognise a distinct right to environment. Second, the source of the rights is different. A majority of non-binding instruments of international law derive the rights or their components from the rights to an adequate standard of living and health in the International Covenant on Economic, Social and Cultural Rights (ICESCR rights). In contrast, the recognition of the CER is based on the harmonious reading of three sets of constitutional provisions, that is, the fundamental right to life (a civil and political right), the Directive Principles of Policy (DPSP) (socio-economic goals) and fundamental duties of citizens. Further, unlike international human rights law, the Constitution does not explicitly guarantee the right to health. Instead, the higher judiciary discussed this right in the context of either a healthy environment or the link between the rights to environment, sanitation and/or health and the fundamental right to life. Third, the recognition of the CER by the higher judiciary is

legally binding. In contrast, the rights to environment, water and sanitation or their components are mostly included in non-binding instruments of international law. Finally, it is not possible to disentangle the individual and collective dimensions of the CER in many cases before the higher judiciary. A number of cases explicitly or implicitly recognised the collective aspects of the CER. Similarly, non-binding instruments of international environmental law recognise the individual as well as collective dimensions of the derived rights to environment and water. Although there is some recognition of the collective aspects of the rights to health and water as a public good, the individual is the primary focus of the right to water as recognised in non-binding instruments of international human rights law.

The strong declaration of the CER by the higher judiciary has paved the way for environmental rights litigation relating to water pollution/quality and ensured the realisation of the procedural right of access to judicial remedies. However, in a number of cases, the strength of the declaration was attributable to the fact that it was *obiter dicta*; that is, the determination of the scope and content of the rights was not necessary for the adjudication of the dispute before the higher judiciary. Even otherwise, as section 8.1.2 illustrates, the determination of the scope and content of the rights weakened the strength of the rights.

8.1.2 Scope and content of strong substantive CER

Moderating effect of the legal bases

Section 8.1.1 highlights that the rights, as recognised by the higher judiciary, are not absolute. Notwithstanding the strong declaration of the CER, their legal bases exerted considerable influence on the determination of their scope and content. The statutory duties of authorities in respect of water supply, health and/or sanitation, or prevention or control of water pollution, played an important role in the recognition of the CER by the higher judiciary. In particular, high courts contributed to the recognition of the rights to sanitation and water, owing perhaps to the fact that the statutory duties of urban local bodies extend to some components of these two rights or that some decisions were subsequently not challenged before the Supreme Court. Further, the likelihood of success in a number of cases depended on the ability of litigants to establish a link between the

non-realisation or violation of the CER and the failure of authorities to discharge their statutory duties. This may be due to the fact that the DPSP that form one of the bases for the recognition of the CER in India are implemented through legislation.

Restriction of the rights 'to' human beings

An anthropocentric approach underpins the scope and content of the rights, which are derived from other rights. In international law, non-realisation or violation of the rights to an adequate standard of living and/or health is a precondition for a claim relating to non-realisation or violation of the rights to water and sanitation. Similarly, in India, non-realisation or violation of the constitutional right to life is a pre-condition for a claim relating to non-realisation or violation of the CER.

There is an inverse relationship between water pollution and/or poor water quality and the realisation of the right to life (including the CER), which was expanded beyond 'protection of limb or faculty' or 'physical existence' to encompass dignity, including the 'bare necessaries', more than 'animal existence', and 'quality of life'. This expansive interpretation of the right to life is critical given the varied manifestations of the adverse impacts of water pollution and/or poor water quality on human beings and the uncertain spatial and temporal dimensions of the impacts. The higher judiciary also established a clear link between health as an indicator of the quality of (the right to) life and the CER. The right to pollution-free water further illustrates how the higher judiciary adopted an anthropocentric approach to circumscribe the scope and content of the rights following a strong declaration. It was willing to tolerate water pollution so long as it did not pose a threat to the quality of human life in the form of a health hazard. The anthropocentric approach also underscored decisions relating to public nuisance and/or in respect of water supply, health and/or sanitation that implicitly served as the source of several components of the rights to sanitation and water - whether interpreted narrowly or broadly.

A fundamental limitation of the rights to environment, sanitation and water is that they represent a shorthand; they are not intended to guarantee a right to all the components of the environment, sanitation and water. This sounds a cautionary note regarding the rhetoric of rights. The need to establish a link with existing rights narrows the scope and content of the rights. This severely restricts the potential of environmental rights litigation

in cases relating to water pollution/quality. It does not take into account several existing and potential (but confirmed) adverse economic, social and physical impacts of water pollution and/or poor water quality. It also excludes claims based on the precautionary principle where there is scientific uncertainty in respect of the negative impacts on the right to life and beyond.

Both non-binding instruments of international law as well as the higher judiciary are silent in respect of the meaning of key terms that could otherwise elaborate the scope and content of the rights. The silence of the higher judiciary may be attributed to the fact that such a determination was not necessary for the adjudication of particular cases. Another explanation is that these terms ought to be elaborated in light of the facts and circumstances of a particular case. Even where the higher judiciary attempted to explain terms, it relied on other undefined terms.

