

RIGHT TO WATER: DEBATING THE HUMAN RIGHTS PERSPECTIVE*

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Water is the elixir of life – it is as fundamental as the air we breathe or the food we eat. In light of the role that it plays in sustaining life and the daily needs of people around the world, right to water manifests itself in the form of a basic human right. Right to water exists in close association with other related aspects like sanitation and basic cleanliness of the community. Without ensuring the latter, the former will hardly have any concrete consequence. Despite many efforts at the international level to focus on the need to recognize and label the right to water as a fundamental human right, nothing concrete has been achieved till date. The repercussions of a post-WTO and GATS world economy, which talks of trade in services amongst nations, adds another critical dimension to the entire discussion on the right to water as a fundamental human right. This warrants a debate into the merits and the justification of viewing the services accruing from water as being a tradable commodity juxtaposed against the other extreme of it being a basic human right. The right to clean drinking water emerges, in this context, as the focal point of discussion, which has been examined from various legal and social angles in this paper.

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I. INTRODUCTION

“The right to water is one of the most fundamental of all human rights: essential for life, essential for development. At a time when 5,000 children are dying each day from drinking dirty water, realising this right has to be at the top of everyone’s agenda.”

- Julia Häusermann, President, Rights and Humanity¹

Water, while having one uniform agreed upon chemical definition, has different meanings for different people. The significance which one attaches to water largely depends on the region of the world in which he or she resides. With the United Nations (*hereinafter* UN) declaring 2003 as the International Year of Freshwater, followed by the Third World Water Forum in Japan in March 2003, then a war in Iraq which tainted the country’s freshwater supply and on top of that, a drought in sub-Saharan Africa that killed thousands of people on a daily basis, there has been of late, a lot of talk about water in the international community.² Today, pressure on the world’s freshwater resources continues to escalate and governments of different countries are struggling to find ways to improve the quality and efficiency of their water supply systems.

Through interactive activities of intergovernmental organizations, and transnational activism, every concept in international law is being given a human rights dimension. In 2002, the UN Committee on Economic, Social and Cultural Rights adopted a General Comment declaring that access to water is ‘a human right and a public commodity fundamental to life and health’.³ Specifically, “[T]he human right to water is indispensable for leading a life in human dignity. It is a prerequisite for the realization of other human rights ... Water should be treated as a social and cultural good, and not primarily as an economic good ... Water, and water facilities and services, must be affordable for all.”⁴ However, the crucial perspective of the

¹ The Right to Water, *Realising The Right To Water*, available at <http://www.righttowater.org.uk/code/RtwRealised.asp> (Last visited on June 6, 2008).

² Mark Erik, *A Pure Perspective on Water*, Vol. 9 (3), HUMAN RIGHTS TRIB. (2003). See also Randall Peerenboom, *Human Rights and the Rule of Law: What’s the Relationship?*, 36 GEO. J. INT’L L. 809, 809 (2005).

³ ‘United Nations: Access to Water Enshrined As A Human Right’ *South North Development Monitor* 5245 (29 November 2002) as cited in Ken Conca, *Environmental Governance After Johannesburg: From Stalled Legalization to Environmental Human Rights*, 1 J. INT’L L. & INT’L REL. 121, 121 (2004-05).

⁴ *Substantive Issues Arising in the Implementation of the International Covenant on Economic, Social and Cultural Rights: The Right To Water*, UN CESCR, 2003, UN Doc. E/C. 12/2002/11 (2003) as cited in Ken Conca, *Environmental Governance After Johannesburg: From Stalled Legalization to Environmental Human Rights*, 1 J. INT’L L. & INT’L REL. 121, 121 (2004-05).

economic value of water cannot be emphasised enough, especially in the background of reforming water laws to address the problem of its apparent unsustainability.⁵

In India, the legislations governing the water sector are not very coherent in nature. On paper they might appear to be superior pieces of legislative action and are based on objectives keeping decentralization and participation in mind. However, problems arise when it comes to actual implementation. With water resources in the country fast depleting, it might be argued that given the increasing demand for drinking water and sanitation, the funding for the same is highly inadequate.⁶ Judiciously speaking, it is also important for people in India to realize that the issue is not how to save more water, but instead how not to waste water. What further aggravates the problem is the verity of continual demographic change in India. As population growth turns villages into towns and towns into cities, this further exacerbates the problem of inequitable distribution of water by increasing the strain on suburban and rural water resources.

Furthermore, in the post-WTO era, it is inevitable that services like water are increasingly drawn into the ambit of trade regulations as well, premised on the belief that the commodification of water has been long rendered a necessity. In this paper, we propose to analyse these aspects in the context of various international instruments and conventions that talk of the need to look at water rights from the human rights viewpoint than colour it as a merely need-based service.

