

Constitutional Paradox on Water and Right to Water

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Abstract

Mother Nature gave us life and various precious gifts. Air and water are few of the most precious gifts of the nature. Without them presumption of existence of any living creature is not possible. Flora and fauna can't survive in absence of water and air. Thus, water and air are deeply associated with the human life, which mother earth provided in abundance, but human being explored and contaminated it for their own interest leaving the interest of humanity behind. In fact, for their survival every living creature on this earth requires suitable environment. We have been enacted a large number of laws for the protection of these resources.

It is well known fact that water is a scant resource, so a regulatory framework is much needed to regularise its sharing and distribution. Unfortunately, statutory water laws are primarily focused around irrigation, though it also includes a number of pre- and post-independence enactments in various areas. In this way water laws are flooded with enactments, but we have no comprehensive law to ensure the right to water.

Keywords: *Right to Water, Water Legislation, Water Laws*

Every civilized society recognized right to life as basic human right and most of the jurisdictions formally recognized it. Everybody requires basic amenities for his survival in the society with human dignity and these amenities, food, shelter and cloths, have been impartially associated with the right to life. All human rights are designed to achieve the basic object of the overall growth of every citizen with full human dignity. An of the civil, political, social and cultural rights enshrined in the Constitution of India or declared in Universal Declaration of Human Rights and various Conventions cannot be exercised without these basic human rights.

Air and water are very essential for the every living creatures of the nature including flora and fauna, without which life can't be imagined. Although Nature has given us these resources in abundance, but these are the most precious gifts of nature to the mankind. All living creatures on the mother earth have a right to environment in order to survive them. Various Laws have been enacted for the protection of these resources, but we have no comprehensive law to ensure the right to water.

Stockholm conference on Human Environment, 1972 was the first comprehensive effort "to protect the environment and the ecology of man". A special strategy were planned to protect the environment necessary for "the peaceful survival of the mankind as well as flora and fauna". In furtherance of this, governments of various countries took executive as well as legislative measures to protect the environment. Indian Government also followed this trend and enacted various laws. Article 48A and 51 A (g) were added in the Indian Constitution in order to protect and preserve the environment.

Due to a large population of over 1.2 Billion, India is facing scarcity of water in spite of the fact that it accounts 4 per cent of the water resources of the world whereas it has total land area of 2.45 per cent of the world. With the growing population, demand of water is certainly increasing in India and on account of limited availability of water it becomes a scarce national resource.

India has a long tradition of conservation and sharing of water¹, but we lost our water conservation structures and convert their lands into agricultural lands, so we are facing severe scarcity of water. Hon'ble Supreme Court also observed that "Unfortunately, people have forgotten the wisdom of our ancestors and that is why some

¹ Anupam Mishra, AAJ Bhi Khare Hain Talab, Gandhi Peace Foundation,

greedy people for their personal interest and to make money have filled up most of these ponds, tanks etc. and have constructed buildings thereon with the result that in most parts of India, there is a terrible water shortage and people are suffering terribly, particularly, in the summer season both in rural and urban areas."²

We are also facing disputes on exploration of our water resources. We have enacted various statutes including laws on water conservation, drinking water supply, fisheries and ferries, irrigation, floods, embankments, river water pollution, rehabilitation of evacuees and displaced persons.

Right to water is a fundamental right under the umbrella provision of Article 21 of the Indian Constitution as a fundamental right to life. Hon'ble Supreme Court held that "Water is the basic need for the survival of human beings and is part of the right to life and human rights as enshrined in Article 21 of the Constitution of India and can be served only by providing source of water where there is none. The resolution of UNO in 1977 to which India is a signatory, during the United Nations Water Conference resolved unanimously."³ it is well established proposition of law that the right to life is not confined to mere animal existence but extends to the right to live with basic human dignity. the High Court at Mumbai also in a verdict vide order dated 15 December 2014 directed Mumbai's local authority to make a policy to ensure the supply of water to slum dwellers, instead of fact that they were illegal inhabitants of those vicinities, stating that the Right to Water is an integral part of the Right to Life under Article 21 of the Indian Constitution. A.P High Court also observed that right to life includes "all enjoyment of life and its attainments and fulfilment" and the same are guaranteed by Article 21 of the constitution. Every gift of nature without which life cannot be enjoyed is subjected to reservation and protection. It also imposes liability on state to protect this precious gift of the nature for betterment of human species. The court further clarified that protection of environment is not only the duty of the every citizen as directed in the directive principles of state policy, but is also the obligation of all state organs including the courts.

the problem begins with the constitutional scheme right from the Government of India Act 1935, which give power to states to legislate on the issues related to regulate water supplies, irrigation and canals, drainage and embankments, water storage, hydropower and fisheries.