Restrictions on the rights 'of' human beings

Not only do international law and the higher judiciary adopt an anthropocentric approach, they are also selectively anthropocentric. This approach gives primacy to the rights of certain right-holders and excludes others entirely. Non-binding instruments of international environmental law restrict the right to water to drinking water. General Comment No. 15 is broader but it restricts the right to water to water for personal and domestic uses, which 'ordinarily' include drinking, personal sanitation, washing of clothes, food preparation, and personal and household hygiene. It further links the safety of water for personal and domestic uses to the colour, odour and taste of water. Although it recognises that water is required for different uses and for the realisation of other rights, the right to water is not extended to these other uses.

The higher judiciary adopted a selective anthropocentric approach in its formulation of the right to water, which is even narrower than General Comment No. 15. It recognised a right to drinking water. In some cases where the affected right-holders resided in rural areas, the higher judiciary acknowledged the adverse effects on the availability of water for other uses such as drinking water for cattle or water for irrigation. However, it confined the judicial remedy to the right to drinking water rather than including these uses within the right to water, or the right to health and the right to life more generally.

An exception is the Court's decision in RLEK (1985) where the right to a healthy environment took into account avoidable hazard to 'cattle, homes and agriculture'. Other cases did not consider the other uses of water or impacts of water pollution/quality. Selective anthropocentrism is also evident in the distinctively urban focus of cases concerning the statutory duties of local bodies in respect of water quality and sanitation. Of course, this is also a function of which right-holders were able to approach the higher judiciary. The interests of some right-holders were also sacrificed where the higher judiciary undertook a balancing exercise between the interests of an individual right-holder or a collective of right-holders versus larger public interest.

Accommodation of some purely environmental interests

The determination of the scope and content of the rights does not usually extend to the adverse impacts of water pollution/quality on non-human environmental aspects. Most of the non-binding instruments of international law restrict themselves to the instrumental value of the natural environment or of environmental (water) quality for the enjoyment of human rights. In some cases, only the man-made environment is under consideration. To some extent, non-binding instruments of international environmental law accommodate the intrinsic value of the environment in the requirement to consider the needs of future generations as well as in some duties of the State. Non-binding instruments of international human rights law do not recognise any right of environment at all. Instead, some components of the environment are read into the substantive and procedural obligations of the State corresponding to the rights to an adequate standard of living and health, and the right to water.

In principle, the constitutional framework for the prevention or control of environmental/water pollution in India appears to give equal weight to human and non-human interests. In practice, the higher judiciary accommodated non-human interests or environmental considerations only to the extent of their instrumental value for human beings. The higher judiciary categorically focused on the man-made environment, or hygienic or humane and healthy environment in some cases. At the same time, in some cases, the higher judiciary and the NGT accommodated the intrinsic value of the environment although human interests retain primacy in the framing of the claim.

More specific steps in the direction of recognition of the right of the environment are evident from the recognition of human beings as the legal representative of the environment or non-human interests based on their fundamental duty, widening of the standing requirement, and invocation of the *parens patriae* jurisdiction. At the same time, Chapter 3 underscored a set of complex questions regarding the operationalisation of such a right. All of these cases also restated the fundamental limitation of rights litigation, that is, the requirement of a human being as the right-holder or the representative of a right-holder.

8.1.3 Substantive duties of the State

The scope and content of the substantive aspects of the rights to water and sanitation are elaborated to a greater extent in terms of the corresponding obligations of the State in non-binding instruments of international human rights law. Similarly, in a number of cases, the higher judiciary did not elaborate the scope and content of the substantive aspects of the CER at all or in sufficient detail. Instead, it was more willing to identify the corresponding duties of the State, explicitly or implicitly, and determine their nature, scope and content.

Accommodation of the tripartite typology of obligations and beyond

Some elements of the tripartite typology of obligations of the State relating to human rights are reflected in decisions of the higher judiciary. The negative duty to respect the CER accommodated a certain level of water pollution and/or poor water quality and did not require the State to undertake any action in case of degradation or pollution of water resources. Therefore, its contribution to the realisation of the CER or to addressing their violation is limited. Further, the higher judiciary's interpretation of Article 48A of the Constitution, which imposes a duty to protect and improve the environment, illustrates an overlap among the substantive duties of the State that correspond to the tripartite typology. This highlights the importance of looking beyond the positive/negative nature of the duties (for example, the duty to maintain) and the possibility that different elements of the tripartite typology may co-exist in one decision (for example, the duty to protect and the duty to fulfil). The expansion of the nature, scope and content of the duties of the

State by the higher judiciary to include the duty to improve, the extended duty to fulfil, and the duty to promote confirms that the tripartite typology does not encompass all the duties. Similarly, the application of certain basic concepts of environmental law to buttress the constitutional or statutory duties of the State implicitly incorporates elements of the tripartite typology and goes beyond it, for example, where the duty to protect extends to undertaking necessary measures.

Significantly, the higher judiciary inverted the typology of obligations for a developing country like India where the right-holders lack the resources for the enjoyment of the CER. It relied on the DPSP, which imposes a duty to improve public health, to recognise the positive duty to facilitate, and it linked the duty to provide the rights to water and sanitation to existing legislation (for example, environmental laws and laws governing local bodies), the fundamental right to life or the DPSP. In some cases, it clarified the scope of the duty to provide and expanded it to include different components of the CER. The higher judiciary also envisaged two additional aspects of the duty to provide the CER. First, measures introduced by the State to discharge its duty to provide the CER may result in a violation. Second, a failure to discharge the duty to provide may result in a claim for compensation for harm or damage to the right-holders. On the one hand, these observations hold the promise of widening the range of remedies that can be granted to right-holders. On the other hand, they raise the question of what exactly do these duties entail, which must be answered in order to identify the source of the duty and to ensure implementation of the remedies.

