Chapter—5

Enforcement Mechanism with Accountability and Liability

Enforcement of Law depends upon the influence of virtues on the persons who control the levers of executive powers. Swami Vivekanand says that "Good must be agressive. The good and auspicious must permeate and penetrate in all directions so that it is able to suppress. In human mind evil thoughts, motives and desires of misdemeanour will gradually be diminished replaced by desire for good thoughts and deeds therefore enforcement of law and public policy depends upon the need for sound background in ethics and values, sincerity and consistency in codes and behaviour. But in modern times we find lipservice to noble principles, and values are sacrificed for selfish motives and over all degradation of society is the unfortunate results. Therefore cultural values and good institutional norms must adopted for governance and execution of laws be directed to mitigate miseries of the people particulary deprived and disadvantaged sections of the society. Now-a-days in the good governance of water resources management and conservation. This depends upon the enforcement of laws and rules directed for the protection of water rights which ultimately depends on the intention of the executive and bureaucrats entrusted with the implement of water resources law. The enforcement of laws can be made intact through the accountability of the officialdom and governing class and liability in case of violation of their duties, such as—

(i) Liability of public

(ii) Liability of Government Departments

Fresh water increasingly is a scarce good and can therefore be regarded as an economic good in need of efficient use. As stated in the United Nations Freshwater Assessment : "Water use has been growing at more than twice the rate of the population increase during this century, and already a number of regions are chronically water-short." These are multiple causes for scarcity of
water such as a growing population, unequal distribution causing local scarcity, and pollution causing scarcity related to a certain quality of water. Water is involved in almost human activities and production processes and often has to be allocated between competing uses. Many problems have been encountered in efficiently managing water, such as enormous wastes of the resource in its transport.

Dealing with water as an economic good is one of the ways increasingly suggested in order to efficiently manage water. In the Dublin Statement on Water and Sustainable Development, Guiding Principle No. 4, it is stated that—

"Past failure to recognize the economic value of water has led to wasteful and environmentally damaging uses of the resource. Managing water as an economic good is an important way of achieving efficient and equitable use, and of encouraging conservation and protection of water resources."

The formulation of the Principle emphasizes that dealing with water as an economic good is a means and not an objective in itself. A market approach in theory will lead to an optimal use. The vital and irreplaceable nature of water makes it a unique good, involving interests other than economic ones.

According to the Dublin Statement water should be recognized as an economic good, but with recognition of the basic right of all human beings to have access to clean water and sanitation at an affordable price. At the Johannesburg Summit, the importance of water to sustainable development was fully acknowledged and key commitments made include the ones to have, by the year 2015, the proportion of people without access to safe drinking water and, by the same year halve the proportion of people without access to basic sanitation.

1. The uses can be categorized as domestic uses (drinking water and sanitation), food production (agriculture, cattle-breeding and fishery and fish breeding), industrial uses, environment, energy, recreation and tourism, waste-disposal and transport.

2. In the Ministerial Declaration of The Hague the importance is acknowledged as well of access to enough safe water at an affordable cost and of managing water in a way that reflects its economic, social, environmental and cultural values for all its uses. Ministerial Declaration of The Hague on Water Security in the 21st Century, agreed to on 22 March 2000, pp 1-2, available at http://www.worldwaterforum.net/Ministerial/declaration.html.

According to the report of the thematic session on valuing water at the second world water forum, the challenge is—

"To manage water in a way that reflects its economic, social, environmental and cultural values for all its uses, and move towards pricing water services to reflect the cost of their provision. This approach should take account of the need for equity and basic needs of the poor and vulnerable. 4

Pricing of water can be used as an economic incentive through which people's behaviour is influenced and can therefore be suitable as an instrument of water management. 5

Although there is a distinction between valuation and pricing of water needs, they are strongly related, water's value is important in deciding on alternative uses of the scarce resource whilst charging is a economic instrument to recover costs and provide incentives for efficiency and conservation. 6

Valuing water economically can pose some problems, such as in case basic domestic needs would be valued lower than industrial use, requiring intervention by means of national or international public law. From an economic perspective, low prices of water can be said to encourage wasteful use of water resources. The lack of an efficient 7 pricing system, not reflecting the economic value of water, is not necessarily the only reason for such wasteful use. Other factors involved are, for example, unsustainable use by the agricultural sector,

4. Report of the Thematic Sessions on Valuing Water, World Water Council (2000), pp. 55-56. In this session water as a basic human right was recognised but linked to the acknowledgement that it should not be provided free of charge.

5. Caponera, D.A. (1992), Principles of Water Law and Administration : National and International, A.A. Balkena : Rotterdam p. 155, the author argues that water has a price and that the costs entailed by its development and conservation need to be reimbursed as far as possible by the users, taking into account. "market forces, social needs, political requirements, public interest, availability of water and, last but not least, the ability of the users to pay."


7. World Commission for Water in the 21st Century (2000), p. 63, where it is stated that adoption of full-cost pricing of water use and services is the most important policy recommendation they make, and the EC Directive establishing a framework for Community action in the field of water policy (Water Framework Directive) (2000/60/EC, OJ 2000 L 327 EC), of which Article 9 requires member States to take account of cost recovery of water services, but this provision can be deviated from.
industrial pollution, and a change in use caused by consumer products such as
washing machines.

In order to be efficient in an economic sense, prices should at least cover
the costs. Full cost recovery is often viewed as the economically sound way of
pricing water. From the social angle, all people are to have basic access to water,
even if this means that cost recovery is not always possible. The inequality of
incomes needs to be reflected in the price of water.⁹

From a sustainable and environmental viewpoint, the price of water
touches upon a public interest and requires common decision-making and
democratic control in order to take into account issues such as intergenerational
equity and the exhaustibility of groundwater. At this level, water use is beyond
sustainability and should be discouraged by a high price not just reflecting
current economic but including the costs for future generations and sufficiently
high to stimulate efficient use and investment in water-saving technologies and
eradicate over-pumping and pollution as much as possible.

**Enforcement Mechanism in India**

**Integrated Water Management In Rural Areas**

Integrated water supply and sanitation programmes, with emphasis on
conservation of water will be increasingly implemented during the Tenth Plan.¹⁰
The implementing machinery in the Centre and States will require organisational
restructuring in order to work in a mission mode, guided by the Rajiv Gandhi

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⁸ World Commission for Water in the 21st Century (2000), p. 3, where it is stated that
fresh water must be recognized and managed as a scarce commodity and that full-cost pricing of
water services will be needed to promote conservation and to attract the required large
investments. It continues—"Polluter pays and user pays principles must be enforced. And
mechanisms must be found whereby those who use water inefficiently have incentives to desist
and transfer that water to higher-valued uses, including environmental purposes."

