CHAPTER X

CONCLUSION

Water which is essential for human survival is becoming scarce in its usable form. This is especially true in a country like India where natural resources are fast depleting due to the tremendous pressure from an ever increasing population. With regard to water, the problem is however expounded due to the legislative indifference to chalk out a well defined structure of rights to regulate its use. Water resource law is still in its nascent stage in India. This makes identification and delimitation of the conflicting claims over water one of the most fundamental issues in water law. This means that competing rights of various stakeholders to water at the individual, community and the state level need to be identified so that rights can be exercised in a balanced manner and are not a cause of exploitation.

Water has always been by virtue of its importance a political issue. Government Schemes for water distribution have little or no impact in providing water to the poor and marginalized people in rural areas. These problems have been further compounded by the water bureaucracy, which has continued from the British times and is considered to be so powerful and vehement in exercising its control over the resource, which is reluctant to give its power to the people to manage their own water.¹ This indifference to the problem faced by the people and their needs coupled with the unwillingness to give up power has led to the clashes in recent times. Infact, state actions often reflect complete ignorance of the ground realities with regard to water usage and how rights distribution exists in reality. The state made rules, regulations, laws, orders etc fail to take into account the people’s participation of their ‘right to water’.²
The lack of comprehensive water legislation in India has ensured that to date water law is made of different instruments, principles and judicial decisions which are not fully compatible with each other. The claim of land owner over the ground water under the common law principles are today difficult to justify in the context of the realization of the human right to water. The State does not realize that water rights need to be looked at as a whole. Another problem that is being faced is that the state programme of development and modernization has led to an alarming reduction in available water resources.³

The Eleventh Five Year Plan (2007-2012) lays down provision for the efficient management of water resources in the country⁴. They are as follows:

1. The Jal Abhiyan Programme was launched in December 2005 for mass awareness among the stake holders about scarcity of water, method for recharging of ground water, management of surface and ground water for efficient utilization which covered about 20,000 villages, developed one lakh water harvesting structures and revamped canal system.

2. State water policies should give priority for utilizing available water resources in a judicious, equitable and in more economic manner.

3. Water User Associations are formed for maintenance, distribution and revenue collection.

4. The Bharat Nirman Programme launched in 2005 identifies major areas where infrastructure gaps need to be addressed. The programme extends into initial two years of the eleventh plan.
Thus the five year plans gave great importance to the implementation of new policies and programmes for the development and utilization of available water resources.


By the 1980s, it became evident that while water was largely a state subject, the lack of national policy on water was a major impediment to the development of coherent set of policies on water at the State and National levels. This led to the development of National Water Policy, 1987. The rapidly deteriorating water scenario and the significant economic policy changes that occurred throughout the 1990s led to the reformulation of the water policy in 2002. The Draft National Policy, 2012 clearly mentions that right to safe drinking water and sanitation should be regarded as a right to life essential to the full enjoyment of life and other human rights. The key difference between the policy documents are that they focus on the development of an improved institutional framework with a focus on improving the performance of the institutions, promotion of rehabilitation schemes for the displaced, enhancing participation by private parties in water management, creating an effective monitoring system and ensuring that state share the waters of the joint river.

The National policies have been supplemented by the adoption of number of state water policies. The National and State Water policies are based on a set of principles that are broadly similar. They are:

1. The emphasis is on water as a national or economic resource that can be harnessed to foster the productive capacity of the economy.
2. Policies tend to introduce prioritization of water uses. There is a clear emphasis on domestic water supply as an overriding priority in water allocation. Nevertheless, several of these policies also provide that this priority list can be changed if circumstances so require.

3. The most noteworthy aspect of the participatory provisions of recent water policies is that they seek to link participation with decentralization.

4. The water policies generally promote the use of incentives to ensure that water is used more efficiently and productively. The main consequence that is derived from this is the call of private sector involvement in all aspects of water control and use, from planning to development and administration of water resource projects.

5. Water Policies propose the introduction of water rights. These policies try to do two different things. On the one hand, some policies restate the proposition that the ‘state is the ‘sole owner of water resources’. On the other hand, policies propose the creation of water rights in favour of the users.

   Over the past decades, water situation has become declining in many parts of the country. This is due to the increased use of water by all categories of water users and increased demand due to economic and population growth. This is also due to the increased pollution of the existing finite water resources, which not only restrict the potential uses of available water but also threaten the future use.

