

Right to Safe Drinking Water: Indian Legal Perspective

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Introduction

The right to water is highly debatable and secures itself top priority in the agenda of various the national and international organizations¹. The situation in India is complicated as the right to water is not recognised as the right by the legislature in any statute or the constitution itself, but interpreted by the judiciary from the existing fundamental rights in different cases brought before it. Therefore, the status of the right, its legal standing and the means for its realisation could not be compartmented into the right and duties of the different departments or the institutions involved in governance of the resource. The importance of the right is undeniable and unanimously accepted at the global level but the manner and technique for securing the 'human right to water for all' is yet to be conquered.² Although, recognition of the right to water could be translated as the obligations of the states to fulfil their positive obligations for the realisation of right and such realisation raises many concerns, which is discussed in this paper.

Meaning of Right to Water

While water has not been clearly recognized as a self-standing human right in international treaties. International human rights law requires specific obligations related to access to safe drinking water. These obligations involve States to ensure everyone's access to a sufficient amount of safe drinking water for personal and domestic uses, defined as water for drinking, personal sanitation,

washing of clothes, food preparation, and personal and household hygiene. These obligations also require States to protect the quality of drinking-water supplies and resources.

Is Water Considered a Fundamental Human Right?

Under international human rights laws, water is protected as a human right. In the 1948 Universal Declaration of Human Rights³, the 1966 International Covenant on Economic, Social and Cultural Rights⁴, and the 1966 International Covenant on Civil and Political Rights, water is not explicitly mentioned as a human right. It was, however, implied through other human rights, such as the right to life, right to an adequate standard of living, and the right to health.

In 2002, the United Nations officially adopted water as a human right. General Comment 15, of the International Covenant on Economic, Social and Cultural Rights states the following: "The human right to water entitles everyone to sufficient, safe, acceptable, physically accessible and affordable water for personal and domestic uses." This means that the 145 countries who have recognized the International Covenant on Economic, Social and Cultural Rights have to ensure fair and equal access to safe drinking water.

The explicit recognition of the right to water is also manifest from the various human right treaties such as, the Convention on the Elimination of all forms of Discrimination against Women⁵; the Convention on the Rights

¹ United Nations Department of Economic and Social Affairs (UNDESA), International Decade for Action 'WATER FOR LIFE' 2005-15'. <http://www.un.org/waterforlife/decade/index.shtml>. Accessed on: 6 Jan. 2017

² UN Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 15: The Right to Water (Arts. 11 and 12 of the Covenant), 20 Jan. 2003, E/C.12/2002/11. <http://www.refworld.org/docid/4538838d11>.

³ United Nations Universal Declaration of Human Rights, 1948, Article 25 (1)

⁴ International Covenant on Economic, Social and Cultural Rights, Article 11 (2) and Article 12

⁵ Convention on the Elimination of All Forms of Discrimination against Women, Article 14, para 2

of Child⁶; and the Convention on the Rights of Persons with Disabilities.⁷

Therefore, it can be understood as the recognition has only ascertained the right a legal status, which perhaps initiates the implementation but certainly that does not guarantee the realisation as such

What does it mean if Water is a Fundamental Right?

a) The right to water contains freedoms:

These freedoms include protection against arbitrary and illegal disconnections; prohibition of unlawful pollution of water resources; non-discrimination in access to safe drinking water and sanitation, notably on the basis of land or housing status; non-interference with access to existing water supplies, especially to traditional water sources; and ensuring that personal security is not threatened when accessing water or sanitation outside the home.

b) The right to water contains entitlements:

These entitlements include access to a minimum amount of safe drinking water to sustain life and health; access to safe drinking water and sanitation in detention; and participation in water- and sanitation-related decision-making at the national and community levels.

c) Water for personal and domestic uses must be safe and accept-able

Drinking water must be free from microbes and parasites, chemical substances and radiological hazards that constitute a threat to a person's health. Water must also be of an acceptable colour, odour and taste to ensure that individuals will not resort to polluted alternatives that may look more attractive. These requirements apply to all sources of water provision, including piped water, tankers, vendor-provided water and protected wells.

d) Water services must be affordable to all.

No individual or group should be denied access to safe drinking water because they cannot afford to pay. All direct and indirect costs related to water should not prevent anyone from accessing these services and should not compromise their ability to enjoy other human rights, such as the rights to food, education, adequate housing or health.