Circumscribing substantive rights

The legal bases of the duties of the State include the Constitution, legislation, and basic concepts of environmental law read into the Constitution or legislation. This restricts the scope and content of the corresponding rights. For instance, reliance on existing pollution control laws to provide the threshold of acceptable water pollution reduced the CER to the enforcement of statutory requirements. Reliance on laws governing local authorities led to the adoption of a narrow anthropocentric approach because the statutory duties are not universally applicable unlike the duties corresponding to constitutional rights. The limited jurisdictional remit of the statutory duties may result in the co-existence of right-holders and the ‘rightless’, for instance, where the latter occupy peri-urban areas. These

duties also curbed the consideration of purely environmental interests. This approach may be traced to the origin of the CER, which is based on a harmonious reading of constitutional provisions. As a result, the duties of the State shape the rights rather than the other way round. The outcome is that the rhetoric of rights of individuals and communities is transformed into the reality of duties of the State. This undermines the potential gains of environmental rights litigation, and it has implications for the nature of judicial remedies as well as their implementation and effectiveness.

8.1.4 Procedural aspects of the rights and duties

Environmental rights litigation illustrates the invocation of the procedural right of access to judicial remedies. The judicial proceedings and court decisions also led to the realisation of the procedural right of access to information of the citizens and government officials. However, the higher judiciary did not engage with the procedural aspects of the rights and duties of the State in great detail in cases relating to water pollution/quality. At the same time, the duties of citizens are increasingly receiving more attention.

Limited focus on the procedural aspects of the rights

There is more explicit recognition of the procedural aspects of the right to environment than its substantive aspects in non-binding instruments of international environmental law. The procedural rights relating to environment and water are also recognised in binding instruments of regional environmental and water law. There is elaborate discussion of the procedural aspects of the rights to sanitation and water in non-binding instruments of international human rights law where the informational and participative aspects are expanded to encompass education and public awareness, and implementation respectively. These instruments generally recognise a link between the procedural and substantive aspects of rights. Both individual and collective dimensions are recognised, and the procedural aspects are interrelated. In contrast, the higher judiciary discussed the procedural aspects of the CER in very few cases. Some of the procedural rights were read into fundamental rights guaranteed by the Constitution. In some of these cases, these rights may be interpreted as a means to inform the right-holders about the duties of, and measures adopted by, the State in respect of environmental protection and human health,

or their own duties including the duty to participate in the planning and implementation of such measures.

Limitations of the procedural duties of the State

The higher judiciary engaged to a greater extent with the duties of the State corresponding to certain procedural aspects of the CER than with the rights themselves. As in the case of international law, it identified the duty of the State to actively collect data and information about the sources of water, the causes and effects of water pollution and/or poor water quality and the existing or proposed prevention or control measures, in addition to the duty to disseminate information. The discharge of the duty to collect and disseminate information equips right-holders with information to hold the State accountable for the discharge of its substantive duties corresponding to the CER. It may also create awareness among government officials and lead to the design and implementation of more informed measures to address the problem.

The duty relating to public participation in decision-making was largely discussed in the context of a restricted statutory mandate to conduct public consultation in respect of the environmental impact of certain proposed projects. In addition, although the Court read the duty of the State to formulate necessary programmes to motivate public participation into the fundamental right to life, it did not provide any further details. Further, the higher judiciary did not examine whether and to what extent the procedural aspects of the rights are incorporated within the policy framework governing the provision of water and sanitation in the country, which is identified as a constituent of the obligations of the State in international law.

Emphasis on the duties of citizens: diluting the primacy of duties of the State

The creative interpretation of constitutional provisions by the higher judiciary has led to growing emphasis on the duties of citizens or right-holders. Undoubtedly the performance of duties by citizens (as non-justiciable responsibilities) can support the realisation of the measures adopted by the State for the discharge of its duties corresponding to the CER. However, the non-performance of duties by citizens cannot be made a condition precedent for the performance, or an excuse for the non-performance, of duties by the

State. It is one thing to remind citizens of their duties or responsibilities; it is another to lay down legally binding duties of citizens without directing the State to discharge its duties or strengthening its capacity to do so. Further, disproportionate focus on the duties of citizens of a particular socio-economic class, such as open defecators or people living on the river bank, in respect of water pollution raises the issue of intra-generational equity.

The recognition of the right to information and community participation for environmental protection and human health as forming a part of the constitutional right to life can also be viewed as a pre-cursor to the imposition of justiciable duties in respect of environmental protection and human health on the right-holders. The same approach is evident where the higher judiciary recognised the right to information, awareness or education without any reference whatsoever to the duties or accountability of the State. The higher judiciary recognised the importance of access to information (for example, about the relevant laws) for the realisation of the substantive aspects of the CER (for example, the enforcement of the relevant laws). A similar approach is discernible in the educational perspective of the duty to promote the CER where the higher judiciary established a link with the duties of citizens towards each other. Further, in some cases, the right of access to judicial remedies was viewed as a vehicle for the discharge of the fundamental duty of citizens to protect and improve the environment by bringing actions or omissions of statutory authorities to the attention of courts. These instances sound a cautionary note in respect of judicial creativity.