II. RIGHT TO WATER AS A FUNDAMENTAL HUMAN RIGHT

A. THE NEED FOR ESTABLISHING WATER AS A HUMAN RIGHT

In its early stages of evolution, human rights were not written in specific terms and therefore did not specifically delineate all possible rights that come within their ambit. For example, right to life as represented in the initial human rights documents, did not include basic life necessities and was perceived rather narrowly.⁷ However, one of the basic life necessities it did include is water. Notwithstanding the same, unlike the attention given to right to health and right to food, little attention has been paid to the question whether there is a right to water and if so, what are the components thereof. Until now, it has been envisaged broadly as a part and parcel of the right to food or health, or at a more fundamental level, the right to life.⁸ The situation is summed up by the United Nations Department

⁵ “Dublin Statement on Water and Sustainable Development”, International Conference on Water and the Environment, Dublin, 31 January, 1992 as cited in Philippe Cullet, *Water Law Reforms – Analysis of Recent Developments*, 47 (2) JILI 27 (2006).

⁶ Dr. Ramesh, *Right to Drinking Water: Need for Changes in the Present Policy*, 30 (1) INDIAN BAR REVIEW 604 (2003).

⁷ Amy Hardberger, *Life, Liberty and the Pursuit of Water: Evaluating Water as a Human Right and the Duties and Obligations it Creates*, 4 NW. U. J. INT’L HUM. RTS. 331, 331 (2005).

⁸ Stephen C. McCaffrey, *A Human Right to Water: Domestic and International Implications*, 5 GEO. INT’L ENVTL. L. REV. 1, 1 (1992).

of Technical Cooperation for Development as follows: “No resource is more basic than water. Water is essential for life, crucial for relieving poverty, hunger and disease and critical for economic development. Despite enormous improvements over the past 15 years, hundreds of millions of men, women and children still do not have proper water for drinking and sanitation. Many remain unemployed because water resources cannot support agricultural or industrial growth. Water problems ultimately end up as ‘people’ problems.”⁹ However, it might be posited that, the kind of right that is sought to be guaranteed as a human right to the teeming millions is not just a mere right to water as enunciated before but also a right to safe, useable fresh water.

It might be noted that the major water-for-consumption issues that developed countries like France, the United States and Spain encounter are largely related to water quality and distribution. In many developing countries, however, the main challenge is that of paucity of water, coupled with the problem of access to it for consumption even where it is abundantly available due to anomalies in distribution. Further, even when there is access to water, the consumption is low because the water is not safe and potable. Overall, almost one billion people worldwide do not have available sources of clean drinking water.¹⁰ The United Nations Development Programme (UNDP) Human Development Report, published on November 11, 2006, reveals that over 1 billion people live without access to clean drinking water and 2.6 billion without adequate sanitation.¹¹ These problems might be considered responsible for causing death and disease throughout the world.¹² In India, according to the 2001 census, 68.2% households have access to safe drinking water. The Department of Drinking Water Supply estimates that 94% of rural habitations and 91% of urban households have access to drinking water.¹³ However, these figures are said to be flawed because they refer to installed capacity and not actual supply. The lack of resources or experience to adequately provide and preserve clean drinking water for all citizens is the biggest impediment in the development of a comprehensive package of water rights and policies. Therefore, several international entities of importance are making efforts to encourage the acknowledgment of the existence of a human right to water which would ensure that the right to water is not adversely affected and no country’s capacity to ensure the full realisation of the right to water is curtailed.

⁹ *Id.*

¹⁰ Constance Elizabeth Hunt, *Thirsty Planet* 44 (2004), as cited in Chad A. West, *For Body, Soul or Wealth: The Distinction, Evolution and Policy Implications of a Water Ethic*, 26 *STAN. ENVTL. L.J.* 201, 201 (2007).

¹¹ United Nations Development Programme, *Human Development Reports*, available at hdr.undp.org/en/media/HDR2006_English_Summary.pdf, (Last visited on September 10, 2008).

¹² Guerin et al., *World Water Actions, Making Water Flow for All* xviii (Earthscan 2003), as cited in Chad A. West, *For Body, Soul or Wealth: The Distinction, Evolution and Policy Implications of a Water Ethic*, 26 *STAN. ENVTL. L.J.* 201, 201 (2007).

¹³ Sujata Dutta Sachdeva, *A Pitcherful of Poison: India’s Water Woes set to get Worse*, *THE TIMES OF INDIA (KOLKATA)*, April 13, 2008.

In 1948, the United Nations passed the Universal Declaration of Human Rights, which guaranteed all people the right to a healthy standard of living.¹⁴ In 2000, the UN Committee on Economic, Social, and Cultural Rights deemed the right to safe drinking water and adequate sanitation as essential to a person's right to health.¹⁵ In 2001, World Water Day participants further defined the right to water as "a right to access to water of sufficient cleanliness and in sufficient quantities to meet individual needs."¹⁶ A human rights approach entails precedence given to water usage in favour of drinking and domestic water. Several water policies assign the following order of priority for water usage: drinking water, irrigation, hydro-power, ecology, agro-industries and non-agricultural industries, navigation and other uses.¹⁷ This is clearly indicative of the emphasis given to domestic uses of water as the overriding priority in water allocation. However, given the possibility of altering the order of items in the priority list, a lot of room for change has been left, ensuring thereby, that there was not much substance left in the prioritization.¹⁸ In most countries, water sector reforms are used as an effective tool to address diminishing per capita availability, problems relating to water quality, control, access and use of available freshwater.

