CHAPTER III

RIGHT TO SAFE DRINKING WATER UNDER THE CONSTITUTION OF INDIA

Introduction

The emergence of water as a vital resource calls for the effective and accountable management. Since our Constitution mandates a federal form of governance, water resource management becomes an important concern in maintaining the federal spirit and better Union- State and Inter- state relations. Water is elixir of life not only for human beings but for all living organisms that require it in the pure form free from any type of contamination. Asian Development Bank warned 1,2 21st century will witness number of countries experiencing a chronic water shortage rising to 90% from the present figure of 25% affecting half the human population.

In the present constitutional scheme, the legislative power in relation to water is divided between Union and States. The Union has been empowered to legislate the matters relating to regulation and development of Inter State River and river valleys. However the power is limited to the extent by which such regulation and development is under the control of Union is declared by the Parliament by law to be expedient in public interest3. The states on the other hand, have been empowered to legislate in respect of water supplies, irrigation and canals, drainage and embankments, water storage and water power4. The legislative competence of the states in these areas is subject to the legislative powers of the Union as provided under Entry 56 List I5. As far as intra state rivers are concerned state have exclusive legislative jurisdiction over them.
The right to life under Art.21 has been significantly expanded for the last six decades include the right to health and right to clean environment which may include right to safe drinking water. There has been significant development in the field of incorporating the right to food as a fundamental right under Article 21. Whether the protection of right to food may be extended to right to safe drinking water under the protection of right to life? If protection of rights included not only negative protection of violation of rights but also positive protection, then it may argued that right to water be extended to mean the people should not be denied access to water but also that in areas where no access to water is provided by the state, the Constitutional right to life guarantees would include a duty on the state to positively provide the safe drinking water.

In a rule based society state activities can survive only on the basis of legality. Legal developments with regard to water resources has not come up to the Constitution standards or failed in meeting the challenges of rendering justices to people as regards water. Hence it is imperative that legislative frame work relating to water resources be fundamentally examined. With a view to ensuring clarity and make the process convenient the exposition is broadly classified into three: pre-colonial, colonial and post-colonial.

1. Pre colonial water laws: In pre colonial period water resources were much in abundance as compared to population and demand. Source of Law are broadly in religious texts and customary practices. The concern for management of water may be seen from the period of Indus Valley Civilization. Specific laws in this respect emerge with the inception of Vedic social order where the dharma becomes the test stone.
A survey of the religious texts provide the insights into the following principles.

2. Colonial: The Maurya Period provided a strong centralized bureaucracy. During medieval times there were inducted another set of principles governed by Holy Quran and Sunna in the existing system by an ethnic group with different views on socio-economic background of water. Water in Islam is considered as perfect, indispensable and priceless element that ‘we made from water every thing.’ Depending upon its quality, there were mainly three types of water in Islamic System. They declare free access and use of ‘water as the birth right of every one’.

3. Post-colonial: The new era of legislative thinking began in India with the British colonial Rule. The interests of rulers were to establish rights over the water resource of the country. The first major development came through the Bengal Regulation (VI of 1819) which empowered the Government to invade private rights of ferry by the establishment of public ferry. The establishment of sovereignty over water by the Government marked a radical shift from the earlier practices which treated the resources as the common property of all, with the control lying in the hands of the people.

There occurred a complete change of legal perception with the Constitution of India, backed by the idea of social welfare. The Constitution at the apex of all laws became the fundamental basis for the legitimacy of the post constitutional legislation.

Under the Constitution, the legislative competence of water and water based resources are divided between the Union and States. The Constitution makes water a state subject in express terms while aspects like the Inter state water disputes are dealt by the Union. All these arrangements may be seen on the three lists (Union, State and
Concurrent list) of the VII Schedule of the Constitution. The general policies and the principles for the management of natural resources including water resources are incorporated in Part III and Part IV. It imposes duty on the state to equitably distribute the resource ensuring ecological improvement and preservation.\textsuperscript{12} To this effect the Constitution imposes fundamental duties on the citizens for the protection and improvement of natural resources. Since water is a basic human need, fundamental right to life gets greater significance for the optimum availability of water for all. The Directive Principles are fundamental in the governance of the country and it is the duty of the state to apply the principles otherwise it could be constitutionally invalid.\textsuperscript{13} For adjudication of disputes between the states on interstate rivers or river valleys the Constitution empowers the Parliament to make laws which may provide the jurisdiction of Supreme Court or High Court\textsuperscript{14}.