8.1.5 Judicial remedies: a balancing act

In principle, the most effective strategy to address the problem of water pollution ought to first prevent its occurrence, then control existing pollution, and finally remedy the adverse effects of past pollution, which could not be prevented or controlled. This thesis finds that the higher judiciary inverted this strategy. The declaration of strong rights was often followed by weak remedies. The lack of specificity and complexity of some of the remedies reflects the inherent difficulties associated with complex environmental problems such as water pollution and/or poor water quality, isolating its causes and effects, and identifying the victims, polluters and appropriate (effective and cost-efficient) measures.

Remedies directed at the State: balancing effectiveness and deference

Cautious approach towards law- and policy-making

Judicial remedies were mandatory or hortatory or they were framed as recommendations or suggestions based on the nature of the action required and the branch of government to whom the direction was addressed. The higher judiciary adopted a deferential approach and declined to issue mandatory orders to the legislature to enact primary legislation, or to the executive to make a particular policy. It relied on recommendations or suggestions instead – either on its own or based on reports of experts. Some of these suggestions were strengthened by imposing deadlines or specifying the process. Some judicial remedies directing the executive to enact secondary legislation were mandatory although they were not always based on statutory provisions. This may raise the issue of judicial overreach on the one hand, and provide relief to the right-holders on the other hand. Alternatively, the higher judiciary recommended the enactment of secondary legislation in order to nudge the executive to act, although the strength of the recommendation varied where it provided examples or specified the manner of implementation.

Constitutional or statutory duties: some weakly moderate remedies

A number of remedies were based on statutory duties to provide public services. They were narrow, specific and mandatory, that is, the right-holders and duty-bearers were identified and the latter were required to discharge their statutory duty. Similarly, judicial remedies that required the government to discharge its constitutional duty corresponding to the right to water were positive and mandatory and they identified the duty-bearer. But they were general and vague in terms of the right-holders and what the corresponding duty entailed. Often, in both cases, the choice of measures and the time period for implementation were left entirely to the government. A deferential approach and the idea of progressive realisation that recognises the implementers' constraints were implicit. The remedies did not specify any consequences in case of non-implementation either. But in a number of cases, following the failure of the government to implement the remedies or due to dissatisfaction with the response, the higher judiciary strengthened the remedy to

ensure implementation, for example by identifying measures, adopting a dialogic approach, specifying a deadline, monitoring implementation, etc.

A similar approach is discernible in cases concerning the establishment and operation of pollution control devices by industrial units for the prevention or control of water pollution. At best, constitutional rights or duties were mentioned in addition to statutory duties. The mandatory remedies were addressed to identifiable statutory authorities. However, the task of identifying the industrial units or monitoring enforcement by the statutory authorities may not be straightforward. Further, the higher judiciary left it open to the authorities to determine the appropriate measures for the discharge of their statutory mandate. There was no engagement with the issue of adequacy of the existing statutory standards. In a vast majority of the cases, the higher judiciary did not question the grant of consent to establish/operate the polluting industry by the statutory authority. The democratic legitimacy objection does not arise where it engaged in some gap-filling exercise leading to the issuance of specific government policy.

In some cases, the higher judiciary directed the government to discharge its constitutional duty to provide the right to water immediately. On the one hand, such cases illustrate the importance of constitutional recognition of the rights beyond statutory provisions. On the other hand, they raise a concern in respect of the sustainability of measures adopted for the immediate realisation of the rights.

Regarding the establishment and operation of facilities for sewage treatment by local bodies, the higher judiciary's approach was deferential although it introduced a measure of accountability by imposing a deadline and/or asking for an inspection report. Often there were no consequences in case of non-implementation. The non-interference approach is also evident from a perusal of challenges to the establishment of sewage treatment plant and related infrastructure, although the higher judiciary directed the consideration of alternatives in some cases. Local bodies that fail to discharge their statutory obligations cannot be punished in the same manner as polluting industrial units. Instead of issuing a mandatory remedy directing supersession of local bodies, which is a statutory provision, the higher judiciary relied on hortatory statements.

Judicial remedies directing the closure of polluting industrial units, dairies and

slaughterhouses suggest that the higher judiciary was taking over the function of statutory authorities. Alternatively, such remedies may be viewed as an attempt to overcome the implementation failure of statutory authorities. In a number of cases, however, the higher judiciary adopted an accommodative approach and presented polluting industrial units with alternatives that dilute the strength of the remedy. Grant of permission to restart operations after complying with statutory requirements may lead to establishment of pollution control devices but their operation remains subject to the discharge of statutory duties in respect of monitoring and inspection by the statutory authorities. Short-terminism of the remedies is another issue. Relocation of polluting units may address the concerns of the right-holders who approached the higher judiciary but it transfers the source of water pollution unless the fear of similar litigation in the future acts as a deterrent and/or the statutory authorities are proactive. Where polluting industrial units were permitted to continue operations in the current location until their relocation, there is little to prevent or control water pollution except faith in the statutory machinery. In addition, the issue of judicial overreach may resurface depending on whether or not the higher judiciary left it to the government to determine the modalities of relocation. Further, the government may or may not implement the court decision. All of this highlights a fundamental limitation of court decisions: they are not self-executing.

