INTRODUCTION

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The alarming situation concerning water problem in our country demands immediate attention to the regulatory frame work governing water use. There are massive flood in some areas and severe drought in others, a great many are dying of water-borne diseases while others do not even have sufficient water for drinking purposes. All this points to a gross mismanagement of water resources. Besides agricultural and industrial development water is also crucial to the whole programme of afforestation and soil conservation. The country is undertaking massive environmental regeneration campaign. More than Rs. 6000 crores have been put into afforestation and watershed development efforts so far. None of this will be successful unless the use of water is efficiently regulated.

Thousands of irrigation canals and dams have been built over this century, and millions of tanks have been dryed up. 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. 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 inappropriate forest and irrigation policies, or has caused great inequities in 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 not only to gross inequities amongst users but also to an unproductive land-use practice; inappropriate hydro-electric plans have inequitably altered the benefits of water and forced a demographically maladjusted urban growth.

Up to the end of the Seventh Plan, the Planning Commission has used its power to invest more than 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 these dams. These investments are now contrary to the new national Water Policy of 1987, which mandates not only 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 as well as of 1986 which require 33 percent of the plains and 60 percent of the hills to be afforested. Now barely 10 percent of the land is covered with natural forests. As a result the sedimentation rate in most rivers is very high, the Ganga faces one of the highest sedimentation rate in the world.

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 our Constitutional duty of legal reform is over. Infact, 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.

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 resources, 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 law, hence, is simultaneously also the pursuit of economic and social justice – the goal 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 peoples – the type of control which they can have over tanks, 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 seperation 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 further impoverished. In such a situation in which the control over water resources is being shifted away 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.

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. But how does one go about studying laws relating to water?

Law persons who are accustomed to reading law under traditional classification, 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 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 in fact 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 states 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.

The reconstruction of even a select body of water law is, however, a momentous task, because water is a state subject for legislation, as per our constitutional arrangement, and each state has enacted or adopted not only a number of statutes but also rules under these Acts. Besides this, the growing body of court judgments in each state by themselves form formidable food for thought for assimilation and digestion.

However, one need not despair when faced with such a large data-base. Epistemology provides us with various strategies when we are faced with the study of very large domains. One is to do a statistical analysis, of trends, corelations, deviations, etc.; the second is the probabilistic approach, of determining what may and what may not happen; the third is the topological

approach, in which one maps the whole domain by identifying the key pivotal points and the inter-relationships between these points. Since the system rotates or transforms itself around these pivotal points, an understanding of the nature and function of these points provides insight into the nature of the whole domain. Some of the key pivotal points in the legal domain are basic concepts, such as rights, remedies, sanctions, powers, delicts, liability, responsibilities and procedures (for dispute settlement.) The papers in this study are based on this topological approach, in which they make a detailed study of the nature and functions of each of these basic key issues in water laws. By this method one not only gets a comprehension of the key notions through which one understands the nature of water laws, and also what one may want to be informed about for purposes of future law reform, but, at the same time, the method also helps in mapping out and introducing one to the comprehensive network of water laws, both at the central and state levels.

The first two papers in this work deal with the issue of rights. The first, Chhatrapati Singh's paper, explains what is meant by 'rights', why it is necessary to consider the nature of water rights, what is the legal position concerning this right in India and how it has historically fared, that is, how it has been violated, asserted or recognized, both in statutes and by the courts. He also gives an analytical account of the jurisprudential position one would have to take if one were to designate water right as a fundamental or basic right. He attempts to show that this right (to drinking water) can be (and must be) read as a fundamental right, but this can be done only on the basis of recognising it as a natural right.

Rights arise not only in the direct use of water, such as for drinking, irrigation and industrial purposes, but also because of the resources or facilities that water provides. These are the *resource-based rights*. One basic resource that water provides is food, specially fish; and the facility it provides are for navigation and production of electricity. The second paper in this work, that of Kiran Jain, deals precisely with these issues, of rights in fishery, navigation and hydroelectric power. She presents a graphic account of the legal framework along with the socio-economic background within which it functions.

If people have the rights in water and water based resources someone must have the correlated *duty* to safeguard these rights. In a society in which the state has attempted to usurp the absolute *power* to regulate water and its resources, the duty to safeguard people's rights goes along with this power. The third paper in this work, that of Rema Devi P., explores this dimension of the state's responsibility in terms of how accountable it can be made to the people within the legal framework and what type of law reform is needed. She looks at the issues concerning responsible management of water resources both from the side of the state and the role played by the people.

