
Right to Clean Water and the Supreme Court of India: A Study*

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Abstract:

The growing water pollution constitutes biggest threat to public health and ecology. Since independence, our inaction towards water pollution has caused the death of many people due to water borne diseases such as diarrhea, dysentery, hepatitis etc. Various reports on state of India's environment cite the gravity of water pollution including river pollution. In this gloomy scenario, the present paper focused on the evolution of specific fundamental right to clean water.

Introduction:

Water is the most precious natural resource. Life without water is unimaginable. Water is needed for irrigation, power generation, domestic purpose etc. Rivers and canals can be used for irrigation as multiple projects have been undertaken to borne the water resources for meeting the needs of people in an integrated manner. We have not yet utilized the available water resources fully but many parts of the country face acute shortage of water and are compelled to drink polluted water. In developing countries like India, water pollution has become one of the greatest problems in the context of environmental pollution in general. The problem generates specific in view of scarce availability of usable water and ever increasing demands as the quality of available water is degraded all over. In third world countries the children usually die either due to polluted water or scarcity of water. According to World Health Organization (WHO) polluted water takes the life of millions of people every year. Nearly eighty percent diseases are caused by polluted water. The main cause of water degradation is discharge of solid or liquid waste products containing pollutants on the land surface or into the surface or coastal waters. The sources that contribute to the generation of such wastes are domestic, industrial, agricultural etc. Due to water pollution, urban and rural areas are suffering from the scarcity of fresh drinking water. Rivers, wells and tanks are chief sources of drinking water but the water of these sources is being polluted gradually in one way or the other. Most of the cities in India discharge polluted water into adjoining rivers and other natural water sources due to lack of proper sewage disposal system.

However, over the last few decades the Indian judiciary has fostered an extensive and innovative on environmental rights in pursuit of a better public health administration in the country. Not only has the Supreme Court ruled that every individual has a fundamental right to the enjoyment of pollution free water and air, but it has been willing to resolve complex matters of environmental management according to this test, and has fashioned a series of innovative procedural remedies to accompany the new substantive right. Moreover, in a country like India where the most serious costs of environmental damage fall upon impoverished and illiterate groups with limited access to the courts, the new environmental right is championed as a legal gateway to speedy and inexpensive legal remedy.¹

Expansion of Right to Life under Article 21:

Following the lifting of the state of emergency in 1977, the Courts assumed a much more liberal and activist approach and were found willing read the directive principles into the fundamental rights. Even where clear obligation under Part IV of Indian Constitution did not exist, the courts have been willing to

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¹ Aprajit , et.al., Judicial Response towards the Protection of Environment: A Critical Evaluation, General of India Legal Thought, Vol 1. 2003, 97.

expand the scope of the fundamental rights, particularly the right to life under Article 21.² In Francis Coralie Mullin v. Administrator, Union Territory of Delhi³, Hon'ble Supreme Court held that the right to life was not limited to the right to mere animal existence, but included a prohibition upon torture and protection of every limb and human faculty.⁴ Having set out these negative injunctions upon the State, Bhagwati, Justice went on to elucidate positive entitlements within the ambit of the right to life. He found that the right to life includes the right to live with human dignity and all along with it.⁵

Following the Francis Coralie dictum two varieties of judicial reasoning may be discerned in the expansion of Article 21. One approach identifies immediate threats to survival, such as the lack of potable water, and seeks to prevent of abide such threats. A more ambitious line of reasoning proceeds where immediate survival is not threatened, but where the court concerns itself with the quality of life. Thus, amenities are added to the baseline of physical existence and treated as justiciable entitlements. Both of these approaches are evident in the environment cases.

A Constitutional Right to Clean Water:

The evolution of right to clean water began in 1985. The Apex Court through Justice Bhagwati stated that a right of people is not only to live in healthy environment but also to live in undisturbed air, water and environment.⁶ It may be noted that the Supreme Court was not able to give clear direction to environmental justice for evolution of specific right to clean water. In 1988, the Apex Court further expanded this right in Ganga Pollution case.⁷ Justice Venkatramiah extended the right to include, the right to defend the human environment for the present and future generations.⁸ It means that the court was willing to protect the right of those who were yet to be born.

Justice K.N. Singh also expanded the right into three directions by saying 'Life, health and ecology have greater importance'.⁹ In one of the cases mentioned above Article 21 was specifically referred for recognition of right to clean water. One can say that the court was waiting for appropriate time to invoke Article 21 directly for evolution of such right. In 1990, the Apex Court adopted a constricted judicial approach.¹⁰

In 1991, the Supreme Court through Justice K.N. Singh declared that right to live is a fundamental right under Article 21 of the constitution and it includes pollution free water.¹¹ Thus the Apex Court has carved out a specific fundamental right i.e. right to pollution free water or clean water from Article 21 of the Constitution of India. In the instant case, the court lost an opportunity to apply the principle evolved in the said case as the petitioner had abused the process of court for personal gain. In another case,¹² the Apex Court applied the principle evolved in the Subhas Kumar case and established a link between pollution free water and right to life under Article 21 of the Constitution.¹³ Similarly, the Apex Court took notice of ground

² Unni Krishnan v. State of A.P., AIR 1993 SC 2178.

