

# PURSuing A BETTER NATIONAL WATER POLICY ENDOWED WITH SUBSTANTIAL RIGHTS ON WATER: CASE STUDY OF SRI LANKA

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**Abstract** - Every state is bound to fulfil fundamental needs of each human being as a duty bearer and subsequently those needs secured more powerful status as human rights. Formerly the water was an unlimited resource and Justinian categorized water under “Res communes” or resource common to all. However for the time being water became a commodity and many restrictions have been implemented over water resources. Similarly it became a scarce resource for many areas. Accordingly water need to be regulated through integrated mechanism. Since the water scarcity became a universal challenge world community presented new strategies to counter upcoming menaces. Many treaties and action plans were introduced in order to ensure the sustainable use of water resources. Right to water confronted with water rights. Land owners were against to ensure right to water of others, violating their water rights. But the governing bodies were bound to protect both right to water while protecting water rights. This paper intends to investigate this conflicting issue and main objective of this paper is to introduce proper national water policy for Sri Lanka which could counter the water management issues. Further this paper looks into water protection strategies and prevailing laws and appropriate mechanisms towards sustainable water use. Furthermore this paper suggests to secure the current runoff and utilize it through proper mechanism. This research use qualitative research methodology and mostly the secondary data and analytical and interpretative approach of writing.

**Keywords** - Water rights, Right to water, water policy

## I. INTRODUCTION

“Water is critical for sustainable development, including environmental integrity and the alleviation of poverty and hunger, and is indispensable for human health and well-being.” (Onyango, 2009) It would be harmful for entire

future of any nation by running on such an immense resource with less or out of proper National contrivance. The United Nations have committed to focus on water for a decade (2018- 2028) having an impression to raise awareness, define a road map and advance the water agenda. (UN, 2018) International community struggling from considerable time period for a sustainable water usage against increasing water scarcity and to establish integrated water management system throughout the world. UN and their funding limbs, are being launched numerous projects throughout the world in order to accomplish an appropriate substantial water management strategy.

This paper intends to investigate a path way to introduce a substantial National water policy for Sri Lanka. Sri Lanka is a country having high water saturation. Sri Lanka's Per capita water resources availability is 2,400m<sup>3</sup>. Average annual rainfall is 2,000mm. This small island discharges nearly 65% of available water to the sea through 103 river basins. As per the recent calculations the Mahaweli River discharges about 4,009mcm and the Kaluganga discharges 4032 mcm. (Wijesuriya, 2005) Accordingly it is hard to presume an immediate water scarcity threat to Sri Lanka. However several provinces of dry zone in the country continuously facing for an arid climate and water scarcity for considerable period of every year. This water diversification sirens a massive challenge raised before Sri Lankan water authorities to establish a standard water policy which could ensure appropriate water capacity for all citizens throughout the year while protecting both water rights and right to water of them.

In order to vanquish this huge target, it is required to proliferate the consumption rate of flowing water enabling the surplus to fertilize the dry zone. Flowing water surplus of the country could be utilized through various equitable

and commercial means which would contribute to marginalize the global water scarcity. This multilateral global approach needs to be implemented through an integrated water management system enabling protection of both water rights and the right to water of entire mankind.

This paper intends to understand the pertinence of protecting water rights and achieving the right to water through the same national water policy which is equipped with appropriate water management strategy and water protection mechanisms enforced by substantial legal bodies to counter emerging threats to the water sector.

## II. SCIENTIFIC APPROACH OF THE STUDY

It is very inconvenient to theoretically analyse the water sector in Sri Lanka which is highly politicized and overruled by the bureaucracy. But it is obvious that precise national water policy should be comparable with both national and global requirements in the water sector rather than addressing internal complications. Water rights and the right to water should be implemented by national legislations through proper enabling bodies to overcome huge disparities in the natural water distribution system. The necessity of national intervention for this enormous task has been declared by Beccar L. as “authorized demands to use a flow of water, including certain privileges, restrictions, obligations and sanctions accompanying this authorization, among which a key element is the power to take part in collective decision making about system management and direction. The main element of this definition is authorization; one can talk of ‘rights’ only when water use is certified by an authority (individual or collective) with legitimacy and power of enforcement, and recognized by users and non-users alike” (Beccar L., 2002). Accordingly, the political authority or the decision-making body (power) is the most important element in the process of securing all the rights behind the water sector. Rights are in two folds. One is human right to water or assuring access to water or right-based approach of water. Other one is water rights or protecting ownership of water or land-based approach of water. Anyhow mingling of these conflicting structures is the most challenging and cumbersome task in drafting an appropriate water policy for a particular state.