⁹ Caponera, D.A. (1992), *Principles of Water Law and Administration : National and
International*, A.A. Balkema : Rotterdam at p. 9

p. 603.
National Drinking Water Mission Authority and its empowered committee. The inputs of professional institutions, non-governmental organisations (NGOs) and community-based organisations are utilised in planning, development and management. All possible measures have been taken for rain-water harvesting and ground water recharging.

As part of the integrated water management approach, traditional sources of water have been identified strengthened and developed with community involvement. Rehabilitating the existing village tanks, creating detention basins by storing rain water in local depressions, abandoned mines/quarries etc. for water harvesting needs to be encouraged for the development of water resources.

**National River Conservation Plan**

Under this plan, polluted stretches of major rivers have been identified for sewage collection and treatment. 153 towns have been considered under the National River Conservation Plan, out of which 74 towns are located on the Ganga, 21 on the Yamuna, 12 on the Damodar, 6 on the Godavari, 9 on the Cauvery, 4 each on the Tungabhadra and Sutlej, 3 each on the Subarnarekha, Betwa, Wainganga, Brahmini, Chambal and Gomti, 2 on the Krishna and 1 each on the Sabarmati, Khan, Kshipra, Narmada and Mahanadi. This project was started with 100 percent funding by the Centre. However, given resource constraints, states have to share 30 percent of the cost during the Tenth Plan.

Under Eleventh Plan\(^{11}\), the National River Conservation Plan has covered 160 town along 34 polluted river stretches in 20 states and has created 2055 MLD of sewage treatment plant (STP) Capacity till now, which is approximately 38% of the approved capacity of 5435 MLD to be set up under the plan. The average capacity utilization of existing STP capacity is reported to be about 72% against the desirable capacity utilization of 100%. Other major river cleaning projects cover Gomti river in Uttar Pradesh, Yamuna River in Delhi, Musi River in

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Hyderabad and Pamba River in Kerala. The 22 km stretch of the Yamuna in Delhi between Wazirabad and Okhla is critically polluted.

**National Lake Conservation Plan**

The National Lake conservation plan was initiated in 1994 for cleaning important urban lakes with high level of silting and pollution. Initially, ten lakes were identified for coverage-Ooty, Kodai-Kanal, Powai, Dal, Sukhna, Sagar, Nainital, Udaipur, Ravindra Sagar and Hussain Sagar. Conservation of 46 lakes in 13 States has been taken up through 31 projects. So far, projects for 10 lakes have been completed and 10 more are likely to be completed. Improvement in the quality of water in the lakes in the completed project is more marked than in the river conservation projects.

**Dal Lake Conservation Project**

The Dal Lake Conservation Project was approved by the government at a cost of Rs. 298.76 crore in September 2005. As an exception, this project is being implemented entirely by the Central Government. The expected date of completion of the project is March 2010. The work envisaged include interception and diversion of pollutants entering the lake, setting up of six STPs, desilting, de-weeding, removal of encroachments in the project area; and so on. The progress of implementation is, however, slow due to delay in relocation of families who need to be shifted from the project area of the lake.

**Planning for Sustainable use of Groundwater**

In order to address the issues of sustainable use of groundwater and the question of ownership of the ground-water, the Planning Commission has set up an expert group on 'Ground Water Management and Ownership chaired by member (Water and Energy) Kirti S. Parikh. The group recommended that the


ownership of the groundwater below the law will continue to remain with the owner of land as per the Easement Act 1882 as long as the exploitation of groundwater is not causing depletion in the ground water level so the similar rights of the adjoining land-owners and public at large are not encroached upon. Centre's intervention would be required when the groundwater level falls below the replenishable level.\textsuperscript{15} In such events, the affected area will be declared as an area under threat and any exploitation will be regulated. The Central Ground Water Authority, under the provisions of the Environment Act 1986, is empowered to make such declarations and it would be the responsibility of the State Government to ensure that the exploitation in the area is regulated. The regulation/reduction/restriction on the groundwater usage can be made effective by the State Government only with the co-operation of user groups and community participation involving Panchayat Raj Institutions. The user groups will be responsible for regulating the ground water usage among various sectors, that is irrigation, drinking and industrial. Such regulations by the user group can be made effective only if the State/Central Ground Water Board monitors and provides information on safely extractable water on the basis of water table levels recorded scientifically.

**Augmenting Utilizable Water**

Usable water availability can be increased by tapping water that otherwise would have run-off to the sea. Water storage above ground through dams and diversion through weirs are the conventional means. However, water can also be stored underground by enhancing percolation through artificial recharge\textsuperscript{16} Rain water harvesting in many small ponds through construction of bunds can also add to water availability.


\textsuperscript{16} Ibid.
Artificial Recharge And Rain Water Harvesting

The groundwater levels are declining in many parts of the country. Artificial recharge of groundwater with rainwater is an important strategy to arrest this trend. The Central Ground Water Board has already prepared a master plan to recharge 36 bcm of rainwater into underground-water at cost of Rs. 24500 crore. In urban areas, many cities have by-laws making rain water harvesting compulsory for new buildings.

Local storage is cost effective. There is significant potential for increasing the overall utilizable water through rain water harvesting, construction of check dams, watershed management, and restoration of traditional water bodies as well as creation of new ones. The multilateral agencies such as World Bank and Asian Development Bank have also been requested to provide financing for this purpose.

A planned management of ground water in the flood plain aquifers offers an excellent scope of its development to meet the additional requirements of water. The development of groundwater in Yamuna flood plain area in Delhi is an example of scientific management of water resources. During rainy season, the flood water spreads over the plains but due to very shallow water table the recharge is small and the rejected recharge result in river out flows. Central Ground Water Board constructed 95 tubewells in palla sector in the depth range of 38-50 m for Delhi Jal Board. The total pumping during the pre-monsoon period of 2002 was 40 million gallons per day which created a regional drawdown of about 5 m in the flood plain area. It was observed that immediately after rainy season, the depleted aquifer fully recouped. Thus over-development of shallow aquifers in flood plains creates the necessary sub-surface space for augmentation of groundwater from the river flows during the monsoon. Induced


19. Ibid.
recharge is an effective management tool to meet the gap of demand and supply in areas adjacent to rivers with active flood plains.

**Accountability in Water Resources Management**

Notwithstanding the popular maxim that 'Power tends to corrupt', it enhances the position and status and brings more responsibility. The correlation of responsibility with power aimed at transparency and reasonableness in the governance in a civilised society. The water resources management demands a harmonious equilibrium in the conflicting interests of the people in a uneven socio-legal system. Since India is a vast country with persisting ecological diversity so in a case, management of water resources of any kind, including water becomes problematic. The solution of this problematic quiz can be achieved by more decentralized control and people's participation making the administrative regime more responsible and accountable for exercising their power in dealing with and settling the dispute relating to the water rights, access to water resources and their management. The water resources management involves water supplies, irrigation and canals, drainage and embankment, water storage and water power, fisheries and navigation, industry, water conservation. Such a huge and complex socio-economic scenario needs an efficient system of governance equipped with power and authority.