In India, water laws are generally included in the state list. Entry 17 of state list give exclusive powers of 'water supplies, irrigation and canals, drainage and embankments, water storage and hydropower'⁴. So, fisheries and power generation also the subject matter of state list. Hence, Union has no power to make laws on this basic use of water. However, Entry 56 of union list empowers the union to make laws on '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'⁵. In this way, Union has authority to make laws in relation to interstate waterways, Development plans of interstate rivers and river valleys in the public interest.

There are no restrictions on use of inter-state rivers, though the Union is empowered to make laws on certain issues including shipping on water ways and use of tidal and territorial water of sea. The Constitution also assign the authority to Union to make laws in relation to adjudication of inter-state disputes on issue of use of water, however, no substantive clause has been included in the entire constitution. Legislature in order to fill this constitutional gap enacted an act "the Inter-State Water Disputes Act 1956".

The act only gives the procedure to resolve the disputes between the states in reference to inter-state rivers, could not solved through negotiations. This Constitutional and legal framework imposes restrictions upon Union to make a law to ensure the supply of water to everybody as Union has no power to make laws on such issue.

The Constitution also doesn't specifically recognizes the Fundamental Rights to water, but the Courts through judicial pronouncements declared that the right to water is implied in the Right to life enshrined under Art. 21 of the Constitution. Article 39 (b) imposes liability on the state and mandates that "the State shall, in particular, direct its policy

² **M.K. Balakrishnan & Ors. Vs. Union of India & Ors.,**

³ Narmada Bachao Andolan v. Union of India, (2000) 10 SCC 664

⁴ Entry 17 of State list of 7th Schedule, Constitution of India

⁵ Entry 56 of Union list, 7th Schedule, Constitution of India

towards securing that the ownership and control of the material resources of the community are so distributed as best to subserve the common good.” Unfortunately, Union has no authority to ensure the compliance of the constitutional mandate of Art. 39 (b).

The Constitution also casts a fundamental duty on every citizen of India “to protect and improve the natural environment including forests, lakes, rivers, wild life and to have compassion for living creatures” under Article 51-A (g).

The right to water is not directly derived from the right to life and personal liberty, but In *Subhash Kumar v. State of Bihar*⁶, Hon’ble Supreme Court declared that “right of enjoyment of pollution free water and air for full enjoyment of life” is part of right to life. Further, the Supreme Court directly connected the Right to water with the Article 21 in the *Sardar Sarovar* case and clarified that “the water is the basic need for the survival of human being and is part of right to life. While the recognition of a fundamental right to water by the courts is unequivocal, its implementation through policies and acts is not as advanced.”

Constitutional mandate as derived by Supreme Court clarifies that Right to water is a fundamental Right, thus state is under obligation to provide the water to everybody for the basic human need. Unfortunately, state fails to cop up with these obligations. All the laws enacted in reference to water are regulatory in nature, but none of them creates any obligation upon state to fulfil the Constitutional mandate. In fact state is not under legal obligation to ensure the supply of adequate quantity of water.

In *P.R. Subhash Chandran v. Government of A.P*, the A.P. High court held that "under the constitution, the role of the State to provide every citizen with adequate clean drinking water and to protect water from getting polluted is not only a fundamental directive principle in the governance of the state but is also a penumbral right under Article 21 of the constitution of India".

So, the Constitution makers left a wide scope to create the express right to water for every citizen, not only in the Directive Principles but also gave the wide scope to the right to life and personal liberty.

Water act also castes duty upon states, specifically state boards and local authorities. Section 17(1)(a) of the Water Act, describes the function of the State Board and assigns a liability to prepare a comprehensive programme to prevent, pollution of streams and wells in the State and even to control and abatement of them. Responsibility to ensure the execution of such plans is also castes upon the boards. In this way legislature shows the concern of legislature to maintain the quality of water and supply of requisite quantity to be laid down. Undoubtedly, the State Governments and local authorities including Municipal and Panchayat authorities. It also includes other local authorities like the Area Development Authorities and/or Special Area development authorities etc. having legal authority for the same and those authorities are duty bound to protect the water-bodies and improve them as a part of environment. Every person has right to safe drinking water and up to that extent state governments and the local bodies are responsible to ensure the supply. The State being public trustee, is under a legal obligation to protect all natural resources meant for public use, including Rivers and lakes. The obligation of states to preserve water sources is of a positive nature requiring the State including the Area Development Authorities and the Local Bodies to protect our common heritage of water bodies including lakes, ponds, reservoirs and streams and to rejuvenate and preserve them quantitatively by harvesting rainwater and qualitatively by prescribing and enforcing standards of their water.

To arm these authorities, legislature has enacted numerous statutes with the power to take appropriate steps for the preservation of these natural resources and prevent their abuse. Apex Court in *M.C. Mehta v. Kamal Nath*⁷ clearly spelt out the duty of the State in this regard. It was also clarified that every citizen is also duty bound to protect the natural environment. in *M. C. Mehta v. Union of India*⁸, The necessity to limit the construction activities in the close vicinity of the two lakes was recognized by the Supreme Court.

