

RECOGNIZING RIGHT TO WATER AS HUMAN RIGHT IN INDIA

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Abstract

Water resource is one of the most important and essential natural resource. It is essential in the sense that it is required in all times for the very existence of life on this earth. Since time immemorial, water is considered as fundamental requirement for human existence. Thus it equals to basic human right and every human being needs to have right to water. India has not provided specifically any right to water. The Indian Constitution has not recognized right to water as fundamental right. However, it is the Indian Judiciary which has time and again reflected in its judgment right to water.

Keywords:

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1. Introduction

According to United Nations (UN) Department of Technical Cooperation for development, “No resource is more basic than water. Water is essential for life, crucial for relieving poverty, hunger and disease and critical for economic development.” Even after years of development, water problem still persists. Millions of people worldwide are deprived of proper sanitation and drinking facility. .

Regarding safe drinking water quality, the World Health Organization (WHO) emphasized that water quality is fundamentally important for human development and well-being.

The *UN Special Rapporteur on Human Rights to safe drinking water* on the official visit to India in New Delhi, November 10th, 2017 observed that policy, programme and implementation initiatives in India’s water sector lacks “a clear and holistic human rights- based approach.” Also there was mention that “The national programmes do not incorporate the human rights to drinking water and sanitation as a whole but rather in a piecemeal manner.”

2. Right to water and human right

In international instruments like Universal Declaration on Human Rights, 1948 (UDHR); International Covenant on Civil and Political Rights, 1966 (ICCPR); International Covenant of Economic, Social and Cultural Rights, 1966 (ICESCR) there is no specific mention of human right to water. Even though there is no explicit reference to human right to water, implied reference to human right to water has been construed. The Magna Carta of human rights UDHR has not referred directly to human right to water. However it has been “argued that water is so implicitly essential for human life that the framers of the Universal Declaration of Human Rights (“UDHR”) did not think about a need to explicitly include the right to water.” (Lee and Best, 2017, p. 10).

The ICCPR has been interpreted to include human right to water. Article 6(1) talks about inherent right to life. Water being a necessary requirement for sustenance of life on earth, right to life mentioned in ICCPR be interpreted and understood to include right to water.

The Convention on the Elimination of All Forms of Discrimination against Women (“CEDAW”) in the year 1979 explicitly mentioned right to water. CEDAW in Article 14 (2) (h) mentions that in order to eliminate discrimination against women in rural areas, the state should “ensure to such women the rightto enjoy adequate living conditions, particularly in relation to...sanitation, electricity and water supply....”

The Convention on the Rights of the Child, 1989 (CRC) in Article 24 (2) imposes a duty on the State to “take appropriate measures to combat disease and malnutrition... through the provision of....clean drinking water, taking into consideration the dangers and risks of environmental pollution....” The CRC under the right to health includes the right to water.

At the global level, the need for recognizing right to water started gaining momentum since 1990s in various environmental conferences like the Agenda 21, Dublin Statement on water and Sustainable Development. Such various efforts resulted in the adoption of the General Comment No 15 by Committee on Economic, Social, and Cultural Rights in 2002. This General Comment recognized “human right to water is indispensable for leading a life in human dignity. It is a prerequisite for the realization of other human rights.” It also states “human right to water entitles everyone to sufficient safe, acceptable, physically accessible and affordable water for personal and domestic uses.” The General Comment No.15 interpreted Articles 11 and 12 of ICESCR to include right to water as human right.

However, human right to water was recognized by the United Nations to the General Assembly by adopting Resolution 64/292 in July, 2010.

In today’s time India is part of various international instruments that provides a human right status to right to water. These various instruments are-

- ICCPR;
- ICESCR;
- The CRC;
- The CEDAW;

- Convention Against Torture and other Inhumane or Degrading Treatment or Punishment (1997);
- The International Convention on the Elimination of All Forms of Racial Discrimination (1969)

In spite of India being a member to these international instruments the Constitution has not till date conferred the status of fundamental right to right to water. However, there are legislative enactments in India that speak about water, water quality and pollution, people's right to unpolluted water. These are-

- Water (Prevention and Control of Pollution) Act, 1974
- The Environment Protection Act, 1986
- Laws relating to nuisance
- Remedy under the Criminal Procedure Code for public nuisance
- Tort law against the polluter
- Class Action under the Civil Procedure Code
- Indian Easements Act, 1882

The national government had come up with the National Water Policy, 2002. This Policy of 2002 is similar to the earlier National Water Policy of 1987. The policy of 2002 in its preamble says that water is a prime natural resource, a basic human need and a precious national asset and that the planning, development and management of water resources need to be governed by national perspectives.