In a civilised society the power and authority should be exercised by the officials in the larger interests of the society. The regime enjoying powers must be acquainted and aware of their duties. The normative structure pertaining to duties envisages a system of accountability of the people who control the lever of powers.

The basic issues in the water resources management is the states' accountability to the people and people's accountability to the people and people's accountability to each other, and also their accountability to the state.

India is one of the most fortunate countries in so far as its water resources wealth is concerned. The average annual precipitation is higher than that of any other continent in the world, except South America, and is twice that of the
average precipitation of the continent of Asia. However, India uses only one tenth of the precipitation it receives annually. The rest of the water drains into the sea and is not properly utilised.\(^{20}\) Moreover, water resources become available only during certain months of the year and this uneven distribution is one of the main factors leading to floods and droughts. Therefore, it is necessary to conserve water resources for sufficient and even supply of water throughout the year.

Since India is a vast country with pronounced ecological diversity, management of natural resources becomes problematic. This can be achieved only by more decentralised control and people's participation. The emergence of non-governmental organisations and cooperatives at the grassroot level have also made the notion of decentralised control more meaningful.

Since the protection and development of water resources is part of the overall environment protection programme, the setting up of various committees and departments, like the National Committee on Environmental Planning and Coordination or the Department of Environment, to name only a few, the launching of various research and media programmes, curricula, laws and so on have direct bearing on the water resources situation in India. The National Water Policies, containing a comprehensive package to deal with various issues relating to the use and misuse of water, was first floated in 1987 and then in 2002. National Water policy 2013 is under table to deal with present scenario of water based issues and problems. However, despite the increasing water consciousness at all levels, the situation remains quite grim today, mainly due to laxity in implementing policies and programmes. Many areas like control of floods and droughts, development of small water bodies, pollution control, equitable development of fisheries, dam construction and disaster relief remain grossly neglected.

In India, the management of water resources vests mainly with the state although proper management is impossible without the active participation of beneficiaries or users. A matter of prime importance here is to secure

accountability of the managers as well as the beneficiaries to the resource so that mechanisms can be devised to arrest deterioration of the resource.

Nature and Extent of Accountability

Accountability, responsibility and authenticity are essential features that should govern the activities of a democratic state. However, accountability as a concept has not been defined in law but when one talks of it a situation can be envisaged wherein there is a duty to perform an act and coupled with it is liability for non performance. As Justice Krishna Iyer does, by quoting Prof. Sikes in the famous Ratlam Municipality case, "All power is a trust that we are accountable for its exercise—that from the people, and for the people, all springs and all must exist."21 It is a basically the use and misuse of this power that is the concern of accountability. It has always to be borne in mind while examining the nature and extent of accountability that power is to be held as a 'trust' simultaneously with obligations and duties. Arbitrary power corrupts and dilutes accountability.

As far as judicial officers, including a judge, magistrate, justice of the peace, collector or other persons acting judicially are concerned, the Judicial Officers Protection Act 1850, protects them, provided the authority concerned in good faith believes to have jurisdiction to deal with the matter. Subject to this limitation, even their mala-fide actions can be protected. Under the General Clauses Act 1897, an act is deemed to be done in good faith if it is done honestly, whether negligently or not. The Law Commission in its First Report has also recommended that such clauses should not be made to extend to negligent acts however honestly done. The appearance of such clauses in the statutes point to the fact that power conferred on the authorities, with no inbuilt check on it, is open to misuse.

Accountability is never mentioned in black letter law though its presence can be deduced from the way in which duties are cast and liabilities prescribed in the Act. There are many laws existing today which have grown on the ethical and moral edifice. The whole realm of tort laws, contract laws and administrative laws

are living examples of this. It is nowhere written in any statute that promises are to be kept or that there is a duty to take care. Similarly the standard of the reasonable man in the law of negligence and natural justice principles in administrative law have also developed because the standards of justice so mandated. Accountability is also an ethical notion responding to justice. It is difficult to quantify the extent of accountability expected in every action because it varies from situation to situation. Therefore, what we term as accountable is what is reasonable and just, and what is expected to be done in the ordinary course of things. In the area of water resources management, in order to avoid the crisis we are facing today, one can say that in any action relating to water management, accountability should be to such an extent so as to ensure the sustainable and equitable development and distribution of the resource.22

When we consider accountability of the state machinery, the presence or absence of it in our Constitution is of serious consequence. When we examine the Constitution, we find that there is not only a fundamental duty cast upon the state to 'protect and improve the environment' but a similar duty is placed on the citizens too.23 Similarly for water resources management in India, it implies management by both the managers and the beneficiaries. No development programme can succeed without active people's involvement and participation. Along with a specific duty to protect the environment the Constitution of India also contains other articles which have bearing on this issue. For instance Article 39 (b) (c), of the Constitution states that 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 so as to subserve the common good, and that the operation of the economic system does not result in the concentration of wealth and means of production to the common detriment. Article 40 also states that the state shall take steps to organise village panchayats and endow them with such


23. Constitution of India, Article 48 A and 51 A (g)
powers and authority as may be necessary to enable them to function as units of self-government. These articles clearly state that the state is under a duty to see to the equitable distribution of natural resources and its proper management.

In many cases, the Constitution has been interpreted by the judiciary in such a way so as to protect the rights of the citizens. If the directive principles which place a duty on the state can be interpreted as giving rise to corresponding rights in the people, following the Hohfeldian analysis, the whole gamut of directive principles can be brought to life. In a famous case *L.K. Koolwal v. State of Rajasthan*, it has been laid down that a right cannot exist without a duty and it is the duty of the citizen to see that the rights which he has acquired under the Constitution as a citizen are fulfilled. This was a case regarding the liability of the municipality not performing the task of maintaining good sanitation which was a fundamental duty. The court further laid down that Article 51A of the Constitution is ordinarily interpreted as being a duty of the citizen but in fact it is the right of the citizens to move the court for the enforcement of the duty cast upon the state, its instrumentalities, agencies, departments, local bodies and statutory bodies created under the law of the state. In the memorable *Ratlam* decision, public nuisance arising from pollution was stated to be a challenge to social justice and the Supreme Court felt that there is enough right vested on any affected party to compel the public functionaries, who have jurisdiction in this respect, to act.

It is for the judiciary to ensure that laws are in conformity with the Constitution and are also adhered to. In keeping with the demands of justice, the courts have played an activist role in safeguarding constitutional ideals. The whole range of Social Action Litigation cases are witnesses to the fact of how the courts have played an important role in the democratic set up. However, even

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such reforms often die with a whimper when it comes to getting them implemented. In the Shriram case, the Supreme Court, for the first time, placed absolute liability on the environment pollutor engaged in a hazardous activity and so did away with technicalities of proving guilt and dragging the case.

