



International Environmental
Law Research Centre

THE RIGHT TO WATER

AN OVERVIEW OF THE INDIAN LEGAL REGIME

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in Eibe Riedel & Peter Rothen eds., *The Human Right to Water*
(Berlin: Berliner Wissenschafts-Verlag, 2006), p. 65-81

This paper can be downloaded in PDF format from IELRC's website at
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I. INTRODUCTION

The situation in India as regards availability of water is a paradox. The country accounts for 2.45 per cent of the total land area and 4 per cent of the water resources of the world. Nevertheless, water is a scarce national resource with demands on it increasing on account of a growing population of over one billion.¹ Much of the available surface water and ground water, estimated at 1869 billion cubic metre is presently unable to be harnessed for use on account of topographical and other constraints.² The World Water Development Report, 2003 indicates that in terms of availability of water, India is at the 133rd position among 180 countries and as regards the quality of the water available, it is 120th among 122 countries.³ Of the present water usage in India, 92 per cent is devoted to agriculture, around 3 per cent is used by industries and only 5 per cent for domestic purposes like drinking water and sanitation.⁴ The picture gets complicated by the other constraints. 40 million hectare of land in the country is flood prone and an average, floods affect an area of around 7.5 million hectare per year. One-sixth area of the country is drought prone.⁵ Water pollution is a serious problem with 70 per cent of India's surface water resources and an increasing number of its ground water reserves standing contaminated by biological, toxic organic and inorganic pollutants.⁶ The National Water Policy advocates a participatory approach to management of water resources and non-conventional methods for utilization of water like artificial recharge of ground water and traditional water conservation practices like rain water harvesting.⁷

With water being a scarce resource, its sharing and distribution requires a regulatory framework which is brought about through not only written laws but also traditional and customary practices. However, this paper is confined to giving a broad overview of the law relating to water and the right to water in India with reference to the constitutional and statutory provisions and the decisions of the courts. The piece begins with outlining the specific provisions of the Constitution of India and some of the significant statutes that help understand the position of the right to water. It proposes to discuss some of the decisions of the courts in cases involving interpretation of the statutory provisions. A brief analysis of the prominent issues that arise and the response to those issues is attempted. The concluding portion seeks to highlight issues that require immediate attention from the perspective of the Millennium Development Goals relevant to the right to water and the requirement of General Comment 15.

II. CONSTITUTIONAL AND STATUTORY FRAMEWORK

A plethora of constitutional and legal provisions govern the availability and distribution and control of water. The Constitution of India recognizes the essential tenet of equal access to water. Article 15(2) of the Constitution explicitly states that no citizen shall 'on grounds only of religion, race, caste, sex, place of birth or any of them' be subject to any disability, liability, restriction or condition with regard to 'the use of wells, tanks, bathing ghats.'⁸ Article 21 which speaks of the right to life⁹ has been liberally interpreted by the Indian Supreme Court to include all facets of life. The directive principles of state policy (DPSP), which the Constitution in Article 37 declares to be non-justiciable,¹⁰ recognizes the principle of equal access to the material resources of the community. Article 39 (b) mandates that 'the State shall, in particular, direct its policy towards securing that the ownership and control of the material resources of the community are so distributed as best to subserve the common good.'

1 The present figures of India's population is around 1.1 billion, with a population growth rate of 1.14 per cent: India Data Profile at the website of the World Bank Group available at <http://devdata.worldbank.org> visited on 10th December 2005.

2 Para 1.2 of the National Water Policy 2002 of the Government of India, Ministry of Water Resources available at <http://wrmin.nic.in/policy/nwp2002.pdf>, visited on 10th December 2005.

3 *Indian Juridical Review*, inaugural issue on Water Resources Law Vol-I: 2004, p. ix.

4 'Troubled Waters: Developing Water, Sustaining Livelihoods', report prepared by the Development Alternatives, a CSO, at <http://www.devalt.org/water/waterinindia/issues.htm#/troubled%20Waters>.

5 Para 1.5 of The National Water Policy, *above* note 2.

6 'Troubled Waters: Developing Water, Sustaining Livelihoods', *above* note 4.

7 Paras 3.2 and 12 of The National Water Policy 2002, *above* note 2.

8 The issue of the socially disadvantaged classes in India being denied access to water and water sources within the community was a prominent feature of the Indian freedom struggle and was reflected in the debates around the framing of this provision that took place in the Constituent Assembly.

9 Article 21: Protection of life and personal liberty.

10 Article 37 states that the provisions in Part IV of the Constitution (which set out the DPSP) 'shall not be enforceable by any court, but the principles therein laid down are nevertheless fundamental in the governance of the country and it shall be the duty of the State to apply these principles in making laws'.

Article 51-A(g) 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.’

