Review Paper

Constitutional mandate and judicial initiatives influencing Water, Sanitation and Hygiene (WASH) programmes in India

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ABSTRACT

This paper undertakes a thorough review of the legislative and policy framework of water supply and sanitation in India within the larger backdrop of the universal affirmation of right to water and sanitation under the UN WASH initiatives, first articulated under the Millennium Development Goals (MDGs). Recognizing the proactive role played by the Indian judiciary in this regard, the paper examines various patterns of judicial reasoning in realising the right to water and sanitation as Constitutional rights of citizens. The paper observes that through a consistent 'rights-based' approach, the Indian judiciary has systematically articulated and achieved the objectives of the UN WASH initiatives long before they were spelled out under the MDGs. The paper highlights the need for the Government to recognise and incorporate judicial insights in implementing developmental projects under the WASH initiatives.

Key words | constitution, Indian judiciary, right to sanitation, right to water, Sustainable Development Goals (SDGs), WASH programmes

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INTRODUCTION

Access to clean drinking water and sanitation services has received great importance internationally in recent times. Today, the world population that bears the brunt of the crisis of drinking water and lacks the most basic sanitation facilities is disproportionately high (UNICEF undated a). According to the recent estimates of UNICEF (undated a), 663 million people lack access to clean drinking water. The relation between proper water and sanitation services and the economy of a country is direct and inseparable due to the indispensability of these services for its people to lead a healthy and productive lifestyle (UNICEF undated b).

Realizing the ripple-effect of water scarcity and inadequate sanitation, access to clean drinking water and sanitation services have been recognized as human rights at the international level. The commitments to provide the same have been strengthened through various international developments. Of central importance to these developments are 'The Johannesburg Plan of Implementation' at the World Summit on Sustainable Development, Johannesburg 2002 (*Report of the World Summit on Sustainable Development* 2002) and the outcome document of the United Nations Conference on Sustainable Development, held in Rio de Janeiro in 2012 (for detailed evolution, see Murthy 2013).

A crucial initiative taken in this regard is the Water, Sanitation and Hygiene (WASH) programmes. They derive their mandate from the United Nations Millennium Development Goals (MDGs) target 7C, which seeks to ensure environmental sustainability. One of the four targets recognised within this goal is to reduce by half the proportion of population without sustainable access to safe drinking water and basic sanitation by 2015. In order to achieve the target, a new UNDP initiative called the GoAL–WaSH programmes was introduced in 2008, declaring the start of the international decade of sanitation.

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At the conclusion of the target year of the MDGs, the Sustainable Development Goals (SDGs) were launched in 2015, building on the progress achieved through the model envisaged by the MDGs. Combining within them a package of 17 goals to end poverty, fight inequality and injustice and tackle climate change by the year 2030, the SDGs recognised universal access to clean water and sanitation as one of their goals (Goal 6) (see https://sustainabledevelopment.un.org/; *Sustainable Development Goals,* UNDP *2017*).

India committed to the MDGs and has consistently expressed its commitment to the goals, given their close convergence with India's own development goals to reduce poverty. With the arrival of 2015, the target year for the goals to be achieved and a reassessment of the national policies and their success were carried out on a large scale. An attempt is made through this paper to understand India's success with the WASH goals, by focusing exclusively on its approach towards realising the right of its citizens to water and sanitation.

With a view to understanding the legal and policy framework pertaining to water and sanitation in India since its adoption of the MDGs, the first section of the paper takes the reader through the Constitutional basis for the aforesaid rights. In the second section of the paper, the legal and policy developments in the water sector in India are located and examined within the distinctive legislative mandates of the Central and State Governments. The paper seeks to argue that despite the alignment of water law and policy to the MDGs subsequent to their adoption in India, the right to water is not clearly defined in any capacity through legislation. The momentous contribution made by the judiciary in this regard forms the centre of discussion of the third section of the paper.

Through a discussion of landmark judicial decisions that clearly recognise and define the fundamental right to water, the paper suggests that the judiciary has been more successful in moving towards achieving the WASH goals than the legislative and executive arms of the Government. While the paper recognises the vital need for a step to constitutionally recognise the right to water, it seeks to highlight the success of the constructive rights-based approach adopted by the judiciary in progressing towards realising the WASH goals.

CONSTITUTIONAL MANDATE FOR WATER, SANITATION AND HYGIENE (WASH) IN INDIA

The Indian Constitution distributes and endows the power to legislate on various subjects between the Central and State Governments under the three lists (Union, State and Concurrent) contained within the Seventh Schedule. In the Union list only the Central Government can legislate, while the State Governments legislate subjects provided in the State list, and in the Concurrent list both Central and State legislatures are given the power to legislate. This outline of distribution of powers is done within Part XI of the Constitution. Water and sanitation find a place as Entries 17 and 6 respectively, under List II – the State List. In other words, the State Governments are constitutionally authorised to enact legislations involving public health, sanitation, hospitals and dispensaries (Entry 6, List II, Schedule 7) and water supplies, irrigation and canals, drainage and embankments, water storage and power (Entry 17, List II, Schedule 7, subject to the provisions of Entry 56 of List I). Due to the paper's specific focus on the supply of drinking water and sanitation services, it confines itself to examining the laws and rules that have emerged from the powers of State Governments and the local self-governing institutions under List II, Schedule 7 of the Constitution.

