

## WATER RIGHTS

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### I.O.O INTRODUCTION :

#### I.1.O. Water Law

Lawpersons who are accustomed to reading law under traditional classifications, such as criminal, constitutional or tort law, may find it somewhat odd to talk of 'water law'. The growth of law, however, has not moulded itself in accordance with the pedagogical or operational categories that human beings may apply to the corpus juris. With the modern proliferation of statutory and case laws we find that often it is difficult to determine where constitutional law ends and criminal or tort law begin, or whether the matter under consideration is one of private law or public law. The traditional classifications have their own limitations. We also find in the modern legal context that specific issues often cut across various branches of law. A tribal or forest issue, for example, may involve constitutional, criminal, contract and a varieties of other laws, including international law. In such a situation it is more pragmatic to focus on the issue (all the laws related to it) rather than on the classification of laws. The emergence of 'natural resources law' (which is now taught as a separate subject in various universities over the world) is infact an outcome of precisely these modern requirements of legal pedagogy. In its scope it circumscribes related issues like forests, land, ores, mines, water, space and air. Such

a domain of legal study would have been impossible within the traditional classifications. Water law belongs to this larger ambit of natural resources law. It involves a selective reconstruction of a legal domain which pertains to acquisition, utilization, distribution, protection and conservation of water. It would require bringing together the central and state laws, rules under these laws, government orders under the rules and the court decisions pertaining to water. Such a selection will cut through the criminal, constitutional, customary as well as public laws, such as those concerning irrigation, control of pollution and protection of the environment. Once we have such a reconstructed body of law it becomes easier to address oneself to the specific issues or problems concerning water.

#### I.1.1. The Need for the study.

##### I.1.1.1. The Ecological Need

In the Indian context it is natural to ask: why single out water law for deeper studies amongst other natural resources law? The simplistic answers are that water law forms one of the core issues in natural resources law, and that it has not been systematically studied so far. Also, that water is one of the basic elements for sustaining life: forests, wild-life, human beings, in fact the whole ecology depends for its survival on the availability of water. The study of water law, hence, is the study of the vital life sustaining regulations.

There are more complex reasons beyond these to take a deeper look at the water laws.

The alarming situation concerning water problem in our country demands immediate attention to the regulatory framework governing water use. There are massive flood in some areas and severe drought in others, pointing to a gross mismanagement of water resources. Water use is also crucial to the whole programme of afforestation and soil conservation. The country is undertaking massive environmental regeneration campaign. More than Rs.4000 crores have been put into afforestation efforts. None of this will be successful unless water is efficiently used.

Thousands of irrigation canals and dams have been built over the century. These have completely changed the prioritization of water use and altered both the users and the availability of surface and ground water. The belief that in an economics of scarcity the sovereign state has the responsibility as well as the right to allocate and utilize water resources is based on the assumption that the state will in fact be able to bring about the most efficient use and also do justice in distributing water equitably. But what does one do when this is not the case? Moreover, what does one do when one finds that the state itself is instrumental in bringing about massive depletion of water resources through wrong forest and irrigation policies, or has grossly mismanaged the distribution of water? There is a growing perception in India that one of

the major reason for drought and floods has been the state's exploitative practice of deforestation; irrigation schemes have led to gross inequities amongst users; inappropriate hydro-electric plans have inequitably altered the benefits of water.

Up to the end of the Sixth Plan, the Planning Commission has used its power to invest Rs.15.206 crores for large irrigation projects. Taking the hydro-electric schemes into account, about 15 per cent of the total national expenditure in the Five Year Plans has been spent ~~on~~ on these dams. These investments are how contrary to the new national Water Policy of 1987, which mandates not only ~~an~~ an equitable distribution of water, but also an ecologically sustained-yield use. The destruction of the watersheds and catchment areas is also contrary to the National Forest Policy of 1952, which requires 33 per cent of the plains and 60 per cent of the hills to be afforested. Now barely 10 per cent of the land is covered with natural forests. The siltation rate in the Ganga is one of the highest in the world. Due to deforestation the sedimentation rate in most rivers is very high.

I.1.2. The Legal Need:

I.1.2.1. Law Reform.

In this present condition of ecological devastation the whole question of laws relating to water needs to be fundamentally re-examined. If the state is to

use the law to regulate the use of resources, how can the people use the law to make the state more accountable and efficient? We need not assume that the task of building a just society - in which the resources are used in an ecologically sustainable and equitable way is over. Each historical situation demands a new effort. These need not be novel, they indeed need to have a continuity with the past laws, but they can surely break new grounds to deal with the present crisis. The motivation and the grounds to build an ecologically sound and equitable society are, in fact, provided in our Constitution. The Directive principles, such as Article 39 (b), (c), the Fundamental Duties as well as the Preamble are nothing but specification of the task before us. We need only be reminded that most natural resources laws, including the water laws, were enacted by the colonial regime, before the making of our Constitution. They naturally cannot share the objectives of the Constitution, nor that of the National Water Policy or the Forest Policy. Article 13 of the Constitution is a major charter for law reform. It tells us to amend all those laws, rules, and orders which violate people's rights. Have we so far examined the pre-constitutional natural resources law, specially the water laws, to find out whether they are in keeping with the Directive Principles and the Preamble, and specially if they respect the fundamental rights of all people? In such a situation it can hardly be

said that the our Constitutional duty of legal reform is over. In fact, with reference to the natural resources laws the task of moving away from a colonial state to a just democratic state has barely begun. We are, therefore, still in a position to discuss the vital issues of water laws ab-initio for modern India.

### I.1.3. Pursuit of Justice

There is also another type of legal need: the pursuit of justice. Our Constitution demands that we guarantee economic and social justice to all Indians. However, even a perusal of the water use practice in this country reveals that the water resources like forest resources, have been used in this country in a manner which has mostly benefited the rich. The poor have borne the brunt of the deprivation, floods and reutilization of the water resource, whether they be through dams or irrigation schemes. Also, despite a sustained affirmative action by the state, we observe that even social justice for all has not been attained. There are still numerous tanks, wells and ghats which the scheduled castes and tribes are not allowed to use. There are also communal barriers to water use. The pursuit of water rights, hence, is simultaneously also the pursuit of economic and social justice - the goals of the Preamble of our Constitution. The basic question in resource utilization is one of control or power over access, and distribution of the resource. The large irrigation canals, take the control over water resources away from people, --- the type

of control which they can have over tanks, ponds or wells. Channeling water by using different technologies is, therefore, also at the same time channeling power or control over the resources. A State which totally neglects the traditional tanks and wells technologies and goes in for large scale irrigation schemes, must ensure that the redistribution of the control over the resources does not result in inequities or skewed separation of powers. In most irrigation or water supply schemes, however, we find that the opposite is the case. Through the neglect of tanks or wells technologies and usurpation of natural water resources (including ground water resources) the rich have gained more control over the resource and the poor have been more impoverished. In such a situation, -that is in a situation in which the control over water resources is being shifted from the hands of the rural and tribal people, the assertion of the water rights becomes all the more important. Considering that water is a vital resource for life, deprivation of a vital life resource is simply a violation of a fundamental Human Right. The pursuit of water rights is, hence, simultaneously also the pursuit of a human right.

#### I.2.0. Water Rights

One of the basic issues in water law is that of rights: what kind of rights do the people have, or ought to have and what are the rights of the state. The whole