Through the judgments of various Public Interest Litigations, the courts have recognized that where a public wrong or injury has been caused by the state, any member of the public acting in good faith can maintain an action for redress. Therefore, lack of access to the court on account of poverty, disability, social or economic disadvantage or any other reason has been remedied by widening the scope of *locus standi* in civil petitions. The courts have evolved various principles to ensure that the rule of law is maintained and secured.

Apart from these, there are various other accountability mechanisms existing in the country. For example the Press and the Press Council of India are some of them. The role of the press in a democracy is that of a watchdog for the interests of the people. The Parliamentary Committees are also a mechanism to ensure accountability. As the activities of the state have multiplied, the legislatures have to face and solve many complex problems. Other accountability mechanisms include the Central Bureau of Investigation, the office of the Solicitor and Attorney General of India, Judicial Commissions, and so on.

**Statutory Accountability**

Law is one way in which direct control can be exercised over water or water based resources whether it be exploitation or distribution. Whenever the resources have been scarce and the demand more there have been attempts to regulate its use and law has been used as an effective medium. However, law shares both liberational and repressive potentials. If law is to be employed to bring about desired results for sustainability and equitable distribution of the resource, then it should be so designed so as not to jeopardise the expected results.

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27. AIR 1987 SC 965

Laws Relating To Water Use

Irrigation Acts

The main demand for water in India is for irrigation. It has been estimated that even if all domestic and industrial needs are adequately met by the year 2025, irrigation withdrawals will be almost 73 per cent of the total water consumption. The water supply comes from both surface and groundwater.²⁹

Whatever the source of water supply may be, what is important is to see that the resource is used in a sustainable manner. It is feared that with barely a quarter of the renewable groundwater resources tapped so far, India runs the risk of polluting most the rest, even before it is used. However, it is tragic that in spite of gross misuse of groundwater, which is such a potential resource in India, it has not been possible to take any concrete measures towards its protection and regulation be it for irrigation or for any other use. The Groundwater (Control and Regulation) Bill was mooted by the Government of India way back in 1970. It was revised twice, once in 1992 and then in 1996 but the latest 2005 version retains the basic framework of the original bill.

In all the Acts studied³⁰ we find wide powers given to administrators to regulate and control supply of water for irrigation. These powers include power of entry for survey and clearing of land, power to inspect and regulate water supply, power to enter for repairs and to prevent accidents, power to stop water supply in certain cases, power to prohibit obstructions or order their removal for drainage, power to construct field channels on behalf of the owner and to recover costs from him, power to acquire land for public purposes and even power to regulate type of crops to be sown. It is to be noted here that even though many of these are duties cast on the authorities to perform certain tasks, nowhere is the word


'duty' mentioned in the provision. Due to this fact it may become impossible to challenge non implementation of these provisions even in a writ petition since no statutory duty is cast on them unless innovative adjudication can read duty to perform as an integral part or consequence of power to perform. However, in *State of Punjab V M/s Modern Cultivators* 31 damage was caused to the plaintiff's land due to a breach in a canal which was managed by the government. The plaintiff's sued the defendants for damages under the Northern India Canal and Drainage Act. The Supreme Court held that neither section 6 of the impugned Act relating to entry in any land and removal of obstructions or closure of channels or anything done which is necessary for such application of use of the said water, nor section 15, relating to power of entry for repairs and to prevent accidents, imposes any duty on the state or the canal officer to take care of the canal banks. However, the decision went in favour of the plaintiffs because the defendants were held liable on the tort principle of negligence. This case makes it clear that all the sections relating to 'powers' do not impose any 'duty' on the authorities even to exercise ordinary care in the area wherein the development work is being carried out. Such unbridled powers threaten accountable behaviour. 32

In some other Acts there are provisions for constituting Irrigation Panchayats. 33 In these Panchayats also the members are elected by the permanent holders and occupiers of the land from amongst themselves, but the powers assigned to them are only of a secondary nature. They are to assist the officer of the Irrigation Department in managing the construction of water courses, in recording and checking irrigation, in making measurements and settling disputes. They also have to collect irrigation revenue and remit it to treasury, among other duties. Compared to the powers of the Irrigation Committee in the Maharashtra Irrigation Act, the powers given to these Panchayats are not very substantial. Even in the Irrigation Committees, it would

31. AIR 1965 SC 17.
be much more effective if the irrigators are involved in the policy making process as well, enabling them to opine on the choice of schemes, their feasibility and scope for improvement. Involving the beneficiaries at all levels of planning and implementation would be the ideal method of securing their accountability to the resource.

In recent years, irrigation cooperatives, like the Pani Panchayats, have emerged in many parts of India. Small irrigation structures are constructed by cooperative effort and the membership is open to all people living in that particular area whether they are landowners or not. Membership entitles the person to use only a specified quantity of water which is decided taking into consideration various factors like the size of the family unit and so on. In case the members are not land owners they can exchange the right to use water for even right to use the land. Such cooperatives promote equitable distribution, involves people at all stages of distribution and also makes them feel responsible to protect and conserve, the resource as well as the systems of distribution.34

The Doctrine of Public Trust

This theory based on the notion of trusteeship (and not property), is the only theory which is radically different from all other theories mentioned so far. The notion of trusteeship, where a nation, state, a community or a group is entrusted with the safe-keeping and use of a resource, is also the only genuine communitarian legal theory, that is, one which presupposes the obligation of a group as a whole and not merely that of individuals.

In law 'trust' can have both a very wide and a narrow meaning. In the widest Gandhian sense the whole state or government is a trustee of the interest and will of the people; in its narrowest sense, such as under the Indian Trusts Act, an individual or a group of individuals can be entrusted with certain specific

tasks, which oblige them, in accordance with the promises they have made, to perform their duties. Cases such as the Mono Lake,

\[ \text{35} \] take the middle road. Here the trust is placed not on individuals or the whole state, but on certain specific agencies of the state, who in accordance with assumed promises of the trust, are supposed to utilise the resources in some ways and not others.

The important thing to note about the trust doctrine is that it is based not on the notion of rights but that of duties. We shall return to the implications this has for the principles of water distribution, here it is important to examine the notion of trust in some more detail first.

Although American law is usually portrayed as being based, on the notion of right and specially property rights, the legal practice discovered long ago that not everything can be best protected and used by attempting to establish rights. The public trust doctrine, therefore, has a much longer history than the Mono Lake case.

Whereas in England all authority for public ownership emanated from the Crown, this doctrine could not be applied in the United States. Early case laws, such as Arnold V Mudy

\[ \text{36} \] laid the foundation for the concept that the state held title to the waters in, and the lands under, navigable water ways subject to a public trust; states, hence, had an obligation to act as stewards for the public interest. The Arnold case was further established by Illinois Central Railroad V Illinois.

\[ \text{37} \] The traditional public trust doctrine has commonly been applied only to the waters and beds of navigable waterways.