The higher judiciary also relied on injunctions to prevent and control water pollution in some cases. Injunctions represent a weak remedy where they simply reinforce the implementation of orders issued in the exercise of statutory powers or prevent the occurrence of water pollution in the future based on the precautionary principle, which has been read into domestic environmental jurisprudence. They may raise the democratic legitimacy objection where they require a change in policy. The judicial approach was also less deferential where the authorities were restrained from undertaking certain measures for the realisation of rights although the court order was subject to approval of the measures by the government. The use of different criteria to issue injunctions affected the certainty of legal reasoning.

The Court also incorporated certain basic concepts of environmental law such as the polluter pays principle, the public trust doctrine and the precautionary principle into the fundamental right to life as well as legislation, and either applied them or asked the government to do so. As in the case of injunctions, unclear articulation of the content of

the basic concepts led to inconsistent application, thus undermining the predictability of the remedies. Further, the balancing exercise inherent in the concept of sustainable development diluted the strength of the remedy.

Rupturing the right-remedy continuum: judicial legitimacy in the dock

In some cases, the higher judiciary simply recognised the right to water or declared its violation without granting a remedy. It expressed confidence in or satisfaction with the State's efforts to address the situation. A second situation was where the higher judiciary was convinced that government was or became cognizant of the issue and was acting on it. Third, the higher judiciary issued hortatory statements after an expression of the need for urgent/immediate action, or of appreciation for the measures undertaken by the authorities. The idea of progressive realisation is implicit in each of these cases. Finally, regulatory gaps come to the defence of the authorities and they were not held responsible for inaction. A restrictive effect on the scope of the right to water is evident here.

In contrast, interim orders were granted in light of the urgency or immediacy of the need for some relief or to prevent pollution without adjudication of the rights. As in the case of judicial remedies based on constitutional/statutory duties, weak remedies were subsequently strengthened in some cases. This also permitted the higher judiciary to retain the case on board and undertake strong monitoring of implementation of interim orders, which can lead to realisation of the rights. Several interim orders were based on constitutional or statutory provisions and therefore do not represent judicial overreach. The precautionary principle, which informed some of the decisions, has been read into the Constitution and environmental law. However, some cases where the higher judiciary appeared to be exercising the statutory power of authorities or filling gaps in legislation may raise such concerns, although they may also be viewed as an attempt to nudge the government to act.

The other form of 'remedies without rights' extended beyond the parties, geographical area or the relief claimed before the higher judiciary. It may lead to the adoption of a more holistic approach towards the prevention or control of water pollution and/or the maintenance or improvement of water quality that benefits a larger number of right-holders. At the same time, such remedies are a matter of concern for the right-holders

who approached the higher judiciary in the first instance and whose interests may be diluted, the duty-bearers who were not represented before the higher judiciary, and the implementers of such complex remedies. These remedies may also have consequences for judicial legitimacy.

Reliance on experts to push the boundary

The higher judiciary relied on the recommendations or suggestions of experts to overcome the institutional capacity objection and to issue strong, detailed and specific judicial remedies. These experts included statutory authorities or government-supported institutions, as well as court-appointed committees. In a number of cases, the higher judiciary relied on experts after the authorities failed to discharge their constitutional or statutory duties. In some cases, the recommendations/suggestions initiated an information gathering exercise and enhanced the accountability of the authorities, besides promoting dialogue among the authorities. However, the independence of the findings of government agencies and government-supported institutions is questionable especially where the State in the dock as the duty-bearer. Judicial overreach and perpetuation of executive/bureaucratic inertia are other concerns. Judicial remedies directing the Central or State Government to constitute a committee for the identification of suitable measures represented a more deferential alternative. Here, the specification of the terms of reference etc. by the higher judiciary was perhaps less problematic than the empowerment of such committees to discharge statutory duties and functions.

Remediation of water pollution: rhetoric and reality

Limits of statutorily prescribed standards

There was an overwhelming reliance on the statutory framework to determine the threshold of unacceptable water pollution. But the requirement that the polluting activity must exceed a threshold, that is, the prescribed standards in legislation, and result in damage did not take into account situations where the polluting activity did not exceed the threshold but resulted in damage, or exceeded the threshold but the resulting damage was observed at a later point of time. As a result, a majority of cases related to past or present pollution. There was no engagement with the issue of adequacy of the existing

statutory standards. Further, legislation does not address cumulative pollution resulting from the activities that are individually within the threshold, or non-point sources of water pollution.

Complexity of determining remedies

The assessment of loss and damage, determination of compensation and damage, or identification of appropriate (effective and cost-efficient) measures for environmental restoration is a very complicated process. The institutional competence objection may be raised where the higher judiciary undertook this task. The Court pre-empted this objection where it declined to undertake assessment of loss and determination of compensation to victims. At the same time, it compelled the right-holders/victims to resort to protracted litigation in local courts. Alternatively, the higher judiciary acknowledged its lack of expertise or knowledge of ground reality, or deferred to the statutory mandate of the executive, and directed experts to undertake this exercise. But the expertise of these entities is questioned, both by right-holders and polluters. In addition, the failure to consider the available evidence and local expertise may lead to dissatisfaction. This concern is partly addressed where this exercise was undertaken by the local government authority that is more likely to be aware of the ground realities. However, often experts were appointed at the state level.