This research is mainly based on secondary data which is influenced by library resources. Further, some eminent professionals and scholars engaged in the field have contributed a lot to elucidate the practical aspect of the Sri Lankan water sector. It was followed by the qualitative

research methodology and analytical and interpretative approach throughout the research. The main focus of this study aims to the international contrivance of drafting appropriate national water policy for Sri Lanka and to assess the causes for its recession.

Research problem of this study is “How to preserve the right to water while assuring the water rights through national water policy in Sri Lanka?” The author endeavoured to resolve this problem via four research questions as follows. What are the national and international attempts to draft an appropriate water policy for Sri Lanka? What are the fundamentals behind the prevailing water management system in Sri Lanka? What are the possibilities to implement equal access to water in Sri Lanka? Whether the contiguous relationship between land and water should be strengthened or discarded?

## III. SRI LANKAN WATER MANAGEMENT SYSTEM

### A. Introduction

South African poet Mazisi Kunene stresses the reality behind water which is invisible for most of the countries saturated with water. He says that, “The dictionary describes water as colourless, tasteless and odourless - its most important property being its ability to dissolve other substances. We in South Africa do not see water that way. For us water is a basic human right, water is the origin of all things - the giver of life.” (Withanage, 2015) Still Sri Lankan authorities behind water have not understood this immutable and idealistic truth which any water policy should be based on. Constitution of Sri Lanka does not recognize the right to water. Majority of the Sri Lankan water authorities do not address the maximum utility of water resources. Political authorities are blind to water pollution and over-extraction. Riparian rights have not been regularized. Ground water resources are in danger due to wage statutory implications. Hence it is clear that the Sri Lankan water sector is subject to particular internal anarchism even though it has been covered by many black-leg laws and snobbish authorities.

Being an island situated in the Indian Ocean covering a land area of 65,610 km<sup>2</sup> out of which 2,905 km<sup>2</sup> correspond to large inland waters, yet water has become a high-demanding commodity in Sri Lanka. (Dahanayake and Perera, 1998) More than 160 bottled drinking water companies are facilitated by the Sri Lankan government

under the Food Act No. 26 of 1980 to utilize various water resources (mainly water springs and groundwater) without considering the concealed risk of exploitation of ground water against the correlative rights of the neighbouring land holders. Though the Sri Lankan National water Policy anticipates to provide 100% water supply for both rural and urban areas of the country by 2025, it do not afford applicable measures to accomplish the target rather than uncertain means such as rainwater harvesting. (Wicramage, 2002) Accordingly it is clear that still Sri Lankan water policy is exercising in aimless and noxious manner.

**B. Long term prospect for a substantial water policy**

Inconsolable requirement of a national water policy was dragging throughout decades with the expectation of reducing the seasonal water scarcity in the dry zone. Ancient hydraulics piloted for the development of infrastructure such as large scale storage tanks and trans-basin diversions. International community committed to focus 1990 decade for widespread water sector reform in order to provide a better service to water users in south Asian region, especially the poor. (Saleth, 2004) With this awakening of international movements World Bank, International Monetary Fund (IMF), United States Agency for International Development (USAID) and Asian Development Bank (ADB) urged to implement several water development projects based on Sri Lanka in order to develop infrastructure facilities of farmers in water management and to launch multipurpose development projects.<sup>1</sup>

Further USAID specially strived to introduce a new water policy upholding international agenda on water resources during year 2000. It was consist of 7 comprehensive titles such as the foundation of the water policy, water rights and allocation, information management, institutional structure for water resources management, demand management and ground water management. However it was failed due to internal resistance of public and political disagreements. Further it did not address the actual problems grounded in the soil such as growing demand of water, sedimentation of reservoirs, saving rainfall water harvest, water pollution and groundwater depletion and

over extraction which are earnest requirements of the Sri Lankan soil. It restricted free use of water for general public, arrogating sole authority of handling and controlling water resources and intended to implement tax for water users.<sup>2</sup> Major directive of this policy was “The right to water will be granted through Water Entitlement”. However it exempted small scale users and individual water users supplied through group schemes. Another dangerous feature of the policy was this so called entitlement was transferable and required to be renewed time to time. Further it guides to extend the policy over small water users by encouraging local authorities to implement registration process for the purpose of groundwater management. Final objective of this policy was to shifting the character of water into a commodity which enabled the private sector to deal with as a business. This annoying and unbecoming policies which inappropriate with the requirements of the soil deteriorated the system and destroyed the public faith towards the government.

Thereafter Sri Lankan waters were not undergo any major regulating projects with appropriate conditions which suit with the genuine demands of the nation instead of implications with destructive appearances.

