

# Recognition of Human Right to Water under Indian legal regime: A myth or reality?

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## ABSTRACT

Water is essential for the survival of mankind and a most basic need. Consequently, the enjoyment of the human right to water is a prerequisite for the enjoyment of life itself. As far as the recognition of the human right to water is concerned – many international law treaties have given express or implied recognition to this right. Similarly Indian courts via judicial decisions have given express recognition to this right but the actual content of this right has not been defined. The present paper explores the various judicial decisions and policy instruments dealing with this valuable right and suggests improvements in the existing legal regime for better protection of the human right to water.

**Keywords:** Human Right, Water, India

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## 1. INTRODUCTION

### The Importance Of Human Right To Water

The right to water clearly falls within the category of guarantees essential for securing an adequate standard of living, particularly since it is one of the most fundamental conditions for survival. Thus, the human right to life doesn't have any sense without the right to water and other vital human rights that are a pre-condition for human life. Consequently, the enjoyment of the human right to water is a prerequisite for the enjoyment of other basic human rights such as the right to the highest attainable standard of health and the rights to adequate housing and adequate food etc. Existing international treaties dealing with the right to water provide state obligations to protect and fulfill the right to water to the maximum of its available resources, with a view to achieving progressively the full realization of the right by all appropriate means, including particularly the adoption of legislative measures. These treaties however do not create any binding obligations on member states, which has weakened the status of the right to water generally. The existing international treaties do not foresee enforcement mechanisms, but de facto mostly belong to international soft law.

## 2. RECOGNITION OF RIGHT TO WATER UNDER INDIAN LEGAL SYSTEM

The fundamental right to water has evolved in India, not through legislative action but through judicial interpretation. The right to 'pollution free water' and the right of access to 'safe drinking water' has been read as a part of 'Right to Life' under Article 21 of the Constitution of India. This has been possible because of a liberal and activist interpretation of the fundamental right to life by the Supreme Court as well as the High Courts of the country in series of cases before them. This section examines both these aspects of the Right to Water in detail. In India, the constitutional right to water can be drawn from the right to food, the right to clean environment and the right to health, all of which have been protected under the broad rubric of the Right to Life guaranteed under Article 21 of the constitution. In addition to article 21, Article 39 (b) of the directive principles of state policy (DPSP), which the Constitution declares to be non-justiciable, recognizes the principle of equal access to the material resources of the community. Article 39 (b) mandates that 'the State shall, in particular, direct its policy towards securing that the ownership and control of the material resources of the community are so distributed as best to subserve the common good.'

## 3. PROTECTING THE NEGATIVE RIGHT TO HAVE CLEAN DRINKING WATER – AS PART OF THE RIGHT TO A CLEAN ENVIRONMENT:

In India, initially the trend had been that the right to clean drinking water was protected by the courts only as a negative right – i.e. the right not to have the water sources polluted. Such protection has stemmed from the articulation of a

fundamental right to a clean and healthy environment as part of the right to life guaranteed under Article 21 of the constitution by the Supreme Court. The concept of right to “healthy environment” has been developed as part of the right to life under Article 21 of our Constitution. This concept was first articulated in the case of *Bandhua Mukti Morcha v. Union of India*<sup>1</sup> and then continued and expanded. The Supreme Court protected the right to clean water as part of the right to a healthy environment in a spate of water pollution cases coming before it from the early nineties onwards. The evolution of this approach is discussed in the cases below:

*Subhash Kumar vs State Of Bihar*<sup>2</sup>

This was the first case dealing with the protection of right to pollution free water. The Supreme Court in this case dealt with a PIL filed against two iron and steel companies, which created health risks by dumping surplus waste from factory washeries in the form of sludge and slurry into the nearby Bokaro river. The court held in this case that: “Right to live is a fundamental right under Art 21 of the Constitution and it includes the right of enjoyment of pollution free water and air for full enjoyment of life.”

