
The Right to Water in India: Changing Perceptions

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ABSTRACT

Water remains the fundamental necessity of mankind. This necessity has turned itself into one of the basic human rights in India. In spite of the eternal value of water, the development of the right to water seems to be very slow in India. In India, water law comprises of various elements at international and national echelons. There are various government policies that require a serious re-consideration and questions of its enforcement are often raised with no proper solutions being provided. In this light, this paper shall throw light on the different water laws prevalent in India and also its problems and prospects. The paper shall meticulously scan the existing national and international legal framework available on the issue and shall also thrive to provide remedies. An attempt through this paper shall be made to identify the core issues in the area for progress of the nation so far as water laws are concerned.

INTRODUCTION

Water is the most crucial need of mankind without which the human race cannot survive. Also, it remains a common heritage and a privilege which must be enjoyed by all equally and without any discrimination. Since the ancient times, it has been regarded as one of the most basic human right which blesses life to all living creatures. Thus, emerged the concept of 'right to water' that was so fundamental in nature that became the backbone of yet another right in the form of right to have an adequate living and a quality life. There are many legal and other instruments that prescribe the need for water and mandates compulsory distribution of water through various resources. Drinking Water Supply continues to be inadequate, despite painstaking efforts by various levels of government from time to time. The level of investment has recently been increased in the area of water and sanitation significantly though falling short of international standards¹. Mainly, the right to access to safe water also needs serious consideration. In spite of all developments made in the domain of science and technologies, there remain a large number of people who are unable to fetch water for their regular use and drinking purpose.

The prime responsibility to provide safe drinking water is allotted to the State Government and further to respective Municipal Corporations. These Governments and Municipal Corporations are trapped in their own problems of governance and often complain of paucity or shortage of funds thereby depriving the poors to get the water for their daily use which remains their basic and fundamental right. An attempt has been made in this paper to identify and realize various problems while dealing with issues of water in India and also to suggest some feasible solutions.

Part-I of this paper deals with introduction while discussing various international protection accorded to water rights. Part-II of the present paper scans the constitutional and legislative framework of water laws in India while Part- III presents the judicial approach of the water rights by thoroughly analyzing various facts and circumstances of different cases. The Final part of the present paper shall draw the conclusion.

¹ See. "UNICEF/WHO Joint Monitoring Programme for Water Supply and Sanitation estimate for 2008 based on the 2006 Demographic and Health Survey, the 2001 census, other data and the extrapolation of previous trends to 2010" available at < <http://www.wssinfo.org/datamining/tables.html>> last retrieved on 03/10/2014 at 2.33 p.m.

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INTERNATIONAL PROTECTION FOR ‘RIGHT TO WATER’

The right to water finds mention in various international treaties and customary rules. It is in existence both in express and implied form. This right can be inferred from a number of international conventions which are binding upon all states making it obligatory for all states to respect the rights relating to water.

Apart from the international protection accorded to right of water, there also exist a number of regional instruments strongly advocating the protection and promotion of water rights in their particular region.

The material on water rights in the domain of international law is present in numerous volumes. It has been recognized as one of the basic and fundamental rights in international law through various international instruments in the form of international human rights declarations, conventions etc. The major instrument in international echelon includes the 1979 Convention on the Elimination of All Forms of Discrimination Against Women² (CEDAW,), the 1989 Convention on the Rights of the Child³ (CRC). Other treaties implicitly recognize the right, for instance the International Covenant on Economic Social and Cultural Rights. In terms of political declarations, the main resolutions were passed by the UN General Assembly and the UN Human Rights Council resolutions both in 2010. The clearest definition of the Human right to water has been issued by the United Nations Committee on Economic, Social and Cultural Rights⁴.

Water rights remain the quintessential condition in international sphere for the successful enjoyment of the right to an adequate standard of living and health⁵.

CONSTITUTIONAL AND LEGISLATIVE FRAMEWORKS

The Constitutional and legislative framework of the water rights regime presents a complex picture of division of powers and responsibilities as regards to water resources in India. The State government has the power to make laws in respect of water resources existing in that state subject to conditions and limitations laid down by Parliament from time to time. The constitutional authority is bestowed upon the State governments by virtue of entry 17 of the State List⁶, entry 56 in the Union List and also one must not forget Article 262 of the Constitution. The plain reading of Article 262 of the Indian Constitution provides that Parliament may by law provide for the adjudication of any dispute or complaint with respect to the use, distribution or control of the waters of, or in, any Inter-State river or river valley. Further, Sub-Clause (2) of Article 262 also states that notwithstanding anything in this Constitution, Parliament may by law provide that neither the Supreme Court nor any other court shall exercise jurisdiction in respect of any such dispute or complaint as is referred to in clause (1).

