

ACCELERATED WATER SECTOR REFORMS AND THE COURTS IN INDIA: An Analysis of the Recent Judicial Trends

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[Abstract: The 1990s marked the beginning of a new era with the advent of structural adjustment policies in India in various sectors, including water. These reforms are popularly known as the 'water sector reforms' and are centered around the idea of 'neoliberalizing nature,' which insists on treating natural resources subject to privatization and market regulation. The reforms also urged treating water as an 'economic good' and called for privatisation in the water sector through private water management of water and supply. International Financial Organizations such as the World Bank, the Asian Development Bank, and the International Monetary Fund promoted the reforms and called for the adoption of structural adjustment policies for countries facing severe water stress. The rationale of the said reform is that the private management of water is more effective in terms of access to water by all than the state-led management and delivery of water, especially in countries with limited resources to invest in water infrastructure.

Similarly, the Government of India adopted new water policies in 2002 and 2012. The National Water Policy of 2002 and 2012 have shifted the focus from water as a 'commons' to water as a 'commodity' and 'economic good'. It raised serious concerns regarding the right to water jurisprudence in India. The article analyses the evolving judicial trends regarding the right to water in India while considering the ongoing water sector reforms. The responses of Indian Courts to the water law jurisprudence are not unified; different courts have given different responses to the ongoing changes, leaving the status of the right to water uncertain and ambiguous.]

Keywords: *Water Sector Reforms, Right to Water, Water Privatisation, National Water Policy 2002, National Water Policy, 2012.*

I

Introduction

Courts in India have been playing a crucial role in developing water law jurisprudence. On various occasions, the courts have recognised the fundamental right to water under Article 21 of the Constitution. Similarly, by expanding various other articles of the Constitution, the courts have established the existence of the fundamental right to water in India. However, its nature and scope remained uncertain and ambiguous. The issue became more complex with the changes in the

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water law and policy with the advent of the new economic policy of the 1990s. The new economic policy has opened the doors for privatization and liberalization in various sectors in India. It resulted in adopting new policies in India in various sectors, including water.

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II

Water Sector Reforms in India: A Paradigm Shift

Over the past two decades, water law and policy have gained momentum at the international and national legal forums. The rising global water scarcity, pollution of water bodies, and increasing water demands in various developed and developing countries led to the formation of an international consensus in favour of various water sector reforms. International Financial Organizations such as the World Bank, the Asian Development Bank, and the International Monetary Fund have promoted such reforms in relation to water resources management, planning and implementation of water policies, and delivering water services to all users. However, there is no binding instrument at the international level concerning the water sector reforms, and in reality, no negotiations took place among the

international community to come to terms with an agreement on water sector reforms.¹ The reforms the International Financial Organizations promoted have greatly influenced the formation of national and state-level policies across urban and rural India. The reforms were based on full cost recovery, privatization and commercialization of water, and incorporation of the public-private partnership in water supply and its management. The Asian Development Bank defined water sector reforms as *“water sector reforms refers to the whole of a country’s policies, planning, implementation, and supporting activities to develop and manage its water resources and deliver water services to all users”*.² However, the concept of water sector reforms is comprehensive in scope and applies to all the measures taken in the water sector for improved water governance and water resource management.

With the advent of the Structural Adjustment Policy reforms of the World Bank and International Monetary Fund, a shift in India’s water law and policy started taking shape in the post-1990s. For ages, the laws in India have developed based on the socio-political structure of the country. Water has always been treated as a sacred resource in ancient India, and the Indians worshipped water bodies and rivers such as the river Ganga. During medieval India, the Mughals considered it a shared resource, and no one had the right to own the water bodies. With the rise of colonialism, common law principles such as riparian rights were incorporated based upon the principle that water is a common property of all. It was centred around sharing and conserving nature rather than treating nature as private property.³ The Indian Easement Act of 1982 also recognised riparian rights based upon the notions of extended usage of water bodies⁴.