*A.P. Pollution Control Board II v. Prof. M.V. Nayudu*<sup>3</sup>

Another important ruling of the Indian Supreme Court was the case of *A.P. Pollution Control Board II v. Prof. M.V. Nayudu*. 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. Exercise of such a power in favour of a particular industry must be treated as arbitrary and contrary to public interest and in violation of the right to clean water under article 21 of the constitution on India....The Government could not pass such orders of exemption having dangerous potential, unmindful of the fate of lakhs of citizens of the twin cities to whom drinking water is supplied from these lakes. Such an order of exemption carelessly passed, ignoring the ‘precautionary principle’ could be catastrophic.”<sup>4</sup> The court referred to India’s participation in the UNO water conference and held that the right to access to drinking water is fundamental to life and there is a duty on the State under Article 21 to provide clean drinking water to its citizens. The Supreme Court also referred to the *Narmada Bachao Andolan v. Union of India*<sup>5</sup> judgment where Kirpal, J. observed that “Water is the basic need for the survival of human beings and is part of the right to life and human rights as enshrined in 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”.<sup>6</sup>

In another judgment of *Vellore Citizens' Welfare Forum v. Union of India*,<sup>7</sup> the Supreme Court gave relief to the victims of water pollution caused by tanneries. In this case, a writ petition was filed against the large-scale pollution caused by tanneries and other industries in the state of Tamil Nadu. The petitioners alleged that untreated effluent was being discharged into agricultural fields, waterways and open land, which ultimately reached the Palar river which was the main source of water supply to the residents of the area. After carefully examining the facts of the case, the Supreme Court, while recognizing the common law right of the people to a clean and healthy environment, awarded compensation to the victims of pollution on the basis of the ‘precautionary principle’ and the ‘polluter pays principle’. The ‘precautionary principle’ when applied by the courts to Indian condition means: (i) that environmental measures taken by the state and the statutory authorities must anticipate, prevent and attack the causes of environmental degradation; (ii) that where there are threats of serious and irreversible damage, lack of scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation; and (iii) that the ‘onus of proof’ is on the actor or the developer/industrialist to show that his action is environmentally benign. By regarding the two aforementioned principles as part of the environmental law of the country, the Supreme Court has to some extent conceptualized the common law remedial measures of awarding compensation to the victims of a tortious action in water pollution cases.<sup>8</sup> Importantly, the Supreme Court held that “The constitutional and statutory provisions protect a person’s right to fresh air, clean water and pollution-free environment, but the source of the right is the inalienable common law right of clean environment.”<sup>9</sup>

<sup>1</sup> AIR 1984 SC 802

<sup>2</sup> AIR 1991 SC 420

<sup>3</sup> (2001) 2 SCC 62

<sup>4</sup> Ibid.

<sup>5</sup> (2000) 10 SCC 664

<sup>6</sup> Ibid at Paragraph 248

<sup>7</sup> (1996) 5 SCC 647

<sup>8</sup> M Batra, ‘Water Rights’ available at <http://www.india-seminar.com/2000/492/492%20m.%20batra.htm>

<sup>9</sup> Vellore Citizens Welfare Forum Case at pg. 661.

The Supreme Court has, in the context of water pollution, mandated the cleaning up of water sources including rivers,<sup>10</sup> the coastline<sup>11</sup> and even tanks and wells.<sup>12</sup> The concern over pollution of ground water by unregulated discharge of effluents has led the court to issue mandatory directions for clean up by the polluter and restitution of the soil and ground water.<sup>13</sup> The court has also applied the 'precautionary principle' to prevent the potential pollution of drinking water sources consequent upon the setting up of industries in their vicinity.<sup>14</sup> The court has recognized that water is a community source which is to be held by the State in public trust in recognition of its duty to respect the principle of inter-generational equity. In *M.C. Mehta v. Kamal Nath*<sup>15</sup> the court declared that 'our legal system – based on English common law – includes the public trust doctrine as part of its jurisprudence. The State is the trustee of all natural resources which are by nature meant for public use and enjoyment. Public at large is the beneficiary of the seashore, running waters, air, forests and ecologically fragile lands. The State as a trustee is under a legal duty to protect the natural resources. These resources meant for public use cannot be converted into private ownership'.<sup>16</sup> Thus, as can be seen from the discussion of the recent cases above, the fundamental right to water has been articulated by the Indian courts within the rubric of the right of citizens to have 'clean' drinking water as part of the right to clean environment guaranteed under the right to life under article 21. By doing so, the court has been protecting only the negative right to not have water sources polluted.