³ AIR 1981 SC 746.

⁴ Id, at 752-53.

⁵ Id, at 753.

⁶ R.L.E.K. v. State of U.P. AIR 1985 SC 652, 656 .

⁷ M.C. Mehta v. Union of India AIR 1988 SC 1037.

⁸ Id. At 1039

⁹ M.C. Mehta v. Union of India AIR 1988 SC 1037, 1040.

¹⁰ Chhetriya Pradushan Mukti Morcha Sangarsh Samiti v. State of U.P. AIR 1990 SC 2060, 2062.

¹¹ Subhas Kumar v. State of Bihar (1991) 1 SCC 598, 604.

¹² Virendra Gaur v. Sate of Haryana (1995) 2 SCC 577.

¹³ Id, at 580, 581.

water pollution caused by industrial effluents in a leading case¹⁴ and recognized the serious violation of the right to life including right to clean water by the polluting industries.

In D.K. Joshi's case,¹⁵ the Supreme Court admitted a writ petition for supply of pure drinking water in Agra city. The State of U.P. Nagar Mahapalika and U.P. Pollution Control Board were made respondents. It was alleged by the petitioner that the water supplied for drinking was extremely polluted and unhealthy for human consumption. Although the court had not referred to Article 21 in the judgment but it is implied from the fact that the writ petition was filed in the Supreme Court under Article 32 which was there for the enforcement of fundamental rights. Right to clean water is new fundamental right carved out of Article 21 of the constitution. The Apex Court appointed a monitoring committee and hoped that the committee would certainly try its best to achieve maximum results in the matter of giving unpolluted drinking water to the citizens of Agra as well as those who visit the heritage city.¹⁶

In another case,¹⁷ the Supreme Court speaking through Justice Jagannadha Rao observed that the right to drinking water is fundamental to life and there is duty on the State under Article 21 to provide clean drinking water to its citizens.¹⁸ The Supreme Court pointed out that India was a party to the resolution of the UNO passed during the United Nations Water Conference in 1977. Further the Apex Court took support from majority judgment delivered by B.N. Kripal, Justice in Narmada Bachao Andolan case,¹⁹ Justice Kripal observed that water is the basic need for the survival of human beings and is part of right to life and human right as enshrined in Article 21 of the constitution of India.²⁰ The Apex Court supplemented its argument with the help of provisions of the Water Act, 1974 and pointed that it is clear that in view of sub sections 2(e), 2(k) read with sections 17 and 18 of the Water Act, the fundamental objective of the statute is to provide clean drinking to the citizens.²¹

The Supreme Court pronounced a significant judgment in *Susetha v. State of T.N.*²² The court has observed that the water bodies are required to be retained. Such requirement is envisaged not only in view of the fact that the right to water as also quality life are envisaged under Article 21 of the Constitution of India, but also in view of the fact that the same has been recognized in Article 47 and 48-A of the Constitution of India. Article 51-A of the Constitution of India furthermore makes a fundamental duty of every citizen to protect and improve the natural environment including forests, lakes, rivers and wildlife.²³ It was also clarified that natural water storage resources are not only required to be protected but also steps are required to be taken for restoring the same if it has fallen to disuse. The court also advocated for the protection of wetland and natural lakes and referred the related cases for their protection and improvement. In the instant case, the petitioner pleaded for the protection and restoration of an old tank of village, which was lying in disuse and in dilapidated condition. The court dismissed the petition as there were already five tanks in working condition in addition to one in question and this recharge of the tank would be insignificant. The court, while arriving at this conclusion declared that the State is enjoined with a duty to maintain natural resources providing for water storage facilities. The State is required to take preventive measures for removal of unlawful encroachment so as to maintain the ecological balance. Treating it as constitutional obligations, it was emphasized that in cases of protection of natural resources,

¹⁴ Indian Council for Enviro Legal Action v. Union of India AIR 1996 SC 1446.

¹⁵ D.K. Joshi v. State of U.P. 1999 (7) SCALE 181.

¹⁶ Id, at 182

¹⁷ A.P. Pollution Control Board v. M.V. Nayudu (2001) 2 SCC 62.

¹⁸ Id, at 69.

¹⁹ (2000) 10 SCC 664.

²⁰ Id, at 767

²¹ Supra note 17 at 79.

²² (2006) 6 SCC 543.