   There is a need for changes in the law and policy framework concerning water. This is due to two broad factors.
First the water law and policy framework was for a long time the object of little attention. While many water related laws were adopted over several decades, comparatively little was done to provide a broader integrated framework for water.

Secondly, the recognition that there is a water crisis in most countries of the world and that the availability of and access to freshwater will be a challenge for nearly all countries in the coming decades had led to a number of international initiatives to reform water governance, law and policy in most developing countries. In other words, domestic and international factors have to contribute for the ongoing water law and policy reforms.

The policy and law changes are momentous. On the whole, they seek to redraw the regulatory framework governing control over and use of water. An understanding of the ongoing, water regulatory changes need to take into account not only the laws and policies put in place but also the condition under which these are being introduced. Through the several laws and policies implemented, several trends in water laws can be noted.

Firstly, even though water is still a state subject, there is significant and possibly increasing uniformity between the laws adopted by different states individually. This may be an indirect acknowledgement of the perceived need for some form of national regulation of water in addition to existing state level instruments.

Secondly, as indicated by the policies for the setting up of Water User Associations, one of the main trends in the current policy making is the thrust to new responsibilities and rights upon the end users of water infrastructure. On the one hand, participation and decentralization are seen as concurrent elements which imply a
progressive withdrawal of the state from certain water related functions in particular with regard to provisions of funding. On other words, the main rationale for this process of decentralization does not seem to give end users more control over water but rather to force them to take part of the role previously played by the state, irrespective of their willingness or ability to do so.

Thirdly, policy initiatives seek to give the state enhanced control in some fields. This is clearly illustrated in the field of ground water where the legal control over ground water is left with the land holders and occupiers; new ground water legislation seeks to give increasing power to the state to regulate its use.

Fourthly, while the state is attempting to regain control over the water sector, the main trend in the past few years is the devolution of power to quasi and non governmental entities. One of the main elements introduced through recent policies is the setting up of Independent Water Regulatory Authorities and private sector participation which are meant to take away part of the powers of Governmental bodies and provide similar services without political interference. As a consequence all water related institutions are called upon to manage ‘water’ on commercial lines.

The National Water Policies 1987 and 2002 and the Draft National Water Policy, 2012 have given the highest priority to drinking water. However, it is important to note that despite five decades of planning and over a decade of ‘drinking water mission’ there is large number of ‘no source’ villages that is those with no identified source of drinking water. India needs to revamp its model of drinking water provision. The country needs to have assured sources and link them within the river basin if
required. This would enable in guaranteeing the domestic supplies with required quality and quantity.

The Draft National Water Policy, 2012 sets out the following objectives:

1. This sets the framework for the policy, including the present scenario, concerns and basic principles of water resources management. This mentions the interdependence of all elements of the hydrological cycle and the need for equity.

2. The need for ‘overarching water framework law’ is mentioned. It mentions the need for ‘development of interstate rivers and river valleys’ and also the need to consider ground water as public trust and not as public good.

3. It is determined to prioritize minimum amount of potable water as a basic human right.

4. It lays heavy stress on the water availability and the conservation of it for future use.

5. It treats water as an economic good and therefore may be priced to promote efficient use and maximizing the value for water.

The new Draft National Water Policy, 2012 suggests that the government is poised to withdraw from its responsibilities of water service delivery and that the multinational corporations and financial institutions might have too big a way in water allocation and policy. At first glance it appears as if the policy takes a holistic approach to water resource management, with a clear recognition of India’s water woes. It gives pre-emptive priority for safe and clean drinking water and sanitation to all and prioritizes meeting the water requirement for ecosystem.

However on a closer look it shows that some important points are missing in the draft policy. To begin with water is not strongly articulated as a fundamental human right in this draft. This is despite India voting in favour of United Nations General
Assembly resolution on Right to Water in 2010. The new policy suggests limiting the role for government in public services when in other parts of the world water services are being bought back into the realm due to negative experiences with the private sector water provision. This policy suggests that the government should function simply as a facilitator and that the service delivery should be handed over to the local communities or to the private sector. In the water quality conservation, the important ‘polluter pays principle’ has disappeared. It has been replaced with ‘incentives’ for effluent treatment and for reuse of water. While reclaiming waste water is necessary to bridge the water deficit, in the absence of strong regulations to limit polluting activities, such incentives to polluter might work as a perverse incentive to pollute more. Multinationals are no longer content with profiteering from their traditional area of businesses, but they want to play a larger role in the allocation of the world’s natural resource, which have so far be in the public realm. The actual water users and their representatives are marginalized. Rules governing the use of water must be the result of careful consultation with all the stakeholders especially the least powerful should not be driven by corporations and international finances.