Access to clean drinking water and sanitation has a tremendous bearing on a number of other rights and freedoms, clearly showing how all these aspects are interdependent.¹⁹ For example, right to clean water and adequate sanitation is related to freedom from inhuman and degrading treatment, right to life and concomitant appendages thereof, i.e. life threatening illnesses borne by dirty water, right to health, right to education, awareness of importance of clean water, freedom from discrimination in terms of who lacks access to clean water and who does not, right to development and freedom from poverty and a right to an adequate standard of living. Here, within the context of interrelatedness of human rights, perhaps the right to development needs to be emphasized *in specie*. Development expands the space for a fuller enjoyment of human rights.²⁰ Establishing water as a right ensures people a position at the centre of development as opposed to the general trend of remaining passive recipients.

¹⁴ World Health Organization, *The Right to Water 8* (Nov. 2003), available at http://www.who.int/water_sanitation_health/rightwater/en/ (Last visited on September 10, 2008).

¹⁵ United Nations Economic and Social Council, *The Right To The Highest Attainable Standard Of Health* : . 11/08/2000. Available at [http://www.unhchr.ch/tbs/doc.nsf/\(symbol\)/E.C.12.2000.4.En](http://www.unhchr.ch/tbs/doc.nsf/(symbol)/E.C.12.2000.4.En), (Last visited on September 10, 2008).

¹⁶ World Health Organisation, *Content of the Human Right to Water*, Available at http://www.who.int/water_sanitation_health/humanrights/en/index2.html, (Last visited on September 10, 2008).

¹⁷ National Water Policy, 2002, S 8 and Rajasthan State Water Policy, 1999, § 9, as cited in Phillippe Cullet, *Water Law Reforms: Analysis of Recent Developments*, 47 (2) JILI 227 (2006).

¹⁸ Maharashtra State Water Policy Act, 2003, § 4 and Rajasthan State Water Policy, 1999, § 8 as cited in *Water Law Reforms: Analysis of Recent Developments*, 47 (2) JILI 227 (2006).

¹⁹ RHONA K. M. SMITH, TEXTS AND MATERIALS ON INTERNATIONAL HUMAN RIGHTS 56-7 (2007).

²⁰ Prakash Shah, *International Human Rights: A Perspective from India*, 21 FORDHAM INT'L L. J. 24 (1997).

B. INTERNATIONAL INITIATIVES TO MAKE RIGHT TO WATER A BASIC HUMAN RIGHT: TWIN ASPECTS OF WATER AND SANITATION

The various international efforts at recognizing water as a basic human right cannot be overemphasized. The UN Committee on Economic, Social and Cultural Rights, in 2002, has declared clean drinking water as the basic human right of the people. It is therefore prudent to infer that water as a human right has been recognized by the world. The major goal which is, however, yet to be achieved by the majority of the states around the world, is the realization of the above right.²¹ Some important parts of the UN Covenants and Declarations which explicitly or implicitly declare water as a 'human right' include the Convention on the Elimination of All Forms of Discrimination against Women, 1967. Article 14, paragraph 2, clause (g) of the same deals with issues pertaining to sanitation and water supply in a substantive fashion. The Convention on the Rights of the Child, 1989 at Article 24, paragraph 2, clause (c) mentions the responsibility of state parties to implement measures to provide for adequate clean drinking water.²² Further, the Universal Declaration on the Eradication of Hunger and Malnutrition, 1974 identified as a pressing issue, the emerging trend of precedence given to the use of water in industry over agriculture.²³

The International Covenant on Economic, Social and Cultural Rights, 1966, coupled with the Universal Declaration of Human Rights, 1948 and the International Covenant on Civil and Political Rights, 1966 along with two Optional Protocols, constitutes the International Bill of Human Rights.²⁴ The General Comment No. 15 of the Committee on Economic Social and Cultural Rights made during its 29th session held in Geneva in November 2002 is perhaps the most explicit document released by the UN till date, declaring water as a 'human right'.²⁵ It emphasizes that the human right to water is indispensable for leading a life in human dignity; and hence, it is a prerequisite for the realization of other human rights.²⁶ The case is buttressed further by other international fora highlighting the

²¹ G. Kamalavardan Rao, *Drinking Water and Sanitation: Practical Vision Needed in BASIC RURAL INFRASTRUCTURE AND SERVICES FOR IMPROVED QUALITY OF LIFE* 127-49(1999).

²² ARUN K. SINGH, *Water: A 'Need' or a 'Human Right' issue?* in *PRIVATIZATION OF RIVERS IN INDIA* 43-4 (2007).

²³ See Universal Declaration on the Eradication of Hunger and Malnutrition (1974), preamble clause (d).

²⁴ SINGH, *supra* note 22, 49. See also Centre on Housing Rights and Evictions, *Right to Water: Background Information* available at <http://www.cohre.org/water>, (Last visited on September 10, 2008).

²⁵ S. Muralidhar, *The Right to Water: An Overview of the Indian Legal Regime*, available at www.ielrc.org/content/a0604.pdf (Last visited on September 10, 2008)

²⁶ International Council on Environmental Law, *The Right of Access to Drinking Water and Sanitation* available at http://www.emwis.net/topics/WaterRight/ICELCIDE_EN.pdf (Last visited on September 10, 2008). See generally Jennifer Naegele, *What is wrong with Full-fledged Water Privatization?* 6 J. L. & Soc. CHALLENGES 99 (2004).

significance of sanitation and drinking water. For example, the World Summit on Sustainable Development (WSSD), Johannesburg, 2002 delivered a ringing peroration about the need for safe drinking water and sanitation and committed itself to the task of improving the situation of people lacking access thereto in their respective locations. The Third World Water Summit, Kyoto, 2003, also harped on the issue of right to water.