A large number of enactments concerning water and water based resources have been passed by the Union and State legislatures, in areas like water supply for drinking purposes, irrigation and rehabilitation of evacuees affected by the operation of the scheme for water resources management. Under the Constitution water is a state subject. The relevant provisions are Entry 17 of the State list, Entry 56 of the Union List and Article 262 of the Constitution.

Entry 17 in the State List as follows: “Water, that is to say, water supplies, irrigation and canals, drainage, embankments, water storage and water power subject to the provisions of Entry 56 of List I”. Water is indeed in the State list but it is subject to the provisions of Entry 56 List II of the VII Schedule of the Indian Constitution. The Entry read as follows: “Regulation and development of the 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 public interest’. Under the Constitution legislative competence of state legislation under Entry 17 of the State list remains unfettered until Parliament has made much use of the powers vested in it by Entry 56 of the Union List. Water is potentially as much a central subject as a state subject, particularly as most of the country’s rivers are inter state. It is also important to note the provisions of Article 262 of the Indian Constitution which read as follows: “Adjudication of disputes relating to water of inter state rivers and river valleys: Parliament may by law provide for the adjudication of any dispute or complaints with respect to the use, distribution or control of the water, or in any inter state river or river valley. (2) Notwithstanding any thing in the Constitution, Parliament may by law provide that neither the Supreme Court nor any other Court shall exercise jurisdiction in respect of any such dispute or complaint as referred to in Clause (1).

Water appears both in the Union list and the State list. The role given to the Parliament in regard to the inter state river and river valleys is potentially an important one and this is reinforced by the use of the provisions of the Entry 20 in the Concurrent list namely, “Economic and medium irrigation projects, hydropower, flood control and multipurpose projects require the clearance from the Parliament. This has been questioned by some of the states, but the clearance requirement remains and there is of course the requirement of central clearance under the Forest Conservation Act and Environmental Protection Act.

Apart from these, it is essentially the responsibility of State Governments to formulate and administer water laws. It may be noted that leaving water law and
administration entirely in the hands of the States could create practical problems emerging from the lack of uniformity in water laws in different states. However the Union could still use its power to minimize the conflicts among water laws especially in the context of inter state water projects.\textsuperscript{15}

Apart form the Union and states, there is now a third tier in the Constitutional structure created by the 73\textsuperscript{rd} and 74\textsuperscript{th} Amendments, namely, local bodies of governance at the village and city levels, the village panchayats and nagar palikas. The Eleventh and Twelvth schedules of the Constitution lay down subjects allotted to panchayats and nagarpalikas. The Eleventh Schedule included interalia drinking water, water management, watershed development and the sanitation.

Article 40 of the Indian Constitution casts a duty on the States to take steps to organize village panchayats and endow then with such powers as may be necessary to enable them to function as units of self government. However, current panchayat legislation as well as irrigation and forestry legislation continues to dilute the power of the panchayats by placing actual control over resources like water and forestry with different government departments. Though panchayats have dejure rights and duties for management of common property resources within their jurisdiction their rights are not backed by the corresponding power and autonomy in the resource use and investment decisions\textsuperscript{16}.

Right to Water and Right to Life

A detailed review of the international treaties considers water to be a fundamental resource. Several of the explicit rights protected by the international treaties, conventions and agreements specifically those guaranteeing right to food, human health
and development cannot be attained or guaranteed without guaranteeing the right to access to safe drinking water. In recent years more explicit articulation of the view supporting right to water has been made by the resolution of United Nations Organization passed during the United Nations Water Conference (1977) as follows:

“All people whatsoever their stage of development and their social and economic conditions, have the right to have access to safe drinking water in quantum and of the quality equal to the basic needs.”

