

# Article 21: a Reservoir of Right to Water?

*Praveen Patil*

*Shahaji Law College, Kolhapur, Maharashtra*

---

## **Abstract**

The life of water is 'life' itself. Rights are legislative conferment and fundamental rights are constitutional guarantees. The debate for legalising right to water has not been a new discourse. The requirements, the availability, the matured usage, the level of importance attached, all influence the policy of a nation towards water. Irrespective of these different indicia, right to water is gaining 'water' throughout the world. As said earlier, constitutional treatments of water as right has not been same or even similar. Constitutions framed out of extraordinary maturity have elevated the status of water to fundamental rights thereby guaranteeing constitutionally in the nations. Some have read the right into other fundamental rights and yet, rests have yet to make such provision or display such adventurous interpretation. In this backdrop, let us discuss the right to water in India context from the constitutional conspectus.

## **The Context**

Constitution of India is a bible of rights and cherished aspersion of people of India. This holy document reflects the promised rights, future governing policy and mechanism to realize and enforce such rights. Numbers of rights have been enumerated in constitution. Though 'Water' has been constitutionally dealt with<sup>1</sup> yet there is no fundamental guarantee of right to water as such. It may come as a surprise to many that water - which after air is the most fundamental requirement for human survival - was not till now explicitly recognised as a fundamental human right. This is true of the UN system, and it is true of the Indian legal regime. In both, the recognition of water as a basic right has been indirect, flowing from other rights<sup>2</sup>

The Indian legal system in respect of groundwater has two important characteristics. First, the system is 'mixed' or 'pluralistic' and includes statutory provisions, precedential court decisions, doctrines and principles deriving from the British common law system, international agreements, religious (personal) law and customary law and practices. This scenario, in no sense unique to India, contributes often to dispensable complexity. Secondly, different parts of the system are not well integrated

---

<sup>1</sup> General provisions concerning water in the Indian constitution are Article 51-A(g), Article 245, Seventh Schedule, Article 252, Article 243G, Article 246, Article 248, Article 32(2), Article 21, Parts IX and IXA, Art 48-A, Art 51-A etc.

<sup>2</sup> Shripad Dharmadhikary "Recognising the human right to water" INDIA TOGETHER 17 October 2010

with each other, resulting in overlapping regulations in many areas. Methods for legal interpretation have to be adjusted accordingly.<sup>3</sup>

Part III of the Constitution of India deals with the fundamental rights. No Article in the aforesaid part of the Constitution specifically deals with the right of a citizen to draw subsoil water for irrigation, business or drinking purposes. Such a right has been argued to be a fundamental right being an attribute of life guaranteed under Article 21 of the Constitution of India. It is true that the right to life is the most fundamental right enshrined in our Constitution which includes all attributes of the life.<sup>4</sup>

India has been a party to all the major international human rights treaties<sup>5</sup> which have accorded a human rights' status to the right to water. An analysis of these conventions arguably leads us to the premise that 'right to water' should be treated as a basic, fundamental and human right even if it is not expressly mentioned in the human rights conventions.<sup>6</sup>

While water has not been explicitly recognized as a self-standing human right in international treaties, international human rights law entails specific obligations related to access to safe drinking water. These obligations require 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 progressively ensure access to adequate sanitation, as a fundamental element for human dignity and privacy, but also to protect the quality of drinking-water supplies and resources.<sup>7</sup>

### Three types of obligations

State obligations fall into three categories<sup>8</sup>, namely the obligations to *respect*, *protect* and *fulfil*.

**The obligation to respect:** The obligation to respect requires States to refrain from interfering directly or indirectly with the enjoyment of the right to water. For

---

<sup>3</sup> Government of India Planning Commission *Report of the Expert Group* New Delhi September 2007

<sup>4</sup> Venkatagiriappa vs Karnataka Electricity Board: 1999 (4) KarLJ 482

<sup>5</sup> For example, India has ratified the following treaties: the International Covenant on Civil and Political Rights (1979); the International Covenant on Economic, Social and Cultural Rights (1979); the Convention on the Rights of Children (1993); the Convention on the Elimination of Discrimination Against Women (1993); the Convention Against Torture and other Inhumane or Degrading Treatment or Punishment (1997); the International Convention on the Elimination of All Forms of Racial Discrimination (1969).

