

**From Communities' Hands to MNCs' BOOTS:  
A Case Study from India on Right to Water**

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## **Abbreviations**

Art	:	Article
BOOT	:	Build Operate Own Transfer
CBO	:	Community Based Organisation
CPC	:	Civil Procedure Code
Cr.P.C.	:	Criminal Procedure Code
EIA	:	Environment Impact Assessment
GATS	:	General Agreement on Trade in Services
IAA	:	Impact Assessment Agency
MNC	:	Multi National Corporation
NGO	:	Non Governmental Organisation
PIL	:	Public Interest Litigation
SC	:	Supreme Court
Sec	:	Section
v	:	Versus
UP	:	Uttar Pradesh
WTO	:	World Trade Organisation

## I. Introduction

*The language of 'rights' has acquired a centrality in modern thinking that cannot be ignored. In the traditional societies, people might not have needed the language of rights; customs and conventions had the force of law. However, in the legalistic societies of today 'formal law' has become more important, and that is why it is important to talk about the 'right to water'.*

- Ramaswamy R. Iyer, Former Secretary, Ministry of Water Resources, India

Water is the essence of life. Hence, any denial of water implies a denial of right to life. The right to water is not enshrined in the Indian Constitution as an explicit Fundamental Right but the Indian Judiciary, both at the state as well as at the centre, has in several judgments interpreted Article 21 of the Constitution to include a right to clean and sufficient water, a right to a decent life, a right to live with dignity, and a right to a humane and healthy environment which would certainly imply a right to water.

India as a country has a very low awareness of the right to water in any sense, least of all that this is a human rights issue. Awareness in this area is limited to those who have been experiencing problems related to water in the form of non-availability, scarcity and pollution. But with water crises worsening in the country more and more people have begun to feel the crunch. Those who can afford to purchase water are aware of the situation but do not mind paying for water; they are responsible for the status of water having suddenly changed from being a common natural resource to an economic good. This segment is oblivious to the dangers of their actions. The process of privatization of water is largely responsible for taking water away from millions of poor both in urban and rural areas.

It is the poorer elements of society that are now becoming mobilized to raise their voices against the new national water policy which has paved way for the privatisation of water and the handing over of rivers to multinational corporations through BOOT agreements<sup>1</sup>. The privatisation of water has undoubtedly affected the rights of these people to water. We cannot say that their rights have been curtailed altogether as these companies are not refusing water. The water companies have threatened to install metres wherever people are using river water for irrigation or for household purposes, thereby inevitably making water unaffordable for many and affecting their right to water.

But although people may not relate to the privatisation of water in the jargon of the 'right to water' or 'human rights', there is some evidence that people are aware of the injustice of this situation. The example of a river in Chhatisgarh state, where the river was privatised a few years ago, is explained below (see 'Community Empowerment'). Privatisation in Chhatisgarh led to the growth of a peoples' movement in the region which forced the government to consider cancellation of the agreement with the company in the interest of

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<sup>1</sup> The National Water Policy 2002 has made provision for handing over water to private parties by build, operate, own and transfer agreements.

the people. In another case of over-extraction of ground water by a private company, thereby affecting the availability and quality of ground water for drinking purposes, led to a mass agitation by local villagers in Kerala.

India is a vast country and has diverse agro-ecological climatic zones. To this extent it is appropriate that water is regulated by each state individually (as opposed to national regulation of water), as each state can enact laws and formulate policies suitable for the conditions within that region. However, this does mean that the regulation of water in India is complex, difficult to understand, and capable of giving rise to inequality between regions. With this in mind, some argue that the constitution should be amended and that water should be dealt with on a federal level to improve uniformity and simplicity in this area of law.

## **II. Using the Right to Water**

India has been a party to all the major international human rights treaties which have accorded a human rights' status to the right to water. For example, India has ratified the following treaties: the International Covenant on Civil and Political Rights (1979); the International Covenant on Economic, Social and Cultural Rights (1979); the Convention on the Rights of Children (1993); the Convention on the Elimination of Discrimination Against Women (1993); the Convention Against Torture and other Inhumane or Degrading Treatment or Punishment (1997); the International Convention on the Elimination of All Forms of Racial Discrimination (1969).

An analysis of these conventions arguably leads us to the premise that 'right to water' should be treated as a basic, fundamental and human right even if it is not expressly mentioned in the human rights conventions.

### **Constitutional Provisions**

The preamble to the Constitution of India envisages the creation of a welfare state. The Constitution of India, 1950, has provisions which reinforce the spirit of all the above mentioned conventions but it does fail to give the right to water the status of a 'Fundamental Right'. However, individuals, communities and the judiciary do all have a role under the Constitution and subsequent legislation to reinforce the basic rights of living beings (including environmental issues). As water is responsible for the basic functions of life for all species of plants, animals and human beings it does seem logical that the right to water is protected to a certain extent under these provisions.

The Fundamental Rights themselves include other provisions which strengthen the concept of social justice and equity, including Article 14 (which guarantees the right of equality before law), Article 17 (which abolishes untouchability), and Article 39 (the principles of the welfare state). These can also be construed as helping to protect the right to water.

Article 14 has been interpreted by the judiciary as guaranteeing intergenerational equity – that is, the right of each generation of human beings to benefit from natural and cultural inheritance from past generations. This therefore requires conserving the biological diversity and the sustainable use of other renewable and non-renewable natural resources (including water) for future generations.

Article 39 lays down the principles for the establishment of a welfare state, prescribing that:

“the state shall, in particular, direct its policy towards securing:

- (a) that the citizens, men and women, equally have the right to an adequate means of livelihood.
- (b) that the ownership and control of the material resources of the community are so distributed as best to sub-serve the common good; and
- (c) that the operations of the economic system do not result in the concentration of wealth and means of production to the common detriment.”

The Protection of Civil Rights Act, 1955 provides an additional guarantee of equality to the suppressed and exploited class of individuals in the Indian social structure. This is another tool that poorer communities can rely on to assert their right to water.

The 42<sup>nd</sup> amendment to the Constitution of India in 1976 inserted two further provisions as fundamental duties upon the state and its citizens, which are relevant in this context.

“Art 48-A: The State shall endeavour to protect and improve the environment and to safeguard the forests and wildlife in the country.”

“Art 51-A: It shall be the duty of every citizen of India – (g) to protect and improve the natural environment including forests, lakes, rivers and wildlife and to have compassion for living creatures.”

### **Legislative Provisions**

Under the Constitution, the legislative competence for water and water based resources is divided between the Union (national or federal level government) and the States (regional level government). Major subjects such as water supplies, irrigation and canals, drainage and embankments, water storage and water power are controlled by the latter. As water is primarily State-controlled, there are a plethora of laws related to the different areas of water such as irrigation, navigation, pollution, and cess. Moreover, these laws may differ from state to state.

The concern of the Union with respect to the resources is mainly in inter-state water sharing and specific areas essential for the economic development of the country. This

latter category includes many of the inherited colonial laws relating to water<sup>2</sup>. A brief overview of colonial laws applicable to India (including regulation of irrigation, fisheries, electricity, canal and drainage) demonstrates that the Crown had extended its control over all aspects of water, types of water and sources of water. For instance, the preamble to the Northern India Canal and Drainage Act, 1873 states, 'the provincial government is entitled to use and control, for public purposes, the water of all rivers and streams flowing in natural channels, and of all lakes and other natural collections of still water'. Similarly, the Bombay Irrigation Act, 1879, lays down that 'whenever it appears expedient to the state government that the water of any river or stream flowing in a natural channel...should be applied or used by the state government...the state government by notification, may declare that the said water will be so applied'.

