

WATER MANAGEMENT AND THE LEGAL DIMENSIONS

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INTRODUCTION

Water is power. Professor Upendra Baxi has rightly remarked that whoever has control over water has control over the lives of other humans, animals, birds, plants and trees. The importance of water can be gauged from the fact that life itself originated in water itself and is indispensable to the survival of all species that inhabit this world. Loren Eiseley has put it rather eloquently that if there is magic on this planet, it is contained in water.

Despite its seemingly abundant quantity, the reality is that water is in fact quite a scarce resource. Therefore, its sharing and distribution require a regulatory framework which is brought about by written laws as well as traditional and customary practices.

POSITION AT THE INTERNATIONAL LEVEL

At the international level, for many years, the water law was limited to primarily treaties regarding navigation in international waters. This has been extended to many non-navigational areas over the years but the bulk of international law on water still relates to the navigational aspect. The only multilateral treaty concerning non-navigational uses of international watercourses was adopted in 1997 [Convention on the Law of the Non-navigational Uses of International Watercourses]. The basic principle it proposes for using international watercourses water is equitable and reasonable utilization. Other than the UN Convention of 1997, there exist a number of international treaties that are directly or indirectly related to water such as the Desertification Convention, the UNECE Convention on impact assessment and the Convention on wetlands of international importance (Ramsar Convention). Even though the International Convention On Civil And Political Right, 1966 does not directly mention the right to water but it is an implicit part of the right to life. Article 11 which deals with the right to an adequate standard of living and Article 12 which states the right to health are also related to the right of water. Effectively all the states that have been signatory to the International Convention on Economic, Social and Cultural Rights have recognized in their political declarations the right to an adequate standard of living includes water and sanitation. Therefore, they need to undertake measures to enforce the right to water. The first international convention that explicitly mentioned the right to water and sanitation was the Convention on the Elimination of All Forms of Discrim-

ination Against Women, 1979 which focused on the women's right to non discrimination and participation. Article 14.2(h) specifies that women have the right to enjoy adequate living conditions, particularly in relation to housing, sanitation, electricity and water supply.

Similarly, Article 24 of the Conventions on the Rights of Child, 1989 which gives the child right to health, places an obligation on the state to enforce this right by providing adequate nutrition and clean drinking water. The 2002 General Comment No.15 interpreted the convention on economic, social and cultural rights and confirmed the right to water in international law. It set out that the 'human right to water entitles everyone to sufficient, safe, acceptable, physically accessible and affordable water for personal and domestic uses.'

Finally in 2010, right to access to water acquired the status of a basic human right by the United Nations General Assembly by Resolution 64/292 along with the right to sanitation.

POSITION AT THE NATIONAL LEVEL

India lacks an umbrella framework to regulate the various dimensions of water. The water law in India at present is a plethora of statutory regulations, common law principles as well as judicial decisions. This diversity in approaches has times proved to be contradictory. For instance, the common law principle which vests the ownership of ground water with the landowners is incompatible with the legal framework based on human right to water and the need to distribute it equitably. These principles came to a stand off in the much significant Plachimada case. In this case in Perumatty Panchayat refused to renew the licence of the Coca-Cola company on account of the exploitation of natural resources that had harmful effects on public health as well as agricultural yield. The court discussed many principles like the public trust doctrine, the polluter pays principle as well as the duties of the Panchayat. It was a tug of war between the right to clean water on one hand the right to ground water on the other. While the company withdrew its operations willingly yet this case threw open the Pandora box of problems related to the laws governing water. The image, therefore, that emerges is that of a multiplicity of principles and rules, a multiplicity of instruments and a lack of coordination between them. The domain of laws related to water is quite vast and the majority of statutory laws in this field are related to irrigation. Water pollution, conservation, drinking water supply, fisheries, etc are other areas where legislations have made their contribution. In India the water law is generally state based. Dating back to the Government of India Act, 1935, the states have been given the power to legislate in this area and regulate the supply of water, irrigation, drainage, storage, etc.