An analysis of Article 2, paragraph 3 of the Declaration on the Right to Development, 1986 hints at an indirect imposition of the hegemony of WTO powers over other member nations, whereby they are mandated to develop policies for the well-being of the entire population. However, constantly being under the obligation of adhering to the binding clause of being in congruence with WTO laws, nations often find themselves in a position where they are unable to abide by their own national policies. In some of the subsequent sections of the present paper, we shall attempt to elaborate upon the position with regard to the WTO and its repercussions on water rights.

C. POLICY FRAMEWORK UNDERTAKEN BY THE GOVERNMENT OF INDIA

In India, water is a State subject. Entry 17 of the State List is in relation to “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”.²⁷ Further, Entry 6 of List II deals with the subject, Public Health and Sanitation.²⁸ It is therefore, highly possible to conclude that States are responsible for the availability and access to safe drinking water and sanitation facilities. The existing water law framework in India is characterized by the co-existence of a number of different principles, Rules and Acts adopted over the last 60 years.²⁹ This has led to a lack of clarity with regard to the rights and obligations of all concerned individuals and institutions. This problem has been further compounded by the fact that formal water law is still supplemented by a number of customary and religious rules concerning water use and control, whose application continues even today in many places.³⁰

A quick glance at the history of India’s water sector shows that it was managed on an *ad hoc* basis till 1987, when the first ever National Water Policy

²⁷ See Entry 17, List II, Schedule VII, The Constitution of India, 1950. See also Entry 56, List I, Schedule VII, The Constitution of India, 1950 which deals with Inter State Water Disputes.

²⁸ See Entry 6, List II, Schedule VII, The Constitution of India, 1950.

²⁹ Philippe Cullet, *Water Law Reforms: Analysis of Recent Developments*, 47 (2) JILI 206 (2006).

³⁰ *Id.* See also Mark Erik, *A Pure Perspective on Water*, Vol. 9 (3), HUMAN RIGHTS TRIB. (2003). See also Ken Conca, *Environmental Governance After Johannesburg: From Stalled Legalization to Environmental Human Rights*, 1 J. INT’L L. & INT’L REL. 121 (2004-05).

was formulated,³¹ and even that was a mere practice of codifying the manner of governmental functioning in this regard. Such a policy failed on a number of counts when it came to changing the ground realities however, because neither was it formulated with the participation of people through consultation, nor did it allocate any role to the communities involved in practising traditional water conservation.³² The word ‘participation’ is sometimes perceived as a misnomer because in principle, it is an umbrella term that covers the various stages of policy planning and project design right down to the management of water infrastructure, whereas in practice, the focus is usually on the fag end of the process.³³ Post the dismal performance of the implementation of the National Water Policy, 1987, the government prepared a fresh draft water policy in 1998. However, instead of wider circulation among the public at large, this policy was kept a secret, though the National Water Board had already approved it. Therefore, the final document did not incorporate any concern, suggestions or ideas emerging from the public, virtually making a mockery out of the whole exercise.³⁴

Some of the norms³⁵ of ‘safe drinking water’ as per the statistics used by the Planning Commission, 2002³⁶ to demarcate the extent of coverage are that drinking water sources should be within: (i) 1.6 km distance in plains, (ii) 100 metres elevation difference in hills; One hand pump or stand post for every 250 persons; 40 litres of safe drinking water per capita for human beings; 30 litres per capita per day additionally for cattle in Desert Development Programme (DDP) areas; drinking water is said to be safe if it is free from bacteria contamination, chemical contamination, i.e. fluoride, iron, arsenic, nitrate and brackishness in excess or beyond permissible limits. Nevertheless, the exact definition of ‘safe’ is still inconclusive. However, it is not like we lack standards for ascertaining the quality criteria but rather, these criteria have not been included in defining ‘safe’. Besides a lack of well-defined and structured objectives of the National Water Policy, 2002, a number of other drawbacks also exist pertinent to the problem of lack of drinking water and proper sanitation.³⁷ Some of them include emphasis on ‘man’ at the centre of, rather than as a part of nature and acting accordingly for the whole ecosystem, and lack of acknowledgment of people’s participation in water resource management. Moreover, project planning does not envisage any participation on part of the common man and the interests of concerned communities most likely to be affected by the wasteful use of drinking water have not been addressed directly despite the allocation of top priority to the provision of drinking water. Further, the critical issue of social justice in water distribution has been totally overlooked despite the fact that more than 60 percent of the population

³¹ SINGH, *supra* note 22, 57.

³² *Id.*, 57-9.

³³ Cullet, *supra* note 29, 209.

³⁴ SINGH, *supra* note 22, 57-8.

³⁵ Dr. Ramesh, *Right to Drinking Water: Need for Changes in the Present Policy*, 30 (1) INDIAN BAR REVIEW 599-600.