There is a need to revamp these old irrigation laws prevalent in most states of India. One apparently progressive piece of legislation is the recent enactment 'Andhra Pradesh Farmers Management of Irrigation Systems, 1997' which provides for the constitution of farmers' organisations and water user association for the irrigation sector.

Another feature of Indian law is the discrepancy between the ownership of surface water and the ownership of ground water (water beneath the surface). While surface water is considered a state property, ground water belongs to the owner of the land. Unrestricted extraction from the ground by some could lead to inequities and injustice to others as people share the same aquifers. To try and limit this the Central Ground Water Authority has promulgated 'Environment Protection Rules for Development and Protection of Groundwater'. Additionally, the Working Group on Legal, Institutional and Financial Aspects, constituted under the Ministry of Water Resources, has suggested that the state should play the role of a facilitator while user organisations and panchayats (a form of local self-government) should act as regulatory agencies.

A large number of enactments regarding water and water based resources have been passed concerning water supply for drinking purposes, irrigation, and rehabilitation of evacuees affected by the operations of schemes for water resources management. However, none of these laws enumerate an explicit 'right to water'. Instead, some of the laws<sup>3</sup> have expressly abolished usufructs (rights to use a resource) and customary rights. It is largely clear from the case law that people and communities have had to claim these rights back from the authorities.

In addition, the Indian Legal System provides four further legal routes to address water pollution and water quality problems, thus helping to reinstate the rights of people and other living beings to clean and unpolluted waters.

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<sup>2</sup> Embankment Regulation, 1829, Northern India Canal and Drainage Act, 1873, the Bengal Irrigation Act, 1876, the Northern India Ferries Act, 1878, the Indian Electricity Act, 1910, Jharia Water Supply Act, 1914, the Madras River Conservancy Act, 1884, the Indian Fisheries Act, 1897 are some such laws.

<sup>3</sup> Section 3 of the Kumaon and Garhwal Water (Collection, Retention and Distribution) Act, 1975, abolishes all existing rights if any (whether customary or otherwise vested in any individual or village communities) to use water in areas to which this Act extends.

1. a comprehensive scheme of administrative regulation through the permit system of the Water (Prevention and Control of Pollution) Act, 1974;
2. provisions of the Environment (Protection) Act, 1986 relating to water quality and access to water through its notifications on permissible quality standards, environmental impact assessments, public hearings, etc.;
3. public nuisance actions against polluters, including municipalities charged with controlling water pollution; and
4. the common law right of riparian owners to unpolluted waters.

### **1. *Water (Prevention and Control of Pollution) Act, 1974***

This is one of the most important of the central laws<sup>4</sup> concerning water resources. The idea behind the Water Act is to restore wholesomeness of water, and to ensure that domestic and industrial effluents are not discharged into watercourses without adequate treatment.

This Water Act provides for the constitution of the central and state pollution control boards empowered to carry out a variety of functions which include establishing quality standards, research, planning and investigations to promote cleanliness of streams and wells and to prevent and control pollution of water. No person without obtaining the consent of the state board can establish any industry, etc. which is likely to discharge sewage or trade effluents.

This Act applies to streams, inland waters and subterranean water, and sea or tidal waters.

The 1988 Amendment to the Act (inserting a new section 33A) empowers state boards to issue directions to any person, officer or authority, including orders to close, prohibit or regulate any industry, operation or process and to stop or regulate the supply of water, electricity or any other service. Under section 33, the state boards can apply to courts for injunctions to prevent water pollution. Failure to comply with orders under sections 33 or 33A are punishable by fines and imprisonment.

Section 49 of the Water Act enables citizens to bring actions themselves.

Subsequently, in 1977, Parliament initiated a positive economic incentive for controlling water pollution. The Water (Prevention and Control of Pollution) Cess Act, 1977 provides for a levy of a cess on water consumed by certain industries and local authorities. A rebate of 70 per cent of the cess is given for the installation of a water treatment plant.

### **2. *The Environment (Protection) Act, 1986***

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<sup>4</sup> Water is a State subject but with the growing incidents of water pollution in the country, a need was felt for a comprehensive central legislation. Consequently, this law was enacted under Section 252 (1) of the Constitution, which empowers the Union Government to legislate in a field reserved for the states, where two or more state legislatures consent to a central law.



The Environment (Protection) Act extends to water quality and the control of water pollution. Section 2(a) of the Act defines the environment to include water and the interrelationship which exists among and between water and human beings, other living creatures, plants, micro-organisms and property. The Act authorises the Central Government to establish standards for the quality of the environment and for emissions of discharge of environmental pollutants from any source.

The Environment Act includes a citizens' suit provision under Section 19(b) and a provision under Section 5 authorising the Central Government to issue direct orders to protect the environment. Rule 5 of the Environment (Protection) Rules, 1989, made by the Central Government in accordance with Section 5, empowers the Central Government to prohibit or restrict the location of any industry and the conduct of certain activities in notified areas. The power to issue directions under Section 5 has also been delegated to some state governments and the power of entry and the right to take samples has been delegated to various officers.

The citizens' suit provision requires that the person give notice of not less than 60 days of the alleged offence and their intention to file a complaint with the government official. After the notice period they may lodge a complaint with a court.

The Ministry of Environment and Forests also published Environment (Protection) Rules establishing general standards and industry-based standards for certain types of effluent discharge.

A new provision of environmental audit was introduced in the Environmental (Protection) Rules in 1992. Environmental auditing recognises self-regulation among the industry with a view to tailoring environmental safeguards in industrial activities. The rules make submission of an environmental audit (now known as the audit statement) report compulsory to be filed on or before September every year to the State Pollution Control Board. Every person carrying on an industry, operation or process requiring consent under the Water Act and other laws has to submit this report for the financial year ending 31<sup>st</sup> March. Greater industry compliance with environmental laws, disclosure of data on waste generation, adoption of clean technology for pollution prevention, waste minimisation, recycling and utilisation, arrangement for off-site disposal and revealing of data on consumption of water and raw materials are some of the remarkable improvements resulting from this audit regime. This information in the form of an audit will also help citizens to enforcing their right to water.

Another provision under the Environment (Protection) Act which helps communities assert their right to water is the provision of public hearings under the process of environmental impact assessment. These provisions have been discussed in the section on community empowerment.

### ***3. Nuisance Laws***

- a) Tort law against the polluter
- b) Remedy under the Criminal Procedure Code for public nuisance.
- c) Class Action under the Civil Procedure Code

#### Tort law against the polluter

This is one of the oldest forms of legal remedy to abate pollution. It was introduced into India under the British rule. Tort law is based on the principles of common law where law is derived from judicial decisions rather than legislation. Under tort law, the plaintiff (aggrieved party) is entitled to damages and injunction of both temporary as well as permanent nature. Damages are pecuniary compensation payable for the commission of a tort (civil wrong). But damages awarded under tort decisions are very low in India and do not serve as serious deterrents to the wrong-doers (polluters) in cases of water pollution. In practice, injunctive reliefs are more effective in abating pollution. An injunction is a judicial process where a person who has infringed, or is about to infringe the rights of another, is restrained from pursuing such acts. An injunction may take either a positive or a negative form. It may require a party to do or to refrain from doing a particular thing. Injunctions are granted at the discretion of the courts, and there can be serious penalties for non-compliance.