In India the Constitutional right to safe drinking water may be drawn from right to food, right to clean environment and right to health, all of which have been protected under the right to life guaranteed under Article 21 of the Indian Constitution. In addition to Article 21, Article 39(b) of the Directive Principle of State Policy, which the Constitution declares to be non justiciable recognizes the principle to equal access to the material resource of the community. Article 39(b) mandates that the state shall in particular, directs its policy towards securing that he ownership and control of the material resource of the community are so distributed as best to subserve the common good.

Through various decisions the right to safe drinking water has been protected by courts only as a negative right, that is, the right not to have water sources polluted. Such protection has stemmed from the articulation of a fundamental right to a clean and healthy environment\textsuperscript{17} as part of the right to life guaranteed under Article 21 of the Indian Constitution.

An important ruling of the Supreme Court was in \textit{Andra Pradesh Pollution Control Board II v. Prof. M.V.Nayudu}\textsuperscript{18}. The fact shows that Andra Pradesh Government
had granted exemption to a polluting industry and allowed it to be set up near two main reservoirs – The Himayat Sagar Lake and Osman Sagar Lake – in violation of the Environmental Protection Act, 1986 and the Water Act, 1974. The Supreme Court struck down the exemption and held that “the Environmental Protection Act, 1986 and Water Act, 1974 did not enable the state to grant exemption to a particular industry within the area prohibited for the location of the polluting industries. Exercise of such a power in favour of a particular industry may be treated as arbitrary and contrary to public interest and in violation of the right to clean water under Article 21 of the Constitution of India. Such an order of exemption carelessly passed ignoring the ‘precautionary principle’ could be catastrophic”. The Court referred to India’s participation in the UNO Water Conference and held that the right to access to safe drinking water was fundamental to life and there was a duty on the State under Article 21 to provide clean drinking water to the citizens. The Supreme Court referred to the Narmada Bachao Andolan v. Union of India19 where Kirpal J. observed 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 the Article 21 of the Constitution of India……and the right to healthy environment and to sustainable development are fundamental human rights implicit in the right to life.”

In Shajimon Joseph v. State of Kerala20 the Kerala High Court made it clear that it was the duty of the State to provide safe drinking water to the citizens. In M.C.Mehta v. Kamalnath21 the court declared that ‘our legal system – based on English common law included public trust doctrine as part of its jurisprudence. The state was the trustee of all the natural resources which were by nature meant for public use and enjoyment. These resources meant for public cannot be converted to private ownership’.
In *Voice of India v. Union of India* the court made it clear that even after 60 years a citizen of the country is not getting clean potable water. Here petitioner seeks relief essentially against municipal corporations, in each state because supply of clean potable water is the function of municipal corporations and other local bodies. Water; being the state subject, it is the duty of the state to provide potable drinking water to the citizens.

Thus it may be seen from the discussion that the fundamental right to water has been articulated by courts within the rubric of the right of citizens to ‘safe’ drinking water as part of the right to clean environment guaranteed under the right to life under Article 21. By doing so, the court has been projecting the negative rights not to have water resources polluted. In *M.V. Nayudu* case the Court did mention that all citizens had the fundamental right to have access to safe drinking water, but did not take the issue forward in order to explore whether that included the positive obligation of the state to provide clean drinking water to all citizens. Thus, one can see that the right to clean drinking water although not articulated as a separate right has been considered as an integral part of the right to clean environment and right to life.

While the right to safe drinking water has been accepted by the Court to be a fundamental right under Article 21 it has only been articulated as part of the guarantee of the right to environment. Such an articulation does not address issues such as having access to water – what if a particular community, village or an urban slum has no water supply at all. Taking this into consideration, can it be claimed as a positive justiciable right from the state? It is argued that by posing right to water as an extension of the fundamental right to food and health one can indeed make such a claim.
So what does the right to water specifically mean? Would it mean providing safe water to all those who need it, or would it mean something more? The Right to access to water can be seen to place three inter related but distinct obligations on the state.