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36. Arnold V Mundy 6 N.J.L. 1 (1822)

The point of jurisprudential significance is that in this doctrine the state's title has not been interpreted as one of ownership, but rather that of a trustee or steward. This needs to be contrasted with the assumption in the socialist legality as well as in Indian law that the state can act in public interest only if it is the owner of (has absolute rights over) natural waters. This doctrine asserts that the state has absolute duty to act in the public interest precisely because it is not the owner but only a trustee of natural waters. The trust has been disposed by the public in the state only as a fundamental contract (set of promises) that the state will act in public interest and also, as the Mono Lake now establishes, in the interest of ecology (nature). The public trust doctrine can be explained in terms of contractarian theory in the same way as the natural rights theory.\(^{38}\)

The second point of jurisprudential significance is that basing a doctrine on the concept of duty is not opposed to invoking the notions of natural rights in the same theory, so long as the rights and duties are correlated. In fact in any systematic legal theory the rights must necessarily be correlated with duties and vice-versa. In the public trust doctrine the state has an absolute (natural) duty because the people have an absolute (natural) right. Neither the state's duty nor the rights of the people are compromised by each other. The state, as a trustee, has been entrusted to fulfil its duty so that people's natural right is not violated.

The Supreme Court of India has invoked the Doctrine of "Public Trust" number of times. This is a doctrine of environmental law under which the natural resources such as air, water, forest, lakes, rivers and wildlife are public properties "entrusted" to the Government for their safe and proper use and proper protection. This doctrine was considered by the Supreme Court of India in its judgement in *M.C. Mehta V Kamal Nath*\(^ {39}\) Relying upon ancient roman "Doctrine of Public Trust", as also the work of Joseph L. Sax, Professor of Law, University of Michigan and other foreign decisions, wrote out that all natural resources are held in "trust" by the Government. The doctrine enjoins upon the government to protect the resources for the enjoyment of the general public rather than to permit their use for private ownership or commercial purposes.

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39. (1997) 1 SCC 388
Liability in Water Resources Management

Water is one of the basic life supporting systems on earth. It has always been a very important factor in the social, cultural, economic and ecological development of human civilization. That is why all great human civilizations have originated and flourished along the great rivers of the world. However in the modern world of decreasing resources the availability of water in right quality and quantity has been adversely affected because of human activities. Water has increasingly been made unusable due to irrational tampering with the existing water resources. Technological advancement and modernization, coupled with urban and industrial growth, create complex problems of pollution, non-availability of water for desired purposes and over exploitation of the resource. Industrial effluents and municipal sewage contribute primarily to the pollution of rivers and other water courses in urban and industrial areas. In rural areas irrational exploitation of groundwater has severely affected the water table in many parts of the country. Floods and droughts further restrict the availability of this resource in time and space.40

There is a urgent need to maintain a viable and sustainable water resources system of right quality and quantity for all living and non-living beings which may be used for different purposes. One way to achieve this goal, is to regulate individual and business behaviour that affects this resource through governmental intervention by the instrumentality of law. Typically, such intervention involves the legislative imposition of standards backed by negative sanctions41 for non-compliance which aim to establish a penalty whose expected value exceeds the cost of compliance.42 This intervention denotes the aggregate


41. Sanction is that part of a law which inflicts a penalty for its violation or bestows a reward for its observance sanctions are of two kinds those which redress civil injuries, called civil sanctions and those which redress crimes, called penal sanctions. John Bouvier, Law Dictionary, Vol. II at 3005 (1914)

of those rules and principles of conduct which the government recognizes as those which it will enforce or sanction, and according to which it will regulate, limit or protect the conduct of members of the community.\(^{43}\) Since every law must have some objective, in the context of water law, it is necessary that such legal rules and standards, and the consequent sanctions for their non-observance, should take care of the basic issues involved in any resource management, namely, equity, justice, development and sustainability.

It is necessary to discuss the extent and scope of civil and criminal liability of the individual as well as of group of individuals, corporations, government departments, etc., in the water law and water based resources.

There are four types of liabilities exist in criminal law which form the basis for imposing sanction under any statute rule or regulation—

(i) fault liability or liability based on fault,

(ii) strict liability, and

(iii) vicarious liability

(iv) absolute liability

(i) Fault Liability or Liability Based on Fault

*Mens rea* is the basis for imposing fault liability. For the imposition of any sanction both *mens rea* and *actus reas* must be present. According to Turner, "*actus reus* is a result, forbidden by law and produced by human conduct. When this has been proved it usually raises the presumption of the existence of an adequate *mens rea*, but it is permissible to prove by other means than by the presumption so created by the facts of the *actus reus.*\(^{44}\)

The *mens rea* may be inferred from the *intention* of the accused or from his *knowledge* of the likelihood of the consequences of his act. The Indian Penal Code, 1860, does not define the word in terms of intentions. But rather with

\(^{43}\) John Austin, *The Provinces of Jurisprudence Determined* (1954)

\(^{44}\) Hardina v Prince (1948) 1 K.B. 700.
reference to the volition or causation of the effect. Section 39 states that a person is said to cause an effect voluntarily when he causes it by means whereby he intended to cause it or by means which, at the time of employing those means, he knew or has reason to believe to be likely to cause it. The rational behind this is that every adult of sane mind is presumed to intend the consequences which directly follow from his conduct.

(ii) Strict Liability

The strict liability is based upon the absence of mens rea and the accused is punished for his actus reus. The application of the doctrine of strict liability in criminal law reflects the rise of industrialization, and its application was invoked first in public welfare offences. In R v Prince, it was held that there could be criminal liability without the necessity of mensrea depending on the proper interpretation of statute creating the offence. A more explicit reasoning for the existence of the doctrine of strict liability was given in an English case of Parker v Alder.

(iii) Vicarious Liability

Vicarious Liability is basically a concept of civil law. Criminal liability can never be vicarious except under certain statutory provisions. In civil law the vicarious liability arises in two situations firstly a master is liable not only for his own acts but also for the wrongs done in the course of employment. However, the application of vicarious liability in criminal law was not favoured by jurists in England. In vicarious liability the mens rea and actus reus of another person is imputed to the accused, and it is for this that he is punished. In common law vicarious liability was imposed only in exceptional cases of public nuisance, defamatory libel and contempt of court, etc. The rationale of vicarious liability was enunciated in R v Medley, where the chairman, his deputy and other directors

46. R v Prince (1875) L.R. 2 CCR 154.
47. Parker v Alder (1899) 1 Q.B. 20
of a company were discharging into a river some deleterious substances so that water became polluted and unfit for human consumption. The court held the accused persons liable for causing nuisance.