³⁶ Shital Lodhia, *Quality of Drinking Water in India: Highly Neglected at Policy Level*, available at www.cfda.ac.in, (Last visited on January 25, 2009).

³⁷ SINGH, *supra* note 22, 58-9.

lives in rural areas where access to water often becomes a question of survival. So also, the lack of national groundwater legislation and its adverse effects are not addressed.

The policy framework undertaken by the Indian Government in the water sector, in the specific context of water supply and sanitation, can be traced by highlighting the various five year plans executed during the last sixty years of India's independence.³⁸ During the First Five Year Plan (1951-56), water supply and sanitation were added to the national agenda. However, sanitation did not receive any separate importance and was merely mentioned under the heading, 'water supply.' It was only in 1954, that the first National Water Supply and Sanitation programme was launched as part of the Health Plan. During the Second and Third Five Year Plans, funding was provided to develop and strengthen state public health engineering departments and preliminary steps were taken for the identification of areas to be provided with drinking water. In 1968, states were given the financial autonomy to sanction rural water supply schemes. Priority was given to villages with acute scarcity of drinking water. Thereafter, the Accelerated Rural Water Supply Programme (ARWSP) was launched to supply water to villages of backward class during the 1970s.³⁹

From the Sixth Five Year Plan (1980-85) onwards, the importance given to the water sector gradually increased. For example, a Low Cost Sanitation Scheme was introduced for urban areas in 1980-81. In 1986, initiatives such as the Central Rural Sanitation Programme and National Technology Mission were launched as a direct consequence of policies adopted during the Sixth Five Year Plan.⁴⁰ During the Eighth Five Year Plan (1992-97), emphasis was laid on treating water as a commodity, and issues pertaining to privatization, inception of local bodies for operation and maintenance and development of proper linkages between water supply and sanitation were taken up.⁴¹ During the Ninth Five Year Plan (1997-2002), emphasis was again laid on privatization, as well as decentralization, both in rural and urban areas. The Tenth Five Year Plan (2002-07) provided for a hundred percent coverage of the urban and rural population insofar as water supply was concerned. Water was to be managed as a commodity and there was a change in the role of the government from a direct service provider to a facilitator in a process leading, to and perhaps, finally culminating in privatization. Focus was not only on investment requirements, but also on institutional restructuring, provision of better services, encouragement of people's participation and fostering managerial and organizational improvement.

³⁸ Ganesh Tagore & Vasudha Paagare, *Springs of Life* in INDIA'S WATER RESOURCES 82-9 (2006).

³⁹ The ARSWP was replaced by a 20 Points Minimum Needs Programme aimed at full rural coverage in 1975. In 1977-78, ARSWP was reintroduced but funds were provided by the states through the Minimum Needs Programme.

⁴⁰ The National Technology Mission was renamed as Rajiv Gandhi National Drinking Water Mission aimed at covering rural areas cost-effectively before the end of the 8th Five Year Plan.

⁴¹ During 1993-94, Accelerated Urban Water Supply Programme was initiated to provide water to towns. Also, during 1994-95, the Mega City Scheme for five metros was started.

III. LEGAL STANDING OF THE RIGHT TO WATER AND SANITATION IN INDIA

A. PROVISIONS OF LAW RELATING TO PUBLIC HEALTH AND SANITATION IN INDIA

With specific regard to right to water, it might be observed that in the Indian context, there is no definite legislation in place. Essentially, constitutional provisions are the ones which are looked into for the purpose of deriving solutions to the various problems in this sphere. Though specific legislations such as the Water (Prevention of Pollution) Act, 1972, Environment (Protection) Act, 1986, etc. are in place, these essentially deal with the issue of water pollution, and not the right to clean drinking water *per se*.⁴² Additionally, the Forest Conservation Act, 1980 could also be resorted to in select cases. With respect to ground water specifically, the Central Ground Water Authority is an authority that can look into such aspects that concern the ground water in a particular area.⁴³ One must however always note the existence of Article 47 of the Constitution of India which reads as follows: “Duty of the State to raise the level of nutrition and the standard of living and to improve public health – The State shall regard the raising of the level of nutrition and the standard of living of its people and the improvement of public health as among its primary duties and, in particular, the State shall endeavour to bring about prohibition of the consumption, except for medicinal purposes, of intoxicating drinks and of drugs which are injurious to health.”⁴⁴

While addressing the issue of clean drinking water as a fundamental right for the masses, another critical aspect is the issue of sanitation. Sanitation has always been relegated to the back burner in the Indian context, especially in the rural areas. This accentuates the problems already at hand, namely, public health concerns. Besides this, the right to clean drinking water has at best, remained mere rhetoric. Though the right to food has been clearly read into the Constitution of India under Article 21, pertaining as it is to the Right of Protection of Life and Personal Liberty, the concomitant Right to Water has not perhaps received its due share. With regard to Schedule VII of the Constitution of India, there are certain provisions that relate to water and issues associated therewith. Most of the major aspects are under the ambit of the State List of the concerned schedule. Entry 56 of List I is with relation to interstate rivers and river valleys. Entry 17 of List II talks, *inter alia*, of providing water supplies. However it is submitted that the right to water does not, despite the aforementioned entries, *per se* ‘water down’ from a reading of the entries in Schedule VII of the Constitution of India.