#### Remedy under the Criminal Procedure Code for public/ private nuisance

A nuisance is an unreasonable interference with the plaintiff's use of enjoyment of land. A plaintiff must therefore prove some injury to his enjoyment of property and his own interest in that property in order to succeed in a nuisance claim. For an interference to be an actionable nuisance, the conduct of the defendant should be unreasonable and must not be momentary. A 'public nuisance' injures, annoys or interferes with the quality of life of a class of persons who come within its neighbourhood. According to Section 268 of the Indian Penal Code, 1860, "a person is guilty of a public nuisance who does any act or is guilty of an illegal omission which causes injury, danger or annoyance to the public". Remedies against public nuisance are also available under the Criminal Procedure Code from Section 133 to 144. Section 133 empowers the magistrate to pass an order for removal of a public nuisance within a fixed period of time.

One of the earlier cases in which Section 133 of the Cr.P.C. was relied upon by the courts is *Delhi Sugar Mill v Tupsi Kahar*<sup>5</sup>. On the request of about a hundred people, the subdivisional magistrate ordered that the two sugar mills in the locality should discontinue draining dirty and toxic water into the river. On appeal, the Patna High Court held categorically that the law of nuisance in Section 133 would be applicable to a case of pollution. It also recognised that the magistrate had jurisdiction over the discharge of effluents, injurious to the health of the community. However, in this case, the High Court felt that there was insufficient evidence either to prove the toxic nature of the effluents or to pinpoint, which of the two mills contaminated the river. The Court observed:

“...it is of the utmost importance that the sources of public water supply must be maintained pure and free from pollution by industrial factories.....”

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<sup>5</sup> AIR 1926 Pat 506

The Patna High Court further observed that if on further evidence of properly prepared samples of effluents taken and analysed, it is found that the discharge of water had a deleterious and injurious effect, action would be taken. It is clear from the decision, that the Patna High Court was specific on the point that section 133 of the Cr.P.C. could be invoked for preventing public nuisance caused by pollution of water.

*Municipal Council, Ratlam v Vardhichand*<sup>6</sup>

In a more recent case, when the magistrate of Ratlam invoked the provisions of Section 133 of the Cr. P.C., to pull up the Municipality of Ratlam for non-performance of duty, the Supreme Court finally upheld the magistrate's decision and maintained that Sec 133 affords a mandatory duty upon the magistrate to remove a public nuisance. In this case, it was found that public sanitation was a low priority in the populous town of Ratlam in the state of Madhya Pradesh. The residents within Ratlam municipality had been suffering for a long time from pungent smell from open drains. The odour caused by public excretion in slums and the liquids flowing on to the street from the distilleries forced the well-to-do citizens of a ward in Ratlam to protest against the poor sanitary conditions and to approach the magistrate for a remedy. The municipal body had been indifferent towards its obligations enlisted in the Madhya Pradesh Municipality Act. The sub-divisional magistrate was moved by the community to take action under section 133 of the Cr.P.C. to abate the nuisance by ordering the municipality to construct drain pipes with flow of water to wash the filth and stop the stench. The municipality pleaded paucity of funds to take such action.

Among other things, the Supreme Court ordered the municipal council to construct sufficient number of public latrines and to provide water supplies and scavenging services so as to ensure sanitation. The Court also held in this case, that budgetary constraints did not absolve a municipality from performing its statutory obligations to provide sanitation facilities. In this case, Justice Krishna Iyer observed: decency and dignity are non-negotiable facets of human rights and are a first charge on the local self-governing bodies.

Class Action under the Civil Procedure Code: Order 1 Rule 8 of the Civil Procedure Code of 1908 recognises a class suit or a representative suit, wherein one or more members of a class having the same interest, may sue or defend on behalf of themselves and all the other members of the class. In MC Mehta's Ganga Pollution (Tanneries) case, AIR 1988 SC 1037 and 1038, the Court treating the case as a representative action, directed the issue of notice under Order 1 Rule 8 by publishing the gist of the petition in the newspaper in circulation in northern India and calling upon all the industrialists and the municipal councils having jurisdiction over the areas through which the river Ganga flows, to appear before the Court and to show cause as to why directions should not be issued to them to stop the flow of trade effluents and the sewage into the river Ganga without treating them.

#### **4. Indian Easements Act, 1882**

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<sup>6</sup> AIR 1980 SC 1622

This Act recognises the right of a riparian owner (someone who owns the land adjoining a river or water stream) to unpolluted waters. A riparian owner has a right to use the water of the stream which flows past his land equally with other riparian owners, and to have the water come to him undiminished in flow, quantity and quality and to go beyond his land without obstruction. Section 7 of the Easement Act provides that every riparian owner has the right to the continued flow of the waters of a natural stream in its natural condition without destruction or unreasonable pollution. The Court in the *MC Mehta v Union of India (Ganga Pollution – Municipality case)*, AIR 1988 SC 1115, recognised and revived the doctrine of riparian rights. The court in this case maintained that ‘the petitioner is a riparian owner and is a person interested in protecting the lives of the people who make use of the water flowing in the river Ganga and his right to maintain the petition cannot be disputed. The nuisance caused by the pollution of the river Ganga is a public nuisance, which is wide spread in range and indiscriminate in its effect and it would not be reasonable to expect any particular person to take proceedings to stop it as distinct from the community at large.’ The case was admitted as a PIL and was filed against the Municipal Corporation.

Some of the earlier cases also reinforce the rights of riparian to free flowing water without any obstruction (by a dam)<sup>7</sup>, no material decrease in water for lower riparian<sup>8</sup>, judicious use by upper riparian owners so as not to injure the right of the lower riparian<sup>9</sup> owners. The earlier decisions also make a point that riparian right is a natural right<sup>10</sup> and accrues only in natural streams/ rivers and not in artificial water bodies<sup>11</sup>.

The Easement Act recognises the customary rights of the people which are acquired under two rules: long usage or prescription and local custom. But these too were subject to the government’s right to regulate the collection, retention and distribution of the water of rivers and streams flowing in natural channels. The court in *Fischer v Secretary of State*, ruled that government did have the power to regulate, in the public interest, the collection, retention and distribution of water, provided that it did not inflict injury on any other riparian owners and diminish the supply that they have traditionally enjoyed.

### **Right to Water Inferred from Judicial Action**

*Public Interest Litigation (PIL)*: Most of the cases related to enforcement of peoples’ and communities’ rights to water have been filed in the form of Public Interest Litigations. This form of litigation is different from the conventional form of litigation where normally the conflict is between two private parties. PIL is normally resorted to where the rights of a larger public have been violated by a state action or inaction. In a PIL, any public spirited individual or organisation championing the cause of public can approach the court for the benefit of society and especially for those underprivileged and poor who

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<sup>7</sup> *Jagan Nath v Chandrika*, AIR 1919 Oudh 74, *Vippalapati v Raja of Vizianagram*, AIR 1937 Mad 310

<sup>8</sup> *Sethramanamalingam v Anada Padyach*, AIR 1934 Mad 583

<sup>9</sup> *Malipat Madhatil v Neelamance*, AIR 1938 Mad 649

<sup>10</sup> *Secy. of State v Sannidhiraju*, AIR 1932 PC 46, *Ram Sewak Kaz v Ramgir Choudhary* AIR 1954 Pat 320

<sup>11</sup> *Supra* note 8.

due to their disadvantaged social position are unable to approach the courts. Thus the locus standi is found to be relaxed in PIL matters. Locus standi refers to 'standing' or the eligibility of a person or an organisation to file a petition in the court.