JUDICIAL APPROACH

In India, the right to water has been developed through judicial intervention. The judiciary is the architect of the right to water in India. Even though there is no explicit provision providing the right to water in India, but the articles 21, 48 and 51(g) of the Indian Constitution have been interpreted by the Indian judiciary to contain within themselves the right to water.

An important case in this regard is that of *Attakayya Tongal v. Union of India*. The petitioner in this claimed that a scheme for pumping up ground water for supplying potable water to the Lakshwadeep Islands in the Arabian Sea would upset the fresh water equilibrium, leading to salinity in the available water resources and causing more long-term harm than short-term benefits. The Kerala High Court, in its judgement, held that the administrative agency cannot be allowed to function in such a manner as to make inroads into the fundamental right under Article 2. It held that the right to sweet water and the right to free air are the attributes of the right to life, for these are the basic elements which sustain life itself.

In *Subhash Kumar v. State of Bihar*, the Supreme Court recognized that the right to life 'includes the right of enjoyment of pollution free water and air for full enjoyment of life.' The Supreme Court in the *Narmada Bachao Andolan* case while upholding the decision of the Indian government to construct 3000 dams over the river Narmada has stated in clear words 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 the right to healthy environment and to sustainable development are fundamental human rights implicit in the right to life." As such the right to access to water is an implicit part of the fundamental right to life enshrined under Article 21 of the constitution. The Andhra Pradesh High Court in *P.R Subhash Chandran v. Government of A.P* has held that under the Constitution the duty 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.

POSITION IN JAMMU AND KASHMIR

J&K is home to four perennial rivers-Indus, Chenab, Ravi and Jhelum. However, despite the abundance of resources the state has witnessed a scarcity of water for the ever increasing population of the state. The state of Jammu and Kashmir has enacted The Jammu and Kashmir State Water Resources (Regulation & Management) Act, 2010 (Act No. XXI of 2010) which has come into force with effect from 10.11.2010. It is a comprehensive

legislation that attempts to consolidate the law relating to the use of water. It seeks to amalgamate the law relating to use of water, the measurement, creation, control and management of works with respect to water storage, preservation and protection, the irrigation, water supply, drainage, flood control and prevention, the improvement in the flow of water, the protection and improvement in the physical integrity of water courses, lakes and springs, the safety and surveillance of dams, the establishment of the State Water Resources Regulatory Authority for regulating water resources, ensuring judicious, equitable and sustainable management, allocation and utilization of water resources, fixing the rates for use of water and matters connected therewith or incidental thereto. Section 4 of the Act asks the state to frame the state water policy which has been recently adopted by the state. However, the implementation of the Act has been dismal. Enacted in 2010, the implementation of the Act has suffered from major setbacks. According to Section 4 of this Act, the Government was supposed to prepare State Water Policy and Plan for effective development, management, planning, utilization and monitoring of water resources in the State.

However, this provision of the law failed to receive due attention of all the concerned authorities including Jammu and Kashmir Water Resources Regulatory Authority for several years. Many public interest litigations were filed in the High Court of J&K seeking the strict implementation of the Act and the notification of the water policy but the said task took an unreasonably long amount of time. The state water policy was finally notified on October 25, 2017 by the Department of PHE, Irrigation and Flood Control but its implementation is yet to see the light of the day because of a lack of coordination between the various departments involved. Infact, this lack of coordination between the various departments dealing with water supply and protection of water resources has been proved to be the Achille's heels of this particular Act.

CONCLUSION

To conclude one can say that the right to water should be recognized as a human right in form and spirit. Water should remain as a public good and not a commodity and the doctrine of public trust should be extended to the ground water resources. The state legislations should be designed so as to ensure the accessibility, availability and affordability and quality of water at the grassroot level and should be properly implemented.

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