The aforementioned legal provisions, with the lone exception of Article 21, act as a guideline towards the pursuance of a certain standard of living for its

⁴² DR. ALI MEHDI, WATER POLLUTION LAWS AND THEIR ENFORCEMENT IN INDIA 117 (2007).

⁴³ RAMASWAMY R. IYER, WATER: PERSPECTIVES, ISSUES, CONCERNS 108-19 (2003).

⁴⁴ Article 47, Constitution of India, 1950.

citizens by the State. Although the Directive Principles of State Policy quoted above are a compelling argument for the right to water, and might be perhaps extended to imply the right to health when read in conjunction with sanitation, this alone is not a guarantee. The very fact that they are outlined by way of Directive Principles of State Policy and are outlined in Chapter IV, illustrate incontrovertibly, that they are therefore, non-justiciable.

B. TOWARDS A FRAMEWORK OF DEFINITE WATER LEGISLATION: FROM RHETORIC TO CONCRETE ACTION

The fragmentation observed in the various policy provisions with regard to water in India gives rise to the pressing need for a comprehensive legislative initiative that must be adopted so as to annihilate the complications arising from the existing loopholes. The National Commission for Integrated Water Resources Development during the course of its deliberations, suggested the need for a comprehensive national legislation based framework, to deal with the various issues pertaining to water and its use.⁴⁵ Though, there may be practical difficulties in ensuring that such a legislation, finally see the light of the day, there are many benefits which could flow, should this proposition become a reality. As an illustration, to deal with the right to clean drinking water, the first concrete step that must be taken is to ensure that there is a certain standard laid down which can indicate basic requirements of quality and quantity. This can consequently ensure that the entire system of providing clean drinking water is scientifically managed.

Another crucial aspect to be looked into would be to stop the wasteful use of water in the areas where it is provided. One way of doing this would be by way of imposing a levy on water consumption. This could also lead to the raising of funds for the maintenance of such services in the future and by corollary, thereby lead to improvement in the infrastructure related to providing water. Thus, we would like to stress that attaching a cost to such services shall ensure that misuse of water supply is effectively checked; even if one were to provide some leeway for the fact that some of the primary objectives behind providing water to people might be slightly compromised upon.⁴⁶

Thus, it is submitted that a unified legal structure will lend clarity to the entire process of providing water to the masses; apart from ensuring that water is not wasted in the zeal of creating a systematic superstructure to address the larger issue of 'water for all'. The right to water has been, and still is, being debated the world over as an inseparable pillar of human rights and therefore, by corollary, is incomplete without an improved scheme of sanitation and better public hygiene. Though, it is acknowledged that a mere statutory enactment may not be the sole requirement or solution to the problems of the people, it can indeed go a long way in putting pressure upon the government to deliver along such affixed lines, apart

⁴⁵ RAMASWAMY R. IYER, WATER: PERSPECTIVES, ISSUES, CONCERNS 108-14 (2003).

⁴⁶ *Id.*

from also affixing accountability in relation to ensuring clean drinking water and better sanitation facilities.

C. JUDICIAL PRONOUNCEMENTS IN THE CONTEXT OF THE RIGHT TO WATER AND THE NEED FOR BETTER SANITATION FACILITIES

The right to water has not been expressly provided for under any constitutional or legislative provision in India. The Supreme Court has, in most cases, taken the refuge of Article 21 of the Constitution of India to address concerns relating to the right to water. In this context, it may also be noted that the right to health stands as superset within which the specific right to clean drinking water and related aspects like sanitation can be located. Article 21 of the Indian Constitution guarantees to individuals their life and personal liberty which might not be deprived except by a procedure established by law. The Supreme Court has widely interpreted this fundamental right and has included within Article 21 the right to live with dignity. It has also held that any act, which affects the dignity of an individual, will also violate their right to life. The issue of right to life and human dignity was first addressed in *Bandhua Mukti Morcha v. Union of India*,⁴⁷ which concerned the living and working conditions of stone quarry workers. The court held that humane working conditions are essential to the pursuit of the right to life.

In the case of *T. Damodar Rao v. Special Officer, Municipal Corporation, Hyderabad*,⁴⁸ the Supreme Court ruled that the responsibility for the upkeep of environment is as much on the state as it is on the various machineries of the state, vide the implication provided in Article 48-A of the Constitution of India. In *Andhra Pradesh Pollution Control Board v. Prof. M.V. Nayudu and others*,⁴⁹ a case dealing with the broader issue of sustainable development, Justice Jagannadh Rao held that the right to life under Article 21 of the Indian Constitution also implies the right to a clean environment. Further, even the Karnataka High Court has considered the right of an individual to have access to drinking water. In the case of *Puttappa Honnappa Talavar v. Deputy Commissioner, Dharwad*,⁵⁰ it held that the right to life also includes the right to have access to clean drinking. Additionally, in the case of *Ratlam Municipality v. Shri Vardichand*,⁵¹ where the issue was whether municipalities are obligated to maintain certain minimum standards to ensure public health, by way of a petition filed under Section 133, Criminal Procedure Code, 1973, the Supreme Court held that a public body constituted for the principal statutory duty of ensuring sanitation and health is not entitled to immunity on account of breach of this duty. With respect to the

⁴⁷ *Bandhua Mukti Morcha v. Union of India*, A.I.R. 1984 S.C. 802.