Relief in PILs is sought through interim orders in the form of directions, writs or orders which are speedy in nature. PIL matters are often of urgent and complex nature. Delayed justice could lead to disastrous consequences. Sometimes the courts appoint expert/scientific and fact-finding committees to advise them in the course of litigation. Evidence and facts are provided in the form of affidavits. PIL is not adversarial in nature and often the judges take on the role of an activist to shape the case. The stimulus in PIL can be attributed to relaxation in the procedural formalities and complexities of filing cases. In the earlier days of PIL, judges even accepted petitions written on postcards.

PIL has been found to be an important step to provide judicial redress for a public injury arising out of a breach of public duty or from any other violation of a Constitutional right. Most of the Right to water cases fall under this category.

The Constitution of India does not clearly provide for the filing of PILs. Most of the PILs are filed as writ petitions invoking the writ jurisdiction of the State level high courts and the apex judicial body, the Supreme Court of India, for enforcement of violations of fundamental rights. Article 32 of the Constitution provides for constitutional remedies: 'The Supreme Court shall have the power to issue directions or orders or writs for the enforcement of any of the rights conferred by Part III of the Constitution [on Fundamental Rights].'

### **Court decisions**

1. The intention of the judiciary to reinforce the right to pollution-free waters is implicit in the *M.C. Mehta* case<sup>12</sup> (1988) where the tanning industries located on the banks of the river Ganga were alleged to be polluting the river. The Court issued directions to them to set up effluent plants within six months from the date of the order. It was specified that failure to do so would entail closure of business. The Court also issued directions to the Central Government, UP State Pollution Control Board and the District Magistrate. Although this judgment has made no reference to the right to life, the supporting judgment has noted that the pollution of river Ganga is affecting the life, health and ecology of the Indo-Gangetic Plain.

2. In *L.K. Koolwal v State of Rajasthan*<sup>13</sup> the High Court in 1988 gave directions to clean the city of Jaipur and save it from its unhygienic conditions. The Rajasthan Court in this case invoked Art 51 A (g) of the Constitution and was of the view that though this provision is a Fundamental Duty, it gives citizens a right to approach the Court for a direction to the municipal authorities to clean the city; and that maintenance of health,

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<sup>12</sup> MC Mehta v Union of India, AIR 1988 SC 1037.

<sup>13</sup> AIR 1988 Raj 2.

sanitation and environment falls within Art 21 thus giving the citizens the fundamental right to ask for affirmative action ((Leelakrishnan, 2002).

The case was filed as a writ petition by citizens of Jaipur through the petitioner Mr. L.K. Koolwal to compel municipal authorities to provide adequate sanitation. The Court in this case has made an important point that when every citizen owes a constitutional duty to protect the environment (Article 51A), the citizen must also be entitled to enlist the court's aid in enforcing that duty against the recalcitrant state agencies. Another noteworthy contribution in the Koolwal judgment is the Court's elaboration of Article 19 (1)(a) – guaranteeing freedom of speech – to include the 'right to know'. In this case, the Court extends the right to know to entitle the petitioner to full information about the municipality's sanitation programme, or the lack thereof.

3. It was in 1990 that a court clearly recognised the right of people to clean water as a right to life enshrined in Article 21 of the Constitution, for the first time. The Kerala High Court in *Attakoya Thangal v. Union of India*<sup>14</sup> attributed right to clean water as a right to life in Article 21. In this case, it was questioned whether a scheme for pumping up ground water for supplying potable (drinking) water to Laccadives (now known as Lakshadweep Islands) in the Arabian Sea, would not bring more long-term harm than short-term benefits. The Kerala High Court in this matter asked for a deeper study to examine whether the scheme, if allowed to operate, would not dry up and result in salt water intrusion into the aquifers. Stressing the need for inter-disciplinary co-operation for provision of civic amenities, the judge observed that.....

“... the administrative agency cannot be permitted to function in such a manner as to make inroads into the fundamental right under Art 21. The right to life is much more than a right to animal existence and its attributes are manifold, as life itself. A prioritization of human needs and a new value system has been recognized in these areas. The right to sweet water and the right to free air are attributes of the right to life, for, these are the basic elements which sustain life itself.”<sup>15</sup>

4. It was in the next year, 1991, that the Supreme Court itself enlarged the scope of the right to live to explicitly include the right to enjoyment of pollution free water and air for full enjoyment of life in *Subhash Kumar v. State of Bihar*<sup>16</sup>.

However, the Court did not get an opportunity to apply the principle as it found the petitioner to have made a false allegation due to a personal grudge towards the respondent company.

Subhash Kumar filed public interest litigation to prevent the pollution of the Bokaro river water from the sludge/ slurry discharged from the washeries of the Tata Iron & Steel Co. Ltd. (TISCO). The petition further alleged that the effluents in the shape of slurry flow into the Bokaro River, which are carried by the river water to distant places, pollute the

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<sup>14</sup> 1990 KLT 580

<sup>15</sup> Id, p 583.

<sup>16</sup> AIR 1991 SC 420

river water, as a result of which the river water is not fit for drinking purposes nor is it fit for irrigation purposes. The continuous discharge of slurry in heavy quantity by TISCO poses risks to the health of people living in the surrounding areas and as a result of this discharge the problem of pure drinking water has become acute. The petitioner has asserted that in spite of several representations, the state of Bihar and the State Pollution Control Board have failed to take action against the company.

The Court on a review of the facts and the averments contained in the counter affidavits did not accept the petitioner's allegations. However, the court in this matter reiterated the use of Article 32 as an instrument for safeguarding citizens' fundamental right to life and averred that the right to live under Article 21 of the Constitution includes the right of enjoyment of pollution-free water and air for the full enjoyment of life.

5. Later in 1996 under the petition from an advocacy group in the case *Indian Council for Enviro-Legal Action v Union of India*<sup>17</sup>, the Supreme Court found that the responsibility for costs of remedying water problems falls on companies in the wrong.

An industry producing toxic material was dumping its sludge in such a manner that much of it was draining into the earth making the soil reddish and the ground water highly polluted. The water became dark in colour and was no longer fit for consumption by human beings or by cattle. Sludge also flowed into irrigation canals. Crops were affected. Another industry was discharging untreated water emanating from a sulphur acid plant. National Environmental Engineering Research Institute (NEERI) prepared a report and brought it to the notice of the court. It also contained the opinion of experts from the Ministry of Environment and Forests and views of the State Pollution Control Board.

The Court said, "The damage caused by the untreated highly toxic wastes resulting from the production of 'H' acid and the continued discharge of highly toxic effluents from sulphuric acid plant flowing through the sludges – is indescribable. It has inflicted untold miseries upon the villagers and long lasting damage to the soil, to the under ground water and to the environment of the area in general."

The Supreme Court fixed the responsibility on the errant industry and asked the Central Government to recover the expenses for remedial action from the industry.

The court accepted this as public interest litigation on behalf of the villagers of Bichiri whose rights to life were being affected by these industries.

6. In a more recent high court case, the ambit of Article 21 was enlarged to include the 'right to water' in *S.K.Garg v State*<sup>18</sup>, where large parts of Allahabad were being deprived of clean and sufficient water. Under the guidance of the High Court, a committee was set up for testing and supply of water.

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<sup>17</sup> AIR 1996 SC 1446

<sup>18</sup> AIR 1999 All 41

A perusal of the relevant judgments shows that while the highest court has been reluctant to confer specifically a right to a clean and humane environment under Art 21 of the Indian Constitution, various high courts in the country have specifically brought right to safe water and sufficient sanitation under Art 21 as Right to Life. There are several such judgments from different high courts in the country. These cited above represent only a few, well-known judgments.