Similarly, In *R v Stephens*,\(^49\) the accused, an old person, stacked rubbish near the edge of a river, floods carried away the rubbish to the river which obstructed navigation. The court held that though the accused was an old person and the works were managed by his son, the accused is guilty of causing public nuisance even though this had been caused without his knowledge and contrary to his general orders.

The same position prevails in India where the vicarious liability is confined more to public welfare offences. In water law the example of this type of liability are found in special statutes such as irrigation statutes, Environment Protection Act, etc.

**Vicarious Liability circumstances under Pollution Laws**

Under the Environment (Protection) Act, 1986 if the discharge of any environmental pollutant in excess of the prescribed standards occurs or is apprehended to occur due to any accident or other unforeseen act or event, the *person responsible* for such discharge and the *person in-change of the place* at which such discharge occurs shall be bound to prevent or mitigate the environmental pollution caused as a result of such discharge. It means that the person incharge of the place will be vicariously and strictly responsible for the discharge in excess of the prescribed standards. Same is the position in Water (Prevention and Control of Pollution) Act, 1974.

**Absolute Liability Circumstances Under Pollution Laws**

Absolute liability for the harm caused by industry engaged in hazardous and inherently dangerous activities is a newly formulated doctrine free from the exceptions to the strict liability rule in England. The Indian Rule of Absolute Liability was evolved in *M. C. Mehta and another v Shri Ram Foods and Fertilizer*

\(^49\) R v Steplicus (1886) L.R. 1 Q. B. 702
Industries and others. While applying the principle of absolute liability, the Supreme Court has held: we would therefore hold that where an enterprise is engaged in a hazardous or inherently dangerous activity and harm results on account of accident in the operation of such activity resulting in for example any escape of toxic gas and toxic effluent, the enterprise is strictly and absolutely liable to compensate all those who are affected by accident and such liability is not subject to any of the exceptions which operate Vis-a-Vis the tortious principle of strict liability under the ruling made in Ryland V Fletcher. According to Chief Justice Bhagwati:

"We have to evolve new principles and lay down new norms, which would adequately deal with the new problems which arise in a highly industrialised economy. We can not allow our judicial thinking to be constricted by reference to the law as it prevails in England or for the matter of in any other foreign country. We no longer need the crutches of a foreign legal order."

The Indian Supreme Court has developed the principle of absolute liability as an indegenous jurisprudence free from the influence of English Law. The main difference between the strict liability and absolute liability is that in case of strict liability there are certain exceptions where there is no liability whereas in case of absolute liability there are no exceptions. The Supreme Court has reiterated the principle of absolute liability and in the case of Indian Council for Enviro-legal Action V Union of India and has held that the rule enunciated in Rylands v Fletcher, which is subject to certain exceptions, is not suitable for Indian Conditions.

**Liability of Government Departments**

In India article 300 of the Constitution empowers the Union and the Government of a state to sue or be sued, but it does not lay down substantive

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50. AIR 1987 SC 965
51. (1866) LR & HL 330
52. (1996) 3 SCC 212
53. (1866) LR & HL 330
law relating to liability or the circumstances in which such actions lie. This
determining power is given to the legislature and subject to such legislation the
existing law relating to this matter will continue "as if this constitution had not
been enacted."

The principle of liability of the government for tortious acts of its servants
was enunciated in *P and O Steam Navigation Company V Secretary of State.*
In this case the question involved was whether the government was liable in tort
for injury caused to the plaintiff by the negligence of workman employed in the
government dockyard. Peacock, C.J., differentiating the distinction between
sovereign and non-sovereign functions held that the maintenance of the
dockyard was an undertaking which could have been undertaken by any private
individual without any delegation of powers from the sovereign and that,
accordingly, the East India Company would have been held liable for the wrong
complained of and, hence, the plaintiff should succeed against the government.
In *N. Nagendra Rao & Co. V State of A.P.*, the Supreme Court has held that
when due to the negligent act of the officers of State a Citizen suffers any
damage the state will be liable to pay compensation and the principle of
sovereign immunity of State will not absolve him from this liability. The court held
that in context of modern concept of sovereignty the doctrine of sovereign
immunity stands diluted and the distinction between sovereign and non-sovereign
functions no longer exists.

In the field of water law there are two special enactments which
specifically provide for the liability of government departments. These are Water
(Prevention and Control of Pollution) Act, 1974 and Environment (Protection) Act,
1986.

Section 17 of the Environment Protection Act and section 48 of the Water
Pollution Act create liability for offences by any Government department. Both
sections provide that if any offence under the Act is committed by a department
of Government, the Head of the Department shall be deemed to be guilty of the

55. (1994) 6 SCC 205.
offence. However he may be exonerated without his knowledge or he had
exercised all due diligence to prevent the commission of such offence. If the
offence has been committed with the consent or connivance of, or is attributable
to any neglect on the part of any officer other than the Head of the department,
such officer shall also be deemed to be guilty of the offence.

**Liability of Corporations**

The violation of the provisions of the Act, apart from the individual
persons, may also be committed by companies, bodies corporate, firms and
other associations of individuals. Section 47 of the Water (Prevention and Control
of Pollution) Act, and section 16 of the Environment Protection Act, 1986 provide
for offences by companies. These sections incorporate the strict, vicarious
criminal liability of persons who are responsible to the company for the conduct
of its business; or of its responsible offence bearers like director, manager,
secretary etc. for all offences committed by a company.

Section 47 of the Water Act and section 16 of the Environment Act deal
with cases where an offence has been committed by a company and with the
liability of the person who at the time when the offence was committed, was
incharge of and was responsible to the company for the conduct of the business
of the company. Sub-section (1) of these sections is similar and provides that
where an offence under the Act is committed by a company, every person who at
the time the offence was committed was incharge of, and was responsible to the
company for the conduct of the business of the company as well as the company,
shall be guilty of the offence and shall be liable to be prosecuted against and
punished accordingly. However the proviso attached to sub-section (1)
exonerates any such person from liability if he proves that the offence was
committed without his knowledge or that he exercised all due diligence to prevent
the commission of such offence.

From sub-section (1) it is clear that the legislature has taken care to
provide that the natural person be made vicariously liable for the offence
committed by a company, or anyone of its employees are to be punished only

when it is established that they had some nexus with the crime either because of their knowledge or due to their negligence which had resulted in its commission.

Sub-section (2) of these sections enlarges the scope of vicarious criminal liability to include director, manager, secretary or other officer of the company if it is proved that the offence has been committed with the consent, connivance or neglect of such director, manager, secretary or other officer. Here a distinction can be made between sub-section (1) and sub-section (2). While sub-section (1) makes vicariously liable only persons incharge of and responsible to the company for the conduct of its business, sub-section (2) imposes vicarious liability on directors, managers, secretaries and other officers. However, sub-section (2) comes into play only if it is proved that the offence has been committed with the consent, connivance or neglect of such officers of the company.