⁴⁸ *T. Damodar Rao v. Special Officer, Municipal Corporation, Hyderabad*, AIR 1987 AP 17.

⁴⁹ *Andhra Pradesh Pollution Control Board v. Prof. M.V. Nayudu and Others*, AIR 1999 SC 812.

⁵⁰ *Puttappa Honnappa Talavar v. Deputy Commissioner, Dharwad*, AIR 1998 Kar 10.

⁵¹ *Ratlam Municipality v. Shri Vardichand*, 1980 (4) SCC 162.

discharge of pollutants as a consequence of industrial activity the Court observed that such reckless degradation of environment is “a challenge to the social justice component of the rule of law”.⁵² The *Vellore Citizen’s Welfare Forum v. Union of India*⁵³ case dealt with the issue of water pollution by the discharge of toxic effluents from tanneries located in the state of Tamil Nadu. The Supreme Court looked into Articles 21, 47, 48-A and 51-A(g) as well as the basic provisions of the Water (Prevention and Control of Pollution) Act, 1974, Air (Prevention and Control of Pollution) Act, 1981 and the Environment Protection Act, 1986 to decide on this case. The twin principles of ‘Polluter Pays’ and ‘Precautionary Principle’ were looked into by the Court and subsequently introduced as ‘law of the land’. The Supreme Court had also gone on to hold in the case of *MC Mehta v. Union of India*,⁵⁴ that environmental pollution causes several health hazards, and therefore violates the right to life.

It is submitted, that the right to water and sanitation do not at present, have a clearly defined niche under Indian laws. Therefore, there must be a clearly defined and expostulated provision pertaining to right to health so that individuals can have their rights enforced and violations redressed. Further, accompanying issues of water and sanitation should get their due share of focus, and efforts be made to assuage the people and their grievances, besides having a policy framework to enunciate how such situations might be dealt with. Having suggested that, we would like to further state that employing Article 21 as a tool to facilitate the introduction of the right to water as a tangible justiciable right is indeed a potent scheme.

D. INTROSPECTING THE CHARACTER OF THE INDIAN LEGAL SYSTEM IN RELATION TO THE WATER RIGHTS

Ideally, water resource systems must be designed, protected and managed well so that not only is water used intelligently, but also that at the same time, their ecological, environmental and hydrological integrity is maintained.⁵⁵ In this regard, it is prudent to first look into the merits and demerits of the Indian legal system in relation to the regulation of such water resource systems. Some of the merits of the Indian legal system with regard to the right to water include the fact that the states tend to protect the negative rights i.e. they can refrain from doing a number of other actions that are not mandatory in nature. Thus, it is comparatively a less expensive mode for the governments to ensure the protection of rights.⁵⁶

⁵² *Id.*

⁵³ *Vellore Citizen’s Welfare Forum v. Union of India*, AIR 1996 SC 2715; *See also* Indian Council for Enviro-Legal Action v. Union of India AIR 1996 SC 1446.

⁵⁴ *MC Mehta v. Union of India*, AIR 1987 SC 1086; *See also* *MC Mehta v. Union of India*, AIR 1988 SC 1037.

⁵⁵ *For a Drop of Water*, STATESMAN (Calcutta), May 9, 2006.

⁵⁶ Harvard Law Review Association, *What Price for the Priceless?: Implementing the Justiciability of the Right to Water*, 120 HARV. L. REV. 1067 (2007).

These days, the reforms that are sought to be brought about within the existing system, are aimed at incorporating the principle of decentralization and participation. For example, the *Swajaldhara* guidelines which are premised on community participation, aim at devolution of ownership of drinking water assets to appropriate *panchayats*.⁵⁷ Moreover, a number of states ranging from Andhra Pradesh and Madhya Pradesh to Orissa and Rajasthan now have Water User Associations (WUAs)⁵⁸ which are meant to be governed and controlled by people that both pay for the services the association offers, and receive benefits therefrom. These are independent entities and are not commercial in nature.

However, some demerits are also inherently present within the regulatory framework of the Indian legal system with regard to the right to water. In order to get some more insight into this aspect, it might be interesting to look at the difference between the South African model and the Indian model.⁵⁹ The South African model confers a justiciable, affirmative right of access to adequate water, and the same is enshrined in the country's Constitution and has been upheld by the country's Constitutional Court. In India on the other hand, an implied justiciable right is only derived from the broader Right to Life.⁶⁰ Perhaps, a more direct approach to justiciability would be of a greater impact in achieving the goal of clean water for all. The urgency and importance of this matter is sorely undermined however when the executive wing of the government sometimes characterizes this right as merely a social development project.⁶¹ Further, there are an insufficient number of monitoring bodies to ensure both the equitable implementation of water policies as well as to provide redressal mechanisms for violations.⁶² If India is truly serious about pursuing a right to water within the human rights discourse effectively, then even human rights must have an equal place in the scheme of development.⁶³ However, this has so far at least, been difficult to achieve. Moreover, the accountability of the government, when no tangible steps are taken towards rights protection, also has to be looked into.⁶⁴ Although justiciability cannot be looked at as a panacea for all our water woes, it is definitely an effective step in ensuring sufficient access to sufficient clean water to all.