The legislative powers are distributed between the Parliament of India and the Legislative Assemblies of the different States.¹¹ Under Article 245 of the Constitution, Parliament makes laws for the whole or any part of the country and a legislature of the State for the whole or any part of the territory of the State. The topics of legislation on which the Parliament has exclusive powers to make laws are set out in List I (Union List) of the Seventh Schedule and the topics over which the State legislatures have exclusive powers are set out in List II (State List) of the Seventh Schedule. List III is the ‘concurrent List’ enumerating the topics over which both the Parliament and State legislatures can make laws. Entry 56 in the Union List pertains to ‘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.’ In exercise of this power, the Parliament enacted the River Boards Act, 1956, although this law has remained largely in operative.¹² The aspect of resolving dispute between States in relation to sharing of river waters finds place in Article 262 of the Constitution which envisages the creation of an exclusive tribunal for the purpose. Accordingly, the Parliament has enacted the Inter-State Water Disputes Act, 1956.

The Parliament can, under Article 252, make laws even on topics in respect of which it has no powers, provided the legislatures of two or more States resolve that Parliament should make such law. Thus, we have the Water (Prevention and Control of Pollution) Act, 1974, which was a law on a topic relatable to Entries 6 and 17 of the State List.¹³ The justification for a central law to tackle the growing problem of pollution of rivers and streams was traced to the inadequate and unsatisfactory nature of local laws. In the context of water pollution, another significant central legislation is the Environment (Protection) Act, 1986, under which we have the notifications issued by the Ministry of Environment and Forests in exercise of the powers under Section 3 of the said Act, laying down the regulatory framework for activities along the vast coastline of India [the Coastal Regulation Zone (CRZ) Notification]. The Government of India has also set up by a notification under this very statute the Central Ground Water Authority, to regulate the existing indiscriminate use of ground water in various parts of the country and in particular the major urban metropolises.

The legislatures of the different States have sought to enact a large number of statutes that touch upon the various aspects of the control, regulation and distribution of water. Thus, we have an elaborate network of laws relating to canals and irrigation,¹⁴ use of water sources,¹⁵ water sewerage and drainage,¹⁶ and ground water.¹⁷ The aspects of collection of taxes and cesses on the use of water are also covered by legislations enacted by both Parliament as well as State legislatures.¹⁸

The common feature in many of these legislations is that they adopt a command and control model under which an authority is setup for granting permissions for use or extraction of water from the identified source.¹⁹ The power to grant licenses spawns other bureaucratic mechanisms which facilitate red-tapism and corruption in the chain of command.²⁰ The model of regulation and control in these legislations runs contrary to the desired objective of decentralized and community based control of water and the right to water.

The recognition in the Constitution of the need for a decentralized structure of governance at the level of *panchayats*²¹ came about with the Constitution (73rd) Amendment Act, 1992, by which the panchayat as an institution

11 As at present, there are 28 States and 7 Union Territories in India.

12 Ramaswamy R.Iyer, ‘Towards a Re-ordering of Water Law in India’, 1 *Indian Juridical Review* 18 (2004).

13 Entry 6 in the State List reads: ‘public health and sanitation; hospitals and dispensaries.’ Entry 17 reads: ‘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.’

14 The Northern India Canal and Draining Act, 1873, The Bombay Irrigation Act, 1879, Karnataka Irrigation Act, 1965, The Rajasthan Irrigation and Drainage Act, 1954.

15 The Kumaon and Garhwal Water (Collection, Retention and Distribution) Act, 1975.

16 The Utter Pradesh Water Supply and Sewerage Act, 1975.

17 Madras Metropolitan Area Ground Water (Regulation) Act, 1987, Kerala Ground Water (Control and Regulation) Act, 2002, Karnataka Ground Water (Protection and Regulation for Drinking Water) Act, 2003 are some illustrations.

18 The Water (Prevention and Control of Pollution) Cess Act, 1977.

19 For a critical evaluation of the legislation on the use of ground water in the southern states of India see P.Ishwara Bhat, ‘A Comparative Study of Ground Water Law and Policy in South India’, 1 *Indian Juridical Review* (2004), 25.

20 *Id* at 35.

21 The panchayat is an agglomeration of villages, which are the lowest in the administrative hierarchy.

of self-government, comprised of elected members, was formally recognized.²² The provisions introduced by this amendment provide for administrative and legislative powers of the panchayat. Under Article 243G, the legislature of a State can make a law to empower the panchayat to prepare plans 'for economic development and social justice' apart from other matters specified in the Eleventh Schedule to the Constitution. The topics in the Eleventh Schedule include minor irrigation, water management and watershed development (Entry 3), fisheries (Entry 5) drinking water (Entry 11), waterways (Entry 13), health and sanitation (Entry 23), public distribution system (Entry 28) and maintenance of community assets (Entry 29). However, this scheme of decentralization of powers is yet to be effectively operationalised. It is next proposed to examine the role of the judiciary in interpreting the provisions of the Constitution in the context of the right to water as this has had a significant impact on the recognition and development of that right.