### **III. Policy**

Water in India is managed by no less than six ministries – Rural Development, Urban Development, Agriculture, Water Resources, Food; and Environment and Forests. This results in chaotic and lop-sided water policies and schemes. Moreover, water being a state-regulated subject, each state is expected to have its own state water policy guiding water management and allocation of water to the various sectors within the state. However, the national government formulated a National Water Policy in 2002, following which each state has up to two years draft its own policy. The task has been made easy for the states as they simply use the same policy. While this does ensure uniformity between states, the fact that most of these state water policies are identical means that states have not taken into consideration the uniqueness and the distinct agro-ecological zones of their states.

#### **National Water Policy 2002**

The National Water Policy (NWP) in its preamble mentioned that the management of water has to be done keeping in view the socio-economic aspects and needs of each state, but this is undermined by the accompanying statement that efforts should be guided by the national perspective. Significantly, the NWP does give priority for drinking water to the needs of human beings and animals. Unfortunately, the policy itself does not make this prioritisation clear.

The NWP has declared water to be a national asset and it has paved way for the private sector to take over management of water in India through BOOT agreements. Under these agreements, private sector participation in building, owning, operating and transferring of water resources is being sought.

This policy decision has come at time when a large proportion of the population lack access to safe water and adequate sanitation facilities:

- 17 per cent of the population does not have access to safe drinking water
- About 38 per cent of urban population in India, who are below the poverty line, have no access to water
- 69 per cent of the people do not have access to sanitary services
- 80 per cent of children in India suffer from water-borne diseases; over 700,000 of these children die each year
- 44 million people suffer from problems related to water quality – due to presence of fluoride, iron, nitrate, arsenic, heavy metal and salinity



- In 1985, 750 villages had no source of water; by 1996, 65000 villages had become waterless

The commodification and privatisation of water as a result of the policies of multilateral aid agencies and trade agreements will certainly aggravate the situation with respect to the availability of and access to water. Privatisation will also increase problems surrounding the affordability of water in the years to come.

### **The Privatisation/ Corporatisation of Water and its Implications**

The process of large-scale privatisation or corporatisation of water which impinges on the rights of people is in its early stages in India<sup>19</sup>. Hence, the real implications of this are yet to be experienced. But the perceived threats based on the experiences of other developing countries seem to be rather strong. The example of the Sheonath River in Chhatisgarh state discussed in details in the next section comes to mind when discussing privatisation of a river in India and its implications on a community.

The bid for privatisation includes allowing the corporate private sector to build and operate dams across rivers for hydro-electric power or irrigation. Assuming that the private sector is interested in investing in such projects (which are capital intensive, long gestation, and generate only modest returns), how are complexities of environmental and social impacts going to be handled by the private entrepreneur? Resource conservation and issues of resettlement and rehabilitation will either lose out, or they will be handed back to the government departments, as was the case in the privatisation agreement with Radius for Sheonath River.

Communities and individuals working on water related issues have perceived a great threat from the new water policy and the new international forces at play. The WTO through its GATS (General Agreement on Trade in Services) negotiations and Trade and Environment Section in the Doha Declaration have pressed for the inclusion of water in national commitments, so that India will be forced to provide national treatment and market access rules to benefit Multi-National Corporations (MNCs) without regard for social or environmental impacts<sup>20</sup>. The 'National Treatment' rule of GATS prohibits governments from discriminating between foreign and local service providers, so foreign companies will have to be treated on par with local companies. This would also have the effect that government funds allocated for public services would have to be made available to MNCs as well as local organisations. However, under this provision, foreign companies cannot be compelled to hire or train citizens or to involve local people in the management.

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<sup>19</sup> It should be noted here that water as a private commodity has been in existence in India for a long time. Owner of land has unlimited right to water under his land. This unlimited access has given rise to well developed water markets and water lords in Gujarat state. Many industries and residential colonies pump out their own ground water. In times of scarcity, water supply through private tankers and carts is a common sight. Emergence of bottled drinking water is an important turning point in the privatization and Commodification of water.

<sup>20</sup> Appeal for "Stop the GATS attack now". [www.gatswatch.org](http://www.gatswatch.org)

Commodification of water in India began when World Bank aided the construction of large dams and the intensification of tubewell irrigation within the past few decades. This has been pushed forward by the Bank's Structural Adjustment Policies. Similarly, Asian Development Bank's loans for privatisation of water seem to have two clear motives – first, to force the entry of private industry in the water sector and second, to create user groups in the form of *Pani Panchayats* who would provide ready customers to the companies. The term '*Pani Panchayats*' makes them sound like local bodies of self-governance which will be empowered to manage the water resources – but use of this term is deceptive. *Pani Panchayats* will in fact be comprised of users of water who will pay for the services provided by the private sector. This is going to have serious implications for small and marginal farmers. They will be forced to grow commercial crops instead of their food crops; this could result in threatening the food security of the country and pushing these farmers to the verge of extinction. Neither does growing commercial crops guarantee that farmers will be able to bear the high tariffs. Due to the trend towards free and open markets, their produce will have to compete with the produce of national and international private agri-businesses. Small farmers will not be able to bear the costs of compliance with high food quality standards.

Several groups in different parts of the country have initiated public consultations, and campaigns. Navdanya, a group based in Uttaranchal, has compiled a good database and it has analysed the implications of this. Uttaranchal has launched a Campaign for Water Liberation (Jal Swaraj) as a part of the Living Democracy movement which is involved with various movements on associated issues such as Save the Seed Movement and Save Biodiversity Movement.

Perceiving severe threats to their water conservation work, Magsaysay award winner, Rajendra Singh from Tarun Bharat Sangh (an NGO working on the issue of reviving traditional water harvesting systems in Rajasthan state), felt the need to start a nationwide campaign to raise awareness on the issue of privatisation. He was actively involved in providing inputs to the new National Water Policy. Most of the recommendations made by his team were accepted with the exception of two additions that were not acceptable to his team. The first of these was calling the natural resource a national asset. The second point of disagreement was the participation of the private sector in the water resources management.

### **Earlier movements for the Right to Water**

The threats to right to water are not new. There is plenty of evidence in the form of past movements who acted against the infringement of the right to water. There are also examples of effective and successful community managed water resources systems. The basis for the success of these efforts lies in the fact that people had full control over the resource and had formulated their own practices and norms for the management thereof. The reason for the failure of most government driven water management programmes is the alienation of people by these programmes. Government schemes do not include public participation at the planning, designing and implementation stages, for example. Planners and administrators have imposed their own pre-conceived ideas of development

without attempting to understand the peoples' needs and their patterns of life and thinking.

This has given birth to several peoples' movements in the past few decades to rectify the problems of access to, use and pollution of water. These movements could be classified in the following ways:

- (a) Movement for access to water for survival. Some of the important movements that come to mind are *Pani Chetna*, *Pani Panchayat* and *Mukti Sangharsh*
- (b) Anti-pollution movements (which include the movement of the fishing communities along the coast line of India against the ecological destruction caused by mechanised fishing which has affected their livelihoods)
- (c) Anti-dam movements such as the Anti-Narmada, anti-Tehri and movements against several other large dams and irrigation projects
- (d) Anti-caste movement: the mahad movement was started on the grounds that caste disabilities had denied them their basic right of access to water

Some of the movements that have suggested and shown constructed alternative strategies are: Pani Panchayats during the drought of 1971-72 in Purandhar district of Maharashtra in which people managed 50 irrigation schemes (120 hectares of land were irrigated for 1500 beneficiaries in 20 villages); the Ralegan Siddhi movement beginning in 1976 to build self-reliance and self-sustaining village communities capable of using the local resources optimally (this led to benefits in five watershed areas); and Tarun Bharat Sangh, together with community mobilization revived the traditional water harvesting systems in Rajasthan and succeeded in revitalisation of six rivers which had gone dry.