<sup>6</sup> Ruchi Pant "From Communities' Hands to MNCs' BOOTS: A Case Study from India on Right to Water" (Right to Water Project) Submitted to Rights and Humanity, UK October 2003, P5

<sup>7</sup> United Nations High Commissioner for Human Rights "The Right to Water Fact Sheet No. 35," Switzerland. Available at <http://www.ohchr.org/Documents/Publications/FactSheet35en.pdf>

<sup>8</sup> *ibid*

example, States should refrain from: polluting water resources; arbitrarily and illegally disconnecting water and sanitation services; reducing the provision of safe drinking water to slums in order to meet the demand of wealthier areas; destroying water services and infrastructure as a punitive measure during an armed conflict; or depleting water resources that indigenous peoples rely upon for drinking.

**The obligation to protect:** The obligation to protect requires States to prevent third parties from interfering with the right to water. States should adopt legislation or other measures to ensure that private actors—e.g., industry, water providers or individuals—comply with human rights standards related to the right to water. States should, for instance, adopt the necessary legislative and other measures to ensure that third parties do not arbitrarily and illegally disconnect water and sanitation services; communities are protected against third parties' unsustainable extraction of the water resources they rely upon for drinking; the physical security of women and children is not at risk when they go to collect water or use sanitation facilities outside the home; landownership laws and practices do not prevent individuals and communities from accessing safe drinking water; the third parties controlling or operating water services do not compromise the equal, affordable and physical access to sufficient safe drinking water.

**The obligation to fulfill:** The obligation to fulfill requires States to adopt appropriate legislative, administrative, budgetary, judicial, promotional and other measures to fully realize the right to water. States must, among other things, adopt a national policy on water that: gives priority in water management to essential personal and domestic uses; defines the objectives for the extension of water services, with a focus on disadvantaged and marginalized groups; identifies the resources available to meet these goals; specifies the most cost-effective way of using them; outlines the responsibilities and time frame for implementing the necessary measures; monitors results and outcomes, including ensuring adequate remedies for violations.

Under the obligation to fulfill, States must also, progressively and to the extent allowed by their available resources, extend water and sanitation services to vulnerable and marginalized groups; make water and sanitation services more affordable; ensure that there is appropriate education about the proper use of water and sanitation, protection of water sources and methods to minimize waste.

### **Art 21: Reservoir of Right to Water?**

As said earlier, right to water in Indian constitutional conspectus, is not explicitly recognised fundamental right. However, every right in order to be fundamental right need not be constitutionally recognized. Courts have developed the via media techniques to incorporate the essential 'human rights' which are precondition for better 'enjoyment' of other fundamental rights in to the "part of fundamental rights." One such technique developed by the courts is doctrine of emanation.

## Theory of emanation

In the 7-judge case of *Maneka Gandhi*<sup>9</sup> BHAGWATI J., for the majority, observed that — "even if a fundamental right is not specifically named in Article 19(1), it may still be a fundamental right covered by some clause of that article, "if it is an ***integral part of a named fundamental right*** or partakes of same basic nature and character as that fundamental right," that is: "it emanates from a named fundamental right or ***its existence is necessary in order to make the exercise of a named fundamental right meaningful and effective.***"<sup>10</sup>

## Judicial response

Therefore applying this theory of emanation, the Supreme Court has evolved the right to water as constitutional right elevated as fundamental right. 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. 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<sup>11</sup>. The context and evolution of the right in these cases are discussed below.<sup>12</sup>

In 1981, in the *Francis Coralie Mullin*<sup>13</sup> case, the Supreme Court declared, "the right to life includes the right to live with human dignity and all that goes with it, namely, the bare necessities of life such as adequate nutrition, clothing and shelter and facilities for reading, writing and expressing oneself in diverse forms, freely moving about and mixing and commingling with fellow human beings. The magnitude and components of this right would depend upon the extent of economic development of the country, but it must, in any view of the matter, include the bare necessities of life and also the right to carry on such functions and activities as constitute the bare minimum expression of the human self." By stressing on the *bare necessities* of life, the Court actually made a point

<sup>9</sup> *Maneka v. Union of India*, AIR 1970 SC 597

<sup>10</sup> However, he also observed that "But, it is not enough that a right claimed... flows or emanates from a named fundamental right or that its existence is necessary in order to make the exercise of a named fundamental right meaningful and effective...What is necessary to be seen is, whether the right claimed... is an integral part of a named fundamental right or partakes of the same basic nature and character as the named fundamental right so that the exercise of such right is in reality and substance nothing but an instance of the exercise of the named fundamental right"