III. JUDICIAL DETERMINATION OF THE RIGHT TO WATER

The judiciary in India has played an active role in expanding the scope and content of individual and collective rights of citizens, in both the civil and political spheres as well as in the economic, social and cultural spheres. The Constitution of India gives powers to the High Courts and the Supreme Court of India to issue writs to strike down unconstitutional legislative and executive action.²³ In *Francis Coralie Mullin*²⁴ the court declared:

'The right to life includes the right to live with human dignity and all that goes with it, namely, the bare necessities of life such as adequate nutrition, clothing and shelter and facilities for reading, writing and expressing oneself in diverse forms, freely moving about and mixing and commingling with fellow human beings. The magnitude and components of this right would depend upon the extent of economic development of the country, but it must, in any view of the matter, include the bare necessities of life and also the right to carry on such functions and activities as constitute the bare minimum expression of the human self.'²⁵

More recently, the context of the legality and validity of the decision of the Government of India to construct over 3000 large and small dams on the river Narmada, the Supreme Court of India, while upholding that decision, 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.'²⁶

The Supreme Court of India has, with a view to addressing issues concerning environmental pollution including water pollution, the denial of the rights to health, education, food innovated the device of public interest litigation (PIL), thus dispensing with the rigid rules of filing of petitions by affected parties and in the prescribed format.²⁷ Apart from expanding the content of the right to life as including the right to water, the court has, in the context of water pollution, mandated the cleaning up of water sources including rivers,²⁸ the coastline²⁹ and even tanks and wells.³⁰ The concern over pollution of ground water by unregulated discharge of effluents has led the court to

22 Part IX of the Constitution deals with panchayats and Article 243B mandates that 'there shall be constituted in every State, panchayats at the village, intermediate and district levels in accordance with the provisions of this Part'.

23 Under Article 13 of the Constitution, any enacted law that is inconsistent or contrary to the fundamental rights enumerated in Part III of the Constitution would be liable to be declared as void. The Supreme Court of India, under Article 32 of the Constitution, and each of the High Courts, under Article 226 of the Constitution, can issue writs to declare the unconstitutionality of statutes that are challenged by way of Writ Petitions.

24 *Francis Coralie Mullin v. The Administrator, Union Territory of Delhi* 1981 (2) SCR 516.

25 *Ibid.* p.529 B-F.

26 *Narmada Bachao Andolan v. Union of India* (2000) 10 SCC 664 at 767.

27 See generally, Ashok Desai and S. Muralidhar, 'Public Interest Litigation: Potential and Problems' in B.N. Kirpal *et al.*, (eds.) *Supreme But Not Infallible: Essays in Honour of the Supreme Court of India* (Oxford, 2000) pp. 159- 192.

28 For orders relating to the pollution on the river Ganga, see *M.C. Mehta v. Union of India* AIR 1988 SC 1037, 1115 and (1997) 2 SCC 411. For an important decision regarding closure of a hotel resort which was polluting the Beas river in Himachal Pradesh, see *M.C. Mehta v. Kamal Nath* (1997) 1 SCC 388.

29 *S. Jagannath v. Union of India* (1997) 2 SCC 87.

30 In *Hinch Lal Tiwari v. Kamala Devi* (2001) 6 SCC 496, the court said (at 501): 'It is important to notice that the material resources of the community like forests, tanks, ponds, hillock, mountain etc. are nature's bounty. They need to be protected for a proper and healthy environment which enables people to enjoy a quality of life which is the essence of the guaranteed right under article 21 of the Constitution of India.'

issue mandatory directions for clean up by the polluter and restitution of the soil and ground water.³¹ The court has also applied the ‘precautionary principle’ to prevent the potential pollution of drinking water sources consequent upon the setting up of industries in their vicinity.³² The court has recognized that water is a community source which is to be held by the State in public trust in recognition of its duty to respect the principle of inter-generational equity. In *M.C. Mehta v. Kamal Nath*³³ the court declared that ‘our legal system – based on English common law – includes the public trust doctrine as part of its jurisprudence. The State is the trustee of all natural resources which are by nature meant for public use and enjoyment. Public at large is the beneficiary of the seashore, running waters, air, forests and ecologically fragile lands. The State as a trustee is under a legal duty to protect the natural resources. These resources meant for public use cannot be converted into private ownership’.

Although there is in India a fairly developed body of case law that recognizes the right to water and the need for the State to preserve and protect that right, there are a number of barriers that require to be overcome before the effective and equal access to water to every citizen is made a reality. The following sections seek to discuss some of these impediments to the realisation and enforcement of the right to water.