The Draft National Water Framework Bill, 2016 (India) in section 3(1) states

“Every person has a right to sufficient quantity of safe waer for life within easy reach of the household regardless of, among others, caste, creed, religion, community, class, gender, age, disability, economic status, land ownership and place of residence:

Provided that the precise quantity of safe water for life shall be determined by the appropriate government from time to time.”

3. Right to water in India- the approach of the Judiciary

The Supreme Court of India has time and again through judicial pronouncements has protected right to water under the umbrella of Right to life guaranteed under Article 21 of the Constitution of India. The right to life under Article 21 of the Indian Constitution has been interpreted to include right to a clean environment.

In *A.P. Pollution Control Board II v. Prof. M.V. Nayadu*(2001)2 SCC 62, the Supreme Court of India held that “drinking water is of primary importance in any country.” The Supreme Court in this case referred to India being a party to Resolution passed by the United Nations Organisation during the United Nations Water Conference in 1977 and thus opined “Right to access to drinking water is fundamental to life and there is a duty on the State under Article 21 to provide clean drinking water to its citizens.”

In *Narmada Bachao Andolan v. Union of India*(2000)10 SCC 664, the Supreme Court of India held that “water is the basic need for the survival of the human beings and is a part of right of life and human rights as enshrined in Article 21 of the Constitution of India.”

In *Vellore Citizen Welfare Forum v. Union of India* AIR 1996 2715, the Supreme Court held that constitutional and statutory provisions protect a person’s right to fresh air, clean water and pollution free environment.

In *F.K. Hussain v. Union of India* AIR 1990 Ker 321, the Kerala High Court declared that one of the attributes of right to life is right to portable water as it is one of the basic elements which sustains life itself.

4. Water as Commons or Commodity

Consideration of water as commons or not is a matter of debate and it raises lot of questions. Indeed this debate has a long history. “In contemporary discussions, this question often occurs in the context of responsibility for water supply between the state, the private sector, and citizens.” (Bakker, 2003, p.1). With time it has been seen that the private corporations are playing the role of “builders, owners and operators of water supply systems.” (Bakker, 2003, p.1) This debate

over water basically centers around the ‘public utility’ or the municipal model, the private sector or the commercial model and the community or the cooperative model. Let us now see how the different models look like-

Public utility model-

Under this system, water (drinking water) is considered as a public good as it is a basic requirement for the sustenance of life. The government undertakes the duty to control the business of supplying water.

Private sector model-

Under this system, the water supply system is “characterized by the management (and sometimes ownership) of infrastructure by private, for-profit corporations.” (Bakker, 2003, p.2). Privatization of water actually results in commercialization of water. As it turns out to be of commercial nature the interests of the market comes into play.

Community model-

Under this type of system, the “community-run water supply systems are most frequently managed as co-operatives.” (Bakker, 2003, p.2)

The difference between these models lies in the role played by consumer: a citizen, a customer, or a community member.

For considering water as commodity, the assertion would be that water will be well managed if there is private ownership and management of water supply systems. “Private companies, who will be responsive both to customers and to shareholders, can efficiently run and profitably manage water supply systems. Water conservation will be incentivized through pricing- users will cease wasteful behavior as water prices rise with increasing scarcity.” (Bakker, 2003, p.3). Water as commodity is in keeping with what has been specified in the Hague Declaration and Dublin Principle.

On the other hand water as commons can be ascertained on the ground that water which is an important natural resource for the sustenance of life should not be categorized as commodity as it would be grossly unethical. What is best fitted is nothing but collective management of water resource. This type of collective management may be done either by the state or by the community. It is believed that under the commons system conservation of water resource can be

done more effectively as it would be incentivized “through an environmental, collectivist ethic of solidarity, which will encourage users to refrain from wasteful behavior.” (Bakker, 2003, p.3)

6. Provide constitutional status to right to water

India is fast heading towards water scarcity. India is “moving fast towards the ultimate limit of its utilizable water resource potential.” (Saleth, 2006, p. 1). The institutional arrangement for water management is not in keeping with the present time. The very simple reason is that most of the laws regarding water management were made “in an era of water surplus.” (Saleth, 2006, p. 1). The present Indian administrative and judicial set up has a long history and a tale to tell all by itself and has come a long distance. It had a strong “central Asian and Persian influence during the Mogul Period and British influence during the colonial period. With the consolidation of a centralized government bureaucracy and the spread of markets and commercialization, local and community-centered institutions have lost their relevance and gradually disappeared.” (Saleth, 2006, p. 6).