<sup>11</sup> Upadhyay, Videh (2003), 'Claiming Water', *Down to Earth*, available at <http://www.indiaenvironmentportal.org.in/node/3259> Last accessed on 24 April 2011

<sup>12</sup> Videh Upadhyay "Water Rights and the 'New' Water Laws in India Emerging Issues and Concerns in a Rights Based Perspective" in *India Infrastructure Report 2011*, Oxford University Press, New Delhi p 56

<sup>13</sup> 1981 2 SCR 516

on the availability of food, water, shelter, clothing etc without which *human dignity* cannot be ensured. The Court 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 intergenerational equity.

In *Hamid Khan V. State of M.P and Ors.*<sup>14</sup> The Supreme Court observed that “Under Article 47 of the Constitution of India, it is the responsibility of the State to raise the level of nutrition and the standard of living of its people and the improvement of public health. It is incumbent on State to improve the health of public providing unpolluted drinking water. State in present case has failed to discharge its primary responsibility. It is also covered by Article 21 of the Constitution of India and it is the right of the citizens of India to have protection of life, to have pollution free air and pure water.

*Subhash Kumar v. State of Bihar*<sup>15</sup> Supreme Court held that a right to life includes right to live properly and have the benefit of all natural recourses i.e. unpolluted air and water. It was observed that "Right to live is a fundamental right under Article 21 of the Constitution and it 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 resource to Article 32 of the Constitution for removing the pollution of water or Air which may be detrimental to the quality of life."

In *A.P. Pollution Control Board II v Prof. M.V. Naidu and Others*<sup>16</sup> the right to access to clean 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 State is duty bound not only to provide adequate drinking water but also to protect water sources from pollution and encroachment. Any act of the State that allows pollution of a water body must be treated as arbitrary and contrary to public interest and in violation of the right to clean water under Article 21.

In the case of *Puttappa Honnappa Talavar v. Deputy Commissioner, Dharwad*<sup>17</sup>, it held that the right to life also includes the right to have access to clean drinking.

The *Vellore Citizen's Welfare Forum v. Union of India*<sup>18</sup> case dealt with the issue of water pollution by the discharge of toxic effluents from tanneries located in the state of Tamil Nadu. The Supreme Court looked into Articles 21, 47, 48-A and 51-A(g) as well as the basic provisions of the Water (Prevention and Control of Pollution) Act, 1974, Air (Prevention and Control of Pollution) Act, 1981 and the Environment Protection Act, 1986 to decide on this case. The twin principles of ‘Polluter Pays’ and ‘Precautionary

---

<sup>14</sup> AIR 1997 MP 191, 1997 (1) MPLJ 587

<sup>15</sup> AIR 1991 SC 420

<sup>16</sup> [1999] 2 SCC 718

<sup>17</sup> Puttappa Honnappa Talavar v. Deputy Commissioner, Dharwad, AIR 1998 Kar 10.

<sup>18</sup> Vellore Citizen's Welfare Forum v. Union of India ,AIR 1996 SC 2715; See also Indian Council for Environmental Action v. Union of India AIR 1996 SC 1446

Principle' were looked into by the Court and subsequently introduced as 'law of the land'.<sup>19</sup>

Yet again in *Narmada Bachao Andolan v. Union of India*<sup>20</sup> the Supreme Court has derived the right to water as a human right from the right to life. Here the Court says, water is the basic need for the survival of the human beings and is part of right of life and human rights as enshrined in Article 21 of the Constitution of India." Now it is, therefore, clear that the Supreme Court beyond any doubt recognizes the right to water as a human right and a fundamental right.<sup>21</sup>

In 1990, the Kerala High Court ruling on a groundwater extraction case involving water supply plan for the island of Lakshadweep ruled that government should not extract groundwater impacting the sources in future that in turn violated the Article 21.<sup>22</sup> It ruled: "... the administrative agency cannot be permitted to function in such a manner as to make inroads into the fundamental right under Article 21. The right to life is much more than a right to animal existence and its attributes are manifold, as life itself. A prioritizing of human needs and a new value system has been recognized in these areas. The right to sweet water and the right to free air are attributes of the right to life, for these are the basic elements which sustain life itself"<sup>23</sup>

In 2004 giving verdict on a PIL on fast depletion of groundwater in Delhi, the apex court ruled that groundwater is a social asset.<sup>24</sup> It further said that people have the right to use air, water and earth interpreting the Article 21<sup>25</sup>. It even observed that in groundwater use, domestic and irrigation needs must be prioritized.