IV. ASSERTING THE RIGHT TO WATER: CONTROL AND CONTESTATION

The sharing of river waters in India between the States that constitute the Republic has given rise to long drawn legal battles. Among the early disputes regarding the sharing of waters was the one between the States of Gujarat, Madhya Pradesh, Maharashtra and Rajasthan over the sharing of the waters of the river Narmada. The dispute was referred to the Inter-State Water Disputes Tribunal (IWDT) constituted under Article 262 of the Constitution and at the end of a decade long determination, an award was made. This led to further disputes and a final award was made in the year 1977.³⁴ The disputes between the States of Tamil Nadu and Karnataka over the sharing of the waters of river Cauvery has also been referred to a similar tribunal in the year 1992, but no award has yet been pronounced despite continuous hearings spread over 13 years.³⁵ The issue has been so highly sensitive and politically charged that it has led to riots and consequent loss of life and property, in both the States.³⁶ Likewise the disputes between Punjab, Haryana and Himachal Pradesh over the sharing of the waters of the Ravi and Beas rivers has proved problematic despite the award of the tribunal.³⁷ Thus, the rights of farmers to river water for irrigation is largely made to depend on the preparedness of the States to respect the rule of law. The above disputes, which largely remain unresolved, point to the grim reality that the States prioritize political expediency over their obligations to honour their commitments under the Constitution.

At the community level, there is a conflict between the States on the one hand and the village level administrative bodies on the other over the control of water sources. Such conflicts have given rise to serious concern that the constitutional scheme of decentralization of power over water sources may in fact be rendered unworkable by the States. In 1985, a non-governmental group in the Alwar district in Rajasthan, Tarun Bharat Sangh, attempted to revive the traditional water harvesting methods by erecting earthen check dams called *Johads*.³⁸ The water conserved in these check dams could be used for irrigation, drinking and domestic purposes. The decisions regarding constructions of *Johads* and their maintenance is taken by an informal body of villagers themselves with no

31 *In Re: Bhavani River-Shakti Sugars Ltd.* (1998) 6 SCC 335. In *Indian Council for Enviro-Legal Action v. Union of India* (1995) 3 SCC 77, a compensation package was worked out for farmers affected by their only source of irrigation, a river in Andhra Pradesh, was polluted by discharge of untreated effluents by industries alongside its banks.

32 See *A.P. Pollution Control Board v. Prof. M.V. Nayudu* (1999) 2 SCC 718 and *A.P. Pollution Control Board (II) v. Prof. M.V. Nayudu* (2001) 2 SCC 62.

33 Note 28 above.

34 For a detailed narrative, see *Narmada Bachao Andolan v. Union of India*, n. above 26.

35 For an early manifestation of the problem leading to the reference to the tribunal, see *Re. Cauvery Water Disputes Tribunal* (1993) Supp 1 SCC 96.

36 For orders of the Supreme Court directing the setting up of tribunals in both the States determining of claims of compensation by the victims of the riots, see *Ranganathan v. Union of India* (1999) 6 SCC 26.

37 The refusal by the State of Punjab to honour the award of the tribunal led to the State of Haryana having to approach the Supreme Court for its enforcement; *State of Haryana v. State of Punjab* (2004) 12 SCC 673.

38 For a detailed narrative see Nemika Jha, ‘Traditional Minor Irrigation Mechanisms: State Versus Community Conflicts’, 1 *Indian Juridical Review* (2004), 244.

participation of the government. This successful experiment was attempted to be disrupted by the irrigation department of the State government issuing a notice to Tarun Bharat Sangh claiming that one of the *Johads* built in the village of *Lava Ka Baas* was technically unsafe and illegal and therefore required to be demolished.³⁹ The protests by the NGO were able to prevent demolition but the State insisted on deepening the spillway to an extent that would make the *Johads* redundant.⁴⁰ The tensions over control and contestation pose a serious challenge to decentralization of water governance structures.

The State can also legislatively avoid any contractual obligation it might have to assure availability of fixed quantities of water for irrigation purposes to cultivators. This was demonstrated in the context of the Parambikulam Aliyar Project undertaken by the State of Tamil Nadu to ensure supply of water for agricultural operations in some of the areas of Coimbatore district. Although the State government entered into an agreement with the cultivators to assure supply of a minimum quantity of water for irrigation purposes, it made a legislation ten years later seeking to expand the area over which the said water for irrigation purposes would be made available. The challenge by the cultivators to the legislation failed with the Supreme Court holding that the cultivators did not have 'any pre-existing right and in any case, even if that right had been established, the State legislature could certainly have altered the same with a view to provide benefit to a larger area and more people.'⁴¹

V. ISSUES AROUND THE RIGHT TO WATER

Among the concerns regarding providing of equal access to water at the community level is the prevalent caste structures, which have institutionalized a hierarchical system of graded inequality. Dominant denominations at the community level can prevent the socially disadvantaged groups from accessing common water resources. Worse still, even where the water sources for the disadvantaged groups are segregated, the dominant group can, as a measure of reprisal, render it unusable. A statutory acknowledgement of this practice can be found in s.3 (xiii) of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 which makes a punishable offence the act of a person, not being a member of a Scheduled Caste or Scheduled Tribe, who 'corrupts or fouls the water of any spring, reservoir or any other source ordinarily used by the members of the Scheduled Castes or Scheduled Tribes so as to render it less fit for the purpose for which it is ordinarily used.'⁴² Despite this statutory recognition, the conflicts over the use of water persist.⁴³