The factum of being a managing director of the company is by itself sufficient to attract the provisions of section 47 (1) of the Water Act and the vicarious liability specified therein. In Municipal Corporation of Delhi v Ram Kishan Rohatgi, the Supreme Court observed that "so far as the manager is concerned, we are satisfied that from the very nature of his duties it can be safely inferred that he would be undoubtedly be vicariously liable for the offence; vicarious liability being an incident of an offence under the Act."

So far as the application of articles 12 and 36 of the Constitution to public and private corporations is concerned, the Supreme Court has held that for the purposes of article 12 and 36, a statutory corporation may be held to be an instrumentality or agency of the government if it fulfils any of the following criteria:

(a) if the entire capital of the corporation is held by the government;

(b) if a department of the government it has been transferred to the corporation;

57. AIR 1983 SC 364.

(c) if the functions of the corporation may be regarded as governmental functions;

(d) if the government enjoys a de facto control over the affairs of the corporation;

(e) if the corporation enjoys a monopoly status conferred by the state.

If the fundamental rights are infringed by any act of the corporation, such an act will be deemed to be an act of state within the meaning of Article 12 and consequently the constitutional remedies under articles 32 and 226 will be available against them.\(^{59}\) It would be no defence for the corporation that the corporation has a separate legal entity or it was created by a statute.\(^{60}\)

However even where a public corporation constitutes an agency of the state for the purpose of article 12, such corporation cannot be considered as a department of the government.\(^{61}\)

Though the scope of article 12 is confined to public corporations, the Supreme Court in a judgement.\(^{62}\) has attempted, through judicial activism, to expand its scope to private corporations engaged in an activity which has the potential to affect the life and health of the people. The court was of the view that in the past expansion of article 12 was done to inject respect for human rights and social conscience in our corporate structure. The Supreme Court negated the apprehension that it will create enormous difficulties in the way of smooth functioning of the system and will also affect its structure. The court opined that "such apprehensions are expressed by those who may be affected by any new and innovative expansion of human rights". But this argument, the court said, "should not deter the court from widening the scope of human rights and

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61. APRTC V ITO AIR 1966 SC 521
expanding their reach if otherwise it is possible to do so without doing violence to the language of constitutional provisions.\(^6^3\)

The Supreme Court reasoned its approach on the ground that any hazardous or inherently dangerous activity for private profit can be tolerated only on the condition that the enterprise engaged in such activity indemnifies all those who suffer on account of the carrying on of such activity regardless of whether it is carried on carefully or not.\(^6^4\)

Supreme Court of India in Indian Council for Enviro-legal Action V Union of India\(^6^5\) evolved "polluter pays" principle while interpreting the "Polluter Pays" Principle the court means that the absolute liability for harm to the environment extends not only to compensate the victims but also the cost of restoring the environment degradation.

**Liability due to Negligence**

In water cases falling under the tort of negligence the principle of the 'duty to take care' has been a subject of varied interpretations. Whether a particular act constitutes a breach of duty or not depends on the existence of proof of negligence but not always so. There have been occasions when the courts have insisted on proof of negligence and there have also been situations where the defendant has been held liable without proof of negligence. As far as disputes between private parties are concerned the courts have been fairly consistent in holding the defendant tortiously liable in case of a violation of the principle of the 'duty to take care'.\(^6^6\)

\(^6^3\) M.C. Mehta V Union of India AIR 1987 SC 1097.

\(^6^4\) Id. at 1098.

\(^6^5\) (1996) 3 SCC 212

\(^6^6\) In certain exceptional cases a breach of the duty to take care has been sided-tracked by the judiciary. For instance, where a defendant establishes that he has a customary, prescriptive or an easementary right to dam up a particular water channel or to use water from a particular water source for the purpose of irrigation or to discharge effluent in a certain stream then even if such an act causes damage to the plaintiff the courts have insisted that without proof of negligence the defendant cannot be held liable in tort. The rights of riparian owners are also protected in the same manner. See for detail Manjula Batra, "Tortious Liability in Water Law" in Water Law in India (ed.) Chhatrapati Singh, ILI New Delhi 1992 pp. 157-207.
In interpreting the 'neighbour' principle the courts have often sought guidance from the observations made by Lord Atkin in the classic English case of *Donoghue V Stevenson*. He states the principle as follows:

"The rule that you are to love your neighbour becomes in law, you must not injure your neighbour. You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour.

Thus, where there is a breach in a canal as a result of which water escapes and damages the property and enjoyment of virtually all the local people, then all these people become the injured neighbours who are entitled to compensation in tort. On the other hand, a 'sole' individual can also be the 'injured neighbour', for example, if a person builds an embankment on his land which diverts the course of a natural water channel which enters the adjoining field and damages the crops therein then the owner of the adjoining field becomes the 'injured neighbour' deserving compensation for the wrong done to him. A person's right to erect a dam or a tank on his land or dig a trench in his land or divert a water-course, whether natural or artificial, is circumscribed by the 'duty to take care' and 'neighbour' principles. The applicability of the principles by the courts has been explained as under:

**Alterations/Improvements**

For a person to be liable for damage resulting from his carelessness there must be a duty of care. The plaintiff should prove a duty on the part of the defendants to use the care which a reasonable man in the position of the latter would use it to avoid causing harm to the plaintiffs. For example, an owner of land exposed to inundation from water flowing along a fresh water channel or from inroad of the sea has the right to protect his land by constructing a bulwark but the bulwark must actually be necessary, appropriate and such as not to prejudice the rights of the owners of adjacent land. An agriculturist has the right

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67. 1932 AC 562
68. *Ramnath V Kalanath and others* (1950) ILR Nag 510
to protect his land threatened with rain-water or by flood by resorting to precautionary measures without regarding his neighbour. Once the right to protect the land from flood is ceded to the land owner he is also permitted to enjoy the power of reasonably selecting how to protect the land. 69 But when the evil of floods has befallen him he is not permitted to shift it from his own land into the land of his neighbours. 70 Similarly, while a lower land owner can protect himself from floods he cannot put a bundh across a natural stream for better cultivation to the injury and damage of upper land owner. 71

The courts, it appears, have maintained a distinction between water coming in a normal way and water coming in abnormally. In case of the former being an incident to property a man cannot relieve himself at the expense of his neighbour while in case of the latter which is a common enemy, each owner is entitled to take precautionary measures such as building bunds, embankments etc, regardless of his neighbour though when evil has befallen him he has a duty not to shift the evil from his land to that of his neighbour. His right is subject to the obligation of seeing that no injury is thereby caused to the property of another. An owner of property has no right to actively let off water which has naturally accumulated therein even for the purpose of its preservation from damage therefrom if this will have the effect of transferring his misfortune to the property of another.

