

The Right to Water: A Constitutional Perspective

Jayna Kothari

Paper prepared for the workshop entitled 'Water, Law and the Commons' organised in Delhi from 8 to 10 December 2006 by the International Environmental Law Research Centre (IELRC) in the context of the research partnership 2006-2009 on water law sponsored by the Swiss National Science Foundation (SNF)

The Right to Water: A Constitutional Perspective

*By Jayna Kothari**

1. Introduction

This paper examines the justiciability of social rights, looking particularly at the Right to Water as part of the all encompassing Right to Life. In India, the Right to water has been protected as a fundamental human right by the Indian Supreme Court as part of the Right to Life guaranteed under Article 21 of the Indian constitution. The right to life has been expanded significantly over the last three decades to include the right to health and the right to a clean environment which can include the right to clean drinking water.

In India, there have also been significant developments in protecting the Right to Food through judicial intervention. The Right to Food has been specifically enforced under the Right to Life guaranteed to all citizens under Article 21 of the Constitution by the Supreme Court of India¹. By protecting the right to food, the Indian Supreme Court not only gave a declaration as to its justiciability, but through its orders also directed the state governments to positively provide mid-day meals to children in state schools and to implement food schemes. Can this protection of the right to food be extended to guarantee access to water under the protection of the Right to Life? I argue that it can be extended. If protection of rights mean not only the negative protection of violation of rights, but also positive protection, then I argue that the right to water can be extended not only to mean that people should not be denied access to water but also that in areas where no access to drinking water is provided by the State, the constitutional Right to Life guarantee would impose a duty on the State to positively provide water.

In framing such an argument, my paper also borrows from South African constitutional jurisprudence, since the South African constitution as the South African Constitution specifically guarantees to citizens the right to adequate food and water in its Bill of Rights. To what extent can this right be enforceable, and is it dependant on state resources? Do water providing agencies have any obligations to citizens before

* B.A.LL.B., B.C.L. (Oxon) Advocate, practicing in the High Court of Karnataka at Bangalore.

¹ *Peoples Union for Civil Liberties (PUCL) v. Union of India & Ors.* W.P. (Civil) No. 196 / 2001.

disconnection of water supply? And does the state have a duty to provide basic water supply even if it does not have sufficient resources? These are some of the questions that my paper attempts to answer.

2. The Right to water – flowing from the right to life

A detailed review of international treaties supports the stand that the drafters implicitly considered water to be a fundamental resource. Several of the explicit rights protected by international rights conventions and agreements, specifically those guaranteeing the rights to food, human health and development, cannot be attained or guaranteed without also guaranteeing access to basic clean water. In recent years, more explicit articulations of this view supporting the right to water have been made such as resolution of the UNO passed during the United Nations Water Conference in 1977 as under:

“All people, whatever their stage of development and their social and economic conditions, have the right to have access to drinking water in quantum and of a quality equal to their basic needs.”

In India, the constitutional right to access to clean drinking 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 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. 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*² 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.

An important ruling of the Indian Supreme Court was the case of *A.P. Pollution Control Board II v. Prof. M.V. Nayudu*.³ 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.*”⁴ 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*⁵ 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*

² AIR 1984 SC 802

³ (2001) 2 SCC 62

⁴ Ibid

⁵ (2000) 10 SCC 664

*healthy environment and to sustainable development are fundamental human rights implicit in the right to "life".*⁶

In another recent judgment of *Vellore Citizens' Welfare Forum v. Union of India*,⁷ 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. The effluents had spoiled the physico-chemical properties of the soil and had contaminated the groundwater by percolation. 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'. **T**he '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.⁸ 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."*⁹

⁶ Ibid at Paragraph 248

⁷ (1996) 5 SCC 647

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

⁹ *Vellore Citizens Welfare Forum* (n 7) at pg. 661.

The Supreme Court has, in the context of water pollution, mandated the cleaning up of water sources including rivers,¹⁰ the coastline¹¹ and even tanks and wells.¹² 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.¹³ The court has also applied the 'precautionary principle' to prevent the potential pollution of drinking water sources consequent upon the setting up industries in their vicinity.¹⁴ 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*¹⁵ 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'.¹⁶

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. In *AP Pollution Control Board*, the Supreme Court did mention that all citizens have the fundamental

¹⁰ 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.

¹¹ *S. Jagannath v. Union of India* (1997) 2 SCC 87.

¹² 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.'

¹³ 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.

¹⁴ 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.

¹⁵ *M.C. Mehta* (n 10)

¹⁶ S. Muralidhar, "The Right to Water: An Overview of the Indian Legal Regime" in Eibe Reidel & Peter Rothen eds., *The Human Right to Water* (Berlin: Berliner Wissenschafts-Verlag, 2006), p. 65-81. Available at <http://www.ielrc.org/content/a0604.pdf>

right to have access to clean drinking water, but did not take that issue forward in order to explore whether this includes the positive obligation on the State to provide clean drinking water to all citizens. Thus we can see that the right to clean drinking water, although not articulated as a separate right, has been considered as an inseparable part of the right to a clean environment and the right to life.