²³ Id, at 546

the court has a responsibility of a higher degree of judicial scrutiny. It was declared that the principle of 'sustainable development' and 'doctrine of public trust' are fundamental concepts of Indian law and are not empty slogans. In the light of these principles, we have to strike a balance between the need to protect ecological balance and necessity for development activities like construction of houses for poor. It is observed that the precise content of this new right is not clear. One view is that it relates exclusively to human health and thus amounts to a right to freedom from environmental conditions leading to death, injury or disease. The Supreme Court found a violation of the right to life where an escape of oleum gas led to immediate injury, thus having a direct effect upon the lives of those exposed.²⁴ Even though it was a case involving industrial pollution, no environmental rights were invoked by the court since a simple nexus between injury and exposure to the gas existed. The more difficult question is whether a court might act on right to life or public health argument where an immediate injury is not apparent.²⁵ The right to a healthy environment has also been invoked even where a direct nexus with human health has not been demonstrated at all.²⁶ Another view is that the right relates principally to pollution rather than health. In a leading case the Supreme Court referred to the right to pollution free air and water.²⁷ Whether this amounts to a negative injunction upon the State to refrain from polluting or a positive injunction to ensure that pollution free air and water are supplied is not entirely clear. A further narrowing of this right may be inferred from *Subhas Kumar v. State of Bihar*. Here the Supreme Court held that the right to move court for removing the pollution of water or air would lie if anything endangers or impairs the quality of life in derogation of laws. On the extreme view, this might be read to reduce the constitutional right to a procedural enforcement of statutory standards. This may be as a logical extension of the public health right argument i.e. for the complete realization of the right to health and life. It is submitted that resorting to either of the interpretations would lead to the setting of environmental standards and serve the cause i.e. promotion of public health just as well.

Epilogue:

It may be noted that drinking water remains unlegislated in India. However, it has been claimed that just because quality standards for drinking water have not been legislated in the country, does not mean that they do not exist. Bureau of Indian Standards (BIS) is a statutory body created under the Bureau of Indian Standards Act, 1986. So, the standards it sets are part of statute and should be observed. Some experts suggest that if one looks at drinking water as a commodity then the services provided by local bodies can be covered under the Consumer Protection Act. One can say that in India water supply is seen as public expense and not as commodity. Others contest that if we apply Consumer Protection Act on drinking water, then it is as if the consumer is demanding from a business entity, whereas right to clean water is a fundamental right. But opinion is crystal clear on point irrespective of whether water is a commodity or public health expense, once drinking water is supplied, it should conform to specific standards.²⁸

It may be mentioned that right to clean water agreed upon in principles and policy but is not clearly specifiable. In a case concerning the pollution of River Yamuna,²⁹ the Apex Court declared that the government with all resources at their command is under a duty to ensure that unpolluted water or tolerable standard of water is maintained. How this is to be achieved is for the government to decide. All that the court is concerned with is to ensure and direct that the parameters laid down under statutory provisions with regard to the quality of water be attained.

²⁴ M.C. Mehta v. Union of India AIR 1987 SC 965.

²⁵ *Krishaiiah v. Mandal Executive Magistrate Mathukur* AIR 2001 A.P. 190.

²⁶ *Supra* note 6 at 652.

²⁷ *Charan Lal Sahu case*, AIR 1990 SC 1480.

²⁸ Sunita Narain, 'Down to Earth' Vol. 12, No. 6, 41, Aug. 15, 2003

²⁹ *A.Q.F.M, v. Central Pollution Control Board and another*, 2001 (8) SCALE 323, 325.

Vides Upadhyay of Enviro-Legal Defense Firm, Noida, U.P. says that the first and foremost thing which we need to do is to clearly specify what right to clean drinking water means which the Supreme Court of India upholds as a fundamental right. In the last few years many High Courts have passed judgments on clean water, but there is no clarity as to what the right means in qualitative and quantitative means, courts also leave it open ended, free for interpretation. There needs to be categorical pronouncements by the Supreme Court as to what right to clean water means. The second important thing after this would be to see, this direction of the Apex Court gets reflected in various statutes. Relevant changes would require to be made in specific section of the rules.³⁰ Commenting on the role of the Supreme Court with regard to Public Interest Litigations, S.K. Agrawal says that the credibility of the court depends wholly on the conviction that the relief granted by the court is enforceable and if the court issues directions which are not capable of enforcement it does not act within its judicial role.³¹ Professor Upendra Baxi also argues that both jurists and judges should accept the fact that Indian courts play a political role in which the line between legislation and adjudication is blurred.³² It is submitted that declaration of right to clean water as a fundamental is meaningless if it is not capable of enforcement. Thus, at final analysis we may identify certain fundamental principles that has led the Supreme Court to drive, adopt and apply a range of principles and standards to guide the development of environmental jurisprudence.

³⁰ Supra note 28.

³¹ S.K. Agrawal, 'Public Interest Litigation in India; A Critique', 34 (1985).

³² Upendra Baxi, 'On How Not to Judge the Judges; Note towards Evaluation of the Judicial Role', 25 JILI 211, 230-37 (1983).