1. It must ensure that all people have physical access to water. It means that facilities that give access to water must be within safe physical reach of all sections of the population, especially the vulnerable and marginalized sections.

2. It must ensure that all people have economic access to water. This implies that the cost of accessing water should be at a level that would ensure that all people are able to gain access to water without having to forgo access to other basic needs.

3. Where water is provided, i.e. the right is guaranteed, they should be protected against undue infringement.23

The South African Constitution specifically guarantees the right to food and safe drinking water to its citizens.24

While protecting these rights the South African Constitution refers to the availability of resources which would be a condition required for implementing the rights. It places a duty on the Government to realize the right to access to water by acting in partnership with one another. While the National Government is required to establish a national framework to ensure the realization of the right, local government must play the critical role of ensuring delivery of water to all.

In this regard reference may be made to a decision from South Africa. In *Manjele v. Durban Transitional Metropolitan Council*25 the applicant, an unemployed woman, who occupied premises with seven children sought a declaratory order that the
discontinuation of water services to her premises was unlawful. She argued that the bylaws in terms of which the water service was disconnected were ultravires the Water Services Act, 1997. Manqele relied on her right to basic water supply as referred to in the Act. The Council argued that as no regulations had at that time been promulgated to give meaning to ‘basic’ water supply, therefore the right she relied on had no content. Manqele was thus denied a remedy, in principle on this technical background, but the judge also commented on the fact that she had illegally reconnected the water supply; arguably thinking that this also underpinned her denial of a remedy. The case galvanized the Government to Gazette Regulations under a year later defining precisely in volumetric terms a basic water supply.

The above case is interesting in that they provide support to right to water by stating that a person has the right to access to a basic level of water supply, even if she is unable to pay for the same and the same cannot be denied by the state.

The South African Constitutional and Statutory jurisprudence can be used in India to argue that the social right to water should be articulated as a positive right to provide access and water supply to those who do not have it and not merely a negative right of not having water resources polluted.

It may seem a truism to mention that through out history, issues of water rights have formed part of law and legislation and by consequences of legal science and doctrine, there exists a condition of under exposure of water law in India. In India, there is nor formal law to deal with water rights and there exists only certain national policies to deal with the same.
Worldwide, the use of water tripled between 1950 and 1990 and is projected
to grow by another 50% by the turn of the century. Growing population increases the
amount needed for domestic use, while migration to cities and rising income raise the
percapita water demands for drinking, cooking, washing etc., Municipal water
withdrawals are projected to grow by 80% and the Industrial withdrawal by 84% from
1995 to 2020. In developing countries municipal withdrawals are likely to increase by
over 150% and the industrial withdrawal more than triple over the same period.

Life is worth living only when a person has access to basic necessities of life.
Central and State Governments have adopted various measures for the preservation and
management of water and water related resources, but it has been found to be inadequate
mainly because of the lacunae in laws and failure of proper implementation of laws. It is
desirable to plug off loopholes for misuse of welfare funds and make adequate funds
available so that basic necessitates of life are made available to people\textsuperscript{28}.

The Constitution Review Committee recommended the inclusion of Right to
Safe Drinking Water under Article 30D\textsuperscript{29}. Article 30D of the Constitution give
importance to right to safe drinking water, prevention of pollution, conservation of
ecology and sustainable development.

Every person shall have the right –

a. To safe drinking water.

b. To an environment that is not harmful to one’s health and well being.

c. To have the environment protected, for the benefits of present and
future generations so as to –

1. to prevent pollution and ecological degradation
2. to promote conservation
3. to secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development

The Ninth Plan (1997-2002) prepared by the Planning Commission of India is understood to have specifically designed to keep in view the goals of Agenda 21 as well as the Rio principles as integral parts of the development process. The main objectives of the Ninth Plan include:

1. Ensuring environmental sustainability of the development process through social mobilization as a participation of people at all levels.