Flexible notion of public interest

Two conceptualisations of the public interest justification determined the degree of acceptable pollution to justify the continuance or discontinuance of a polluting activity. First, the rights and interests of present and future victims of water pollution, and of the environment, were sacrificed on the ground of public interest in the continuance of the activities of certain industries. Here, the determinants of ‘public interest’ included the amount of employment or revenue generated by the polluter, or the polluter’s economic or political influence. Second, judicial remedies reflected pre-conceived notions regarding the contribution of polluters from particular economic backgrounds and the interest of certain members of the public (the urban rich and middle class). The higher judiciary directed immediate removal of the poor slum dweller that encroached on public

land, or directed the poor person who engaged in the practice of open defecation to pay a substantial sum of money. But it did not hold the government responsible for its failure to realise the rights of these polluters. In both situations, the members of the 'public' comprised taxpayers who subsidised measures undertaken by the government to prevent, control or remediate water pollution.

Limited effectiveness of remedies

The polluter was held liable for causing pollution and directed to pay compensation and/or damages in a number of cases. But often the amount did not reflect the loss and damages suffered by the right-holders and the environment respectively. In some cases, judicial remedies directing compensation for the loss suffered by the victims of water pollution were circumscribed by the choice of methodology. The inadequacy of the amount of compensation is another thorny issue, which is also evident where the polluter was directed to pay a lump sum amount. Finally, there is a big question mark on the recovery of the amount from the polluters and the payment of compensation to the victims.

Insofar as award of damages for environmental restoration measures is concerned, the polluter pays principle pays little attention to the natural environment although it is a widely recognised principle of environmental law. First, the belief that the adverse effects of water pollution can be remediated led to the acceptance of a high degree of water pollution. Judicial remedies were restricted to reversible damage, and they did not take into account the disturbance of ecological balance or the equilibrium between its biotic and abiotic components. Second, in some cases, the polluter was required to undertake measures for reversal of water pollution or restoration of the water body to its original condition, including removal of the polluting matter. The higher judiciary did not, and cannot, determine the acceptable extent of reversal or original condition of the water body. Third, in most cases, the polluter was directed to pay damages for environmental restoration and the authorities were responsible for undertaking the remedial measures. But much depends on the adequacy of the amount paid by the polluter or the ability of the authorities to arrange the required amount. Fourth, the amount paid by the polluter was not always used for restoration of the polluted or degraded environment. It was used

for the protection or restoration of other components of the environment in the same or different areas, or for socio-economic objectives, such as educational, medical and agricultural facilities.

Alternatively, certain polluting industries, such as small-scale industries, may lack the financial means to discharge their liability, partly because they cannot absorb the cost or they pass it on to the consumers. The effectiveness of implementation of remedies also depends on the apportionment of the amount among the polluters. Another concern is that the polluter may not pay because the pollution was within the acceptable threshold, or it was not asked to pay enough because of methodological choices, or it simply does not comply with the court decision. Here, the government may compensate the victims and/or pay for environmental restoration measures. In addition, the higher judiciary directed the government to pay in some cases for dereliction of duties. In both cases, some right-holders ended up paying as taxpayers.

Side-lining prevention of water pollution

The implementation of statutory provisions requiring the establishment and operation of pollution control devices and compliance with prescribed standards may prevent water pollution to some extent. The use of injunctions to prevent water pollution was also usually linked to statutory requirements.

Judicial remedies awarding compensation and damages, as well as exemplary damages and pollution fines, may contribute to the prevention of future pollution, by the polluter or other polluters. However, the deterrent effect is questionable where the cost of non-compliance was lower than the cost of compliance, or the polluter was not made to pay anything at all. Certain categories of industrial polluters were allowed to pay for past pollution and continue their operations, or some polluters were permitted to pay in advance for pollution that may result from their future activities. Here, the deterrent effect depends on the amount of liability imposed on the polluter and the strict enforcement of statutory duties relating to monitoring and inspection. Victims of water pollution may have to bring cases of non-compliance with statutory requirements to the attention of the court. More fundamentally, there is no incentive for the polluter to prevent pollution where it does not cross the regulatory threshold. Judicial remedies directing the

government to pay may compel them to take their constitutional or statutory duty to protect the CER more seriously in the future. However, this potential gain may be undermined by the ability of the government to pass on the costs to taxpayers who are right-holders as well.

The polluter pays principle is a more politically palatable alternative to preventing the establishment of certain polluting industries or the discharge of domestic effluents, which would require a fundamental transformation of the development paradigm into which we are currently locked in. However, its failure to take into account the irreversibility of certain environmental degradation highlights the need for the application of other principles. Where there is risk or apprehension of pollution, it may be necessary to apply the prevention principle (where there is certainty) or the precautionary principle (where there is uncertainty). However, such principles do not extend to situations where the possible harmful effects of a discharge are completely unknown.

8.1.5 Internal factors influencing implementation

Coercive remedies: extent of use, deterrent effect, and implementation

In principle, the higher judiciary was willing to invoke its power to punish for contempt of court. In practice, however, often it adopted a deferential approach and expected the authorities to comply with its orders, or it unconditionally accepted the contemnors' justification, which was often based on the practical limitations of the regulatory environment. Alternatively, the contemnors were simply reprimanded or a fine or suspended sentence was imposed on them instead of imprisonment. Polluting industrial units were also let off the hook subject to the payment of a fine and submission of an undertaking to implement the decision. The effectiveness of these remedies depends on the amount of the fine and exercise of the power to monitor implementation by the concerned authorities respectively.