Between the extremes of the rights that people have and which they are unable to realize or which are violated, and the duties that the state ought to take upon itself, and which it does not do, there is a large section of the operative legal regime which concerns the daily lives of the people. These aspects of the regime are the topics of the next two papers. There are two sides to these aspects, one criminal and the other civil.

P.K. Chaudhary looks at the legal regime of *sanctions* amongst the laws which lay a *criminal liability* on the wrong - doer. The stigma of criminal liability for a delict or offence does not arise due to the provisions of the Indian Penal Code alone, most parliamentary enactments relating to water resources tacitly presuppose that the regulation of the resource can be done by imposing or using the principle of criminal liability alone. Hence, although the laws may not define the offence as a criminal one, the penalties they impose makes the delict criminal in nature. The principal of criminal liability is, thus, presupposed in laws ranging from those concerning pollution control to irrigation. P.K. Chaudhary documents and provides a critical account of this whole range of sanctions which relate to the penal provisions in various laws. Whether the application of the principle of criminal liability is a good legal strategy for regulating the use of water resources, is a matter for deeper thought.

The principle of criminal liability thinks in terms of punishment alone, and it only relates the state to the people, in terms of whether or not the state will punish someone for the delict. The principle of civil liability, on the other hand, not only relates people to people and to the state, it also provides the legal space for compensation for damages, both from other people as well as from the state. The question here is not of punishing the wrong - doer, but one of setting right the loss once the wrong or delict has happened. This civil area of compensation for damages and other entitlements for the loss suffered has been technically called 'tort law' in legal discourse and comes under the province of *civil liability*. In the paper that follows Manjula Batra gives a comprehensive account of the development of tort law in India. Her description makes it evident that unlike the state which has relied solely on the concept of criminal liability for regulation of water-use, under tort law the courts have managed to evolve a variety of strategies since they have relied upon a number of uncodified principles of justice for dispute settlement. Whether these principles of tort law need to be codified into some parliamentary enactment is a matter of debate.

Understanding the substantive aspects of the criminal and civil laws for water regulation informs one of *what* the laws are if something goes wrong. However, one still needs to know the procedures for the settlement of disputes, so that one can know *how* to set right whatever wrong has occurred. The procedures available for *dispute settlement* under various laws, is the topic of Rita Aryan's paper, which follows next in this work. She, evidently,is not oblivious to the fact that whatever the procedures may be a great part of the population does not have access to the courts and legal process. Nonetheless,documenting the procedure is necessary because one of the main reasons why people do not have an access to the law is because they are ignorant of the procedures. There is a vicious circle here which needs to be broken.

What if the vicious circle cannot be broken? What may one do when the government uses the law to oppress people when they demand their rights to water or oppose the execution of projects which they do not consider beneficial to them? This is where the question of people's *power* comes up. Of course, the people need not express their power merely in reacting to the oppression or exploitation, they can also show it in a positive way by taking up the task of resource management on themselves. These constructive tasks can be taken up within the legal framework. Law is a double edged instrument, it

can be used to cut or heal to exploit or liberate, both by the state and the people. These roles of law is the subject matter of Furqan Ahmed's study. He documents various people's movements and the oppressive and liberational role the laws have played in these movements. The liberational potential of law, specially when it is sought by the people, demands inovative strategies. In the democratic process, therefore, it becomes a matter deserving greater attention, even when the scales of the endeavours are small.

The next paper in this work by Iqbal Siddiqui is a chronological survey of the history of legislative activity in the area of water law in India. It is intended to compliment the preceding papers not only in terms of providing an over all historical view of the development, but also to fill in information about laws which exist but which have not been discussed in the earlier papers. In terms of the topological strategy, while the other papers identify and discuss the nodal points in the domain, this paper maps the outer boundary of the domain, and thus demarcates the province of water law. It is in this sense that the paper is intended to be complimentary to others. Having marked the terrain and the boundary all the papers put together should give a comprehensive account of the whole field of water law.

There is another aspect of water law, which is not strictly Indian law, but which has become an integral part of it since India has not only ratified these laws but also used them in the settlement of various inter-state water disputes; this concerns the aspect of International Law, which is the subject matter of the last paper by Dr. B. R. Chauhan. Since the government has adopted these laws, they become as much a part of the Indian law as any foreign judgment adopted and used by the courts. A complete picture of water law in India must, hence, necesserily take into account this aspect of International Law.