

# WATER AS A FUNDAMENTAL RIGHT: A PERSPECTIVE FROM INDIA

Vrinda Narain\*

## I. CONTEXTUALIZING THE RIGHT TO WATER IN INDIA.

Across the globe there are rising concerns about the economic, social and environmental aspects of the world water crisis and about the structural aspects of a lack of access to basic water resources. Related issues are inequities in access to water resources, the privatization of water in the context of neo-liberal policies and a continued resistance to the recognition of economic and social rights. The increasing scarcity of water has resulted in efforts both internationally and domestically, in particular in developing nations to advance a human rights based approach to access to water.<sup>1</sup> This approach is gaining force, with India and South Africa foremost among those nations advocating a rights-based approach.<sup>2</sup>

India offers a fascinating lens through which to view the issues raised by a rights based approach to access to water. The *Constitution of India* is a remarkable document with an explicit transformatory agenda, drafted at a moment when the ideals and aspirations of human rights were compelling to the newly independent nation. Recognizing the role of law and the significance of rights in remedying the sharp inequities of colonial India with its divisions of class, caste, gender and religion, the *Constitution* incorporates notions of universal human rights. Taking its postcolonial constitutional mandate for social reform through judicial activism seriously, the Indian Supreme Court has been remarkably enthusiastic about interpreting the *Constitution* to reach decisions in favor of the justiciability of social and economic rights. Although the right to water is not a fundamental right, the Supreme Court has over the years creatively read in the right to water through the right to life.<sup>3</sup> The Court has also been receptive to incorporating international law in its analysis of socio-economic rights.

However, despite this progressive jurisprudence, the state has done little to enforce judicial decisions, or to initiate domestic legislation to bring

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\* Assistant Professor, Faculty of Law, McGill University; Research Associate, Department of Afroasiatic Studies, Sign Language and Language Practice, University of the Free State, South Africa.

1. Note, *What Price for the Priceless?: Implementing the Justiciability of the Right to Water*, 120 *Harvard Law Review* 1067, 1068 (year).

2. Erik B. Blueme V, *Implementing a Right to Water: Domestic Experiences*, 31 *Ecology Law Quarterly* 957 (2004).

3. Note, *supra* note 1, at 1067.

it into conformity with India's international law obligations. Notwithstanding constitutional mandates and judicial injunctions, millions of Indians, in particular, women and children, do not have adequate access to water. According to the World Water Development Report, 2003, in terms of availability of water, India is at the 133rd position among 180 countries and as regards the quality of the water available, it is 120th among 122 countries.<sup>4</sup> 17% of India's population does not have access to potable water, 80% of children suffer from waterborne diseases and a total of 44 million people have illnesses related to poor water quality.<sup>5</sup>

In this comment, I focus on the treatment of the right to water in Indian constitutional jurisprudence, evaluating its potential and emancipatory possibilities. Recognizing access to water as a human right could be a tool in the hands of marginalized groups to hold the state accountable. I consider the challenges that lie ahead in recognizing such a right, and the potential of constitutional jurisprudence to revitalize the public trust doctrine as initiated by Joseph Sax as a way for common citizens to hold the state accountable.<sup>6</sup>

I retain an awareness of the difficulties in translating the rights articulated at the Supreme Court level to the material context of ensuring that governance structures are in place to actually enforce these rights. I acknowledge the need to recognize the specific context of group rights to water based on customary law and tradition. In fact, customary law in India supports the notion of the right to water and there is a recognition of the broad social right to access to water.<sup>7</sup> Currently, the debate in India on water rights is focused on in whom the rights should be vested, individuals or the state in trust.<sup>8</sup> The government asserts that the right should vest in the state, whereas Ngos and academics argue for rights to be vested at various levels, rather than all lying with the state. This latter position calls for a system of correlative rights vested in cooperatives together with some rights vested in the state through the public trust doctrine.<sup>9</sup> Arguably, as suggested by some experts, a structure whereby individual use rights and

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4. S. Muralidhar, *The Right to Water: An Overview of the Indian Legal Regime*, in *The Human Right to Water* 65–81 (Eibe Riedel and Peter Rothen eds., 2006), available at <http://www.ielrc.org/content/a0604.pdf>.

5. Ruchi Pant, *From Communities' Hands to MNCs' Boots: A Case Study from India on Right to Water*, 16 *Rights and Humanity*, UK (Right to Water Project), available at [http://www.righttowater.org.uk/pdfs/india\\_cs.pdf](http://www.righttowater.org.uk/pdfs/india_cs.pdf).

6. Joseph L. Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 *Michigan Law Review* 471 (1970).

7. Marcus Moench, *Allocating the Common Heritage: Debates over Water Rights and Governance Structures in India*, 33 *Economic and Political Weekly* no. 26 (Jun. 27 – Jul. 3, 1998), pp. A 46-A53 at A48.