India covers an area of 3.29 million km² and has a population which exceeds one billion. In India’s economic progress, water economy has an important role to play. India which is a “monsoon-dependent country, water resources availability in India displays a wide variation across time and space” (Saleth, 2006, p.6). The utilization of water in India is increasing day by day because of the rise in its population and development works.

India’s total water resource potential at present is estimated to be approximately to be about 1,953 billion cubic meters (bcum). Out of this, the total amount of water resource that can be utilized is 1122 bcum. Whereas the total water resource requirement by India is projected to be in the range of “784-850 bcum by the year 2025, and 973-1180 bcum by the year 2050 (GOI, 2000)” (Saleth, 2006, p.7).

In such scenario the role of water institutions is of paramount importance. For the proper functioning of the water institutions there has to be proper law. India does not have any separate and exclusive law on water. Rather what it has is various provisions regarding water that can be

found in various legislations like irrigation acts, central and state laws, constitutional provisions, and various penal and criminal procedures codes.

The legislative competence for water and water related resource under the Indian Constitution is divided between the Union and State. The Parliament has also enacted the Inter-State water Disputes Act, 1956. It was enacted in pursuance of Article 262 of the Constitution. Under this Act various tribunals were set up to deal with water related disputes. Also the Union can have legislative powers on waters when two or more states desiring to have a uniform law on water request the union to do so. But at the end of day what remains as a fact is that regarding water related matters it is the State that has the final legislative power. This arrangement has some limitations. Limitations in the sense that since laws relating to water is state controlled there are many laws relating to different areas of water like pollution, irrigation. Moreover these laws may differ from state to state. Also the present arrangement poses hindrance to the central government as it cannot take “proactive role in water matters. As a result, the central government is unable to provide the kind of leadership and guidance needed for reforming the legal and institutional basis of the water sector, both at the national and state levels.”(Saleth, 2006, p. 9)

India does not confer on any individual right to water explicitly. But water right has come up as an important issue and is drawing attention at this moment because of the present situation of water scarcity. “The issue of water rights as a mechanism for allocation and accountability assumes importance with increasing scarcity and conflicts both at the macro level of regions and sectors as well as at the micro level of distributaries, communities, and individual users.” (Saleth, 2004, p.11)

Right to water is not enshrined anywhere in the Indian Constitution as a fundamental right. But it is the judiciary who in many judgments has interpreted Article 21* of the Indian Constitution to include right to clean and sufficient water, a right to a decent life, a right to live with dignity, and a right to a humane and healthy environment which would certainly imply a right to water.

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

As already discussed, India does not have any explicit law that provides for any water right. In the pre- independence era i.e. during the British period (British Legislation in India during 1859-1877) customary rights to water of individual and groups was recognized. But with the coming of the Indian Easement Act, 1882 there was total shift in this approach. What the Indian Easement Act, 1882 did was that it conferred on the state absolute right over the rivers and lakes. It is only through the land rights that an individual's right to both surface and ground water is recognized. Because of the 'dominant heritage' principle that is implied in the Transfer of Property Act IV of 1882 and the Land Acquisition Act of 1894, a land owner can have a right to groundwater as it is considered an easement connected to the dominant heritage, i.e., land.

6. Progressive laws

Many of the countries in the world wide have considered water resource as commons and come with important legislation. The reason for their doing so was that water resource with its preciousness and the risk attached to it due to pollution cannot be ignored and so they needed to come up with legislation that will result in better protection of water.

One such country is Brazil. Brazil has considered water resource as common good and has brought about legislation in furtherance of such consideration.

Taking into consideration of the scarcity of water and its need of immediate attention for preservation, South Africa has come up with a positive legislation in order to deal with such situation. What South Africa has done is that it has come up with a progressive law which is totally based upon its constitutional recognition of the right to access to water. South Africa has in its constitution the right of access to water. Also in order to implement the provision of the constitution South Africa has also come up with the Free Basic Water policy in the year 2001. South Africa has made a remarkable step by introducing in its constitution the right of access to water. The constitution which was adopted on 8th May, 1996 embraces human rights principles and contains bill of rights which sets forth the right of access to water as part of social and economic rights.

6. Conclusion

No life can sustain without water. Water is a basic human right. Despite right to water not being specifically guaranteed as a fundamental right, Indian judiciary has time and again broadened the horizon of fundamental right to incorporate right to water as a fundamental right. However, till date access to water and holistic water management is a problem in India. Water being an utmost importance to human life and being a human right demands that Government must take steps towards the realization of water as human right in an effective manner. There also needs to be explicit mention of right to water in the Indian Constitution as that will clearly set out that everyone has equal access to water. Right to Water should also be considered as human rights because only then there can be an imposition on the government to take proper action in this regard. As India is water scarce nation at this moment, there needs to be mentioned specific rights to water.

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