A new water policy must aim at ensuring equitable and judicious use of water for survival of life, welfare of human beings and sustained as well as the balanced growth of nation. The amount of water is always fixed in nature and the demand is increasing with the growth of population, better standard of living and overall development process which creates a pressure and competition among various water users to fulfill their respective demand which often generates conflicts and leads to failure in the management of water resources. There should be clarity between the view
that the water is a social good and the opposing view that water is an economic good that must be treated as a commodity in the private hands. The distribution and management of water should not be left wholly with the Government but communities and water users to take adequate responsibility for managing their water resources to meet their demand. The new policy must be transparent in clearly defining the roles and responsibilities of various water related departments, NGOs, private sector traders and individual users’ rights. Policy should provide legal solution to problems relating to natural calamities, droughts and scarcity conditions and must not only consider water as a commodity to raise water markets but should also believe that water is a free gift of nature for overall ecological balance and minimum supplies is assured for growth of flora and fauna and every living beings on a sustainable basis. The most important point is that a policy like National Water Policy is to be guided not only by the fundamental right to water, but also by all other rights whose realization depend on water. This includes right to health, right to basic sanitation and right to food. The policy should clearly acknowledge ‘right to water for drinking, and basic hygienic purpose as a fundamental right’ which would cast a corresponding duty on state to provide this to one and all. The quality and quantity of drinking water, its access etc should also be mentioned in the policy to make it a meaningful right.

**Legal Framework in India**

India lacks an umbrella framework to regulate fresh water in all its dimensions. The existing water law framework in India is characterized by the coexistence of number of different principles, Acts and Rules over the past decades. These include common law principles and Irrigation Acts from the colonial period, as well as recent regulation of
ground water rights and judicial recognition of human right to water. The lack of umbrella legislation at the national level has ensured that the different State and Central Acts and other principles do not necessarily coincide and be in opposition in dealing with the water rights. Besides common law principles linking access to water and rights over land are still prevailing in India. The legal framework concerning ground water is still in rapid evolution. It is likely that common law principles will be increasingly challenged despite the fact that the Plachimada High Court decision seems to uphold the land owner’s right to a large extent. But in the Draft National Water Policy, 2012, it emphasized the need to consider ground water as a public trust and not as a private good.

In addition to all the laws, rules and regulations that make up water law, there is a substantial body of additional rules and regulations at the local level. Rule of access and control has often evolved over long periods of time but are often unwritten or not formally recognized in the local system. As a result, they often run in parallel to ‘formal’ water laws and regulations.

**Role of Judiciary in Water Sector Reforms**

The engagement of courts with water during past decades is characterized by a number of different judgments courts have pronounced on water reforms, for instance in the fundamental right to water and in the area of *public trust doctrine*. Indian Courts have responded to different water related issues. It is not the courts way of addressing water law but rather a reflection of the fact that water law itself remains a relatively limited area because it is made of various layers including Constitutional principles, Union and State Acts, Common Law principles and Customary principles. Additionally, what constitutes water law itself is subject to debate because water like environment
pervades many other areas of law. The water law has been quickly evolving over the past fifteen years in the context of water sector reforms. This explains why certain decisions focus on certain principles, while others do something different. Yet this is problematic because it is for instance, in past the lack of clear understanding of the scope of fundamental right to water that leads some judges to take decision that, in effect, prioritize the realization of the right for water in certain categories of people at the expense of others who are usually among the poor and disadvantaged sections of the society. Some of the water related issues attract significant judicial attention including private rights related issues and broad issues such as fundamental right to use water. The honorable Supreme Court tries to affirm through various case decisions that State is the owner of water resources and trustee upon the public trust doctrine.