The traditional water managers at the village level find themselves marginalized with the recent slew of legislation by the States failing to provide any role for them. These traditional managers are called by different names: in Maharashtra they are the *Havaldar*, *Jagliya* or *Patkari*, in Ladakh the *Churmun*, in Tamil Nadu, Andhra Pradesh and Karnataka, they are known as *Neerkattis*. Their essential function was to apportion water among cultivators accessing a common water resources, be it a tank or a river. It is unfortunate that both the Andhra Pradesh Farmers Management of Irrigation Systems Act, 1997 and the Tamil Nadu Farmers Management and Irrigation Systems Act, 2000 do not provide for any role for the *Neerkattis* even while they envisage the creation of associations of water users at the village level.⁴⁴

39 Recourse was had to Sections 55(3) and 58(2) of the Rajasthan Irrigation and Drainage Act, 1954.

40 A Committee of Experts constituted to examine the issue concluded that the notice served on Tarun Bharat Sangh was not legal since the Act invoked did not apply to *Johads*. It negated the allegation that the *Johad* could be technically unsafe. It emphasized a need to formulate guidelines for improved community based water management efforts: Centre for Science and Environment, *Jal Swaraj* Report of the Technical, Legal and Administrative Issues Concerning the *Johad* in *Lava Ka Baas* (2001).

41 *Parambikulam A.P.O.A. Association v. State of Tamil Nadu* (1997) 7 SCC 626 at 632.

42 This offence is punishable with imprisonment for a time which shall not be less than six months but which may extend to five years and with fine. A similar provision is s. 4 (iv) of the Protection of Civil Rights Act, 1955 which renders punishable the act of a person who, on the ground of 'untouchability', enforces against any other person any disability with regard to 'the use of, or access to, any river, stream, spring, well, tank, cistern, water-tap or other watering place, or any bearing ghat'. This is punishable with imprisonment for a term of not less than one month and not more than six months.

43 In *State of Karnataka v. Appa Babu Ingale* (1995) 4 Supp. SCC 469, the Supreme Court of India affirmed the conviction of the accused who had obstructed the socially disadvantaged persons from taking water from a bore well which was drilled at a distance of 15 ft. from a segregated area. The conviction was under s. 4 (iv) of the Protection of Civil Rights Act, 1955.

44 See 'Apt Arrangers', *Down to Earth*, 31 October 2003, p. 26.

There are other users of water like fisherfolk, whose livelihoods face a crisis on account of the changing priorities of the State. One instance is the conflict between environmentalists on the one hand and communities living around a protected forest area on the other over the issue of traditional access of such communities to forest resources. This is illustrated by the decision of the Supreme Court in *Animal and Environment Legal Defence Fund v. Union of India*.⁴⁵ Certain environmental activists and lawyers questioned the decision of the Chief Wildlife Warden, Forest Department, Government of Madhya Pradesh in granting 305 fishing permits to tribals residing in the outskirts of the Pench National Park for fishing in the Totladoh reservoir situated within the Park. These tribals who had earlier been residing within the park, had been evicted and relocated outside it after the park came to be notified under s. 35 (1) of the Wildlife (Protection) Act, 1972 for being declared as a National Park.⁴⁶ The government defended its decision to grant permits on the ground that after displacement, the tribals were yet to be rehabilitated and that they had no other means of livelihood. It said 'If they are not given fishing permission a serious problem of feeding and supporting their families will arise.'⁴⁷ Further, the permits were subject to conditions which restricted entry into the reservoir for fishing only between 12 noon and 4 p.m. and then again only between November and June; transportation of fish would be allowed only before sunset. Called upon to balance the conflict of rights in the case, the court decided to give 'additional directions' including prohibiting access of the permit holders to islands in the reservoir, mandating the deployment of check posts along the route of their ingress and egress, and prohibiting the fishermen from 'lighting fires for cooking or for any other purpose along the banks of the reservoir nor shall they throw any litter along the banks of the reservoir or in the water.'⁴⁸ Urging the government to proceed to issue the final notification under the Act, the court concluded: 'if one of the reasons for this shrinkage (in the forest cover in the country) is the entry of villagers and tribals living in and around the sanctuaries and the National Park, there can be no doubt that urgent steps must be taken to prevent any destruction or damage to the environment, the flora and the fauna and wildlife in those areas'.⁴⁹

The conflict arising as a result of claims by industrial units that their right carry on trade and business be accorded priority over the right to a clean environment has invariably been resolved by the court leaning in favour of the latter. In so doing, the court has drawn extensively on international environmental law and employed the polluter pays principle and the precautionary principle to good measure. In *Vellore Citizens Welfare Forum v. Union of India*,⁵⁰ the court found that the pollution caused by 900 leather tanning units in Tamil Nadu had caused extensive damage to the ground water sources over a vast area. Despite taking note of the fact that the leather industry was a major foreign exchange earner, the court was constrained to order closure of the polluting units since the leather industry 'has no right to destroy the ecology, degrade the environment and pose a health hazard. It cannot be permitted to expand or even continue with the present production unless it tackles by itself the problem of pollution created by it.'⁵¹ Apart from the deterrent pollution fines that were directed to be paid by the erring units, they were made to set up on a time-bound schedule, common effluent treatment plants to prevent any further damage to the water sources. The polluter pays principle has been applied in the *Bichhri Case*,⁵² and in cases concerning shrimp farms,⁵³ distillery units in Tamil Nadu,⁵⁴ and polluting units in Andhra Pradesh⁵⁵.