However, with the idea of a welfare state, control and management over water were shifted from commons to state-managed water institutions.⁵ The concept of a welfare state requires the state to fulfill the basic needs of the people, such as food, water, healthcare, education, and shelter. Failure of the state-led administration and management of water resources gave rise to the consensus in favor of water privatization at the global level in the post-1990s and against the government institutions’ supply-based water management and delivery model. The poor performance in fulfilling the water supply demands resulted in an urgent need for a

¹ Philippe Cullet, WATER LAW, POVERTY, AND DEVELOPMENT-WATER SECTOR REFORMS IN INDIA 82 (2015).

²*Id.*

³ Vandana Shiva, WATER WARS, PRIVATIZATION, POLLUTION AND PROFIT(2002).

⁴ The Indian Easement Act, 1982.

⁵WORLD BANK GROUP, *Poverty and Equity*, available at:https://databank.worldbank.org/data/download/poverty/987B9C90-CB9F-4D93-AE8C750588BF00QA/SM2021/Global_POVEO_IND.pdf. (last visited Jan. 01, 2022).

shift from a supply-driven to a demand-oriented approach, influenced significantly by the World Bank in 1998⁶. In its report, the World Bank has called for “[a]n urgent shift from supply-driven to demand-oriented approaches...an explicit engagement of non-government stakeholders in sector activities.”⁷The commoditisation of natural resources occurs when private capital takes over natural resources like water, which were earlier kept outside the scope of the capital market and previously managed and regulated in ‘common’ by the public or community.

Based on similar grounds, the National Water Policy (NWP) of 2002 and 2012 promoted the IWRM approach to water management and delivery, considering the water scarcity and high water demands by various sectors in India. As we have seen in the previous parts of this paper, water has multiple uses and stakeholders; the NWP 2002 and 2012 call for an integrated approach to water. The integrated approach to water is based on the understanding that water use cannot be seen in isolation, that an integrated approach is required among various water uses, and that it is necessary to treat water as an economic good to avoid unsustainable water use. The NWP of 2002 and 2012 states that “private sector participation should be encouraged in planning, developing, and managing water resources projects for diverse uses, wherever feasible.”⁸ It further states that “private sector participation may help introduce innovative ideas, generate financial resources, introduce corporate management, improve service efficiency and accountability to users”.⁹ Also, it provides that “depending on the specific situations, various combinations of private sector participation may be considered in building, operating, leasing, and transferring water resources facilities.”¹⁰

The National Water Policy of 2012 urged “...for improved service delivery on a sustainable basis; the State Governments / urban local bodies may associate private sector in public-private partnership mode with penalties for failure, under regulatory control on prices charged and service standards with full accountability to democratically elected local bodies.”¹¹ Based on these policy reforms, many states have adopted various public-private partnership (PPP) schemes in water supply and management, such as the

⁶WORLD BANK, INDIA, *Water Resources Management Sector Review, Rural Water Supply and Sanitation Report*, 1998, available

at: http://www.indiawaterportal.org/sites/indiawaterportal.org/files/India_Water%20resources%20management%20sector%20review_Rural%20water%20supply%20and%20sanitation%20review_%20World%20Bank_19988.pdf (last visited Dec. 28, 2020).

⁷MC Mehta v. Kamal Nath, (1997)1 S.C.C. 388.

⁸Supra note 6.

⁹Id.

¹⁰Id.

¹¹ Hugo Tremblay, *Clash of Paradigms in the Water Sector - Tensions and Synergies between Integrated Water Resources Management and the Human Rights-Based Approach to Development*, NAT. Resources J. 51, 307 (2011).