At the same time, the higher judiciary did not hesitate to impose other coercive remedies such as penalty payment, closure or recovery as arrears of land revenue on polluting industrial units. But two issues remained - implementation and its effectiveness, which are contingent upon the willingness or ability of the concerned authorities to implement

court decisions. The effectiveness of implementation also depended on the amount of penalty imposed, the seriousness with which the closure order is implemented by the concerned authorities (for example, immediate or delayed implementation, monitoring of compliance where permission is granted to re-start operations subject to fulfilment of statutory requirements, etc.) as well as the expediency of the recovery proceedings.

Court monitoring and implementation: absence of a strong correlation

There are instances of strong, moderate, weak and no monitoring of implementation by the higher judiciary in cases relating to water pollution/quality but a consistent pattern is absent. The nature of the remedies (collective/systemic) and the initial response of the constitutional or statutory duty-bearer to the higher judiciary's directions led to the issuance of interim orders and strong monitoring of implementation by the higher judiciary. On the one hand, strong monitoring may encourage dialogue among the parties and accountability, and lead to the development of remedies that are more likely to be implemented. On the other hand, it may lead to the criticism that judicial activism makes the authorities weak and discourages the development of strong institutions. The identified cases did not indicate any definitive correlation between the strength of monitoring and the implementation of court decisions. In fact, strong monitoring does not always lead to effective implementation (in the short or long term). Conversely, moderate or weak monitoring may result in effective implementation. This highlights the need for more circumspection in discussing the potential of court monitoring of implementation without examining other relevant factors.

8.1.6 Co-existence of implementation and non-implementation

None of the court decisions in the three 'landmark' cases were fully implemented. In any event, the direct and material effects of full implementation were restricted, for instance, where the amount of compensation awarded to the victims of water pollution was too low to redress the violations of rights. Further, the implementation of these court decisions was simultaneously narrowly effective and broadly ineffective. For instance, the higher judiciary granted compensation for loss to the victims of water pollution and damages for environmental restoration. But it failed to ensure that different types of loss, right-holders,

and latent health impacts and social effects of water pollution were included in the assessment process, and that environmental restoration was possible and suitable measures were adopted for this purpose failing which stricter measures were adopted to prevent water pollution in the future.

Partial implementation was most common but its effectiveness is questionable. For instance, the threat of immediate closure with the option to suspend closure if the polluting units comply with statutory requirements ensured prompt action in terms of establishment of pollution control devices without their operation in accordance with the prescribed standards. Unless the pollution control authorities exercise their statutory powers or the higher judiciary undertakes strong monitoring of implementation, there is considerable responsibility to monitor implementation on the often-resource-starved litigants/right-holders or the media. Further, a piecemeal and reactive approach undermined the effectiveness of implementation of court decisions. Closure orders led to relocation of the polluting units to other areas, generation of pollution and violation of the environmental rights of the local population. In addition, closure orders in respect of particular industries failed to exert a deterrent effect and prevent or control pollution from other sources in the same or different area. The adoption of a proactive and holistic approach by the higher judiciary may address these concerns but raise the issue of judicial overreach. The implementing authorities may struggle with, or ignore, the implementation of general remedies based on a proactive and holistic approach.

Some of the mandatory remedies remain unimplemented. In the Bicchri case, for example, the affected villagers are still waiting for water supply from the government, there is no remediation of the loss suffered by right-holders on account of past pollution, and environmental restoration remains a non-starter. Together with other court decisions as well as pressure from other sources, some recommendations have contributed to developments in environmental law in the country (for example, the establishment of the NGT). But this is a time consuming process and most of the other recommendations have not been implemented.

This state-of-affairs leads to the conclusion that it may not be possible to control pollution (where it is expensive or the authorities do not exercise their statutory powers) or to remediate pollution (where it is irreversible or too expensive or there is no technology or

the technology is underdeveloped or there is lack of certainty in respect of adverse effects). In these circumstances, the only option may be prevention of pollution by closure of all industries or no further grant of permission to establish industries in particular areas. The health effects of water pollution, which may be observed at a later point in time, also highlight the need to adopt the precautionary principle rather than focusing on control or remediation of water pollution *post facto*.

More generally, environmental rights litigation solves the problem of water pollution for some right-holders to some extent. At the very least, the CER now form part of the decision-making calculus. Environmental rights litigation and court decisions bring the issue of water pollution and/or poor water quality to the attention of the concerned authorities as well as members of the public through media coverage of selected cases. Arguably, there are significant indirect and symbolic effects, which influence the actions of other actors.

8.2 Practical contributions of research

This research has a number of practical implications. In a context where domestic law is the means to recognise the rights and to determine their scope and content and the corresponding duties of different actors, this research reminds domestic law-makers that international law ought to serve as the baseline rather than the ceiling. It also identifies areas where there is room to increase the ambition of international law.

For the judiciary, the research highlights the importance of legal certainty, which is currently hampered by lack of reasoning and consistency, in improving the implementation of court decisions. It also underscores the need for circumspection in the use of experts to address the institutional competence objection, and judicial creativity to flesh out the duties of citizens especially where is the risk that this may displace the emphasis on the duties of the State. The judiciary must adopt a considered approach towards the determination of the cost of compliance and the use of the public interest justification. The research also emphasises an important role of the adjudication process and court decisions, that is, creation of awareness about the causes and effects of environmental problems and the existing regulatory and institutional framework. This can

contribute to the realisation of the procedural aspects of the rights and the corresponding duties and therefore merits attention. The examination of the effectiveness of implementation of selected court decisions provides an opportunity for the higher judiciary to reflect on measures to improve implementation and to ensure judicial legitimacy. In this regard, it is worthwhile to consider the use of coercive remedies and monitoring mechanisms while recognising the role of external factors.