This precautionary principle was applied by the Supreme Court to strike down the notification issued by the Government of Andhra Pradesh exempting an oil industry located in the vicinity of two major water reservoirs

45 (1997) 3 SCC 549.

46 This involved a two-stage process. First a notice is issued under s. 35 (1) of the Act inviting objections to the proposal of the State government to declare the area as a National park. Thereafter, upon consideration of the objections, a final notification under s. 35 (4) is issued. In the instant case, no final notification had yet been issued.

47 Note 45 above at 553.

48 *Id.* at 554. The intervener group, representing the fisherfolk's interests, was asked by the court to 'explain to the fishermen concerned, the conditions, subject to which they are allowed to fish in the Totladoh reservoir'.

49 *Id.* at 555.

50 (1996) 5 SCC 647.

51 *Id.* at 657. The court referred to the Stockholm Declaration 1972, the Brundtland Report of 1987 and the declarations at the Rio Conference in 1992.

52 *Indian Council for Enviro-Legal Action v. Union of India* (1996) 3 SCC 212 in which residents of village Bichhri in Rajasthan who were denied access to drinking water on account of pollution of the wells by seepage of toxic untreated wastes produced by chemical factories, were held entitled to restitution and compensation.

53 *S. Jagannath v. Union of India* n.29 above.

54 *In Re: Bhavani River-Shakti Sugars Ltd.* n. 32 above.

55 In *Indian Council for Enviro-Legal Action v. Union of India* (1995) 3 SCC 77 a compensation package was worked out for farmers affected by their only source of irrigation, a river in Andhra Pradesh, was polluted by discharge of untreated effluents by industries alongside its banks.

from the purview of an earlier ban imposed on the setting up of such units within a 10k.m. radius of the two reservoirs. In *A.P. Pollution Control Board v. Prof. M.V. Nayudu*,⁵⁶ when initially faced with ambiguous reports of experts the Supreme Court referred the case for the further opinion of the National Environmental Appellate Authority. The court pointed out that the inadequacies of science in being able to assimilate the impact of environmental harm had led to the replacement of the 'assimilative capacity' rule with the precautionary principle. This in turn had led to the 'special principle of burden of proof in environmental cases where burden as to the absence of injurious effects of the actions proposed is placed on those who want to change the status quo.'⁵⁷ Later when the incontrovertible evidence contained in the scientific reports of independent expert bodies showed that there was every possibility that the unit would pose a potential threat to the major drinking water source and that, in such circumstances, 'an order of exemption carelessly passed, ignoring the 'precautionary principle', could be catastrophic,'⁵⁸ the court concluded that the industrial unit question had failed to discharge the onus of showing that there would be no danger of pollution even if it adopted the suggested safety measures.

The approach of the Supreme Court was, however, different when, a few years later, it was asked to determine the correctness of the decision of the Gujarat High Court which had negated the plea of an oil company to be permitted to lay pipelines through the Jamnagar Marine National Park and Sanctuary for carrying crude oil to its refinery.⁵⁹ In doing so the High Court overruled the permission given under the Wildlife (Protection) Act 1972 and the opinions of expert bodies which seemed to suggest that the laying of crude oil pipelines would not harm the marine wildlife. Reversing the High Court's decision, the Supreme Court held: 'Once the State Government has taken all precautions to ensure that the impact on the environment is transient and minimal, a court will not substitute its own assessment in place of the opinion of persons who are specialists and who may have decided the question with objectivity and ability.'⁶⁰ The court did not take recourse to the precautionary principle that would have shifted the onus of proving that there would be no pollution on to the oil company.

The risk posed by water borne diseases to public health can assume serious proportions. The absence of a regulated system of sewage collection and treatment significantly enhances to the risk factor. A recent study shows that only 14% of rural and 70% of urban dwellers have access to adequate sanitation facilities.⁶¹ The need for the enactment by the Parliament of the Employment of Manual Scavengers and Construction of Dry Latrines (Prohibition) Act in 1993 is a pointer to the prevalence of the pernicious practice of having persons belonging to the weakest and most disadvantaged social strata to physically collect and carry night soil from dry latrines on their heads to the garbage dumps.⁶²

Among the newly erected barriers to accessibility of affordable and potable water to communities is the move by certain States to privatise the distribution of water for drinking purposes in both urban and rural locations.⁶³ The instance of the sale of a river to a private company in the State of Chhattisgarh illustrates the negative fallout of such a move.⁶⁴ A state owned industrial development corporation entered into a contract with the private company under which the latter was permitted to exclusive rights to a length of 23.5km of the Sheonath river. Under the build-own-operate-transfer agreement, the company was permitted to build barrages over the allotted stretch for diverting waters to a reservoir. The waters would be sold by the private company to the state owned corporation which in turn would sell it to the ultimate users in the nearby industrial township. The immediate impact was adverse to the fisherfolk who were barred from fishing in the river and to small farmers who depended on the river

56 (1999) 2 SCC 718.