Water, has been, is and will continue to be an important fundamental issue that the Indian Judiciary addresses in terms of its importance to people’s lives and the environment in general. It is true that Indian law have laid great emphasis on the fundamental right to water over the past couple of decades. They have emphasized right to water together with other principles, application of the public trust of water etc. In *Vishala Kochi Kudivella Samarkshana Samiti v. State of Kerala*, the Kerala High Court held that, ‘we have no hesitation to hold that failure of the state to provide safe drinking water to the citizens in adequate quantity would amount to a violation of fundamental right to life enshrined in Article 21 of the Indian Constitution and would be a violation of human rights. Therefore, every government which has it as a priority right should give foremost importance to provide safe drinking water even at the cost of other developmental programmes. Nothing shall stand in its way whether it is lack of funds or
other infrastructures. Ways and means have to be found out at all costs with utmost expediency instead of restricting service’. It is evident that water has been shifted from human right to economic good in water reforms and water forums, where privatization of water was given more importance, by shifting it to a commodity rather than a fundamental right. Even the Draft National Water Policy, 2012 treats water as an economic good and emphasizes that water is to be priced to stop the wastage of water.

**Water Sector Reforms**

Water sector reforms are made of number of formal and informal laws, rules and regulations. Water sector reforms have been proposed as a way to address diminishing per capita availability, increasing problems in water quality and increasing competition for control, access and use of available fresh water. It has evolved over time in a relatively uncoordinated and adhoc manner. This started to change with the progressive realization that existing laws were inappropriate to ensure access to water for all.

Right to safe drinking water has been explicitly treated as a basic human right through various Conventions and Declarations. The World Water Forums laid heavy stress on the preservation and conservation of water and the accessibility of these resources to the majority of population who are deprived of their basic human right. But the National Water Policies of 2002 and 2012 gave little emphasis on the right to safe drinking water as a basic human right and shifted their focus in to the privatization of water.

Right to safe drinking water is implicit in Article 21 of the Indian Constitution. The honorable Supreme Court through its various decisions stated that the
state should act as a trustee of the natural resources, but it is a fact that there are so many ‘no source villages’, which do not have access to safe drinking water. The various schemes implemented by the Central Government have provided water to 70.6% in urban parts and 30.6% in rural parts of India\textsuperscript{12}. The policies and Acts prioritize in providing drinking water, but the drawback is that, there is no proper legislation to deal with the functions and defects in the schemes incorporated by the government for providing safe drinking water to its citizens\textsuperscript{13}. It has also been implicitly accepted since independence that Central and State Governments have a primary responsibility for providing water for drinking and other purposes. Provisions for supplying drinking water have been made in all the five year plans and the responsibilities of the governments have also been clearly mentioned. Accordingly a host of programmes have been framed and implemented by the Central and State Governments such as Accelerated Rural Water Supply Programmes, Rajiv Gandhi National Drinking Water Mission, and Swajaldhara Guidelines etc.

Water sector reforms seek to reduce the role played by the public sector and to emphasize the direct contribution of individuals to their water needs and the participation of private sector. The reduction of the role of the state in the water sector is linked to the promotion of the use of ‘incentives’ to ensure that water is used more efficiently and productively. The main consequence is the call for private sector involvement in all aspects of water control and use from planning to development and administration of water resource projects\textsuperscript{14}. This has also been introduced under the Swajaldhara guidelines which suggest that water users have to take partial responsibility for the capital cost of new drinking water infrastructure and full responsibility for operation and maintenance\textsuperscript{15}.  

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Until recently ground water has been largely governed by the old legal principles linked to a large extent to land ownership. As a result there was little by way of statutory provisions concerning ground water use and control and the Central Government’s intervention into this area was even less prominent than with regard to surface water. The introduction of new Groundwater law and policies has helped to reduce the exploitation of ground water to a little extent by shifting the focus from common law doctrine to public trust doctrine\textsuperscript{16}. The role of government in curbing ground water extraction has been clearly mentioned through the policy documents and various Acts have been passed to regulate the same. But it is a sad fact that till now ground water is not treated as a public good and it is believed as the land owner’s right to extract as much water he requires, giving priority to the common law doctrine. Water pollution is another area which requires immediate attention from the part of the concerned authorities. Even though we have Water (Prevention and Control of Pollution) Act, 1974 to deal with the same, the pollution caused to the water bodies is increasing day by day, and the quality of water is deteriorating to a larger extent which is to be curtailed for the preservation of the natural resource. There should be stringent law to regulate the over exploitation of water resource and strict penalty is to imposed on those who pollute water rather than introducing ‘incentive’ method which has find its place in the New National Water Policy, 2012. The ‘Polluter pays Principle’ and ‘Precautionary principle’ is to be made strict in curtailling the water pollution.

