

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

edifice of the corpus iuris of water law, in fact, rests on this basic issue of rights. The whole question of state's accountability to the people and the people's accountability to each other and to the state, cannot be worked out unless we are clear about the legal framework of rights in water. This paper is devoted to this fundamental aspect of water law.

Water, like air and food, is one of the vital needs for human survival. Acquisition and distribution of water has, therefore, been a matter of legal concern since the ancient times. With the rise of the new technologies, however, which allow large scale extraction and utilization of water, it becomes important for the state to intervene and make sure that this does not result in a skewed or inequitable distribution amongst the people. The people begin to play a smaller role in water harvesting. In ancient times when the resource was available in plenty and the demand less, the jurisprudential principle of 'discovery' had applied -- whoever discovers the resource had 'dominium' over it. This was the state of affairs in the old Roman Law and the Common Law of England; the dominant owner may allow the use of resource at his will, because it was like a slave to his property, hence the principle of 'servitude' could apply. When the dominant owner allowed the use of his resource like a common property resource, the principle of 'profit a pendre' would apply. Alternatively, he could, in a manner of speaking, cast out his claims over the

resource, allowing for 'easement' to share the resource.

However, in modern times, in an economy of scarcity --- when the resource has been depleted, such principles of 'discovery' or 'servitude' cannot be applied simpliciter. External agencies have to intervene to decide prioritization of use, or conversely, when external agents exploit the resource, the state or law has to intervene to ensure equitable distribution. In either case, the whole issue of water rights needs to be fundamentally clear so as to be able to make appropriate decisions.

I.2.1. Issues Concerning Rights

The problematic of water rights -- of the state's rights versus those of people and vice-versa, can be amply illustrated, even to the uninitiated, if we consider for example, the juristic issues involved in a large dam construction for irrigation or hydro-electric purposes. A dam is essentially a technique to transform the natural use of water and to redistribute the benefits from water flow from one set of people to another. This at once raises a horde of basic legal questions: What about the water rights of the original users, did they have such rights in the first place? If they did what was its nature and extent? How can the violation of these rights be compensated? Moreover, from the side of the state too various legal issues arise: by what authority and under what conditions can the state exercise its rights to dam a river, assuming it had such

rights in the first place? The legal questions of rights arise not only for the people immediately affected, but also those indirectly involved. In a naturally flowing water the lower riparians have traditionally had customary rights. The construction of a dam changes the surface water availability for them. How is the denial of such rights to be legally dealt with. Dam construction also changes the groundwater situation. The water table goes up for the upper-riparians and goes down for the lower ones. Does this alteration of groundwater table affect people's rights to access to water? The truth of the matter is that there has been a gross violation of human rights in this country. More than 3000 large and small dams have been constructed without sufficient consideration for compensation to the lower riparians. The areas lower than the dam are often simply declared 'drought prone'. Groundwater loss due to the non-availability of flowing surface water in the lower riparian areas are simply not considered. The almighty state has been simply turning and twisting the rivers around without consideration of the riparian rights or groundwater rights of the people; simply because the people have not been aware of their rights, or have not had the economic power to demand their rights.

It is undeniable that water is required for irrigation and industrial purposes and no theory of development or ecology will want to obstruct this availability. But in a situation in which through a gross

violation of human rights some people are not even getting pure or clean water to drink, and thousands are dying of water-borne diseases, the issue of right to pure drinking water indeed takes the priority.

In fact prioritization of water use must be a central concern for water legislation. A comprehensive water law must prioritize and rank various uses of water, drinking, domestic, agricultural and industrial (and perhaps in that order). The water laws in India take no cognizance of prioritization. They do not even mention that access to clean drinking water is a matter of first priority. A detailed discussion on water law, in general, must critically analyse the prioritization of water rights, and suggest a framework for an appropriate legislation. The task here is to, first of all, establish that there is such a thing as water right and to show by analysis whether the very first priority -- the right to clean drinking water, does exist, and if so, what can be its nature and status.

I.2.2. Whose concern ?

It is possible that some people may think that all such questions are vacuous, because they never occurred to them before; or that they have not occurred within the Indian legal framework in this ramified way. The latter, in fact is not true. The issues, as we shall see, have indeed come up under the Indian laws, specially, those concerning irrigation, in various ways. The fact is that they have never been expressed in a systematic or emphatic way. The

need for such an expression has hitherto not arisen partly because of the availability of the resource in plenty, but mainly because usually people's whose rights have been violated have mostly been from the poorer sections of the society. They have neither had the capability nor the voice to express their concerns. However, as those, who have traditionally been at the losing end in the distribution and benefits from resources, get more and more empowered in the democratic processes, the questions of rights will become progressively more important. It is necessary, therefore, that we must consider the issues relating to water rights in all its details, even if they have not occurred in these ways in law so far.

I.2.3. The Subject Matter of Rights

It is important to note that the rights we are talking about here are the rights to water itself as a resource, and not water based resources, such as fish and water plants, or food. Water based resources give rise to numerous questions of rights too, but these need to be dealt with separately. The questions relating to water itself as a resource are those such as pertain to water for irrigation, for domestic and drinking use and also when water is used to produce other benefits from it, such as electricity. It is this latter type of rights, over water as a resource, that is under consideration here. These issues concerning rights in water must also be distinguished from other related issues which arise when water is used. As, for example,

when a dam is constructed there are issues concerning rights in submerged land, resources from these land, rehabilitation of oustees, compensation, etc. These are different from the rights in water which the dam has obstructed and the benefits arising from this damed water. Such rights are substantive in nature. They do not concern procedures or remedies.

Before we get into the hard law aspect of what are the water rights in Indian law, there is one basic task that remains: getting clear about what is meant by 'rights'. Let us turn, therefore to briefly explicate the meaning of 'rights', before we get back to the Indian situation.

1.3.0. The Nature of Water Rights

There are specific questions concerning the nature of water rights:

- (a) is it a natural (customery) right or a legal (positive) right (right granted by law) ?
- (b) is it a individual right or a group right?
- (c) is it a positive right or a negative right?

To deal with these three issues one needs to separate the question of law: what is the meaning given to the notion of rights in the Indian law presently, from that of legal policy: what meaning they ought to be given (or can be given) to attain the constitutional and democratic ends. These two questions need to be further distinguished from the historical question of how the notion of water rights has evolved in Indian law -- what meaning its nature has