24*7 water supply scheme introduced in Delhi, Maharashtra, Andra Pradesh, Madhya Pradesh, and the five districts of Karnataka, namely, Belgaum (South), Belgaum (North), Hubli, Dharwad, Gulbarga¹² funded by the World Bank.¹³ However, the proponents of HRBA to water argued that the involvement of the private sector in water management and delivery would lead to the exclusion of the poor and marginalised section of society.¹⁴ The exclusion of poor and marginalised sections of society cannot be accepted in any democracy, especially in India, where two-thirds of the population is below the poverty line. Many case studies have shown that public-private partnership models in water management and delivery have failed to prove what they promised and ultimately resulted in protests by the people, and the governments have to put them either on hold or close such projects.¹⁵

III

Courts and the Establishment of the Right to Water in India

The law relating to water is not new in India, and it can be traced back from ancient times to the modern period of colonialism and post-colonial development in water laws and water-based laws. However, the former water law was relatively underdeveloped. Over the past decades, the water law in India has focused on land rights, irrigation, and ownership over groundwater, leaving a gap in the drinking water supply and its regulation of conservation and protection from pollution. The long-standing focus on regulating the access and control over water and water resources, multiple laws on various aspects of water, including irrigation and groundwater control, and the lack of a comprehensive water law framework have made the study a complex issue.

India does not expressly mention a human right to water under any constitutional or legal instruments; however, the courts in India have recognised a fundamental right to water within the meaning of the Right to Life under Article 21 of the Constitution¹⁶. The constitutional guarantee of clean drinking water can be drawn

¹²WORLD BANK ASSISTED KARNATAKA URBAN WATER SECTOR IMPROVEMENT PROJECT, *available at*:https://mohua.gov.in/upload/uploadfiles/files/KUWASIP_Karnataka_PPT_0.pdf (last visited Jan. 01, 2022).

¹³KARNATAKA URBAN WATER SUPPLY IMPROVEMENT PROJECT, PUBLIC-PRIVATE PARTNERSHIPS IN INDIA, *available at*:<https://www.pppinindia.gov.in/toolkit/urban-transport/module3-rocs-kuwsip1.php?links=kuwsip1> (last visited Jan. 12, 2022).

¹⁴ Amit Bhaduri & Arvind Kejriwal, *Reforming the Reformers*, 40EPW 5543-5545(2005).

¹⁵Director-General of the International Labour Office, *Employment, Growth and Basic Needs: A One-World Problem, Tripartite World Conference on Employment, Income Distribution and Social Progress and the International Division of Labour, ILO, International Labour Office Geneva*, (1976).

¹⁶ Philippe Cullet, *Water Sector Reforms and Courts in India*, III RECIEL 19, 328-338 (2010).

from various judgments of the Supreme Court of India dealing with the right to food¹⁷, the right to the environment¹⁸, and the right to health¹⁹, all of which have been guaranteed by the Supreme Court under Article 21 of the Constitution of India. Article 39(b)²⁰ of the Directive Principle of State Policy also recognises “equal access to the material resources of the community”, which directs the state government to ensure through its policy equality and common good in terms of ownership and control over the material resources of the community. The courts in India have protected safe drinking water as a human right through various decisions. Concerning the nature of water as a resource, the Supreme Court in *M.C. Mehta v. Kamal Nath*²¹ held that “the Public Trust Doctrine primarily rests on the principle that certain resources like air, sea, waters and the forests have such great importance to the people as a whole that it would be wholly unjustified to make them a subject of private ownership. The said resources being a gift of nature, they should be made freely available to everyone irrespective of the status in life.”²² The doctrine encourages the Government to protect the resources for the general public’s enjoyment rather than permit their use for private ownership or commercial purposes.

Further, the High Court of Andhra Pradesh in *Ashok Kumar Agarwal v. Hyderabad Metropolitan Water Supply and Sewerage Board and Ors*²³ clearly stated that the “right to access to drinking water is fundamental to life and there is a duty on State under Article 21 to provide clean drinking water to its citizens.” The case is a breakthrough in establishing the jurisprudence of the right to water as the court has recognised the right to water as a fundamental right and put an obligation, a duty on the state, to satisfy the basic water needs of the people. The right to water can also be derived from Article 47²⁴ of the Constitution, and the courts in India, on repeated occasions, have established that the right to water includes a positive duty on the part of the state to provide water to the public.²⁵

¹⁷*Kishen Patnaik v. State of Orissa*, A.I.R. 1989 S.C. 677.