While water sector reforms are more than welcome in the existing shortcomings of water regulation and changing conditions in the water sector, it is unlikely that law reforms based on the principles put forward in the water sector
constitute an appropriate response. It is to be kept in mind that any water law which is not based on Constitutional right to water and the principle of public trust is bound to fail as a legal tool and its implementation as far as the overwhelming majority of people’s human right to water is effected. There is a need for a water legislation which would take into effect all this matters concerning water preservation and maintenance which would to certain extent ensure in providing right to safe drinking water as a basic human right and fundamental right under Art.21 of the Indian Constitution.

There is no legislation in India that says government has to provide water to its citizens, but courts have ruled that the right to safe drinking water is a fundamental right and is a part of constitutional guarantee of right to life under Article 21 of the Indian Constitution. There is a need for a water legislation which would prioritize the right to safe drinking water as basic human right and a fundamental right. Water is a precious natural resource, in other words, water is life. It is true that India is a country blessed with heavy rainfall. But the governments and authorities have failed in the preservation and maintenance of water. There is large scale exploitation of groundwater by the land owners trusting upon the common law doctrine. Even though there is a Water (Prevention and Control of Pollution) Act, 1974, the water quality is deteriorating day after day due to the contamination in it. The privatization of water which has been accepted by the Government through the National Water Policies 2002 and 2012 has made water a ‘human need’ rather than a ‘human right’. Water theft and aqua robbery have become quite common and there is no comprehensive law to deal with the same in the national level\(^{17}\). So it is the need of the hour to have a water legislation taking into consideration the policy documents of 1987 and 2002 for the conservation and maintenance of this
natural resource. It is true that water legislation is not a precondition to ensure that water sector achieves its social, human rights and environmental goals. But this would constitute an appropriate starting point to realize the right to safe drinking water and the principle of public trust throughout the country.

Suggestions

1. Plan for improved water supply service based on clear operating, maintenance and management procedures including clear Operation and Maintenance (O&M) cost recover policy which is to be accompanied by the protection of right to water for basic needs, including that for basic livelihood strategies.

2. Design and implement new preventive measures at the basin source system and household levels to protect water quality, and develop water quality testing facilities at appropriate levels for ensuring the quality of drinking water supply.

3. Measure water availability and implement measures to conserve, protect, enhance and manage surface and ground water resources, develop local self-regulation for water demand management, modify the use of water supply system to ensure source sustainability.

4. While implementing new schemes, the government should give priority to the ‘no source’ villages where there is no access to safe drinking water.
References:


6a. *Infra* n.11

7. *Perumatty Grama Panchayat v. State of Kerala* (2004 (1) KLT 731) and in *Hindustan Coco cola Beverages Company (P) Ltd v. Perumatty Grama Panchayat* (2005 (3) KLT 10) (Discussed in detail in Chapter VI- Role of ground water in providing safe drinking water, Chapter VIII- Privatization of Water –How far it affects the availability of safe drinking water and in Chapter IX- Water Pollution and Water Quality Maintenance)

8. *Ibid*

8a. 2006 (1) KLT 919

9. Discussed in detail in Chapter II Right to Safe Drinking Water as a Basic Human Right

10. Para 13 of the National Water Policy, 2012 calls for the encouragement of ‘private sector participation’ in the planning, development and management of water resource projects, on the ground that it may introduce innovative ideas, greater financial resources, introduce corporate management and improve service sufficiency etc. Para 7.1 of the Draft National Water Policy, 2012 treats water as an economic good and therefore may be priced to promote efficient use and maximizing use of water. (Discussed in detail in Chapter VIII – Privatization of Water – How far it affects the availability of safe drinking water)
11. Discussed in detail in Chapter III – Right to Safe Drinking Water under the Constitution of India


13. Discussed in detail in Chapter IV Legislative Measures implemented by the Central Government in providing safe drinking water

14. Discussed in detail in Chapter VIII Privatization of Water – How far it affects the availability of safe drinking water

15. Supra n.13

16. Discussed in detail in Chapter VI – Role of ground water in providing safe drinking water

17. Kerala Water Supply and Sewerages (Amendment) Act, 2008 mentions about the water theft and the penalty imposed on those who unauthorizedly make use of water for domestic as well as industrial purposes. (Discussed in detail in Chapter V- Legislative Measures implemented by the Kerala Government in providing safe drinking water)