2. Providing the basic services of safe drinking water, primary health care facilities, universal primary education and connectivity to all in a time bounded manner.

3. Ensuring food and nutritional security to all, particularly the vulnerable sections are few of them.

Taking into effect the this principles, judiciary stretched its arm to include the basic right to water as part of Article 21. Potable water is a bare necessity without which life cannot sustain and this has rendered right to water as a basic human right.

In *F.K.Hussain v. Union of India*[^30], the petitioner contended that the coastal water around the Lakshadweep islands is very limited. Potable water is in a short supply and large scale withdrawals with electrical and mechanical pumps can deplete the water source, causing stoppage or intrusion or saline water from the surrounding Arabian Sea.
The Court held that ‘the right to sweet water and right to free air is attributed of the right to life, for these are the basic elements which sustain life itself.’\textsuperscript{31} Through these decision the court tries to shift the water right from negative to positive right.

In \textit{Venkatagiriappa v. Karnataka State Electricity Board}\textsuperscript{32} the court held that in a developing country like ours no citizen can claim absolute right over the natural resources ignoring the claim of others. Water resources, being limited, its use has to be regulated and restricted in the larger interests of the society and for the welfare of the human beings. The court also held that the right to life could be held to include right to have water for drinking purposes without which life cannot be enjoyed at all.

In \textit{Shailesh R. Shah v. State of Gujarat and others}\textsuperscript{33} held that the state as the trustee of all natural resources including ponds and lakes.

In \textit{State of Karnataka v. State of Andra Pradesh}\textsuperscript{34} dealt with the sharing of water between three states – Karnataka, Andra Pradesh and Tamil Nadu, the court held that life cannot be sustained without water; the right to water has been declared as a part of right to life.

In \textit{Narmada Bachao Andolan v. Union of India}\textsuperscript{35} which dealt with conservation of Sardar Sarovar Project, Justice Kirpal held that water is the basic need for the survival of human beings and is part of the right to life and a basic human right.

The basic water requirement can be defined as right to access water of sufficient quantity and quality to meet basic human needs, in terms of drinking, cleaning etc.\textsuperscript{36} In \textit{Delhi water Supply and Sewerage Disposal Undertaking v. State of Haryana}\textsuperscript{37} the Supreme Court held that the right to water for domestic purposes would prevail over other water needs.
In the Plachimada instance\textsuperscript{38} which dealt with the exploitation of ground water resources by a private company, it was made clear by the court that water is the primary human need to deprive which is to deny the right to life. This gift of nature has to be equitably distributed for every human being to keep the life going. But the water mafousis strangle the supply of water and make this right to life a misery. The state has a great duty in the distribution of water. In single bench decision, the court made it clear that the ground water was held as national wealth and as a resource that belongs to the public. The Panchayat was held as a custodian of all natural water resources in its jurisdiction. The right of the individual to use the ground water was made subject to the restrictions imposed by the state. The Single Bench decision in Perumatty Grama Panchayat v. State of Kerala recognizes that the fundamental right of the individual is likely to be infringed by the over extraction of the ground water by a person or a company. Unfortunately this decision has been reversed by the division bench of the Kerala High Court. In appeal the division bench accepted the contention of the company and states that in the absence of a specific statute prohibiting the extraction of groundwater from his/her land. Such an extraction could not be considered illegal. The division bench in Hindustan Coco cola Beverages Company (P) Ltd v. Perumatty Grama panchayat discredited the powers of the Panchayat under the third schedule of Kerala Panchayati Raj Act which deals with the ‘maintenance of traditional drinking water resources’ could not have been envisaged as preventing an owner of a well from extracting water there from as he wishes. The division bench recognized ground water as a ‘private water resource’ and accepted the preposition of law that the land owner ha ‘proprietary’ right over it. The division bench failed to recognize the emerging
jurisprudence based on Article 21 of the Constitution of India. The Supreme Court of India, have decided that the natural resources are public trust and the state as the trustee is duty bound to protect and preserve such resources for the present and future generation\textsuperscript{38a}. The overexploitation of such resources due to state action or inaction would amount to the violation of the fundamental right. The division bench has also failed to understand ground water hydrology and the natural process through which the recharging of ground water occurs. The ground water in one person’s land need not always is the water percolated through his land or the water that falls upon the land. Moreover the overexploitation of ground water by one person would have adverse impact upon every land. Therefore it is not proper to consider ground water as a ‘private property’ that can be extracted by the land owner by treating it as his/her wealth.