For the legislature, the research exposes the limitations of the outdated statutory framework in responding to the environmental impacts of increasing population, urbanisation, industrialisation and agricultural transformation. It highlights the need to strengthen existing laws and to introduce new laws in order to address gaps. For the executive, non-enforcement or poor or partial enforcement of statutory provisions that compel litigants to approach the higher judiciary in the first place, as well as limits of litigation as a solution that are particularly evident in the implementation stage, reiterate the need to strengthen the capacity of institutional structures, such as the pollution control boards and the local bodies.

This research introduces a realistic note for right-holders about the potential and limits of environmental rights litigation. As stated earlier, rights litigation is ‘a’ solution but there is a need to keep other channels of communication open. This research also encourages litigants and their legal representatives to be strategic in their use of rights litigation and to learn from what works and what does not work. The assessment of the higher judiciary’s approach calls upon legal representatives of right-holders to look beyond short-term victories and to discharge their duty to the legal profession, the public and the environment through more rigorous engagement in the adjudication process. This research also encourages a fundamental reconsideration of the understanding of the environment as adopted by environmental law and in environmental rights litigation. Of course, this requires a reorientation of the idea of development and the way we interact with the environment, at present and in the future.

8.3 Further research agenda

In this section, I identify four issues that I consider particularly interesting and fruitful subjects that warrant systematic attention in future scholarship.

The first area of further research relates to conflict among right-holders. This thesis finds that some of the environmental rights litigation relates to the actions of duty-bearers rather than their inaction. This means that in certain situations, measures for the realisation of one of the CER for some right-holders may undermine the realisation of the same right for other right-holders or other (environmental) rights of the same or other right-holders. Alternatively, measures for the realisation of other rights may undermine the realisation of one or more of the CER. In this context, the potential and limits of the CER and other rights in ensuring the avoidance or resolution of such conflicts is an important area of research.

Second, environmental problems such as water pollution/quality provide fertile ground for an examination of the interplay between law and science. In several cases, the higher judiciary relied on the statutory framework to determine the contours of the CER, the corresponding duties of the State and non-State actors, as well as judicial remedies. Chapter 1 raised the issue of the adequacy of environmental legislation – both primary and secondary – but the design of legislation merits closer scrutiny. Such an exercise is also necessary in order to suggest changes to existing legislation, for example, on discharge standards, or enact new legislation to set standards, for example, for wastewater recycling and reuse, which can promote the realisation of several of the CER. Further, the higher judiciary relied on experts for fact-finding as well as identification of appropriate remedies partly as a response to the institutional competence objection to judicial enforcement of such rights. This thesis also highlighted some concerns relating to the use of experts that may influence the right-holders' and duty-bearer's perception of the outcome of litigation, the relationship with the other branches of government, and the potential of environmental rights litigation as a solution to the problem of water pollution. Future research may examine these concerns where courts rely on experts in cases relating to water pollution or other environmental issues.

Third, Chapter 6 confirmed that the higher judiciary and the NGT engage in the assessment of loss and damage and determination of the polluter's liability. At the same time, Chapters 6 and 7 highlighted some methodological issues that undermine the

effectiveness of environmental rights litigation. Courts as well as lawyers are aware of these challenges. Yet there exists a lacuna in terms of the identification of methods for the assessment and determination of liability that may provide a starting point to address some of these challenges. Such research will require an examination of international civil liability regimes, and an investigation into the methods adopted for the determination of liability for environmental pollution in other jurisdictions as well as in other situations in India.

Finally, although the CER have not found expression in legislation, the existing policy framework concerning water (for example, National Water Policy, National Rural Drinking Water Programme) and sanitation (for example, the *Swachh Bharat Mission* (Clean India Mission)), which is being implemented across the country, implicitly incorporates some of their components. Chapter 5 highlighted the reluctance of the higher judiciary to question policymaking. The potential contribution of the policy framework to the realisation of the CER, or as a source of their violation, and the implications of its non-binding nature are another interesting area of research.

APPENDIX: GUIDANCE TO READERS

Court decisions:

Order: interim order or final order conveying some directions of the court for implementation

Judgment: last and final decision in the case

Value of judges' observations:

Ratio decidendi is the rationale of the decision on which the outcome of the case depends. Some of the comments or observations in court decisions are *obiter dicta*, that is, they are said in passing. They are not essential to the decision and do not form part of the *ratio decidendi*. They may contribute to evolving 'jurisprudence'.

Applicability of court decisions:

Article 141 of the Constitution of India provides that the law declared by the Supreme Court shall be binding on all courts within the territory of India. There is no similar provision regarding decisions of high courts. Instead, the following rules of practice have evolved from court decisions:

(i) The decision of a coordinate bench is binding on the high court of the same State.

(ii) The decision of a high court is not binding as precedent on other high courts; at best, it can have persuasive value.

In order to maintain consistency, only one source of reported orders or judgments is cited in the footnotes. In most cases, this is Supreme Court Cases (SCC), in the case of the Supreme Court, and All India Reporter (AIR) in the case of high court (although orders and judgments of the Supreme Court are also reported in AIR).

Case names are cited as in the reported source.

The numbering system should be read as: one lakh = 100,000; one crore = 10,000,000

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