8. *Id.* at A49.

9. *Id.* at A50.

market forces are mediated by governance structures would be a pragmatic response to the increasing scarcity of water resources.<sup>10</sup>

## II. THE LEGAL FRAMEWORK.

Internationally the right to water is not directly recognized, although there is gathering momentum to do so. The adoption in 2002 of General Comment 15 on the right to water by the UN Committee on Economic, Social and Cultural Rights is understood as the defining moment in supporting a human rights approach, articulated as the “right of everyone to sufficient, safe, acceptable, physically accessible and affordable water for personal and domestic uses”.<sup>11</sup> Subsequently, the UNDP’s 2006 *Human Development Report* recommended that countries should make water a human right.<sup>12</sup> Most recently, however, in March 2009 at the World Water Forum, countries have demonstrated a continuing reluctance to recognize water as a human right, notably the United States, Canada and China, preferring to call it a basic need.<sup>13</sup> The notion of water as an economic good rather than as a fundamental human right persists as the transition to articulating access to water as a fundamental right is fraught with political and economic tensions. As the Indian case illustrates, there are several difficulties in realizing the right to water.<sup>14</sup> The Indian Supreme Court has grappled with the question of whether the right to water is best understood as an independent human right or as a subsidiary right necessary to achieve other economic and cultural rights.

International efforts however, so far, have been insufficient and states are not subject to any legally binding obligations to recognize water as a human right.<sup>15</sup> General Comment 15 does not explicitly recognize the enforceability of a right to water.<sup>16</sup> There is no enforcement mechanism; countries are merely required to take steps subject to “the maximum of their available resources.”<sup>17</sup> Nevertheless, there have been some national governments that have invoked these international commitments while interpreting economic social and cultural rights.<sup>18</sup> Arguably, international

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10. *Id.*

11. General Comment 15 (2002) on the Right to Water by the UN Committee on Economic, Social and Cultural Rights. *available at* <http://www.unhcr.ch/html/menu2/6/gc15.doc>.

12. UNDP’s Human Development Report’s recommendations.

13. The PLoS Medicine Editors (2009). “Clean Water Should be recognized as a Human Right”. *PLoS Med* 6(6): e1000102. Doi:10.1371/journal.pmed.100102.

14. Blueme, *supra* note 2, at 962–63.

15. *Id.* at 977.

16. *Id.* at 971, 972.

17. Moench, *supra* note 10.

18. Note, *supra* note 1.

law has a normative impact on states as demonstrated by the adoption of international human rights norms by the Indian Supreme Court.<sup>19</sup>

In India, the *Constitution* does not recognize a fundamental right to water. However, the right to water has been derived from the fundamental right to life under Article 21 of the *Constitution*.<sup>20</sup> In addition, the *Constitution* recognizes economic, social and cultural rights under the Directive Principles of State Policy. Although non-justiciable, they are fundamental to the formulation of public policy, governance and the interpretation of constitutional rights.<sup>21</sup> Article 39 (b) provides: “The State shall, in particular, direct its policy towards securing ... that the ownership and control of the material resource of the community are so distributed as best to sub serve the common good.”<sup>22</sup> The *Constitution* obliges the state and all citizens to protect the environment.<sup>23</sup> It also emphasizes India’s obligation to respect international law.<sup>24</sup>

The fundamental right to water has evolved in India, not through legislative action but through judicial interpretation. Indian Supreme Court decisions deem such a right to be implied in Article 21, the right to life, interpreted to include all facets of life and to also include the right to a clean environment to sustain life.<sup>25</sup> While upholding the Indian government’s decision to construct over 3000 dams on the river Narmada, the Supreme Court stated in *Narmada Bachao Andolan*, that “Water is the basic need for the survival of human beings and is part of the right to life and human rights as enshrined in Article 21 of the Constitution of India ... and the right to healthy environment and to sustainable development are fundamental human rights implicit in the right to life.”<sup>26</sup> Understanding the right to water as implied in the recognition of the right to a clean environment, 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*.<sup>27</sup>

The Supreme Court has been proactive in the context of the state’s duty

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19. *Vellore Citizens’ Welfare Forum v. Union of India* 2004(12) SCC 118.

20. **Need cite to constitution of India—likely just in the bluebook!** Article 21: Protection of life and personal liberty.- No person shall be deprived of his life or personal liberty except according to procedure established by law.

21. A. 37, Indian Constitution.

22. Article 39 (b).

23. Article 51-A (g).

24. Article 51(c).

25. *Francis Coralie Mullin v. The Administrator, Union Territory of Delhi* 1981 (2) SCR 516.

26. *Narmada Bachao Andolan v. Union of India* AIR 2000 SC 3751; 248 (2000) 10 SCC 664.