Indian Legal Regime on Right to Water

a) The Right to water – flowing from the right to life

Article 21 the Constitution of India states that 'no person shall be deprived of his life or personal liberty except according to procedure established by law'. This has popularly come to be known as Article on 'right to life'. In interpretation of the scope of this right, environmental, ecological, air and water pollution gets violated in Article 21 of the constitution of India. Further, 'the entitlement of citizens to receive safe drinking water (potable water) is part of the right to life under Article 21. In year 1984, In the case of *Bandhua Mukti Morcha vs. Union of India*, the Supreme Court derived the concept of right to 'healthy environment' as part of the 'right to life' under Article 21. The Court in the year 2000 while deciding the case of *A.P. Pollution Control Board II v Prof. M.V. Naidu and Others*⁸, had observed that 'in today's emerging jurisprudence, environmental rights which encompass a group of collective rights are described as "third generation" rights'. In this case, the AP government had granted an exemption to a polluting industry and allowed it to be set up near two main reservoirs in Andhra Pradesh – the Himayat Sagar Lake and the Osman Sagar Lake, in violation of the Environment Protection Act 1986. The Supreme Court struck down such exemption and held that the "*Environment Protection*

Act and The Water (Prevention and Control of Pollution) Act 1974 did not enable to the State to grant exemption to a particular industry within the area prohibited for location of polluting industries."

⁶ Convention on the Rights of the Child, Article 24, para 2

⁷ Convention on the rights of persons with disabilities, Article 28 (2)

⁸ Civil Appeal Nos. 368-373 of 1999 (Cited from John Lee 'Right to Healthy Environment', Columbia Journal of Environmental Law, Vol. 25, 2000.)

b) Protecting the negative right to have clean drinking water – as part of the right to a clean environment:

In India till date the right to clean drinking water has been protected by the courts only as a negative right – i.e. the right not to have water sources polluted. A large number of enactments regarding water and water-based resources have been passed concerning water supply for drinking purposes, irrigation, and rehabilitation of migrants affected by the operations of schemes for water resources management.

However, none of these laws enumerate an explicit ‘right to water’. 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 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.

There are basically three main enactments passed by the legislation. They are being listed as follows:

1. Water (Prevention and Control of Pollution) Act, 1974;
2. Provisions of the Environment (Protection) Act, 1986; and
3. Indian Easements Act, 1882

Water (Prevention and Control of Pollution) Act, 1974

This is one of the most important of the central laws 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.

The Environment (Protection) Act, 1986

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 authorizes the Central Government to establish standards for the quality of the environment and for emissions of discharge of environmental pollutants from any source.

Indian Easements Act, 1882

This Act recognises the right of a riparian owner 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.

c) Guaranteeing a positive right to water as an integral part of the right to food, health and life

The Indian Supreme Court has reiterated in several of its decisions that the Right to Life guaranteed in Article 21 of the constitution in its true meaning includes the basic right to food, clothing and shelter.⁹ The justiciability of the specific Right to Food as an integral right under Art 21 was however articulated and enforced in 2001. In 2001, there was a massive drought in several states in India especially Orissa, Rajasthan and Madhya Pradesh. While the poor were starving in the drought hit villages, the central government had excess

⁹ Francis Coralie Mullin v. Union Territory of Delhi., 1981(1) SCC 608

food grains in its storehouses, Slowly, the agitation over access to food became a full-fledged Right to Food campaign in the country. As part of this campaign, a public interest litigation was filed by the People's Union for Civil Liberties (PUCL) in April 2001 before the Supreme Court for enforcement of the Right to Food of the thousands of families that were starving in the drought struck States of Orissa, Rajasthan, Chhatisgarh, Gujarat and Maharashtra¹⁰ The Court, in an unprecedented interim order on 28 November 2001¹¹, directed all the state governments and the Union of India to effectively enforce eight different centrally sponsored food schemes to the poor. These included the Antyodaya Anna Yojna, the Integrated Child Development Services (ICDS) programme, the National Mid-day Meals Programme (NMMP), the Annapurna scheme and several employment schemes providing food for work. Out of the eight schemes, the most significant was the Mid-day Meal Scheme. In light of the right to food judgments passed by the Supreme Court, I would argue that the fundamental right to food can be extended to include the fundamental right to access to water.

While the right to water has been accepted by the Supreme Court to be a fundamental right under article 21, it has only been articulated as the right to have clean water as part of the guarantee of the right to environment. By posing the right to water as an extension of the fundamental right to food and health under Article 21, one can indeed make such a claim. Therefore, it can be understood as the recognition has only ascertained the right a legal status, which perhaps initiates the implementation but certainly that does not guarantee the realisation as such.

JUDICIAL INTERPRETATION OF THE RIGHT TO WATER IN INDIA

Judicial priorities have continually changed to adapt to the current scenario and to

accommodate the change needed in the society¹².

The advancement of fundamental rights for the protection of environmental rights through means of litigation has been customary from 1970 onwards in India. The protection of such rights by bringing them within the ambit of enlarged interpretation of existing fundamental rights and later development of relevant laws and policies for keeping the promise so made, has have been the real motivation to reframe the administrative and legislative capacities of the government in that regard. Manifestly, the recognition of universal primary education as an explicitly recognised fundamental right and emergence of separate programme to satisfy the right to food for people has been the remarkable achievements made through the means of rights-based litigation. Similarly, the Court had interpreted the right to water as an integral part of Article 21 (right to life). However, the prominent cases in this field cover different challenges regarding the concept of the right to water is exposed in the Indian constitutional and legal setup.