Thus, even the apex court’s jurisdiction has been ousted in the matters of water. This highlights the importance of water rights and also the apprehensions of the government in dealing with conflicts

²Please See. Art.14(2) of CEDAW, 1979

³Please See. Art.24 of Convention on the Rights of the Child, 1989. Also See. International Labour Organization No. 161 concerning Occupational health Services, 1985 (Art.5); The Convention on the Rights of Persons with Disabilities, adopted in 2006 (Art.28)

⁴See. ‘Right to Water’ available at < http://en.wikipedia.org/wiki/Right_to_water> last retrieved on 04/10/2014 at 3.25 p.m.

⁵In recent years, more explicit articulations of this view supporting the right to water have been made such as resolution of the UNO passed during the United Nations Water Conference in 1977 as under: “All people, whatever their stage of development and their social and economic conditions, have the right to have access to drinking water in quantum and of a quality equal to their basic needs.” Please See. Kothari Jayna, ‘The Right to Water: A Constitutional Perspective’, available at < <http://www.ielrc.org/activities/workshop0612/content/d0607.pdf>> last visited on 03/10/2014 at 4.15 p.m.

⁶Please See. Entry 17 in List II (State List) in Schedule VII which *inter alia* reads as, “Water, that is to say, water supplies, irrigation and canals, drainage and embankments, water storage and water power subject to the provisions of Entry 56 of List-I.” Although water is in the State List, this is subject to the provisions of Entry 56 in the Union List. *Also See.* Entry 56 of List I (Union List):”Regulation and development of inter-state rivers and river valleys to the extent to which such regulation and development under the control of the Union is declared by Parliament by law to be expedient in the public interest.”

relating to water. This serves as a tool in the hands of parliament specifically in the disputes relating to Intra-State or Inter-State Rivers between the States.⁷

Besides this, the parliament also has exclusive power to make any law with respect to any matter not enumerated in the Concurrent List or State List which is otherwise known as ‘Residuary Powers’ of the Parliament⁸. In case of inconsistency between laws made by the Parliament and laws made by Legislatures of States, the laws made by former shall prevail courtesy repugnancy solutions provided by the Constitution⁹. Thus, wide ranges of law making powers have been conferred upon the Union government with respect to the regulations and governance of water management and rights in India¹⁰.

It is also most unfortunate to note that there is no express inclusion of ‘right to water’ under part-III of Indian Constitution which deals with the Fundamental rights. Instead the ‘right to water’ implies and indirectly flows from the most revered wordings of Article 21 of the Indian Constitution¹¹ which remains the bloodline of our social consciousness and the horizons of which are expanded by the judicial interpretation from time to time.

It must also be noted that there are various implication of the right to water. The term ‘water rights’ implies many rights in itself beginning with right to have safe drinking water to right to use the water. Usually anyone who owns land on the banks of a stream has a right to reasonable use of water for his needs. The government has the exclusive right to regulate the collection, detention and distribution of the Waters of rivers and streams flowing in natural canals, lakes, ponds or the water flowing, collected, detained or distributed in any canal constructed for irrigation at public expense.¹²

The Indian law confers on the owner of the land, the right to collect and dispose, within his own limits, all water under the land which does not pass in a defined channel. This enables the owner full control of the water beneath his property and he is free to withdraw and use it as he feels appropriate.¹³ This right has created a number of problems in situations where a farmer can dig deeper tube-wells and exploit large quantity of water thereby depriving nearby landowners from their legitimate rights to have water. It also affects and harms the quality of water because of uncontrolled disposal of industrial waste, sewage and use of chemical pesticides etc.

The Water (Prevention and Control of Pollution) Act, 1974 has also enacted with a view to prevent and control the water pollution in India with adequate safeguards.

JUDICIAL ENGINEERING IN THE WATER RIGHTS REGIME

The Judicial approach to water rights regime in India clearly showcases the urge of the Supreme Court and various High Courts to shelter the right to water thereby providing basic amenities of life to poorest of poor. There are a number of judgments by virtue of which the Judiciary in India has expressed their concern from time to time. The following analysis of some cases will highlight the journey of Judiciary in making right to water a fundamental right hidden in Art.21 of the Indian Constitution.

Chameli Singh V. State of UP¹⁴

A Bench of three Judges of Supreme Court had considered and held that the right to shelter is a fundamental right available to every citizen and it was read into Article 21 of the Constitution of India as encompassing within its ambit, the right to shelter to make the right to life more meaningful.

⁷In this context, it will be appropriate to make a clear distinction between Intra-State Rivers and Inter-State Rivers. A River which remains in one State from its source to its mouth is an Intra-State River and any river which flows in the territory of two or more State is an Inter-State river.