There is no new law at present which is hampering the rights of people to water. But some of the earlier laws have acted as barriers. For instance the Irrigation Acts assert state control over the river waters. These Acts are not supportive of community or peoples' efforts in water management. The suppressive potential of these laws is witnessed in case of the check dams, *johads* constructed in Rajasthan by the community with support from Tarun Bharat Sangh. This movement came up to tackle the drought situation in Alwar district of Rajasthan, with the permission of the Block Development Officer and the District Magistrate. The concerned officers went back from their earlier decision and the Government of Rajasthan ordered removal of these *johads* although they made the area green and brought prosperity. The Government served a notice on 13<sup>th</sup> March, 1987 to Tarun Bharat Sangh mentioning that action would be taken against them under section 42 of the Rajasthan Irrigation and Drainage Act, 1954, which empowers the State Government to prohibit obstructions causing injury to any land or public health or public convenience. Fifty-two tanks constructed in one of the watersheds were declared to be illegal since they may cause harm to farmers of the area because in their construction the prescribed techniques were not adopted and therefore they may collapse at any time. Interestingly, the legally valid and technically sound structures of the Irrigation Department have been washed away during subsequent rainfall whereas the *johads* constructed by people are still fulfilling the needs of the people of the region.<sup>21</sup>

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<sup>21</sup> 'Hamara Paryavaran', Paryavaran kakch, Gandhi Peace Foundation, Delhi 42 (1988).

#### IV. Community Empowerment

The 73<sup>rd</sup> and 74<sup>th</sup> amendments to the Constitution of India empower bodies of local self-governance by the creation of Panchayats in rural areas and Municipal Councils in towns to manage their own water resources – drinking water and water ways. The Panchayat Extension to Scheduled Areas Act, 1996 makes similar provision for the devolution of powers for the management of water resources by village and tribal councils through the recognition of their traditional practices and customary norms in resource management. The Sixth Schedule of the Constitution creates special District Autonomous Councils for North Eastern states of India and empowers them to legislate on certain subjects which include management of any canal and water course. In addition, the Constitution has made special provision for the North Eastern states under Article 371A, 371B, 371C, 371F, 371G and 371H from time to time, giving supremacy to the customary laws of these states.

Water management practices in North East India are not of recent origin. These age-old practices have been refined over the years and handed down from one generation to another. Since land, water and other resources therein were considered to be common property and were under the management of community, clans or individuals, people had framed their own social norms, taboos and rules and regulations for the utilisation of the resource based on availability and need. These included the practice of setting aside river reserves and attaching sacred sanctity to certain water bodies, and not defiling water sources.

These community efforts in water management through indigenous practices are not limited to North Eastern states. There are plenty of examples of successful management of water systems from all areas of the country, ranging from Tamil Nadu tanks to the *Naulas* (water springs) or *gools* (channels) of Uttaranchal. These are the *johads* (earthen check-dams) of Rajasthan and *pokhars* (village ponds) of West Bengal. They were all managed as per the folk laws accepted by the community members. In some cases the traditional systems had continued through the generations whereas in some cases communities revived the old practices when resource-scarcity was felt. The example of the *Johads* constructed by the communities in Rajasthan falls in the latter category. Not only have the communities succeeded in revival of the rivers which had gone dry but more recently they have also reformulated some of the earlier norms related to water management and framed some new ones keeping in consideration the threats brought by new national and international policies. We will read the details in the case below:

##### **The Story of the ‘Arvari River Parliament’**

Mindless tree-felling in the Aravali mountain range had led to drought situation in the state of Rajasthan. 1985-1986 saw the worst droughts in Rajasthan, and the district of Alwar was badly hit; it was also one of the poorest districts in the state. The district lies in a semi-arid region receiving a meagre average 620mm annual rainfall. The district has two distinct features: the Aravali Mountain and the Sariska Tiger reserve. Alwar district

had suffered severe water scarcity - the groundwater table had receded below the critical level and the state had declared parts of the area as 'dark zones' (meaning that the water table was so low that any further extraction of groundwater was restricted). An old tribal leader suggested to Tarun Bharat Sangh, a local NGO, that it could help them by reviving traditional water harvesting systems to solve the water problems of the villages. He explained the rich tradition of building *johads* in the region, which were created by simple inexpensive traditional technology. *Johads* are earthen check dams that catch and conserve rainwater, leading to improved percolation and groundwater recharge.

Beginning with Gopalpura village in 1985, Tarun Bharat Sangh played a leadership, catalysing role, and acted as a facilitator in building 6000 *johads* and rejuvenating 2500 old structures with the help of village communities in 1058 villages.

With the return of water to the villages, young people who had migrated out in search of jobs, returned back to agriculture in their villages. Women who would spend most of their day fetching water could tend to the housework, while children could go to school. Water brought back life to the Tiger reserve and started attracting far more migratory birds. Rivers became perennial.

Arvari, a small river in Alwar district had been reduced to a monsoon drain for decades. The process of rejuvenation of this river was started in 1987 by constructing small *johads*. 350 *johads* have been built in the catchments of the river. From 1996 onwards, the river began to flow in its full flow and became perennial. With the revival of the river, aquatic life prospered. There was natural growth of fish population. However, seeing this, the government gave the contract for catching fish to a private party. The people were concerned – today the privatisation of fish, tomorrow it could be the river itself. So although the people in this region do not eat fish, they resisted the move of the government. Water was developed by them through their hard efforts and labour and they did not want to lose their inalienable rights over the river waters. They succeeded in reinforcing their right over the river and the government interference stopped.

This long-felt need of the rural communities to sustain the prosperity resulting from the perennial river waters and the perceived threat of losing their rights thereupon, provoked them to think of a long term solution. This led to the formation of Arvari Parliament on 26<sup>th</sup> January 1999. The Parliament represents 72 villages, each of which sends two representatives. The Parliament has framed 11 rules with regard to the use of the river waters. A co-ordination committee comprising members selected by the Parliament handles the operations and ensures compliance with the rules.

The rules formulated by the Arvari Parliament relate to the following:

1. Direct water irrigation from Arvari River
2. Irrigation from wells
3. Crop pattern and production free from the market and middlemen (cropping pattern should be based on the needs of local people)
4. Sale of water and the protection of fish in the river

5. Sale of land in the villages (rules to prohibit the giving of land to outsiders and to take decisions regarding these issues)
6. Programmes to make the whole river area green and to protect the surrounding area from damage that has been done by severe mining
7. The hunting of animals and illegal cutting of trees in the Arvari River area
8. Traditional methods of water conservation and the revival of these practices
9. Documentation of the reasons for over-exploitation of water and promote water conservation
10. An active system for the management of the river
11. The role of the Water Parliament and the village Gram Sabha (village forum) towards management of water sources

The Arvari Parliament meets on a regular basis and has been successful in keeping wrong-doers at bay. Though this ‘river parliament’ has no legal status and its decisions are not legally binding, the moral force of people makes its survival possible. The workers of Tarun Bharat Sangh have served as facilitators. This success has been a result of the efforts of every member of the community who attaches a feeling of ownership to the river and its waters. In turn, this feeling of ownership, thus ensuring the safety and maintenance of the resources, is a product of contributions, participation and sharing.