In the case of *Subash Kumar vs State of Bihar*¹³ the concerned question was that, does the right to pollution free water qualify as one of the parameters arising from the liberal explanation of the concepts of Art 21 – Right to life. In response to the question, the Supreme Court has made a statement stating ***“Art-21 of the Constitution includes the right of enjoyment of pollution free water and air for full enjoyment of life.***

If anything endangers or impairs that quality of life in derogation of laws, a citizen has right to have recourse to Art-32 of the Constitution for removing the pollution of water or air which may be detrimental to the quality of life” The SC recognised the right to water as part of right to life, but the recognition so made in this particular case was from the protectionist view point and the protectionism so made was negative protectionism. Which is

¹⁰ Peoples Union for Civil Liberties

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http://www.righttofoodindia.org/orders/no_v28.html

¹² Bhagwati, P.N., The Role of the Judiciary in the Democratic Process: Balancing Activism and Judicial Restraint. Commonwealth Law Bulletin, 18(4), 1992.

¹³ 1991 SCR (1) 5

only applicable against negative interference by third party (inclusive of state). However, the clear judicial stand was made on recognition of the right to water and its relevance as a fundamental right.

In the case of **Delhi Water Supply and Sewage vs State of Haryana**¹⁴, the Supreme Court in its order said that *“Water is a gift of nature. Human hand cannot be permitted to convert this bounty into a curse, an oppression. The primary use to which the water is put being drinking, it would be mocking the nature to force the people who live on the bank of a river to remain thirsty, whereas others incidentally placed in an advantageous position are allowed to use the water for non-drinking purposes. A river has to flow through some territory; and it would be travesty of justice if the upper-riparian States were to use its water for purposes like irrigation, denying the lower riparian States the benefit of using the water even for quenching the thirst of its residents.”*

In the case of **MC Mehta v Kamal Nath**¹⁵ the SC has directed the use of natural resource in public trust by the state for the people at large. Clear recommendations were made for the governing body regarding the management of the resource, which stated ‘that, such resource should not be converted into the resource for private ownership in any case’.

Similarly, the judgement again has recognised such right and protected it from negative interference. In this case, the court directed the polluters of groundwater and every other source of water in vicinity not to continue polluting the resource by any direct or indirect means. Thus, it again confirmed the existence of the right to water as the fundamental right.

In the issue of Sardar Sarovar Project over River Narmada, the Supreme Court observed that *“Water is the basic need for the survival of human beings and is part of the right to life and human rights as enshrined in Article 21 of the Constitution of India....and the right to healthy environment and to*

*sustainable development are fundamental human rights implicit in the right to “life”*¹⁶

In the case of **Coca-Cola vs state of Kerala**¹⁷, the situation is far more complicated and the matter is sub-judice on appellate jurisdiction before the SC of India. This case clearly

pictures the major aspect of proprietary rights to groundwater and its contradicting claim the right to water as a fundamental right under Article 21. In factual aspect of the case that the absolute legal property right of the corporate company functioning in that area is interfering with the normal functioning of the right to life of individuals living in that locality. This is due to deterioration of the primary source of water by alteration in its quality

and quantity available to the people, which acted as their means of livelihood. The recognition, confirmation and acceptance of the right to water as a fundamental right within the expanded notion of the right to life had been explicit by the above mentioned case laws. The apex court of the country has had ascertained the right to water as an integral part

of the right to life, but the recognition so made is in the form of negative right as it is confined to the non-interference with the right to water of an individual by the concerned third party: by direct or indirect means. Henceforth it can be said that, the SC has ascertained the right to water as the fundamental right but the positive obligation so attached for the enforcement of such rights has not been guaranteed yet. Notwithstanding the fact, that the protection of right from negative discourse is easier in comparison to the positive obligations so imposed.

The recognition of right and its protection against negative interference is settled but that does not mean that the recognition by means of positive obligation is not possible. However,

if we look back into the judicial practise, the ESC rights have been first recognised by

¹⁶ Narmada Bachao Andolan v. Union of India, (2000) 10 SCC 664

¹⁷ Kerala High Court Perumatty Grama Panchayat vs State of Kerala 2004 (1) KLT 731

¹⁴ AIR 1996 SC 2992

¹⁵ 1997 1 SCC 388.

means of their recognition as a fundamental right and later by means of imposition of positive liabilities on the government to fulfil them. As it has been observed in the case of right to food or right to primary education, once the need has been realised by the government, its fulfilment has been progressively achieved by means of rights-based discourse.

Conclusion

The denial of access to water and sanitation to the poor in India has been going on for a long time even before the advent of economic reforms. This has been happening despite the Supreme Court's rulings time and again that access to clean drinking water is a fundamental right as part of right to life in Article 21 of the Indian Constitution.

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. Hence, the Right to clean water is guaranteed under article 21 of Constitution of India and no one can be deprived of it. The same has been upheld by the courts around the country.