**C. Prevailing legal background behind Sri Lankan water sector**

Vast range of governing laws (nearly 50 statutes) and coordinating bodies (nearly 40 institutions) have been established in order to manage water resources in Sri Lanka. Each and every laws and institutions are having individual agendas and they attempt to carry out allotted quantum of duties within the spectrum of law. This less collaboration leads to minimize the productivity of the system and to raise unnecessary conflicts among higher authorities. Certain virtuous suggestions of the proposed policy were implemented through new amendments for the prevailing legislations such as National Water supply and drainage board<sup>3</sup> (Amendment) Act No.13 of 1992 and Water Resources Board<sup>4</sup> (Amendment) Act No. 42 of 1999. Even though most of the implications were not

<sup>2</sup>Regulation 3 (1) states “An application for water entitlement shall be submitted to the Authority in triplicate, and shall: -

(e) Be accompanied by the fee specified in schedule II hereto.”  
Schedule II gives the necessary application fees i.e.

(a) Registration of existing use Rs. 500  
(b) Application for water entitlement Rs. 1000  
(c) Renewal of water entitlement Rs. 500  
(d) Declaration or transfer of water entitlement Rs. 250  
(e) Application for transfer of water entitlement Rs. 1000

<sup>3</sup>National water supply and drainage Board Act No. 2 of 1974

<sup>4</sup>Water Resource Board Act No. 29 of 1964

<sup>1</sup>Gal Oya Left Bank Canal from 1979 – 1986, Mahaweli multipurpose development project in 2004, Asian Development Bank (ADB) funded for Comprehensive Water Resources Management Project (CWRM) in 1992, Water Resources Management Project (WRMP) was launched in 2001, World Bank and USAID initiated policy development program to enhance the productivity of irrigated agriculture in 1970 to 1980, Irrigation Management Policy Support Activity was initiated with support from USAID in 1990.

triggered out Water Resources Board Act of 1964 includes so many commendable qualities such as formulation of policy and planning for the water sector, conservation, utilization, prevention of pollution, integrated planning and coordination of activities on water resources and acting in an advisory capacity to the minister in charge. Hence it is clear that uncertainty of the Sri Lankan water is not a result of inadequacy of laws or defects of prevailing procedures. Since those laws were not aligned with tangible solutions for national demands in water sector and out of appropriate action plan, most of the laws were ill-famed.

### IV. TRANSITIONAL STATUS OF WATER

#### A. Introduction

Water was considered as *res communes* or common entity for all under the Justinian's classification of property. However at the present context competition for water was rapidly increased before growing population and urbanization and it was intensified by the lowered water tables, reduced natural flows and complex water pollutions, resulting in defining it as a commodity to fill the lack of access to safe drinking water. This transition of status of water conducted to develop it as a human right under right based approach along with a crucial influence for the property holders who were bearing ownership of water sources.

#### B. Right based approach

Though the South African Constitution has recognized the right to water as "Everyone has the right to have access to sufficient water" Sri Lankan Constitution is still silent on water resources. It only substantiate the public trust doctrine by article 27(14) and 28(f) which express the idea that the present generation holds the natural resources in trust for future generations. (Justice Shirani Thilakewardena, Justice Nissanka Udalgama, Justice N E Dissanayake, Justice L K Wimalachandra, 2009) South African Water Policy strongly declared that "All water, wherever it occurs in the water cycle, is a resource common to all, the use of which shall be subject to national control. All water shall have a consistent status in law, irrespective of where it occurs." It further establish the right based approach against the property ownership by stating that "There shall be no ownership of water but only a right (for environmental and basic human needs) or an authorization for its use. Any authorization to use water in terms of the water law shall not be in perpetuity."

Emerging trend to expand the Right to Life within the scope of Customary International Law has accommodated the Right to Water by establishing state obligations all over the world. Accordingly states are bound to provide continuous water supply and to facilitate various other integrated water resource management systems. Though the Sri Lankan water policy do not admit the enlargement of water rights, generally we are bound by international influence of strengthening human rights and most of the concepts will gradually creep into our social practices and legal system.

Right to water and sanitation has been recognized by more than 25 international instruments in various instances including the ICESCR, Convention on the elimination of discrimination against women (1979), the Convention on the rights of the child (1989), the UN General Assembly Resolution on 'The right to development' (1999) etc.

Especially the right to access to sanitation and safe drinking water was recognized by the 3rd South Asian Conference on sanitation which was held in India on November 2008 as the first regional attempt to promote human right to water. At the 4th South Asian Conference on sanitation held in Sri Lanka on April 2011 all the participants unanimously agreed to recognize the right to water and sanitation by all means including legislation and to make budget allocations for sanitation and hygiene programs. Even though most of the states in the Region were not eager to implement these directions, it conducted to promote it as a directive principle throughout all the national efforts in this regard. Accordingly Sri Lanka is also inspired to implement right to water through the national water policy rather than promoting entitlement.