Apart from expanding the content of the right to life as including the right to water, the court has, in the context of water pollution, mandated the cleaning up of water sources including rivers<sup>26</sup> the coastline<sup>27</sup> and even tanks and wells<sup>28</sup>. The concern over pollution of groundwater 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 groundwater.<sup>29</sup>

---

<sup>19</sup> Abhishek Tripathy and Prajna R. Mohapatra "Right to Water: Debating the Human Rights Perspective" <http://www.commonlii.org/in/journals/NUJSLawRw/2009/16.pdf>.

<sup>20</sup> *Narmada Bachao Andolan v. Union of India*, AIR 2000 SC 375

<sup>21</sup> Taposik Banerjee "Right to Water: Some Theoretical Issues" *Contemporary Issues and Ideas in Social Sciences* June 2010 available at <http://journal.ciiss.net/index.php/ciiss/article/viewFile/79/76..>

<sup>22</sup> Indira Khurana and Richard Mahapatra *Right to Water and Sanitation* available at [http://re.indiaenvironmentportal.org.in/files/Righttowaterandsanitation\\_march252009\\_draft.pdf](http://re.indiaenvironmentportal.org.in/files/Righttowaterandsanitation_march252009_draft.pdf)

<sup>23</sup> Ruchi Pant *Supra* 6

<sup>24</sup> Indira Khurana and Richard Mahapatra *Right to Water and Sanitation* [http://re.indiaenvironmentportal.org.in/files/Righttowaterandsanitation\\_march252009\\_draft.pdf](http://re.indiaenvironmentportal.org.in/files/Righttowaterandsanitation_march252009_draft.pdf)

<sup>25</sup> *MC Mehta V. Union of India* 2004(12) SCC 118

<sup>26</sup> *M.C. Mehta v. Union of India*, (1998) 2 S.C.R. 530

<sup>27</sup> *S. Jagannath v. Union of India* [1997] 2 SCC 87

<sup>28</sup> *Hinch Lal Tiwari v. Kamala Devi* AIR 2001 SC 3215

<sup>29</sup> Indira Khurana and Richard Mahapatra "Right to Water and Sanitation" [http://re.indiaenvironmentportal.org.in/files/Righttowaterandsanitation\\_march252009\\_draft.pdf](http://re.indiaenvironmentportal.org.in/files/Righttowaterandsanitation_march252009_draft.pdf)

While upholding the Indian government's decision to construct over 3,000 dams on the river Narmada, the Supreme Court stated in *Narmada Bachao Andolan*, that “water is the basic need for the survival of the human beings and is part of right of life and human rights as enshrined in Article 21 of the Constitution of India . . . .”<sup>30</sup>

Understanding the right to water as implied in the recognition of the right to a clean environment<sup>31</sup>, the Supreme Court has repeatedly reaffirmed the connection between public access to natural resources, including water, the right to a healthy environment, and the right to life under Article 21 of the Constitution.

In *M.C. Mehta v. Union of India*,<sup>32</sup> which concerned the pollution of the river Ganga, the Supreme Court reaffirmed the duty of the government, under Article 21, to ensure a better quality of environment and ordered the government to improve its sewage system.

In *M. C. Mehta v. Union of India*, the Supreme Court of India recognized that groundwater is a public asset, and that citizens have the right to the use of air, water, and earth as protected under Article 21 of the Constitution<sup>33</sup>

Significantly, the Supreme Court has recognized that water is a community resource 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>34</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, airs, 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

In *Indian Council of Enviro-Legal Action vs. Union of India*<sup>35</sup> (the Bichhri pollution case), following the decision in the Oleum Gas leak case and based on the polluter pays principle, the polluting industries were directed to compensate for the harm caused by them to the villagers in the affected areas, specially to the soil and to the underground water.

In *Shanti Star Builders vs. Narayan Totame*<sup>36</sup> the Supreme Court held that right to life is guaranteed in a civilised society would take within its sweep the right to food, the right to clothing, the right to decent environment and a reasonable accommodation to live in.