57 *Id.* at 734-35.

58 *A.P. Pollution Control Board (II) v. Prof. M.V. Nayudu* (2001) 2 SCC 62 at 79. More recently, the Supreme Court declared as illegal the action of the Government of Karnataka excluding the land brought under mining by the Kudremukh Iron Ore Company Ltd. excluded from the purview of notification issued under s.35 (1) of the Wildlife (Protection) Act 1972 declaring the Kudremukh National Park to be a national park: *T.N. Godavarman Tirumalpad v. Union of India* (2002) 8 SCALE 204.

59 *Essar Oil Ltd. v. Halar UtkarshiSamiti* (2004) 2 SCC 392.

60 *Id.* at 409.

61 'Troubled Waters: Developing Water, Sustaining Livelihoods', n.4 *above*.

62 The author is involved in a PIL in the Supreme Court asking for strict implementation of this statute which envisages liberation of manual scavengers and their rehabilitation by the State. For the orders of the Supreme Court see *Safai Karamchari Andolan v. Union of India*.

63 While Maharashtra has enacted a law which paves the way for privatisation, the draft legislation in Delhi has met with stiff resistance from water users.

64 For a detailed narrative see Pragnya Bhattamishra and Kumar Saurabh Singh, 'Rivers for Sale: The Sheonath Controversy' 1 *Indian Juridical Review* (2004) 239-243.

waters for cultivation. The agreement not surprisingly invited strong protests compelling the government to announce its cancellation, although it is not clear whether in fact it has.⁶⁵

The setting up of bottling plants by the multi-national soft drinks companies and their ability to corner prime groundwater sources have generated misgivings among rural communities. The recent case involving the settling up of a bottling plant by Coca Cola in Kerala is one such instance (see box below). The case involves, among others, the issue

The Coca Cola Plant in Kerala

In March 2000 the village level administrative body, the Perumatty Gram *Panchayat* in Palakkad District in the southern state of Kerala, granted a licence to Coca Cola to set up its bottling plant at village Plachimada on a total area of 35 acres. Coca Cola began extracting 500,000 litres of groundwater from through six bore wells and two dug wells. Of this while 150,000 litres was used in the manufacture of the beverage, the remaining was used in incidental activities like washing of the bottles and treatment of the effluent generated as a result of subjecting the extracted to a process of reverse osmosis for ensuring purity of the water mixed with the concentrate.⁶⁶ Within two years there were numerous complaints from the communities residing around the area of the plant of acute drinking water scarcity and environmental problems. As a result, the *panchayat* decided to cancel the licence which it did on May 15, 2003, after considering Coca Cola's reply to the notice issued to it by the *panchayat*. Upon a challenge to this decision by Coca Cola, the State government put the cancellation on hold and directed the *panchayat* to constitute an expert committee to examine the soil and groundwater samples to ascertain the truth of the complaints. Aggrieved by this decision, the *panchayat* petitioned the High Court of Kerala. A Single Judge accepted the contention that water was a public wealth and its excessive extraction by a private actor could not be permitted by the state which was a public trustee of the precious community resource. Coca Cola was restrained from extracting further groundwater through the wells on its land.⁶⁷ On appeal by the company, a bench of two judges of the High Court reversed the Single Judge and directed the *panchayat* to renew the licence. This it did after receiving the report of an expert committee constituted by it.⁶⁸ The *panchayat* has taken the case to the Supreme Court where it is pending.

regarding the extent to which community level decision making bodies can control the activities of corporations and private actors in their domain. The growing bottled water industry in India adds a further problematic dimension to the already strained availability of water to communities for their basic survival needs. It would appear that water as commerce has replaced the state's obligation to ensure availability to the community of basic minimum quantities of affordable water.

The ad hoc attempts by the state to introduce disincentives in order to curb growth of population has a negative impact on the rights to water of poor households. One instance is the recently enacted Maharashtra Water Resources Regulatory Act 2005 which places an unconscionable restriction on the availability of affordable water by linking the payment for water to the size of the family. S.12 (11) of this law states: 'Notwithstanding anything contained in this Act, a person having more than two children shall be required to pay one and half times the normal rates of water charges fixed...' Such provisions which seek to punish a poor family by depriving its members, and particularly children, of their right to water are vulnerable to challenge on the ground of violation of the right to life, to health and equal access to common resources.

