

Water Rights in India: Approach and Challenge

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Abstract—Civilization originated from water sources. Water is vital for human Survival but a part from this water and water bodies have its cultural, Social, Political, ecological concerns. It is very pathetic to discuss about the necessity of water and its potable access where 2/3rd of earth surface is covered of water. According to UNDP water is “the stuff of life and a basic human right”.

On the line of legal and Constitutional framework Government of India Act-1935 gives power to states to legislate on this subject. In Sardar Sasovar case, Supreme Court derived “Right to Water” from article-21. It states that “Water is basic need for the Survival of human being and is a part of right to life and human rights” as enshrined in Article-21 of the Constitution of India.

The major problems that thrives our attention are:

1. Water issue is the subject matter of “State list”. We know that water is neither a regional issue nor political issue. It is related with every individual therefore it should be in Union list in spite of state list.
2. Ownership of land resources always creates a problem in proving access of water to every individual. Because underground water is a public property but land above that water sources is skewed
3. In India, lack of any umbrella framework on this issue is also a crucial problem is resolving the issue of water and water body related problems.

This paper analyzes the human right to water in order to determine its contours and prospects for enforcement. The introductory section provides a general discussion of the issue, highlighting the severity of the problem.

Keywords: Water, Water Right, Water Law.

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.

Under Fundamental right in the constitution of India, Article 21 entitled ‘Protection of life and personal liberty’ of states, ‘no person shall be deprived of his life or personal liberty except according to procedure established by law.’ This has popularly come to be known as Article on Right to Life. In course of time this concept has been expanded to include several other vital aspects of human life like ‘pollution free water and air for full enjoyment of life.’ health etc. Thus it entitles citizens to receive safe drinking water (potable water) in part of the Right to Life under article 21. Water is fundamentally different from other resources for the reasons that it is one of the four elements of the ancients (along with air, earth, and fire) essential to life, it plays an important role in hygiene and in combating epidemics. Even some of the famous personalities said that the main reason for the third world war will be the dispute related to Water. Because water is necessary for the survival of all life, yet over one billion of the world’s more than 6 million people do not have available sources of clean water for drinking. Over 2 million people die every year due to a lack of safe water. This shows that our future is in danger. This paper analyzes the human right to water in order to determine its contours and prospects for enforcement. The introductory section provides a general discussion of the issue, highlighting the severity of the problem.

OBJECTIVE

- (1). To analyze water rights in India.
- (2). To analyze the different type of water
- (3). Water laws in India from a rights- based perspective

METHODOLOGY

The paper is based on secondary data. The main source of data is Census, 2011 and Ministry of Water and sanitation.

DEFINATION OF WATER RIGHTS

Water rights are one of the interests that may attach to real estate ownership and pertain to the rights to use adjacent bodies of water. Riparian rights are awarded to land owners whose property is located along a river, stream or lake. Typically, landowners have the right to use the water as long as such use does not harm upstream or downstream neighbors. In the even the water is a non-navigable waterway; the landowner generally owns the land beneath the water to the exact center of the waterway.

TYPES OF WATER RIGHTS

Fundamental differences exist between. Generally, water rights are based on the water law that applies in a particular country and, at their most basic, are classified as land-based or use-based rights. Some countries allow their subdivisions to establish independent water laws. For example, each state and territory of the United States has its own set of water laws that establish water rights that may be land-based, use-based, or both.

(1) Land-based

Some water rights are based on land ownership or possession. For example, many common law jurisdictions recognize riparian right, which are protected by property law. Riparian rights state that only the owner of the banks of the water source has a right to the 'undiminished, unaltered flow' of the water.

(2) Finnish water rights

In Finland, water bodies are generally privately owned, which is not the case in most EU countries, but Finland also applies the Roman law principle of *aqua profluens* (flowing water), according to which the freely flowing water in water bodies cannot be owned or possessed. This means that the owners of water bodies cannot prohibit diversion of water for agricultural, industrial, municipal, or domestic use according to the provisions of the Finnish Water Law and cannot prohibit use of the water bodies for recreational purposes.

3) Community-based rights

In some jurisdictions water rights are granted directly to communities and water is reserved to provide sufficient capacity for the future growth of that particular community. For example, California provides communities and other water users within watersheds senior status over appropriative (use-based) water rights solely because they are located where the water originates and naturally flows. A second example of community-based water rights is pueblo water rights. As recognized by California, pueblo water rights are grants to individual settlements (i.e. pueblos) over all streams and rivers flowing through the city and to all groundwater aquifers underlying that particular city. The pueblo's claim expands with the needs of the city and may be used to supply the needs

of areas that are later annexed to the city. While California recognizes pueblo water rights, pueblo water rights are controversial. Some modern scholars and courts argue that the pueblo water rights doctrine lacks a historical basis in Spanish or Mexican water law.

4) Use-based rights

Use-based rights do not relate to land and instead rely on whether the water user has legal access to the water source. As a general rule, use-based rights are usufruct ray, fully transferable to anyone. Under common law use-based rights only apply to navigable-in-fact waterways in which there is a presumptive easement, often referred to as a navigable servitude.

5) Appropriation

Appropriative water rights are the most common use-based water rights in the United States and are most commonly found in the western states where water is scarcest. "The appropriation doctrine confers upon one who actually diverts and uses water the right to do so provided that the water is used for reasonable and beneficial uses," regardless of whether that person owns land contiguous to the watercourse. "[A]s between appropriators, the rule of priority is 'first in time, first in right.'" The modern system of prior appropriation water rights is characterized by five principles:

1. Exclusive right is given to the original appropriator, and all following privileges are conditional upon precedent rights.
2. All privileges are conditional upon beneficial use.
3. Water may be used on riparian lands or non-riparian lands (i.e. water may be used on the land next to the water source, or on land removed from the water source)
4. Diversion is permitted, regardless of the shrinkage of the river or stream.
5. The privilege may be lost through non-use.