¹⁸*M.C. Mehta v. Union of India*, A.I.R. 1988 2 S.C.R. 538.

¹⁹*Hamid Khan v. State of Madhya Pradesh*, A.I.R. 1997 M.P. 191.

²⁰The Constitution of India, 1950, Art. 39(b).

²¹*Supra* note 7.

²² Sólón Pablo, THE RIGHTS OF MOTHER EARTH, THE CLIMATE CRISIS: SOUTH AFRICAN AND GLOBAL DEMOCRATIC ECO-SOCIALIST ALTERNATIVES(2018).

²³*Ashok Kumar Agarwal v. Hyderabad Metropolitan Water Supply and Sewerage Board and Ors* (2006) 3 A.L.D. 541.

²⁴The Constitution of India, 1950, Art. 47.

²⁵WORLD BANK GROUP, *Poverty and Equity*, available at: https://databank.worldbank.org/data/download/poverty/987B9C90-CB9F-4D93-AE8C750588BF00QA/SM2021/Global_POVEO_IND.pdf. (last visited Jan. 08, 2022).

IV

Water Sector Reforms and the Courts in India: An Analysis

As we have seen, the courts have often asserted the fundamental right to water; therefore, the Supreme Court and the High Courts in India have upheld this right theoretically in multiple cases. However, the courts did not concentrate on its nature and scope but instead used it as a foundation for the specific judgements on establishing the right to water jurisprudence. Nonetheless, in certain circumstances, courts have addressed some of the broad features of the nature and content of the right. In *Vishala Kochi Kudivella Samarkshana Samithi v. State of Kerala*, the court said explicitly that the government “is bound to provide drinking water to the public” and that this should be the Government’s priority.²⁶ In *Hamid Khan v. State of Madhya Pradesh*, the Government was sued for failing to take enough safeguards to guarantee safe drinking water free of excessive fluoride.²⁷ By invoking Article 47 of the Constitution, the court held that the state is responsible for “improving the health of the public by providing unpolluted drinking water.”²⁸ It further held that it is the “primary responsibility” of the state to provide safe drinking water to its citizens under Article 21 of the Constitution.

Further, it has been said that under Articles 47 and 21, the state has a duty “to provide pure drinking water to every citizen of India.”²⁹ The courts, therefore, have attempted to broaden the scope of the right to water under the Constitution of India. In *Dr. K.C. Malhotra v. State of Madhya Pradesh*, the High Court drew the connection between water, health, and sanitation in the framework of basic rights.³⁰ However, in another case, *Venkatagiriappav. Karnataka Electricity Board*, the court narrowed the scope of the right to water while establishing that the right to water does not include water for irrigation or business purposes.³¹

Drinking water is a primary use of water and has been given priority over other water uses. Indian courts also, from time to time, recognise drinking water within the scope of the fundamental right to water and have given it the priority it deserves in disputes involving inter-sectoral water distribution. Drinking water has also been established as a core content of the right to water. However, while the case laws discussing the fundamental right to water mention drinking water numerous times,

²⁶*Vishala Kochi Kudivella Samarkshana Samithi v. State of Kerala*, (2006) 1 K.L.T. 919.

²⁷*Supra* note 20.

²⁸*Id.*

²⁹*Id.*

³⁰*Dr. K.C. Malhotra v. State of Madhya Pradesh*, A.I.R. 1994 M.P. 48.

³¹*Venkatagiriappav. Karnataka Electricity Board, Bangalore*, (1999), 4 KarLJ 482.

drinking water remained the immediate focus only on a few occasions. In the case of *F.K. Hussain v. Union of India*, the right to clean drinking water was not the direct outcome of the case.³² Similarly, in the case of *DLF Universal Ltd v. Prof. A. Lakshmi Sagar*, drinking water was considered from the perspective of health and the environment. The case law concerning drinking water is extensive but has not contributed to creating a fully developed body of principles in this field.