#### 4. PROTECTING THE POSITIVE RIGHT TO HAVE ACCESS TO CLEAN DRINKING WATER

After initially talking about the right to water in the context of pollution cases, courts have delivered a growing body of verdicts on the more fundamental concerns of access to drinking water and on the right to safe drinking water as a fundamental right. One noticeable trend is that this has happened mostly in cases where inadequate water supply to different cities was legally questioned and challenged. The context and evolution of the right in these cases are discussed below.

In a case relating to the scarcity and impurity of potable water in the city of Guwahati, it was contended that the municipal corporation is responsible for supplying sufficient drinking water.<sup>17</sup> The municipal corporation in its counter affidavit said that while it is well aware about its duties with regard to supply of drinking water to the citizens, due to its financial constraints it could not augment its existing plant.<sup>18</sup> The court made clear that 'Water, and clean water, is so essential for life. Needless to observe, it attracts the provisions of Article 21 of the Constitution'.<sup>19</sup>

Likewise, in a petition filed by an advocate for suitable directions to ensure regular supply of water to the citizens of Allahabad, the High Court reiterated the fundamental right to drinking water.<sup>20</sup> The court cited with approval the Supreme Court's decision holding that the need for a decent and civilized life includes the right to food, water, and a decent environment.<sup>21</sup> In another case, the Supreme Court had observed, 'Drinking is the most beneficial use of water and this need is so paramount that it cannot be made subservient to any other use of water, like irrigation so that right to use of

<sup>10</sup> For orders relating to the pollution on the river Ganga, see *M.C. Mehta v. Union of India* AIR 1988 SC 1037, 1115 and (1997) 2 SCC 411. For an important decision regarding closure of a hotel resort which was polluting the Beas river in Himachal Pradesh, see *M.C. Mehta v. Kamal Nath* (1997) 1 SCC 388.

<sup>11</sup> *S. Jagannath v. Union of India* (1997) 2 SCC 87.

<sup>12</sup> In *Hinch Lal Tiwari v. Kamala Devi* (2001) 6 SCC 496, the court said (at 501): 'It is important to notice that the material resources of the community like forests, tanks, ponds, hillock, mountain etc. are nature's bounty. They need to be protected for a proper and healthy environment which enables people to enjoy a quality of life which is the essence of the guaranteed right under article 21 of the Constitution of India.'

<sup>13</sup> In *Re: Bhavani River-Shakti Sugars Ltd.* (1998) 6 SCC 335. In *Indian Council for Enviro-Legal Action v. Union of India* (1995) 3 SCC 77, a compensation package was worked out for farmers affected by their only source of irrigation, a river in Andhra Pradesh, was polluted by discharge of untreated effluents by industries alongside its banks.

<sup>14</sup> See *A.P. Pollution Control Board v. Prof. M.V. Nayudu* (1999) 2 SCC 718 and *A.P. Pollution Control Board (II) v. Prof. M.V. Nayudu* (2001) 2 SCC 62.

<sup>15</sup> *M.C. Mehta v. Union of India* AIR 1988 SC 1037,

<sup>16</sup> In *Re: Bhavani River-Shakti Sugars Ltd.* (1998) 6 SCC 335. In *Indian Council for Enviro-Legal Action v. Union of India* (1995) 3 SCC 77, a compensation package was worked out for farmers affected by their only source of irrigation, a river in Andhra Pradesh, was polluted by discharge of untreated effluents by industries alongside its banks.

<sup>17</sup> *Gautam Uzir & Anr. V. Gauhati Municipal Corp.* 1999 (3) GLT 110

<sup>18</sup> Para 6 of the affidavit-in-opposition filed by Gauhati Municipal Corporation and quoted in 1999 (3) GLT 110.

<sup>19</sup> At p. 112, para 10.

<sup>20</sup> *S.K. Garg v. State of UP* 1999 ALL. L. J. 332.