In a case highlighting the duty of the state to provide its citizens with safe drinking water, Public Interest Litigation was filed against the state of Madhya Pradesh. The state has provided tube wells for the supply of drinking water to a number of villages. However, before the digging of wells, certain tests were to be performed to determine the safety of water. In \textit{Hamid Khan v. State of Madhya Pradesh} \textsuperscript{39} the court held that state has failed in its duty under Art.47\textsuperscript{40} and to improve public health and to provide safe drinking water.

In \textit{K.M. Chinnappa v. Union of India}\textsuperscript{41} aptly stated that the enjoyment of life and its attainment including the right to life with human dignity encompasses within its ambit the protection and preservation of environment, ecological balance, free from pollution of air and water, without which life cannot be sustained.
Through all this judgments the Supreme Court has tried to reiterate the concept of safe drinking water under Article 21 of the Indian Constitution. But there still exists the water shortage and thousands are deprived of this basic human right. The state is not able to provide these natural resources to the needy citizens.\textsuperscript{42}

To meet this formidable challenges of wise and equitable water management, India has to take profound actions. For such actions to be meaningful, water has to be given an important place in India’s Constitution to guide and empower the legislative, executive and judiciary. For this, the attributes of water that necessitates its recognition in the Constitution is to be given more importance\textsuperscript{43}.

The idea of conservation of natural resource has been echoed in the words of the Supreme Court of India in \textit{State of Tamil Nadu v. M/s Hind Stone}\textsuperscript{44} where it observed ‘Rivers, forests, minerals and such other resources constitute nation’s natural wealth. These resources are not to be fettered away and exhausted by any one generation. Every generation owes a duty to all succeeding generation to develop and conserve the natural resources of the nation to the best possible way. It is in the interest of the mankind and the nation’.

\textbf{Conclusion}

The Rule of Law runs close to the rule of life, and the Indian Constitution in its humanist vision has made environmental, ecological preservation a fundamental value. Indeed, the higher jurisprudence of Article 21 of the Constitution (right to life) embraces the protection and preservation of nature’s gift without which life ceases to be viable and human rights being denied. Water is a primary human need, to deprive which is to deny the right to life. The State has a great duty viz- a-viz distribution of drinking water.
The core principle of public law is: The State is a trustee of all natural resources and is under a legal duty to protect them. These rare resources are meant for public use and cannot be converted into private ownership. This is clearly laid down by Honorable Supreme Court in *M.C.Mehta v. KamalNath*\(^45\). The doctrine enjoins upon the Government to protect the resources for the enjoyment of general public rather that to permit their use for private ownership. The observation of the Supreme Court of California in *MonoLake Case* clearly shows the judicial concern in protecting drinking water. The California Court observed as follows:

“Thus the public trust is more than an affirmation of state power to use public property for public purposes. It is an affirmation of the duty of the state to protect the people’s common heritage of streams, lakes, marshlands, surrendering that right of protection only in rare cases when the abandonment of the right is inconsistent with the purposes of the trust”.\(^46\)

It is therefore settled law that the public have a paramount right of priority to use of river water and other ecologically fragile assets. Being a common pool natural resource which plays a key role in sustaining a healthy ecosystem with multiple users and numerous claimants, water resource management involves reconciling and balancing consideration of efficiency, equity and sustainability. Numerous Fundamental Rights cannot be fully realized without water. For eg, without water no life can be sustained and therefore right to life can never be respected, protected and fulfilled unless we stop ignoring right to water. Similarly right to self determination also included the right of all people to manage their own resources and is thus connected with water. Right to
adequate standard of living cannot be realized without a secure access to water. So right to water is indispensable for leading a life in human dignity.