This time, the community succeeded in driving away the outside forces. But in future, if the social fabric of the community weakens, some from within the community and stronger outside forces could question the legal status of the Parliament and the norms laid down by it. This is a problem faced by most sites and locations where communities have undertaken resource/conservation work. For this purpose the National Law School of Bangalore University has drafted a strategic legal environment for community management of tank system in Karnataka. On similar lines, Tarun Bharat Sangh is in the process of developing one for *Johad* management to give teeth to the rules promulgated by the Arvari Parliament. This effort will require the formal support of the legislature and will make its decisions meaningful.

### **The struggle for reinstating community rights over Sheonath River in Chhatisgarh<sup>22</sup>**

The people of Chhatisgarh were amongst the first to be affected by the privatisation of a river. Hitherto the responsibility for water supply was vested in the state government through its Water Departments. More recently, some of these responsibilities have been delegated to the local bodies of self-governance, the Panchayats. The privatisation of the Sheonath River in Chhatisgarh by Radius Water Limited is however the first time that water supply has been transferred to a private company. The agreement between the Radius and the government was signed on 5<sup>th</sup> October, 1998 – but since then Radius has failed to fulfil several conditions of the agreement.

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<sup>22</sup> Compiled from an article by Asha Krishnakumar in *Frontline*, 7<sup>th</sup> November, 2003, and personal communication with Gaotam Bandyopadhyay, Convenor, Nadi Ghati Morcha (River Valley Protest March) in October, 2003.

Sheonath River enters Chhatisgarh in Durg district and flows into Mahanadi River. This river has been a source of livelihood to farmers and fishermen for centuries. But now small farmers can no longer cultivate along the 23.6km stretch; they cannot install pumps or tubewells to draw water even a kilometre from the river; and people are not allowed to fish, bathe or wash clothes in the river.

The Build Own Operated Transfer (BOOT) agreement was signed between the Madhya Pradesh government (before the formation of Chhatisgarh as a state) and Radius Water Limited; this gave ownership of this stretch of river to the company for 22 years on a renewable concession. Radius has control over the stretch of river that runs mostly through the Mohlai village, and has gained monopoly on the supply of water in the Borai industrial area near Durg town. The agreement covers groundwater as well. Radius has had metres installed on tubewells supplying water to the local industrial units and the payment has to be made to the company.

The company supplies 40 million litres of water at Rs. 12.60 a litre to industries, the railway station and a railway colony through the nodal agency, Chhatisgarh State Industrial Development Corporation Limited, which pays Radius irrespective of whether it collects the money from the industries using the water. The nodal agency has paid Rs. 41,400,000 to the company between November 2002 and February 2003, but has recovered only Rs. 12,900,000 from the industries. The largest consumer has paid up less than half its water bill.

Thousands of local people, who have survived for generations on the river waters, are now going hungry due to loss of livelihood. People campaigned to the Chhatisgarh government for the termination of the contract with Radius Water Company. People were supported by activists, social workers and left-wing parties wanting their rights over water restored. These activists from the National Alliance of People's Movements, the All India Youth Federation, the Nadi Ghati Sangharsh Samiti and Chhatisgarh Mukti Morcha united and mobilized people living along the river from other villages such as Kekro Koli, Bedwa Pathra, Vagrum Nalla, Basik Hai, and Chattari to join the struggle.

In April 2003, the Chief Minister of Chhatisgarh, buckled under pressure and decided to cancel the agreement. Supreme Court in another case has set the precedent that any agreements signed by the state government of undivided Madhya Pradesh would be allowed a review by the government of the new state of Chhatisgarh.

Besides direct question of the peoples' rights of people to water, other problems have been faced by the Chhatisgarh government over its contract with Radius.

In June 2002, Radius wanted the government to raise the tariff as per the Tariff Variation Clause in the agreement. The basic tariff was Rs. 60 per cubic metre and Radius wanted to increase this by 12 per cent every year.

In July 2002, the State Water Resources Department planned to set up a check dam on the river near Bhatt village. Radius opposed this move stating that they held certain rights

over that part of the river. The Municipal Corporations of adjacent districts also plan to construct another check dam under the Proposed Drinking water supply scheme on the same river. The fear that these schemes may get linked to the Radius project, leading to an escalated tariff for the people, may eventually result in water wars. The impact of this price hike will fall primarily on the urban poor living in slums. Unlike the government agencies, private companies such as Radius do not have a social responsibility to provide safe and affordable drinking water to all.

The process of the privatisation of rivers in the state has not stopped at Sheonath – consultants have since recommended to the government of Chhatisgarh that the region needs substantially more privatisation.

However, when the rights of the community to a resource are affected, there are examples from all over India that show that people do come together in the form of peoples' agitations/movements to fight for their rights.

In addition to the 73<sup>rd</sup> and the 74<sup>th</sup> Amendment to the Panchayats, the community has been empowered in relation to the right to water by certain other national legislation.

**Environmental Impact Assessment (EIA)** – EIA helps to ascertain in advance the likely impacts of any project. EIA was made compulsory by a notification issued in 1994 under the Environment (Protection) Act, 1986 but the final version of the notification diluted the well-intended provisions. Firstly, many companies are excluded<sup>23</sup>. Secondly, the provision that the Impact Assessment Agency (IAA) would consult a Committee of Experts and interact with the affected population or environmental groups has been made discretionary. Public hearings for soliciting comments from the public are arranged only if IAA decides to do so.

A new dimension added to the EIA process in India in 1997 has strengthened some of the earlier provisions in favour of the communities. Earlier the State Pollution Control Boards had no role to play in the assessment process. But with the 1997 amendment<sup>24</sup>, an applicant for environmental clearance has to submit to the concerned Board twenty sets of executive summary of the project along with other environmental information or documents. The Board is bound to give notice for a public hearing. Now, it is specifically provided that the finding of the IAA should be based, *inter alia*, on the details of public enquiry. Procedure for hearing is laid down in details. The Pollution Control Boards have to give notice of hearing in two newspapers of wide circulation in the locality, one of which should be in the vernacular language. The notice should mention the date, time and place of public hearing. Suggestions, views, comments and objections of the public are invited within 30 days from the date of publication of the notice. A panel consisting of representatives from the State Pollution Control Board, the State Government and the

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<sup>23</sup> It is now specified that clearance is not required if the investment is less than Rs. 500,000,000. However, for clearance of tourism projects in the coastal regulation zone, the investment need be just above Rs. 50,000,000. Projects such as mining, pit-head thermal power stations, hydro-power irrigation or flood control and ports and harbours require preliminary site clearance.

<sup>24</sup> SO 318 (E) dated 10<sup>th</sup> April 1997, Gazette of India, Part II. Section 3 (ii) dated 10th April 1997.



local authorities and not more than three senior citizens will hear representations. Bona fide residents, environmental groups, and people affected by the project or displacement can participate in the public hearing.

Public hearing has also been made compulsory by most of the multilateral and bilateral aid agencies prior to sanctioning funds for any projects. However, public hearings are meaningless without information on project details and its implications. This illustrates that the Right to Information is an inherent right of people and community for empowerment – public hearings without information are merely rubber-stamp exercises.