#### C. Property based approach

Even the right to water is hardly claimed, water rights are frequently discussed among legislative authorities. Water rights were interconnected with land ownership and land holders were entitled to use water as a conjunctive right. Among various other explanations water rights have defined in satisfactory manner by the Food and Agriculture Organization (FAO) as follows; "Water right is a legal right: to abstract or divert and use a specified amount of water from a natural source; to impound or store a specified quantity of water in a natural source behind a dam or other hydraulic structure; or to use water in a natural source" (Singh, 1991) It has further elaborated by certain authors and interpreted with substantial modifications. "In general, local water rights are based on a combination of historical rights, claims emerging from

labour (or capital) input in (re)constructing irrigation or drinking water systems, territorial rights or individual rights linked to land ownership. Often, these complex combinations do not correspond to what is defined as 'water rights' in official legislation" (Vos, 2006)

Mar del Plata Action Plan was initiated by the international community in year 1977 in order to establish the public ownership of water for the first time in history. It states that "Legislation should define the rules of public ownership of water projects, as well as the rights, obligations, and responsibilities, and should emphasize the role of public bodies at the proper administrative level in controlling both the quantity and quality of water. It should also spell out, either in the primary or subordinate legislation, administrative procedures necessary for the coordinated, equitable, and efficient control and administration of all aspects of water resources and land use problems, as well as the conflicts that may arise from them". (Bradlow, n.d.) Previously suggested water policy for Sri Lanka with the assistance of USAID recommend to establish the property rights of water in order to increase the productivity and it initiated the transformation of the status of water from common property to commodity. The suggested policy (March 2000) stated that all water including surface and groundwater will be owned by the state and managed by the government in partnership with users on behalf of all Sri Lankans; which was severely contested as being contrary to Common Law principles the government could transfer ownership to anybody, making water a market commodity. (C.Gopalakrishnan, 2002) However this maleficent suggestions were not established which would nullify the inherent property ownership and drastically violate the water rights of the citizens.

Water policies proposed with the same features were rejected by most of the countries throughout the world. The US farmers in Florida rejected a similar water policy. Thousands of Bolivians took to the streets in protest against such a bad policy. The people in Bolivia made it very clear that they do not want water companies entering into the public water systems. As same as British water investors strived to enter into the Sri Lankan water market during year 2000 with new water proposals.

Ultimate goal of the ADB water policy was providing investment opportunities for the private sector rather than incorporating sustainable water management system

or safeguarding water resources. Mr. John R. Cooney the Residents Representative of ADB has professed that free water is a thing of the past; for anybody it costs money to do it, costs money to generate it, costs money to dispose of it; somebody must pay some money along the chain. He further said that a "free resource is a wasted resource". In his opinion, therefore, pricing of water is good. (Cooney, 2000) Accordingly it is clear that ADB water policy was not genuine and it was a collusion against water resources of the country to convert it into a commodity.

## V. CONCLUSION AND RECOMMENDATIONS

In the event of Pursuing a better National Water Policy standing for general public and concurring with global agenda, as a partially saturated country general public of Sri Lanka is liable to preserve available water resources and ensure water rights of them. It is clear that Sri Lanka has agreed with international community to preserve right to water while ensuring the property based ownerships as the government assigned by the people. According to the constitution of the country government would act only as a guardian over the natural resources. However government is bound to preserve the human rights of the public and spontaneously it would lead to protect the right to water. At the same time government cannot acquire or violate the associated rights linked with any private property. Hence the water rights or property based ownership would be protected by the constitution thus the government adopt any human right which was not so far identified by the constitution.

Eventually glob would confront with huge water scarcity which should be investigated a prompt common solution as early as possible. Invariably dry zone of the country is also in danger of for considerable period of every year due to poor rains and depletion of water table. Everyone is unanimously liable to find solutions for this viable problem of water scarcity. Sometimes certain predictions may come true regarding climax of water scarcity that it would lead to a future world war. Many International movements have been declared several successful dimensions towards the sustainability of the globe in terms of preserving and promptly managing available water resources. At the movement it is impossible to survive without entering into the global thinking process, especially regarding the common natural resources.

Sustainable water use could be ensured only through proper water management process. Any water management criteria should be based on the stages of water circle and apt with human consumption patterns. Further it should be concentrated on the possibility of consuming running off stuff. Further the national water policy should be able to regulate all the differed authorities and absent from political interferences. Finally the national water policy should be ensured both right to water and water rights of the general public simultaneously by using applicable propaganda to promote both rights and sustainable means.

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