Storage of Water and Other Hazard Causing Substances

The concept of the "neighbour" principle has no doubt undergonr a gradual change since the early twentieth century. In fact the Madras High Court in Ramanuja Chariar V Krishnaswami Mudali and another 72 doubted the decision laid down by the Bombay High Court in Mohanlal Maganlal Shah V Bai Jivkore. 73

69. P. Seetharamayya V G. Mahalakshamma AIR 1958 AP 103; see also, Pattam Satyabadi V Kasinath Bissoyi, AIR 1964 Ori 47; Sami Ullah V Mukundlal, AIR 1921 All 182;
70. P. Seetharamayya V G. Mahalakshamma, AIR 1958 AP 103.
71. Gopala Yachendriva Varu Bahadur V Secretary of State, AIR 915 Mad 372.
72. ILR 31 Mad 169
73. 6 BLR 529 : 28 Bom 472
In *Ramanuja Chariar* the court held that an owner of land is not liable for damage caused to other lands by the retention of water on his land in the natural or usual course of enjoying his property. But the retention of water by a person on a portion of his land to prevent its passing on to other portion of his land is not an act done in the natural and usual course of enjoyment and the person so doing is liable for damage caused. In that case the defendant increased the size of an edge of his field. The effect of this was that water stagnated in one portion and percolated into the plaintiff's field and made it until for cultivation. The defendant was held liable. If the defendant had collected the water in a tank or reservoir then probably the act would have been considered as a natural use of land.\(^{74}\)

In *Murlidhar Kurmi V Bhanji Kurmi*,\(^ {75}\) again the 'duty to take care' towards one's neighbour was emphasized. In that case the plaintiff filed a suit claiming damages on the ground that owing to the defendant not letting out water of the tank (which was situated on the defendant's land) by opening the sluices the water went back into his land and submerged his fields causing him loss. The plea taken by the defendants was that the excess water accumulated in the tank was due to two years heavy rainfall and as such it was not his duty to open the sluice and therefore he could not be held liable. The court maintained that it lay within the defendant's normal physical power (as the owner of the tank) coupled with the duty to take care to keep the level of water within the usual height in the tank and that he certainly owed a duty to his neighbour to open the sluice and let off the surplus water.

**Concept of Strict Liability with Reference to Water**

There are many resources which when put into operation may constitute a constant danger to person and property of others. Such resources may not be dangerous in themselves but may lead to devastating results. Water is one of such resources. Its utility is unchallengeable yet when it is collected in quantity in the wrong place or allowed to percolate it can create havoc.

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75. AIR 1919 Nag 94
The basis of liability is the foreseeable risk inherent in the very nature of the activities. It is based in the maxim, *sic tuo alienum non laedas* meaning "so use your own property as not to injure the property of neighbour." The tort governed by this rule is neither trespass where the harm is consequential, nor negligence because there is no duty to see the foreseeable harm nor nuisance because nuisance implies unlawful interference with a person's use or enjoyment of his land.

**Historical Background of Doctrine of Strict Liability**

Strict liability has its origin in the case of *Rylands v Fletcher*\(^76\) wherein it was established that if a person bring on his land and collects and keeps anything likely to do harm if it escapes and if it does escape is liable for all the natural consequence of his act. The principle of *Rylands V Fletcher* has been followed in several Indian water cases, but compared to English law such instances are few.\(^77\) What is a 'non-natural user' of land has not defined by the court anywhere which has resulted in creating ambiguities in the application of the principle as under:

**Constructions Alterations Affecting Flow of Water**

Where a person constructs a dam on his land which has the effect of diverting water from its natural channel on to the land of a neighbour and damage to the neighbour's property results, he is liable at law to the neighbour. According to the principle laid down in *Rylands v Fletcher* erection of the dam is not a natural use of land and is an actionable wrong if it results in an injury to another. In *Ram Bhika* the defendant had built a miniature dam on his land to change the course of rain water which instead of flowing to the *nala* through the defendant's fields flowed towards the plaintiff's fields damaging the crops therein.

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76. (1886) LR & HL 330.
77. Dhanusao V Sittbai ILR 1948 Nag 698; Becharam Choudhary V Puhubnath Jha (1862) 2 Beng LR (Appx.) 53, Baldeo Das V Secretary of State (1883) PR No. 30 of 1883.
The court after reviewing the evidence placed before it came to the finding that the right of a person to dam up water or provide a particular channel for the flow of accumulated water is not an absolute right but subject to the obligation that no injury was caused to the property of another. Digging of a trench was considered a non-natural use of land. But in *Mohanlal* the digging of a trench in a land, was considered a natural use of land.

**Tank Water**  

If a person has a customary right to accumulate water in a reservoir for purpose of cultivation then even if water accumulated in the reservoir over flows due to silt in bed and damages the plaintiff's crops, the defendant is not liable to damages as there is no non-natural act of the defendant.  

78 In *Shah Yad Ali V Shyam Pratap Dubey*  

79 it was held that the defendants were not responsible in any degree for changing the status quo and that the damage was due to a cause that must have been foreseen by all parties i.e. the deposit of silt. Over here the lower Court could have highlighted the duty aspect of the defendants to remove silt from the bed of the reservoir as a customary practice as well. As this issue was not taken below the Patna High Court decided not to opine upon it.

80 From the above discussion the general principles of law regulating the duties and liabilities of the owner of land with regard to the escape of water may be stated thus :

"Where the owner of land, without wilfulness or negligence, uses his land in the ordinary, he will not be liable for damages, but where for his own convenience he diverts or interferes with the course of a stream, or where he brings upon his land water which would not naturally have come upon it, even though in so doing he acts without wilfulness or negligence, he will be liable for all direct and proximate damages, unless he can show that the escape of water was caused by an agent beyond his control, or by a storm, which amounts to *vis*  

78. AIR 1987 Kar. 87  
79. AIR 1917 Pat. 44  
*major* or an act of God, in the sense that it is practically, if not physically, impossible to resist it. It is apparent that the application of the principle of strict liability in Indian cases relating to water has been restrictive. Where waters of a stream were penned back due to erection of a bundh on the defendant's land which inundated the plaintiff's land, where water outlets of the banks were closed as a result of which there was overflow and consequent damage to crops of the plaintiff, where water was retained by a person on his land and was not allowed to pass on to other portion of his land. The defendants were held liable for damages caused owing to non-natural use of land.

On the other hand where a bundh had been lawfully constructed and the breach was owing to no fault of the defendant, where a well or embankment had been erected to protect the land from the influx of water from adjoining land regardless of the water being thrown back on the land of another the defendant was not held liable.

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83. *Guru Charan V Ram Dutt* (1865) 2WR43; *Kadur Bukh V Ram Wag.* (1967) 7 WR 448.
84. *Shankar V Laxman* AIR 1938 Nag. 289