**Right to Information** – Public access to government information about and government's intent in any action that is likely to have an implication on their right to water is imperative. Access to information strengthens participatory democracy through public debates and public hearings on subjects of public concern. It is the duty of the government to seek informed consent from its people before the planning of any developmental activity which may hamper *inter alia*, their right to water. Thousands of people are affected by the initiation of large developmental projects. Projects which aim at improving the quality of life for some, in reality threaten the lives of many in the process. Such projects benefit a very small section of the public and the costs are borne by the poor and marginalised sections of the society. In India, the Right to Information is at a premium as it has been overshadowed by the Official Secrecy Act. The present achievements in the field of Right to Information are to the credit of Magsaysay Award Winner, Ms. Aruna Roy, who spearheaded a National Campaign for Peoples' Right to Information some years ago.

The Ministry of Environment and Forest had brought out a notification under the Environment (Protection) Act, 1986, relating to right to information in location of companies handling hazardous material. This is a useful regulation as it will help people in accessing information and raising their concerns timely.

### **Whose interest is it anyway? - Public Interest/ public purpose**

One way in which community loses its control over natural resources is by the acquisition of land – one concern is that in the future there will be a formal way of acquisition of water directly, too. Government acquires land with the help of colonial legislation - *Land Acquisition Act, 1894* on the pretext of 'public purpose or national interest'. In emergency situations such as in times of sudden changes in the course of a navigable river, the government can acquire land immediately on publication of a notice. Similarly, if government considers it necessary to acquire immediate possession of any land for the purpose of maintaining any structure or system pertaining to irrigation, water supply, drainage, road, communication or electricity, the government can direct the Collector to take immediate possession of lands after a public notice. Many a times, *inter alia*, peoples' right to water have been affected by the use of this Act. In most developmental projects especially mega dams, thousands of people living along the river are displaced for the larger interest of the nation; needless to say, they are not appropriately rehabilitated. Most often safe drinking water, adequate sanitation and irrigation facilities

are not made available. Hence the question arises why should the people who had the first charge on these resources and services should sacrifice for an unknown public and unknown purpose? Any future acquisition under any project not serving the interests of the original users should not qualify to be a public interest acquisition.

No specific group is working on the right to water in India. Different agencies and individuals such as NGO, government, research institutions, academic institutions, water user groups and the media are playing different roles in related fields to raise the associated concerns. One organisation which is trying to connect the works of all these myriad of groups spread over the country is *Jal Biradari*. The provisions of the new National Water Policy have raised doubts and deep concerns about the implications on the rights of people to safe, adequate and affordable water. Jal Biradari has resolved to assist in the drafting of state water policies that prioritise the water needs of the people. For this purpose, Jal Biradari is organising *Jan Sunwai* (public hearings) and *Jal Adhikar Yatras* (Water Right Marches) all over the country. This process began in December 2002. The National Jal Biradari's aim is to fight for a policy that ensures everyone's access to water and making the community the custodian of its water resources. The National Jal Biradari also aims to sensitise the policy makers to the successes of people-centred, decentralised water structures. Jal Biradari convinced the Minister of State for Water Resources to oppose the notion of privatisation and declaration of water as an asset. She agreed to organise five regional level public hearings prior to the finalisation and announcement of the National Water Policy, although this did not happen and the policy was declared in haste with no public hearings.

The Prime Minister in his speech while announcing the water policy highlighted and supported the concept of community conservation and management of water. He also emphasised on the need for a social audit of most large-scale water projects. But these issues were missing from the announced policy.

The initiator of the Jal Biradari, the NGO Tarun Bharat Sangh is on the verge of launching a Water University. The objective of this University is, "to bring together new energies under the guidance and training of experts to build a team of water engineers to fuel or launch a Water Literacy Movement to sensitise a larger public to respect this sacred common resource – water."

## **V. Lessons Learnt**

It is clear from the previous sections in this study that Right to Water in India is not expressly guaranteed either through the Constitution or any legislation. It is an implied right, asserted through a set of laws which confer a duty upon the state through its various agencies to prevent and control water pollution. In India, the aggrieved and/or public spirited people have succeeded in eliciting the right to water with the help of an active judiciary, a conscious community, available pro-bono lawyers and a supportive media.

Past experience shows that large, centralised, top-down, modern technology-driven projects are not in the interest of the nation and its public especially when the country is

dotted with the successes of local, decentralised, community-managed, people-centred more economical alternatives. The cases of Tarun Bharat Sangh and the Arvari River shows that unless people's rights are guaranteed, community management of resources could be affected. The present legal framework does not support community initiatives; in fact it is hostile to them which is again highlighted by the experiences of Tarun Bharat Sangh in their earlier years of work. There is an urgent need for a review of all laws impinging upon people's basic right to water to make them reflect modern needs.

Legal embodiment of the priority given to drinking water in the National Water Policy and the recognition of access thereto as a fundamental right is imperative. The National Water Policy merely serves as a national guideline. The matter of private sector participation needs to be well debated at the national, regional, local and international levels, as it is a trend towards countering the process of decentralisation and empowerment of communities in water management as sought by the 73<sup>rd</sup> and 74<sup>th</sup> constitutional amendment.

The inefficiencies and incapacities of the water resources and related departments cannot be the justification for handing over of water management, allocation and distribution to private sector. Instead, government needs to act in a more responsible and accountable manner towards the civil society.

The move of the government to undertake a project on interlinking of rivers in India which aims at transferring water from water surplus basins to water scarce basins is also being viewed as a panacea to the water problems in India. The choice of this gigantic project (mere cost of construction of this is estimated at US \$200 billion) as an appropriate mechanism to achieve this goal is debatable. Unless techno-economic studies are made available, social and environmental impacts are understood against other possible options, such a project cannot be justified. Prima facie it seems the community managed low cost decentralised schemes/projects for access to water and sanitation facilities based on traditional and local wisdom, corroborated by scientists' knowledge would be most economical and effective in meeting the water problems of the country.

International law were traditionally been considered as soft law and there was no sovereign – subordinate relationship between international and domestic law. Now, though, not only have some international laws gained sovereignty over domestic laws but some international laws have gained supremacy over other international laws. The hegemony of trade agreements over international human rights agreement is a case in point. It is important for trade agreements to be based on more humanitarian grounds and human rights agreements be treated at par. Important issues such as equity, social justice and sustainability of natural resources cannot be left to the market forces. Basic human rights cannot be held ransom to the dictates of WTO.

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### **About Ecoserve**

Ecoserve was set up in the year 2000 with the objective of conservation of nature and natural resources by protecting the ecology and improving the economy of the local communities dependent on natural resources in their environs. The organisation has, in

the past three years, been engaged in different kinds of activity involving research, policy analyses, mobilisation of farmers and encouraging them to cultivate mountain medicinal plants in the hill state of Uttaranchal. More recently, as a part of a larger network of individuals and organisations involved in a national level campaign against privatisation of water under the banner of *Jal Biradari*, Ecoserve has contributed by way of analysing the national level and the some of the state level water policies. Ecoserve has also assisted in organising the National Jal Yatra (the water march) in the state of Uttaranchal to raise the awareness of cross section of people in different towns and villages. Ecoserve has also been engaged in a study looking at the implication of the Sanitary and Phytosanitary Agreement under the WTO on small and marginal farmers in developing countries. Ecoserve is also in the process of developing an Organic Farm, a nutritional garden, growing traditional as well as some commercial herbal species. Ecoserve as a part of the Jal Biradari, Ranikhet, has initiated the process of rejuvenation of a dried up river. Ecoserve educates and trains farmers in issues related to phytosanitation and food quality/food safety especially those who are taking to cultivation of market oriented crops. The organisation also provides orientation to farmers and other interest groups on the popular international certifications and labels such as fair trade labelling, organic and forest stewardship council.