27. (2001) 6 SCC 496 at 501; *Attakoya Thangal*, AIR 1990 Ker 321; *Subhash Kumar v. State of Bihar* AIR1991 SC 420.

not to pollute, mandating the cleaning up of water sources and the coastline by the polluter and restitution of the soil and ground water. The Court has also applied the 'precautionary principle' to prevent the potential pollution of drinking water sources consequent upon the setting up of industries.<sup>28</sup> In *M.C. Mehta v. Union of India*, 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.<sup>29</sup> In *A.P. Pollution Control Board v. Prof. M.V. Nayadu* the Court held that the right to access to drinking water is fundamental to life, and that the state has a duty under Article 21 to provide clean drinking water to its citizens.<sup>30</sup> In *M. C. Mehta versus 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>31</sup>

A landmark decision is *Vellore Citizens' Welfare Forum v. Union of India* dealing with compensation to victims of water pollution caused by tanneries.<sup>32</sup> The Supreme Court incorporated principles of customary international law: the polluter pays principle and the precautionary principle, as an integral part of domestic environmental law, linking them with the fundamental right to life in Indian constitutional law. Emphasizing the duty of the government to prevent and control pollution, the Supreme Court held that, "the constitutional and statutory provisions protect a persons right to fresh air, clean water and pollution free environment, but the source of the right is the inalienable common law right of clean environment."<sup>33</sup>

Significantly, the Supreme Court has recognized that water is a community source to be held by the State in public trust in recognition of its duty to respect the principle of inter-generational equity.<sup>34</sup> In *M.C. Mehta v. Kamal Nath* 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

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28. Muralidhar, *supra* note 4, at 3; *M.C. Mehta v. Union of India* AIR 1988 SC 1037, *M.C. Mehta v. Kamal Nath* (1997) 1 SCC 388; *S. Jagannath v. Union of India* (1997) 2 SCC 87. *A.P. Pollution Control Board v. Prof. M.V. Nayudu* (1999) 2 SCC 718; *A.P. Pollution Control Board (II) v. Prof. M.V. Nayudu* (2001) 2 SCC 62.

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

30. *See cases accompanying note 27.*

31. *Vellore Citizens' Welfare Forum v. Union of India* 2004(12) SCC 118.

32. AIR (1996) 5 SCC 647.

33. AIR (1996) 5 SCC 647 at 661.

34. *M.C. Mehta v. Kamal Nath* AIR 2000 SC 1997 34.

seashore, running waters, air, forests and ecologically fragile lands. The State as a trustee is under a legal duty to protect the natural resources. These resources meant for public use cannot be converted into private ownership.”<sup>35</sup>

### III. CHALLENGES AHEAD

Despite this well-developed jurisprudence affirming the justiciability of the right to water and imposing a duty on the state to protect the environment and water resources, all citizens do not have adequate access to water, demonstrating that an enabling legal regime is by itself insufficient. Measuring its performance in relation to the Millennium Goals set out in *General Comment 15*, India has a long way to go.<sup>36</sup> The statutory framework and the law governing water in India are fragmented and inadequate and there is no coherent water policy, there is a lack of infrastructure and of water resources.<sup>37</sup> India needs to develop a comprehensive approach to enforcing economic and social rights and to formulate public policy based on the understanding that access to water is an integral part of other social and economic rights.<sup>38</sup> Water management and access to water must be informed by the objectives of equity and social justice. Certainly, social and economic rights are politically sensitive and require a reallocation of state resources. However, questions of economic development, affordability and lack of resources ought not to be permissible justifications for a refusal to recognize the right to water.<sup>39</sup> The state should ensure equitable distribution of water, rather than be concerned with assuming proprietary rights over water. The notion of water as an economic good, leading to the privatization of water and water resources could have a profound impact on marginalized groups.

Drawing lessons from South Africa, arguably it might be more effective to articulate the right to water as a positive right rather than as a negative right as part of the right to clean environment under Article 21.<sup>40</sup> Although the advantage of the Indian model is that it gives governments a certain flexibility, the disadvantage is that in the absence of a legislative

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35. *Id.*

36. Muralidhar, *supra* note 4, at 9.

37. *Id.*

38. Millennium Development Goals General Comment No. 15.

39. Vellore Welfare, *supra* note 18; Mehta, *supra* note 27.

40. The South African Constitution guarantees access to “sufficient clean water” as a basic right, allowing individuals to take legal action when they have been denied water; see the landmark *Grootboom* case.

right, the judiciary is forced to take on the tasks of the legislature.<sup>41</sup> Furthermore, the judiciary is forced to read in the right to water as a negative right, articulated in terms of what the state is not permitted to do, such as a duty not to pollute, rather than a recognition of the positive duty of the state to provide access to water for all.<sup>42</sup> This reduces the burden on the state to act to address the structural aspects of a lack of access to water, absolving it of any responsibility proactively to enforce socio-economic rights. In the context of the profound vulnerability of India's poor and disenfranchised populations, such a passive approach is inadequate and it is critical to have an affirmative, positive right.<sup>43</sup> Having an enforceable right also places citizens in a more stable position in relation to the state.<sup>44</sup>