4. Guaranteeing a positive right to water as an integral part of the right to food, health and life – An analogy and extension of the Right to Food argument

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**.¹⁷ The justiciability of the specific Right to Food as an integral right under Art 21 was however articulated and enforced only in 2001.¹⁸ In 2001, there was a massive drought in several states in India especially Orissa, Rajasthan and Madhya Pradesh. Due to the drought, which had been going on for months and the extreme poverty and complete lack of access to food grains, people were starving in large numbers. While the poor were starving in the drought hit villages, the central government had excess food grains in its storehouses, which were not being disbursed and were rotting! 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 in 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 Maharashtra, and where several had died due to starvation.¹⁹

In its several hearings, the Court directed all state governments to ensure that all Public Distribution Shops are kept open with regular supplies and stated that it is the prime responsibility of the government to prevent hunger and starvation by providing people access to food. On 23 July, 2001, recognising the right to food, the court said:

¹⁷ *Francis Coralie Mullin v. Union Territory of Delhi.*, 1981(1) SCC 608; *Chameli Singh v. State of UP.*, 1996 (2) SCC 549.

¹⁸ *Peoples Union for Civil Liberties (n.1)*

¹⁹ *Ibid*

*'In our opinion, what is of utmost importance is to see that food is provided to the aged, infirm, disabled, destitute women, destitute men who are in danger of starvation, pregnant and lactating women and destitute children, especially in cases where they or members of their family do not have sufficient funds to provide food for them. In case of famine, there may be shortage of food, but here the situation is that amongst plenty there is scarcity. Plenty of food is available, but distribution of the same amongst the very poor and the destitute is scarce and non-existent leading to mal-nourishment, starvation and other related problems.'*²⁰

The Supreme Court, thus recognised a distinct positive Right to Food under the constitution under Article 21 and also sought to broaden the scope of the right to not only encompass the right to be free from starvation, but to also include distribution and access to food and the right to be free from mal-nutrition, especially of women, children and the aged. The Court, in an unprecedented interim order on 28 November 2001²¹, directed all the state governments and the Union of India to effectively enforce eight different centrally sponsored food schemes to the poor²². These food security Schemes were declared as entitlements (rights) of the poor, and the Court also laid down very specific time limits for the implementation of these schemes with the responsibility on the states to submit compliance affidavits to the court. These included the Antyodaya Anna Yojna, the National Old-Age Pension Scheme, 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. Of the eight schemes, the most significant was the Mid-day Meal Scheme and the direction of the Court to all state governments to provide cooked mid-day meals in all government schools by January 2002.

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

²⁰ Hearing dates 23 July 2001 (unreported) *People's Union for Civil Liberties* (Above n 1)

²¹ Interim Order dated 28 November 2001 in *People's Union for Civil Liberties* (Above n 1) Unreported order, < <http://www.righttofoodindia.org/orders/nov28.html> >

²² These schemes included food distribution schemes and schemes guaranteeing income support in order to gain access to food such as the National Old Age Pension Scheme, the National Maternity Benefit Scheme and the National Family Benefit Scheme.

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. Such an articulation does not address issues such as having access to water – what if a particular community, village or an urban slum has no water supply at all. Can it be claimed as a positive justiciable right from the state? I argue, that 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.

Meaning of the Right to Water:

So what would the right to water specifically mean? Would it mean providing water to all those who need it, or would it mean something more? Here I would like to borrow some jurisprudence from the South African courts on this issue. Jaap de Visser quite rightly holds that the right of access to water can be seen to place two interrelated but distinct obligations on the State:

1. It must ensure that all people have physical access to water. This means that the facilities that give access to water must be within safe physical reach for all sections of the population, especially for vulnerable and marginalised groups.
2. It must ensure that all people have economic access to water. This implies that the cost of accessing water should be pegged at a level that would ensure that all people are able to gain access to water without having to forgo access to other basic needs.²³
3. Where water is provided, i.e. the right is guaranteed, they should be protected against undue infringement.

Guarantee to the Right to Water under the South African Constitution:

In contrast to the Indian Constitution, which does not specify a clear right to water but protects a broad right to life under Article 21, the South African Constitution specifically guarantees the right to food and water to all its citizens.

²³ J Visser, E Cottle & J Mettler 'The Free Basic Water Supply Policy: How Effective is it in Realising the Right?' *ESR Review* Vol 3, No. 1, July 2002 Available at http://www.communitylawcentre.org.za/ser/esr2002/2002july_water.php

The South African Constitution in Article 27 of the Bill of Rights holds,

“27. (1) Everyone has the right to have access to -

a. ...

b. sufficient food and water; and

c. ...

(2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights.”

While protecting these rights, the South African constitution refers to availability of resources which would be a condition required for implementing these rights. The South African Constitution places a duty on all three spheres of government to realise the right of access to water by acting in partnership with one another. While the national government is required to establish a national framework to ensure the realisation of this right, local government must play the critical role of ensuring delivery of water to all.