<sup>21</sup> The Supreme Court held in *Chameli Singh v. State of UP* (1996) 2 SCC 549: AIR 1996 SC 1051, 'That right to live guaranteed in any civilized society implies the right to food, water, decent environment, education, medical care and shelter. These are basic human rights known to any civilised society. All civil, political, social and cultural rights enshrined in the Universal Declaration on Human Rights and Convention or under the Constitution of India cannot be exercised without these basic human rights'.

water for domestic purpose would prevail over other needs'.<sup>22</sup> In view of these decisions, the Allahabad High Court directed that a high powered committee be set up to look into the problem of access to water and decide on the ways and means to solve it on a war footing.<sup>23</sup>

The Andhra Pradesh High Court reiterated this position saying that 'the right to safe drinking water is a fundamental right and cannot be denied to citizens even on the ground of paucity of funds'.<sup>24</sup> In this line of cases in 2006 a Public Interest Litigation (PIL) was decided by the Kerala High Court ventilating the grievances of the people of West Kochi who had been clamouring for supply of potable drinking water, for more than three decades. Noting that the petitioners 'have approached this Court as a last resort' the Court held that:

"We have no hesitation to hold that failure of the State to provide safe drinking water to the citizens in adequate quantities would amount to violation of the fundamental right to life enshrined in Article 21 of the Constitution of India and would be a violation of human rights. Therefore, every Government, which has its priorities right, should give foremost importance to providing safe drinking water even at the cost of other development programmes. Nothing shall stand in its way whether it is lack of funds or other infrastructure. Ways and means have to be found out at all costs with utmost expediency instead of restricting action in that regard to mere lip service."<sup>25</sup>

## 5. CONCLUSION AND SUGGESTIONS

All is not well with the implementation of judicially evolved right to water. The various cases discussed above confirm that the fundamental human right to water is well established. Yet, the actual content of the right has not been elaborated upon in judicial decisions. This has also meant that the judicial response to specific cases on violation of right to water can be adhoc. Even in the cases discussed above, a closer look at the verdicts can reveal fault-lines. Take, for example, the 2002 case in the High Court of Andhra Pradesh. The High Court said that the right to safe drinking water is a fundamental right and 'cannot be denied to citizens even on the ground of paucity of funds'. Then it contradicted itself. The judgment also says that though the state is under an obligation to provide at least drinking water to all its citizens, 'the limited availability of water resources as well as financial resources cannot be ignored'. The Court could have categorically declared that the state's failure to provide safe drinking water was unconstitutional. However, the judge felt that to issue such a direction would be only 'utopian'. The solution to this problem would be to explicitly recognize a fundamental right to water under the Indian Constitution by way of an amendment.

On a related note, the mere incorporation of a right need not necessarily be seen as remedy or result inducing in itself. There are three conditions for a 'good quality' human right to be effective: the right needs to be fundamental, universal, and clearly specifiable. Can the right to water in India meet the said three conditions? While the basic need for, and hence right to, water is universally accepted as a fundamental right, it has struggled to meet the test of specificity in the Indian context. This is simply because it has not been possible to specify a level below which the right to water can be said to be denied. It is for this reason that the literature on social and economic rights produced by the United Nations (UN) over the years emphasizes that all socio-economic rights subject to a regime of 'progressive realisation' can only be effective if 'minimum core obligations' are built in to them. The minimum core obligation of the state flowing from the right to water of every person has not yet been defined and specified in India either by the legislature or by the courts. Perhaps it is time to clearly recognize that a certain quantity of water (litres per capita per day or lpcd) is a most basic human need and should be seen as an inviolable part of the fundamental right to water.

Explicit incorporation of a right that is fundamental and universal and, more importantly in the Indian context, clearly specifiable in terms as laid out above has the potential to catalyzing changes in law and policy in the area. A categorical carving out of a fundamental right to water in the Constitution of India has the potential to mobilize the people, the media, and ultimately the decision-makers. Besides, it can serve to underline the fact that ensuring a certain quantity of water to every person in the country is a non-negotiable and mandatory legal requirement. These steps will go a long way in securing this basic human need to the people of India.

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<sup>22</sup> Delhi Water Supply and Sewage Disposal Undertaking v. State of Haryana, (1996) 2 SCC 572

<sup>23</sup> Further, the Court said that since the matter involved technical expertise, the committee should consult experts also in this regards. If any complaints were made by the citizens of any locality that they were not getting water, the committee would look into it and do the needful. See para 9 in S.K. Garg v. State of UP 1999 ALL. L.J. 332

<sup>24</sup> Wasim Ahmed Khan v. Govt. of AP, 2002 (5) ALT 526.

<sup>25</sup> Vishala Kochi Kudivella Samrakshana Samithi v. State of Kerala, 2006(1) KLT 919, para 3.