Thus there is a need for much deeper and systematic approach on the scope and content of water resource law, its conceptual basis, clarity and internal consistency, the interpretation of this law by courts and tribunals as reflected in their judgments, the extent to which the branch of law has or has not met the criteria of justice and served the interests of efficient, equitable and sustainable use of water.
References:


3. Ibid.


5. Entry 14, List II, Schedule VII reads ,’As agriculture depends upon water including river water the State legislature while enacting a legislation for agriculture may be competent to provide for the regulation and development of water resources including water supplies, irrigation and canals, drainage and embankments, water storage and water power which are the subjects mentioned in Entry 17. However, a legislation enacted under Entry 14 is so far as it relates to inter state river water is subject to the provisions of Entry 56. See In the matter of Cauvery Water Disputes Tribunal (AIR 1992 SC 522, 545).

6. Property Rights in Water: - The Dharmasutra by Apastamba, an authority on civil and criminal law, lay down that one who has taken the property of another unintentionally shall be reprimanded if the property is water. It serves two purposes – guarding a kingdom from the harmful effects of water and storage of water. Because of their importance, the law provided severe punishments including capital punishment for the destruction and embankment. (Chhatrapati Singh, Water Resource Law in India, Water Project Series, Indian law Institute, 1992, p,132)

7. The highly organized bureaucracy in charge of administration during the period was agronomic with duties interalia to supervise irrigation. The construction of tanks, canals, and wells are regarded as part of the state functions. In South India, a different system of irrigation management prevailed in which land called tank land was donated by the individuals to the state for the common use. The villagers depended on the tanks for irrigation (See Romila Thapper, A History of India, 1984, p.177).

8. The Holy Quran (XXI) verse 30.

9. They are aabe –tahoor (water which purifies the things), aabe-tahir (pure water) and ghair – tahoor (impure or dirty water). See Maulana Minhaj Uddin Islami, Fiqah, (1980), p.54.

11. *Supra* n.7 at p.195.

12. Article 39(b) and (c) of the Indian Constitution and Article 48(A) of the Constitution of India.

13. Article 37 of the Constitution of India.


15. One approach suggested by Chhatrapati Singh to solve such problem is to transfer water either in the Union List or in the Concurrent List so that the Union could provide legislative leadership. The Centre has to be content with its current adversarial role and continue with the formulation and circulation of model water bills which the state may or may not adopt. But this role could not have any effect at all under the current constitutional division of power between the centre and the state. This is amply demonstrated in the fate of model bills. (Chhatrapati Singh, *Water Resource law in India*, Water Project Series, Indian Law Institute, 1992, p.22.

16. The Kerala Irrigation and Water Conservation Act, 2003 is passed under the guidance of Kerala Panchayati Raj Act, 1994. As per Section 3 of the Panchayati Raj Act, 1994 State is responsible for all the water resources within the state and the local bodies can make use of these water resources with the consent of the State for domestic as well as the industrial use.

17. The concept of the right to healthy environment has been developed as part of right to life under Article 21 of the Indian Constitution. The concept was first articulated in the case of *Bandhua Mukti Morcha v. Union of India* (AIR 1984 SC 802).


24. The South African Constitution under Article 27 of the Bill of Rights reads thus: “(1) everyone has the right to access to … be sufficient food and water. (2)
state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realization of each of these rights.”

25. 2002(6) SA 423 (D) (Durban High Court)  

26. This Act is to provide for the right to access of basic water supply and sanitation, to provide for the setting of national standards and of norms and standards of tariffs.  
http://www.acts.co.za/water_serv/water_service_act_pdf  accessed on 12/6/2008 at 4.00 p.m.


30. AIR 190 Ker.321

31. These was again reiterated in Attakoya Thangal v. Union of India (1990) 1KLT 580. These two decisions have a common thread. The rights of the local community have been given preference over the rights of the state to either extract or use water for meeting the demand of the people. This is to be emphasized as it shows the development of jurisprudence over water rights which strongly favour the recognition of the rights of the community.