The Right of Access to Sufficient Water:

In this regard, I would like to discuss two interesting cases from South Africa:

In *Manqele v Durban Transitional Metropolitan Council*²⁴ the applicant, an unemployed woman who occupied premises with seven children, sought a declaratory order that the discontinuation of water services to her premises was unlawful. She argued that the by-laws in terms of which the water service was disconnected were *ultra vires* the Water Services Act. Manqele relied on her right to a basic water supply as referred to in the Act and did not rely on the Constitution. The council argued, successfully, that as no regulations had at that time been promulgated to give meaning to the right to a 'basic' water supply, the right she relied on had no content. Manqele was thus denied a remedy, in principle on this technical ground, but the judge also commented on the fact that she had illegally reconnected to the water supply, arguably implying that this also underpinned her denial of a remedy. The case galvanised the government to gazette regulations just under a year later defining precisely in volumetric terms a basic water supply.

²⁴ Durban High Court, 2002 (6) SA 423 (D).

The South African High Court (WLD) took a different approach in the unreported case of *Residents of Bon Vista Mansions v Southern Metropolitan Local Council*,²⁵ where the Court found that the disconnection of water supply would constitute a prima facie breach of the State's duty to respect people's right of access to water. In *Residents of Bon Vista Mansions v Southern Metropolitan Local Council*,³⁴ the provision of this basic water supply (now clearly a legal obligation) was given some due process protection. The applicants' water supply was disconnected as they had not paid for it. The applicants sought interim relief on an urgent basis for the reconnection of their water supply, relying directly on the Constitution. The court held that the obligation to respect existing access entails that the state may not take any measures that result in preventing such access. By disconnecting the water supply, the council had *prima facie* breached the applicants' existing rights. The court referred to the Water Services Act and noted that the Act provides that a water service provider may set conditions under which water services may be discontinued. Water supplies may be disconnected if appropriate procedures are followed, provided that consumers who are unable to pay for water services have their supply restricted to the basic level rather than discontinued completely. The court held that a *prima facie* violation of a local council's constitutional duty occurs if a local authority disconnects an existing water service, and that such disconnection therefore requires constitutional justification. They should not result in a person being denied access to basic water services for non-payment where the person proves, to the satisfaction of the water services authority, that he or she is unable to pay for the basic services.

The above cases are interesting in that they provide support to right to water by stating that a person has the right of access to a basic level of water supply, even if she is unable to pay for the same and the same cannot be denied by the State.

The South African constitutional and statutory jurisprudence can be used in India to argue that the social right to water should be articulated as a positive right to provide access and water supply to those who do not have it and not merely a negative right of not having water resources polluted.

²⁵ [2002] (6) BCLR 625.

5. Conclusion

As we can see above, both Indian and South African constitutional law address the right to water through different perspectives. There is no doubt of the fact that the right to water is a fundamental human right and is protected as such. In India we need to push right to include the right to access to water. The implementation and enforcement of this right is crucial as it is often dependant upon resources available to guarantee such a right. Social and economic rights such as the right to water, are notoriously politically sensitive since their effective elaboration requires the political branches to adjust their allocation and distribution of resources, sometimes at a highly systemic level, in response to judicial direction.

There are some problems despite having the constitutional right to water in India – a.) There are vast areas in India where water infrastructure does not exist and water delivery of any kind is not possible. The policy to provide free basic water therefore needs to be supplemented with a policy that aims to rapidly increase access to water infrastructure - especially for the rural poor; b.) Especially in rural communities where there are not a sufficient amount of high volume users to cross-subsidise the provision of free water to all, policy creates serious problems for local governments, which are often not able to finance the free provision of basic water for all. This leads rural municipalities to take drastic measures (e.g. disconnections) that deprive their residents of access to water. A water policy therefore should be properly targeted to meet the needs of the rural poor - a particularly vulnerable group in society.

The rhetoric of a human right to water, once implemented and fleshed out in practice, has a tendency to dissolve into a series of strategies eerily resembling consumer rights – an important dimension of a market state and the urgency of the rights claim can be entangled in a web of a complex regulatory framework.²⁶ This should not necessarily stifle the rights claim to water. A human need can be left to market forces to fulfill. But if water is a human right, then the State is responsible for the fulfillment of that right even if it allows private intermediaries to play a role. For example, distributive justice and universal access are two core dimensions of socio-economic rights that can be given substance through rules on cross-subsidies, or through detailed codes of procedure governing disconnection practices by companies.

²⁶ B Morgan, “The Regulatory Face of the Human Right to Water” (2004) 15 *Journal of Water Law* 179-187.

To conclude, governments, international aid agencies, nongovernmental organizations and local communities should work to provide all persons with a basic water requirement and to guarantee water as a human right. By acknowledging a human right to water and expressing the willingness to meet this right for those currently deprived of it, the water rights community would have a useful tool for addressing one of the most fundamental failures of 21st century development.