Poor households in informal settlements in urban locations also suffer from the deprivatory policies of the state regarding forced evictions and resettlement. A recent example is the ordering by the Delhi High Court of the removal of unauthorised encroachments along the banks of the river Yamuna flowing through Delhi, which according

65 'Deal Shelved', *Down to Earth*, 15 May 2003, p.20 and Asha Krishnakumar, 'People's Battle for a River', *Frontline*, 7 November 2003, p.85.

66 The report of a scientist from the Council of Scientific and Industrial research at Hyderabad who visited the plant noted that to produce one litre of the beverage, 3.75 litres of water was required.

67 Judgment dated December 16, 2003 of K. Baakrishnan Nair, J. of the Kerala High Court in Writ Petition (C) No. 34292 of 2003.

68 Judgment dated April 7, 2005 of the Division Bench of the Kerala High Court in Writ Appeal No. 215 of 2004.

to the court were the main cause of the pollution.⁶⁹ This resulted in massive demolition drives in the slums areas along the river's banks even while the city's industrial units, many of them unauthorized, that dot the river's banks and which the real cause of pollution by discharging of large quantities of untreated effluents into it were left untouched.

The utilitarian logic that the state uses to justify its policy of building large dams to harness river waters creates problems for the displaced populations. The large-scale project involving the construction of over 3000 large and small dams across the Narmada river flowing through Madhya Pradesh, Maharashtra and Gujarat, threw up an expected conflict of rights and competing public interests: the right of the inhabitants of the water starved regions of Gujarat and Rajasthan to water for drinking and irrigation on the one hand and the rights to shelter and livelihood of over 41,000 families comprising tribals, small farmers, fishing communities facing displacement on the other. The Supreme Court was required to find a satisfactory solution to this conflict in a PIL brought before it by the Narmada Bachao Andolan (NBA), a mass-based organisation representing those ousted by the dam. In its decision in 2000, by a majority of 2:1,⁷⁰ the court negated the plea that the SSP had violated the fundamental rights of the tribals because it expected that: 'At the rehabilitation sites they will have more, and better, amenities than those enjoyed in their tribal hamlets. The gradual assimilation in the mainstream of society will lead to betterment and progress.'⁷¹ The court acknowledged that in deciding to construct the dam 'conflicting rights had to be considered. If for one set of people namely those of Gujarat, there was only one solution, namely, construction of a dam, the same would have an adverse effect on another set of people whose houses and agricultural land would be submerged in water.'⁷² However, 'when a decision is taken by the government after due consideration and full application of mind, the court is not to sit in appeal over such decision.'⁷³ Even while it was aware that displacement of the tribal population 'would undoubtedly disconnect them from the past, culture, custom and traditions,' the court explained it away on the utilitarian logic that such displacement 'becomes necessary to harvest a river for the larger good.'⁷⁴ The decision serves to underscore the need to undertake informed cost benefit analysis of large dams in order to prevent the negative impact of 'development' on the lives of the already marginalized populations.

VI. THE EMERGING SCENARIO

The Indian experience with the protection and enforcement of the right to water is a reminder that having an enabling legal regime is by itself not sufficient to realise that objective. The policies of the State that are progressively inconsistent with the constitutional recognition of the right to water require to be continuously interrogated and challenged. From the perspective of the Millennium Development Goals and the obligations spelt out in the General Comment No. 15, the immediate tasks that would require to be undertaken would include:

- Identification of elements that constitute basic minimum (core) rights of access to water: safe drinking water, water for sanitation and health
- Targeting of the most vulnerable populations for reform measures and retaining state responsibility in the area
- Clearly defining corporate liability for impermissible use of common resources including surface and ground water
- Evolving a comprehensive approach to the question of protection and enforcement of economical social rights. It is imperative to view the right to water as an integral part of the other economical social rights:

69 Order dated March 3, 2003 of the Delhi High Court in Writ Petition 2112 of 2002 (*Wazirpur Barton Nirmata Sangh*).

70 *Narmada Bachao Andolan v. Union of India* (2000) 10 SCC 664. Kirpal J., wrote the majority opinion for himself and Anand CJ. Bharucha J dissented on the question of environmental clearance, which he found to be mandatory and non-existent and further on the consequent issue of *pari passu* rehabilitation of the oustees which again he found to be wholly unsatisfactory. While the majority opinion permitted the raising of the height of the dam, the dissenting opinion enjoined further construction till the grant of environment clearance and prior satisfactory rehabilitation of the oustees.

71 *Id.* at 702-03.

72 *Id.* at 764.

73 *Ibid.*

74 *Id.* at 765.

to livelihood, to health, to shelter: water management has to satisfy the objectives of equity and social justice

- The law and policy divide ought not to be used by the state to avoid effective consultation with affected populations. This can come from an acknowledgment by the state of the irrelevance of the doctrine of eminent domain in the context of its obligations under the economic and social rights regime.

A vigilant civil society can activate political and judicial processes to check water deprivatory practices of the state. The state's priorities may have to be re-ordered in order to ensure that the right to water is not whittled down on the grounds of affordability and lack of resources.

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