⁸Please See. Art. 248 of the Constitution of India

⁹See. Article. 254 of the Constitution of India

¹⁰The provisions of Entry 20 in the Concurrent List, namely, economic and social planning, are also quite significant, in this regard. By virtue of this provision, the major and medium irrigation, hydropower, flood control and multi-purpose projects are required to seek clearance of the central government for inclusion in the national plan.

¹¹Article 21 of the Indian Constitution provides: “No person shall be deprived of his life or personal liberty except according to procedure established by law”.

¹²Please See. Indian Easement Act, 1882

¹³*Id.*

¹⁴See. (1996) 2 SCC 549: AIR 1996 SC 1051

The Supreme Court in this case observed:

‘That right to live guaranteed in any civilised society implies the right to food, water, decent environment, education, medical care and shelter. These are basic human rights known to any civilised society. All civil, political, social and cultural rights enshrined in the Universal Declaration on Human Rights and Convention or under the Constitution of India cannot be exercised without these basis human rights’¹⁵.

Gautam Uzir & Anr. V. Gauhati Municipal Corp¹⁶

This was a case related to scarcity of water in the city of Guwahati. It was argued that the Municipal Corporation is liable for supplying sufficient and quality drinking water to all living in their jurisdiction. The Municipal Corporation contended that effective policies could not be adopted due to paucity of funds. The court made clear that ‘Water, and clean water, is so essential for life. Needless to observe that it attracts the provisions of Article 21 of the Constitution¹⁷’.

S.K. Garg v. State of UP¹⁸

Similarly, complaint was made to ensure regular supply of water to the citizens of Allahabad, the High Court reiterated the fundamental right to drinking water.

Delhi Water Supply and Sewage Disposal Undertaking v. State of Haryana¹⁹

A water usage dispute arose because of the fact that the state of Haryana was using the Jamuna river for irrigation, while the residents of Delhi needed it for the purpose of drinking. It was reasoned that domestic use overrode the commercial use of water, the court ruled that the State of Haryana make available the water for consumption and domestic use in Delhi.

In this case the Supreme Court observed:

‘Drinking is the most beneficial use of water and this need is so paramount that it cannot be made subservient to any other use of water, like irrigation so that right to use of water for domestic purpose would prevail over other needs’²⁰.

Subhash Kumar v. State of Bihar²¹

This is also one of the notable cases, where a discharge of sludge from the washeries into the Bokaro River was petitioned against by way of public interest litigation. the Court found that the right to life, as protected by Article 21 of the Constitution of India included the right to enjoy pollution free water.

Thus, the entire scope of water rights and laws in India has been widened and a positive approach has been adopted by the Indian judiciary thereby reflecting the international norms and standards.

CONCLUSION

The National Commission that reviewed Indian Constitution recommended in its report the inclusion of a new right in the form of right to safe drinking water²² to avoid ambiguity and also to bring clarity by constitutionalizing the provision. There remains no reason as to why ‘right to water’ should not be included expressly in the Constitution paving a way for a better and guaranteed future to us and our next generations.

¹⁵*Id.* Also See. Iyer S.H., ‘Judicial Activism And Rights Of The Urban Poor In Indian Cities’ available at <<http://nsm.org.in/2008/08/29/judicial-activism-on-right-to-shelter-rights-of-the-urban-poor/>> last retrieved on 04/10/2014 at 4.20 p.m.

¹⁶See. 1999 (3) GLT 110.

¹⁷*Id.* Also See. Upadhyay Videh, ‘Water Rights and the ‘New’ Water Laws in India: Emerging Issues and Concerns in a Rights Based Perspective’ available at <<http://www.idfc.com/pdf/report/2011/Chp-5-Water-Rights-And-The-New-Water-Laws-In-India.pdf>> last retrieved on 04/10/2014 at 4.15 p.m.

¹⁸See. 1999 ALL. L. J. 332.

¹⁹See. , (1996) 2 SCC 572: AIR 1996 SC 2992.

²⁰*Id.*

²¹See. (1991) 1 SCC 598,

²²The report of the National Commission’s report can be found at <<http://lawmin.nic.in/ncrwc/ncrwcreport.htm>> last retrieved on 04/10/2014 at 5.13 p.m. ; New Article was suggested in the form Article 30D be inserted in the Constitution thus: ‘Every person shall have the right—(a) to safe drinking water..’.

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The right to pollution free water, right to have access to safe drinking water and the right to use the water are the very basic rights the protection of which is required at all expense. The Government must make policies towards realization of these rights and Judiciary must balance the rights of the citizens and must also take care of other aspects relating to water governance laws and regulations throughout the country.

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