The Public Trust doctrine would be an effective way of recognizing a positive right to water, which is essential to the more equitable distribution of, and access to water. Sax's conception of the public trust doctrine is useful in the Indian context. Sax sees the public trust doctrine as a way of democratizing state action.<sup>45</sup> It gives the judiciary a technique to address the lack of action by the legislative and administrative process.<sup>46</sup> However, this expansion of the public trust doctrine in natural resource law has been criticized as being undemocratic, allowing for the undermining of administrative decisions by the judiciary, raising doubts about the appropriateness of judicial competence to make social and public policy decisions that the legislature and the executive branch should make.<sup>47</sup> Finally, there is a fear that the public trust doctrine could encroach on private property rights.<sup>48</sup> Certainly there are shortcomings of the public trust doctrine, in terms of the limitations of rights themselves and the fact that economic and social rights are seen as rights "subject to the reasonable demands of other users."<sup>49</sup> Indeed, Sax acknowledges that rights under the public trust doctrine are to be balanced against "needful development and industrialization."<sup>50</sup>

However, rather than being a subversion of the democratic process, the

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41. Note, *supra* note 1, at 1084.

42. *Id.*

43. *Id.*

44. *Id.* at 1087.

45. *Id.*

46. Sax, *supra* note 6, at 509, 521.

47. William Araiza, *Democracy, Distrust, and the Public Trust: Process-based Constitutional Theory, the Public Trust Doctrine, and the Search for a Substantive Environmental Value*, Issues in Legal Scholarship, (2003) p.15 available at <http://www.bepress.com/ils/iss4/art1>.

48. *Id.*

49. Sax, *supra* note 6, at 485.

50. JOSEPH L. SAX, DEFENDING THE ENVIRONMENT: A STRATEGY FOR CITIZEN ACTION 170-71 (1971).

public trust doctrine is an affirmation of it. As Sax argued, the public trust is a way for citizens to assert their rights and to enforce responsible state stewardship of public resources, empowering the common citizen against a powerful state.<sup>51</sup> Sax saw it as a tool that could be used by citizens to counter the misappropriation of common resources either by the state or by private parties.<sup>52</sup> The Indian Supreme Court has embraced the public trust doctrine as vital both for environmental protection as well as access to water. In *M.C.Mehta v. Kamal Nath*, the Court declared: “The State is the trustee of all natural resources, as a trustee the State has a legal duty to protect the natural resources and these resources meant for public use cannot be converted into private ownership.”<sup>53</sup> This public trust doctrine needs state legislative recognition. The constitutional mandate as embodied in Article 39(b) is that all resources of the country must be used for the common good. Through this, the right to water must be understood as vesting in the people as a fundamental human right.

The decisions coming out of the Supreme Court of India are encouraging. It has been receptive to the notion of public stewardship of natural resources and ensuring public access through the imaginative use of the public trust doctrine. However, despite progressive Supreme Court decisions, in most local contexts it is the network of customary laws that generally influence local actions and govern access to water.<sup>54</sup> Nevertheless, the normative impact of these decisions is significant, creating a framework within which to articulate and forward claims to access to water as a fundamental right. In conjunction, it is also necessary to develop institutions and governance structures that ensure more equitable access to natural resources, moving towards the implementation of rights, balancing individual rights, group rights and public policy and governance issues.<sup>55</sup> The public trust doctrine is a crucial part of this endeavor: it gives the judiciary the possibility of holding the state accountable to ordinary citizens, it permits disempowered groups to claim their rights in the face of state power by invoking notions of public stewardship and fiduciary obligations of the state towards all citizens while drawing justification from the fundamental right to life. I conclude with the suggestion that the public trust doctrine is critical to articulating the positive duty of the state to

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51. Sax, *supra* note 6, at 521; David Takacs, “The Public Trust Doctrine, Environmental Human Rights, and the Future of Private Property”, *N.Y.U. Environmental Law Journal* Vol. 16, 2008 711 at 715.

52. Sax, *supra* note 6, at 484.

53. *M.C. Mehta v. Kamal Nath* AIR 2000 SC 1997.

54. Moench, *supra* note 7, at 48.

55. *Id.*

protect the access rights of all citizens to the state's natural resources, including the right to water. There is a certain tension between the notion of water as a common resource and the conception of water as an economic good. The public trust doctrine can be used to mediate the tensions between the recognition of group interests, private interests and the state's interests. Ultimately, any solution must consider the rights claims of communities, individuals and the common rights that reflect the universal ownership of water resources.<sup>56</sup>

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56. *Id.* at 48–51.