(6) In-stream Water Rights

In-stream water rights are rights that only apply to water in a stream and cannot be diverted for usage. These rights are most commonly used to protect endangered species or to bolster the amount of a threatened aquatic species.

Water Law in India from a Rights-Based Perspective

On July 28, 2010, the United Nations General Assembly passed Resolution 64/292, which explicitly recognized the human right to water and sanitation and declared that clean drinking water is crucial to the realization of all human rights. The resolution was prompted by an increase in water-related conflicts around the world due to widespread water shortages. As it stands, 884 million people do not have access to safe drinking water, and 2.6 billion people lack access to basic sanitation. By 2050, the world's population will reach

9.1 billion, 34 percent higher than today, and nearly all of this population increase will occur in developing countries. Even today, many developing countries are struggling with the task of providing their citizens with safe drinking water in the face of diminishing water resources and a growing population.

India faces a particularly turbulent water future. By 2050, India's population is projected to be 1.69 billion, 38 million larger than China's projected population of 1.31 billion. Due to aggressive farming, expanding industry, and, of course, their growing population, India's demand for water and water consumption has also gone up significantly in the past few decades. To accommodate for the increased demand for water, India has become largely reliant on its supply of groundwater. However, India's groundwater supply, like all groundwater supplies, is finite, and India is drying up at an alarming rate. As a result, India's newest challenge is to figure out how to apportion the water they have between its industry, its agriculture, and its public, which raises the question: how does a country go about creating a legal right to water?

While much emphasis has been put on how India's water shortages put the rural poor at an extreme disadvantage, there has been little consideration on how water legislation in India leaves the poor legally defenseless, and with no claim or right to any of the country's water. This will become increasingly problematic in the ensuing years, as the battle for water between industry, agriculture, and people has already begun to unfold in its High Courts. Every citizen's legal right to "safe drinking water" is recognized under Article 21 of the Constitution of India. In the past few years, courts have delivered a growing body of verdicts on the right to safe drinking water as a fundamental right, predominantly in cases where inadequate water supply to different cities was legally challenged.

For the most part, the Court has upheld the right to water under Article 21. In one of the earlier cases relating to unclean drinking water in the city of Guwahati in 2000, the Court resolved that water is essential for life, therefore protected under Article 21 of the Constitution. The Court held that the Guwahati government was responsible for providing its citizens with safe drinking water even after the government filed in a counter affidavit that it could not supply safe water due to financial constraints. Similarly, in *S.K. Garg v. State of Uttar Pradesh* (2001), the High Court reiterated the fundamental right to drinking water, stating that the need for a decent and civilized life included the right to food, water, and decent environment. In *Delhi Water Supply and Sewage Disposal Undertaking v. State of Haryana* (1996), the Court went as far as to state that drinking is the most important use of water, above irrigation and industry. Finally, in *Vishala Kochi Kudivella Samrakshana Samithi v. State of Kerala* (2006), the Kerala High Court acknowledged the grievances of the people of West Kochi who had been fighting for clean water for over three decades. In an attempt to further solidify safe drinking water's place as India's most important issue,

the Court expressed, "no hesitation to hold that failure of the State to provide safe drinking water to the citizens in adequate quantities would amount to violation of the fundamental right to life enshrined in Article 21 of the Constitution of India and would be a violation of human rights. Therefore, every Government, which has its priorities right, should give foremost importance to providing safe drinking water even at the cost of other development programmes. Nothing shall stand in its way whether it is lack of funds or other infrastructure." Pursuant to these decisions, the Allahabad High Court directed the creation of a high powered committee with the sole purpose of examining the issue of water access and discussing possible solutions.

Although these particular cases in the late 1990s and early 2000s made it clear that the fundamental right to water is judicially upheld, more recent cases have been able to exploit the fact that Article 21 never explicitly states that each citizen has a right to safe drinking water. In fact, this glaring error was caught in 2002, when the National Commission that reviewed the Constitution recommended a new article. Article 30D would have stated, "Every person shall have the right to safe drinking water." In the midst of political turmoil and weakening infrastructure, this potential addition has been overlooked.

It is imperative that the change be made now, as the implication of this right has become increasingly important. That is to say, with water shortages worsening, every person may have a right to water, but there are no guidelines as to how much water and for what price. In the 2010 U.N. resolution, it was estimated that every person requires between 50 and 100 liters of water per person per day and that water costs should not exceed 3% of household income. However, in India along with many other developing countries, there are no legal guidelines supporting the U.N.'s resolution. While it is certainly important to focus now on giving Indian citizens access to safe drinking water through the creation of wells among other water infrastructure, without immediate revision to water legislation, said infrastructure will become virtually useless in the face of massive drought, and citizens, especially the rural poor, will not have legal claim over the fundamental human right to water.

CONCLUSION

The inadequate (or denial of) access to water and sanitation to the poor in India has been going on for a long time even before the advent of economic reforms. This has been happening despite the Supreme Court's rulings time and again that access to clean drinking water is a fundamental right as part of right to life in Article 21 of the Indian Constitution. Why is it that the same governments at State and Central levels show such callous attitude to the problem of drinking water to poor people even while adhering, in public postures, to the basic tenets of the Constitution? The hold of the rich and powerful middle class groups over the State machinery, their capacity to appropriate natural resources (public water at

highly subsidized rate, in this case), and the inability of the poor to mobilise themselves into effective pressure groups over a longer period of time may be some possible explanations

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