The most unfortunate thing is the after passing the decades, the laws could not implemented properly, so as to protect the water bodies and to prevent their abuse only on the account of apathy of the authorities responsible to take positive steps for the same. It is evident that court through various orders had mobilized the system to take

⁶ AIR 1991SC420

⁷ AIR 2002 SC 1515

⁸ AIR 1996 SC 1977

appropriate actions, but such actions remained limited to the compliance of the court order, but the spirit of the law still waiting for the implementation in true sense. Although, the orders made by the Courts in a large number of petitions have, however, sensitized the authorities and also forced them to take at least some action. response of state authorities after these orders is generally positive and in most of the cases positive steps have been taken, which raised distinct ray of hope that if states are serious to protect the surface water, and rejuvenation and reinforcement of surface water bodies, may in near future glitter on the surface waters of the water-bodies that are promised to be reinforced and preserved.

Undoubtedly, there are a large number of laws, rules and regulation to make up water law, but a large number of rules are also made to regulate the water, written or even unwritten. This situation creates the multiplicity of written or unwritten arrangements to govern and regulate the access to and use of water for domestic purposes or irrigation. India's complex caste structure also contributes in these local laws related to distribution of drinking water, though the system is illegal, but in existence in a large area. The water sources run in many cases along caste lines even though other rules of access also exist. So the rules of access and control of water resources, be it drinking or irrigation, have often evolved over long periods of time as local customary laws but are often unwritten and most of the time the legal system doesn't formally recognised them. Resultantly, society runs parallel water management system not recognised by law. Another consequence of the local laws is that they are generally not based on any legal principle or rational, so lacks in uniformity.

It is universally accepted fact that the multiplicity of rules creates hurdles in the implementation of the law. We have local customary laws other than the state and union legislations and rules. In 1873 we started the law making for utilization of water resources, but after passing one and a half century, we still have no competent statutory authority to formulate and implementation of water policy.

Another important drawback of our water legislation is in our Constitution, where most of the time water is the subject matter of state list, hence, laws made for the utilisation and management of water resources are mostly state laws. Another aspect of these laws is that all these laws were made to utilisation of water resources, rather than protecting them. Water conservation is not priority area according to laws because at the time of the enactment of these laws, environmental protection was not the matter of serious concern and scarcity of water was an area, nobody thought about.

Sharing of river water among the state is another grey area, which requires proper consideration of legislature. These disputes have not been settled, even after prolonged legal battles, and now scarcity of water is giving raise to these issues. Narmada Water dispute between Madhya Pradesh, Gujrat, Maharashtra and Rajasthan, Kauveri water dispute between Karnatak, Tamilnadu, Kerala and Andhra Pradesh are some of them.

Now it is high time to rethink about our water policy in light of globalisation, new technical social and economic development. Demand of water for industries has been substantially increased and at the same time water pollution is also creating serious problems. Every state is making every possible effort to attract the investment, and water is one of the decisive factors for industrial investment. With the present constitutional framework it will be difficult to solve complex issues related to water.

Water is the subject matter office state list in Indian Constitution which creates problems to the law making process which governs by the state legislatures and the problem of variation in law making is usual things. The coordination of various state laws is not an easy task and contradictions in various history class creates serious water disputes among the street moreover the coordination between various agencies responsible for the protection of water is also becoming difficult. Even once employee is agency Central pollution control is also facing difficulties and implementing the water safety standard throughout the nation.

One sustainable solution to this problem is to include the subject water in concurrent list in place of state list if not possible to include in the central list. This step will provide the necessary powers to the union government or Union legislature to make appropriate laws looking into conditions of various systems. though the distribution of water within States maybe the subject matter of the states but every state law should be in conformation with water policy made by the union government under a constitutional authority. The present water policy is made by the central government but without constitutional mandate. If water becomes the subject matter in the union list or even the concurrent list the central government will acquire the power to make appropriate water policy which constitutional mandate and its implementation would be easier and union will

Generally speaking, although there is definite trend towards cooperative federalism and integrated approach, in view of the mammoth dimension of the problem, its network should be widened and its full potentiality should be tapped. Many countries such as Brazil and South Africa have adopted water laws that seek to provide a comprehensive regulatory answer to the problems identified. While the adoption of a comprehensive federal water legislation is not a precondition to ensure that water law achieves its social, human rights and environmental goals, this would constitute an appropriate starting point for ensuring proper management and conservation of our water resources.

Using the provisions of Art 252 and Art 263 can bring about the legislative competency for such an enactment. The parliament can also empower themselves by virtue of Article 249 to bring about an effective Central Statutory Regulation in order to effectively manage and conserve India's water resource. Thus, India can learn from the experiences of countries like Australia where the Department of Environment and Conservation, a Central body has been effective in forming policies and the guidelines for their implementation for the whole nation.

There is no meaning to the right to live without right to water. If right to water is not properly implemented, other fundamental rights such as right to health, right to shelter, right to air, right to good environment, etc; would also become futile.