33. AIR 2004 NOC (Guj) 191.

34. 2000 (9) SCC 572.

35. 2000 (10) SCC 664.

36. The minimum amount of water for drinking purposes ranges from about two litres to about 4.5 litres per day. (World Health Organization, The Right to Water, 2003, p.17).

37. 1996 (2) SCC 572 at p.574.

38. In Perumatty Grama Panchayat v. State of Kerala (2004 (1) KLT 731) the single bench of Kerala High Court relied upon the public trust doctrine and decided in
favour of the panchayat to control the use of ground water by the company. The public trust doctrine denoted the state’s relationship with certain ‘common property’ and its citizens. The doctrine put a control over Government’s power to transfer the natural resource to private interest. The court held that the ground water does not belong to any one and no one can claim ownership over the ground water. But the decision of the single bench has been reversed by the Division Bench in *Hindustan Coco cola Beverages Company (P) Ltd v. Perumatty Grama Panchayat (2005 (3) KLT 10)* in which common law rule was given importance and stressed on the idea that a land owner should have dominion over the percolating ground water that under lies his/ her land in the same way that he has dominion over other elements in his land. The division bench discredited the powers of the panchayat and held that ‘maintenance of traditional drinking water resources’ could not have been envisaged as preventing an owner of a well from extracting water from the well. The Company stressed on two points. (1) The Government is the appellate authority under the Kerala Panchayati Raj Act and therefore the Government is empowered to cancel the direction of the Panchayat. (2) It was argued that there was no statutory prohibition on digging of bore wells at the time when the company started production. Therefore, there was no legal restriction on the part of the company to extract ground water. The court affirmed the first time but disagreed with the second and held that the Panchayat can restrict the extraction of ground water in the light of emerging water jurisprudence. In the Plachimada cases only the power of the Panchayat was discussed and not about the pollution caused by the Coco Cola Company to the ground water was given importance. The property right of the Company was given more importance than the basic human right of the people of Plachimada.

38a. *Infra* n.45


40. The State shall regard the raising of the nutrition and the standard of living of its people and the improvement of public health as among the primary duties and in particular the state shall endeavor to bring about prohibition of the consumption except for medicinal purposes of intoxicating drinks and of drugs which are injurious to the health. (Art.47 of the Indian Constitution)

41. *AIR 2003 SC 724* at p.731.

42. In Bangalore, water is rationed twice a week. In Bhopal for 30 minutes a day, 250 tankers make 2250 trips to quench the Chennai’s thirst. Mumbai routinely lives through water cuts from January to June: in Hyderabad some areas get water once in three days, while upmarket Vasant Kunj of Delhi gets it only for 15 minutes a day. Rural India is worse off as ground water levels have plunged in 206 of the 593 districts. Villages have the choice to walk for miles or waiting for Government tankers to fill a single pot. Water is clearly the single biggest crisis facing in India and the stress is very high. A study of 12 major cities shows that
they need 14000 million litres of water a day; they get only 1000 million litres a day. It is estimated that the demand for water on the top 35 cities is expected to double to 12,906 million cubic. The population shoots from 107 million today to 202 million in 2021 while the availability of water stays at 20011 levels. In Neemuch, Madhya Pradesh on 2003, one person was killed and six injured when people fought for water with swords and knives. (See Aasha Kumar Mehta and Nikhila Menon, ‘Drinking Water’, Alternative Economic Survey, (2000-2001), p.126-136)

43. (1) Water in its manifestations as surface water, soil water and ground water is vital for the sustenance of humans, and communities of plants and animals. (2) Human use of water may not affect its availability but also protect the environment and the biological habitat. (3) Water must be managed wisely so as to minimize detriment to water resource systems. (4) All citizens shall have reasonable access to water without wasting it. (5) Water belongs to the society and government acts as the trusted of the natural resources. (T.Narasimhan, ‘Water and India’s Constitution’, The Hindu, Dec.15, 2005, p.11).

44. 1981 SCR (2) 742 at p.751.