---

<sup>30</sup> Narmada Bachao Andolan v. Union of India, A.I.R. 2000 S.C. 375

<sup>31</sup> Vrinda Narain “Water as A Fundamental Right: A Perspective From India” available at <http://lawreview.vermontlaw.edu/files/2012/02/narain.pdf>

<sup>32</sup> M.C. Mehta v. Union of India, (1998) 2 S.C.R. 530

<sup>33</sup> M.C. Mehta v. Union of India, (2004) 3 S.C.R. 128

<sup>34</sup> M.C. Mehta v. Kamal Nath, (1997) 1 S.C.C. 388

<sup>35</sup> 1996 3 SCC 212

<sup>36</sup> 1990(1)SCC 520

In *Francis Coralie Mullin vs. Union Territory*<sup>37</sup> the Supreme Court held that “The right to life includes the right to live with human dignity and all that goes along with it, namely the bare necessities of life such as adequate nutrition, clothing and shelter....”<sup>38</sup>

### **Attempts to constitutionalise ‘right to water’**

Amid these developments of judicial perspective concerning water and movements for constitutionalising right to water, National Commission to Review the Working of the Constitution<sup>39</sup> has advocated for amendment of the constitution to include a separate Article recognizing the right to safe drinking water as fundamental right. The recommendation of the commission is

“The Commission recommends that after the proposed article 30-C, the following article may be added as article 30-D :-

“Art. 30-D. Right to safe drinking water, prevention of pollution, conservation of ecology and sustainable development. -

Every person shall have the right –

(a) to safe drinking water;

(b) to an environment that is not harmful to one’s health or well-being; and

(c) to have the environment protected, for the benefit of present and future generations so as to –

(i) prevent pollution and ecological degradation;

(ii) promote conservation; and

(iii) secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development.”.

However, unfortunately the governments have not translated this wise wish of the commission in to a constitutional guarantee.

### **Conclusion**

---

<sup>37</sup> 1981 2 SCR 516

<sup>38</sup> See also other judgments touching the same aspects in Ashish Kothari & Anuprita Patel “Environment and Human Rights” National Human Rights Commission New Delhi 2006, p 15

<sup>39</sup> Report of the National Commission to Review the Working of the Constitution, Volume – I, March 2002

The above judgments are illustrative judgments of how judicially the right to water has been dealt with. However, it makes a difference, when one sits to read the judicial pronouncements as source of law in contrast to comprehensive legislative policy. Though judicial decisions have at times acted as grounds for prompting the executive reactions yet, they such pronouncement cannot partake the character of legislative wordings. Hence, right to water which is judicially upheld needs to be judiciously addressed by legislative enactment and comprehensive executive policies.

Access to safe drinking water is a fundamental precondition for the enjoyment of several human rights, including the rights to education, housing, health, life, work and protection against cruel, inhuman or degrading treatment or punishment. It is also a crucial element to ensure gender equality and to eradicate discrimination.

Part of the reason for not acknowledging the right to water as an independent right is that once such an explicit acknowledgement is there, it puts a greater responsibility (burden?) on states to actualise the right. The accountability is increased. This is precisely why struggles and movements all over the world are strongly advocating the explicit declaration of water as a fundamental right.<sup>40</sup>

It is submitted, that the right to water and sanitation do not at present, have a clearly defined niche under Indian laws. Therefore, there must be a clearly defined and expostulated provision pertaining to right to health so that individuals can have their rights enforced and violations redressed. Further, accompanying issues of water and sanitation should get their due share of focus, and efforts be made to assuage the people and their grievances, besides having a policy framework to enunciate how such situations might be dealt with. Having suggested that, we would like to further state that employing Article 21 as a tool to facilitate the introduction of the right to water as a tangible justiciable right is indeed a potent scheme<sup>41</sup>

However, this path breaking move to constitutionalise right to water thorough judicial pronouncements and recommendation National Commission to Review the Working of the Constitution , has been halted by the ruling governments by not heeding to the recommendation as seriously and sincerely as is expected by constitutional creature. Therefore till this day, advocates of 'right to water' have to depend their struggle, dialogue and dissertation on judicial pronouncement. It is, therefore, as on date, apt to say 'Article 21 is the reservoir of right to water'

---

*Praveen Patil is Assistant Professor, Shahaji Law College, Kolhapur, Maharashtra. Email: prof\_praveenpatil@rediffmail.com*

---

<sup>40</sup> Shripad Dharmadhikary "Recognising the human right to water" INDIA TOGETHER 17 October 2010

<sup>41</sup>Abhishek Tripathy and Prajna R. Mohapatra *Supra* 19