⁵⁷ Cullet, *supra* note 29, 216-7.

⁵⁸ See Andhra Pradesh Farmers Management of Irrigation Systems Act, 1997, Madhya Pradesh Sinchai Prabandhan Me Krishakon Ki Bhagidari Adhiniyam, 1999, Orissa Pani Panchayat Act, 2002, Rajasthan Farmers' Participation in Management of Irrigation Systems Act, 2000.

⁵⁹ Harvard Law Review Association, *supra* note 56.

⁶⁰ Erik B. Bluemel, *The Implications of Formulating a Human Right to Water*, 31 Ecology L.Q. 957 (2004).

⁶¹ Shah, *supra* note 20.

⁶² Centre on Housing Rights and Evictions, *Right to Water: Background Information* available at <http://www.cohre.org/water> (Last visited on September 10, 2008).

⁶³ Shah, *supra* note 20.

⁶⁴ Hardberger, *supra* note 7, 331.

IV. RIGHT TO WATER AS A NEED: THE ISSUE OF WTO AND WATER BEING TREATED AS A COMMODITY

A. ROLE OF THE STATE AND THE PROSPECT OF PRIVATIZATION OF WATER SERVICES

The major consequence of making the right to water a part of the definition and scope of services, as understood for the purposes of the WTO mechanism, is that the onus shifts from the State being a facilitator, to the State as a mere regulator. This, thus, implies thereby, a sharp transition from a situation where the state machinery is to be responsible for the provision of water services to the people, to one where the same function essentially flows to the hands of private parties. In the former situation, considering water as being within the ambit of human rights, the onus shifts onto the shoulders of the State to ensure that the masses have no trouble in gaining access to water. Further, in the given scenario, the profit motive also remains absent as the provision of clean drinking water to the people becomes a welfare function.⁶⁵ On the other extreme, water services after being privatized, run the risk of fomenting practices such as profiteering, so as to sustain the business of providing water to the people. In this case providing water comes at a premium and may well be beyond the reach of the common man due to prohibitive pricing policies, which in fact may to an extent be necessary, for the private firms to recover input costs.

B. PRACTICAL PROBLEMS ARISING FROM THE PRIVATIZATION OF WATER SERVICES IN THE CONTEXT OF WTO REGULATIONS

The WTO and GATS regime have strict regulations with respect to governmental intervention with reference to the functioning of private players involved in the supply of water services. For example, the government of states cannot endeavour the creation of 'specific legal entities' that trespass into the realm of water services. The various provisions of the arrangement seemingly slant in the direction of private participation, and therefore do not take into consideration the need for participation of the public at large in the provision of as essential a service as water to the masses.⁶⁶ At the same time however, it might be acknowledged that the entry of private players into the hitherto preserve of state monopoly is welcome, especially if considered from the viewpoint of efficiency in the services provided as a consequence of privatization. Further, the GATS setup also encourages governments to decide on the selection of such parties to carry

⁶⁵ Mireille Cossy, *Water Services at the WTO* in FRESH WATER AND INTERNATIONAL ECONOMIC LAW 117-41 (2005).

⁶⁶ Elisabeth Tuerk, Aaron Ostrovsky and Robert Speed, *GATS and its Impact on Private Sector Participation in Water Services*, in FRESH WATER AND INTERNATIONAL ECONOMIC LAW 143-72 (2005).

out the provision of these services to the people. It is submitted that the right to water as a need-based right to accommodate the mandate of WTO for trade in services, has certain typical problems that many nations, especially developing ones may find uncomfortable to adhere to, given the socio-economic scenario of such nations. While an increased state of efficiency may be desired, it cannot be the only motivating factor to look at trade in water services.

V. CONCLUSION

It must be remembered that though law can come in as a facilitator of change, for it to be truly effective and deliver on its mandate, the desire of the people must always remain the supreme consideration. In this context, efforts at capacity building of the local population may be undertaken so that theoretical propositions, as stated during the course of this paper are demonstrated in practical life as well. A situation where water and related services are entirely within the ambit of trade in the open market, defeats the very purpose of treating water as a basic means to survival. Therefore, it is our view that water should be treated as a fundamental human right. It is only then, that a substantial proportion of the masses, which are still not in a position to afford the basic necessities of life, can access water resources freely. In fact, greater stress may be placed on the strengthening, creation and sustenance of a robust infrastructural base that can support the pressures of a large population on water resources. For the purpose of prevention of wastage and excessive unplanned use, a nominal cess may be levied so that people use water with prudence. In fact, a segregation could be made between the requirements of water from the perspective of water being a basic human right on one hand, and water being used as a commodity that can be traded in on the other. It is then, that we can try to ensure that there is ample availability of water for both human requirements and commerce; thus avoiding the scope of friction between these two contradictory segments of water usage. This mechanism can also ensure that the concepts of human rights and trade in services remain in their own exclusively defined realms and do not encroach into each other's territory. Finally, this can also lead to greater efficiency in the usage of water when there exist clear legislative parameters to deal with both kinds of usage as suggested hereinbefore in the paper.