At various times, Indian courts have dealt with environmental and water-related issues. The types of interventions made by the courts range from exceedingly broad pronouncements to relatively narrow technical difficulties. On a broad level, the courts have emphasised the importance of water to life on Earth. The connection between water pollution and drinking water was also recognised by the courts in various cases. In the case of the *Indian Council for Enviro-Legal Action v. Union of India*, the Supreme Court addressed the issue of pollution of the drinking water sources of the inhabitants of the village in Rajasthan and held it is a violation of the right to water under Article 21 of the Constitution.

Further, in the case of *Andhra Pradesh Pollution Control Board II v. Prof. M.V. Nayudu*, the Supreme Court held that one of the primary objectives of the Water Act is to provide clean drinking water to the people.³³ In another case, *Tirupur Dyeing Factory Owners Association v. Noyyal River Ayacutdars Protection Association*, the Supreme Court found further connections between water, the environment, and economic development. It reiterated the importance of preventative and precautionary principles and the concept of sustainable development.³⁴

The case laws on water from the last two decades demonstrate that Indian courts have presented several alternative solutions to the problems they have encountered.³⁵ From establishing the jurisprudence on the fundamental right to water to various environmental law principles such as polluters pay principles, sustainable development, the precautionary principle and the public trust doctrine, the Indian courts have established the rule of law on the water and environment. On the one hand, the courts have also shown their unwillingness to go beyond the established principles, and on the other, they have also shown concern with the changing environment, particularly the advent of critical economic changes and, more significantly, reforms to the water sector. Nonetheless, courts have refrained

³²*F.K. Hussain v. Union of India*, A.I.R. 1990 K.e.r. 321.

³³*Andhra Pradesh Pollution Control Board II v. Prof. M.V. Nayudu*, (2000) 3 SCALE 354.

³⁴*Tirupur Dyeing Factory Owners Association v. Noyyal River Ayacutdars Protection Association & Others*, (2009) 9 S.C.C. 737.

³⁵*Supra* note 2.

from making sweeping declarations.³⁶ This approach of the court has created a gap in the law with reference to the conflicting issues of water as a fundamental right and water as an economic good. With the advent of private participation in India's water management and delivery and with the adoption of the public-private partnership in various states in India, water supply has required a broader interpretation of the various dimensions of the right to water by the judiciary. Simultaneously, courts have moderated using a basic rights-based approach by seeing water through conventional eyes regarding matters such as large economic development projects or urban planning and development.³⁷ Rather than emphasising the fundamental nature of water as essential to human survival, agriculture, and civilisation, Indian courts have frequently viewed water through its contribution to aggregate economic development, emphasising the already privileged people's position in society.³⁸

V

Conclusion

The Indian courts have established the jurisprudence of the right to water on various occasions. In terms of the importance of water to the everyday lives of the people and the environment in general, water has been, is, and will continue to be one of the most critical concerns the Indian court must handle. The evolution of case law demonstrates that Indian courts have placed a high value on the fundamental right to water in recent decades. They have utilised the right to water in conjunction with other concepts, such as the application of the public trust in water, to remedy some of the flaws of water law, such as the lack of framework legislation outlining the core principles controlling water, especially drinking water. Similarly, the Indian judiciary has shown an active role in establishing the principles concerning water pollution or the environment and established various doctrines in response to the said issues. The advent of the structural adjustment policies in the 1990s, resulting in the adoption of water sector reforms, has shifted fundamental understanding and the rule of law concerning water in India. The National Water Policy of 2002 and 2012, which recognised water as an economic good, has created a gap in understanding water as a human right, basic human need, or commodity. There are not many judgements that directly address the issue; however, the courts, on one or two occasions, have emphasised that the state must provide access to water to the people at large. The article concludes that there is a need for the Indian courts to

³⁶*Id.*

³⁷*Id.*

³⁸*Id.*

examine the issue pertaining to water as an economic good *vis-à-vis* water as a fundamental right.