Apart from devolving responsibility to legislate in the domain of water and sanitation to the State Governments, the Constitution further decentralises the administration of water and sanitation facilities subsequent to the 73rd and 74th Constitutional Amendments inserted into the Constitution through the Constitution (Seventy-Third Amendment) Act, 1992, commonly referred to as the Panchayat Raj Act and the Constitution (Seventy-Fourth Amendment) Act, 1992 referred to as the Nagarpalika Act. These Amendments played a significant role in the inclusion of local self-governing institutions, that is, the *panchayats* at the village level, into the network of the administrative infrastructure of the country. *Panchayats* are local self-governments in rural areas, mandated in the Constitution of India, which became an integral part of governance under the State Governments as per Part IX of the Constitution after the 73rd Constitutional Amendment in 1993. Through these Amendments,

provisions were added to the Constitution, which introduced local self-governing institutions of municipalities and *panchayats* for supply of water and sanitation facilities in urban and rural areas. For instance, under Article 243G of the Constitution, States are empowered to make laws and endow power and responsibilities upon the *panchayats* in respect of matters mentioned in the Eleventh schedule. Drinking water (entry 11), health and sanitation (entry 23) have been covered as matters under the Eleventh schedule. Thus, in effect, the *panchayats* can be authorised by States to ensure provision of drinking water, health and sanitation services under the Constitution. Similarly, under Article 243 W Municipalities may be authorised by the State with powers and responsibilities in respect of water supply (entry 5 of Twelfth Schedule) and public health, sanitation conservancy and solid waste management (entry 6 of Twelfth Schedule). On the specific question of Constitutional mandate with respect to legislative competence, the power is clearly spelt out. On the subjects of water and sanitation, and implementation of the 73rd and 74th Constitutional Amendments, the legislative power lies with the States' legislatures. It is doubtful whether Central Government or the judiciary in particular can force the State to legislate in matters under the States' legislative competence.

While the constitutional mandate for legislation on the subjects of water and sanitation is apparent, Part III of the Constitution also provides scope for recognising drinking water and sanitation as the fundamental rights of citizens. Though there is no explicit mention of such rights, Article 15(2)(b) of the Constitution prohibits any disability, liability, restriction or condition on access to wells, tanks, bathing ghats and other places of public resort maintained out of State funds or for the use of the general public. The said provision in effect mandates that there shall be no discrimination on the basis of religion, race, caste, sex, or place of birth in respect of access to water sources meant for general public use. Further, Article 21 – the right to life and personal liberty – an encompassing provision, has been expanded to include rights to water, sanitation and hygiene under it. Article 17 of the Constitution prohibits untouchability, a practice often associated with the still prevalent practice of manual scavenging (Sripathi 2017).

Apart from the Fundamental Rights, the Constitution also impresses a duty upon the State to undertake policy measures in the domain of water, sanitation and hygiene under the Directive Principles of State Policy, which are in essence a set of guidelines for the functioning of a welfare state. Despite encompassing a wider scope, the Directive Principles bear a close similarity to the WASH programmes. Article 38(2) of the Constitution focuses on eliminating inequalities in facilities available to people, while on a similar note WASH programmes aim to make clean water, safe sanitation and hygiene available to all. Similarly, where clauses (e) and (f) of Article 39 target that the health of the citizens is not abused and children are given adequate opportunities and facilities to develop, WASH programmes aim at a reduction of these instances by promoting safe water, sanitation and hygienic practices. Raising the levels of nutrition and improvement in public health is a primary objective to be targeted under Article 47 of the Constitution of India. A number of WASH studies have shown that improvement in growth and health levels is not possible until proper sanitation and hygiene practices are promoted (Gupta 2014). Based on the similarities between policy aims mentioned under the Constitution and objectives of WASH, it may be observed that promoting access to water, sanitation and hygiene will help in securing the Directive Principles.

From the above glimpse of the Constitutional framework, it may be noted that long prior to the launching of the MDGs or the WASH programmes, the Constitution provided sufficient scope for policy-making on the subjects of drinking water and sanitation facilities. The legislative intent behind the 73rd and 74th Amendments of including local self-governing institutions in administration was also in accordance with the aim of decentralising administrative functions to the local levels, to increase the spread of access to basic drinking water and sanitation services.

However, while a favourable infrastructure to formulate and implement policy with respect to the WASH objectives has been provided by the Constitution, the actual implementation and enforcement of these policy measures at the ground level remains weak. A majority of the policies and initiatives undertaken on the basis of the existing Constitutional framework often end up serving a mere ceremonial function, as the Directive Principles are non-enforceable in nature. Several of these policies are also subject to the availability of funding, and financial impediments

are often used by States as a pretext to avoid obligations created upon them. Lastly, the lack of a performance-review mechanism has also consistently led to a poor performance of the local self-government institutions.

Therefore, despite a robust mechanism being available in the Constitution for increasing the access of people to drinking water and sanitation facilities, many deficiencies exist at the structural level, in disseminating these services to the people. The following section of the paper will briefly gloss over the various national and State level legal and policy regimes in India since India's commitment to the MDGs.

LEGAL AND POLICY REGIME FOR ENSURING WATER, SANITATION AND HYGIENE IN INDIA

In the previous section, it was seen that the aforementioned subjects fell within the domain of State responsibility. This section of the paper will examine the legal framework in India in relation to water and sanitation. This is done with a view to understanding the policy approach towards increasing access to water and sanitation facilities to reduce the population deprived of the same.

In recognition of the International Drinking Water Supply and Sanitation Decade (IDWSSD) in 1980, a great deal of changes and developments were effected in the water and sanitation policy front in India (Kurup 1991). These changes occurred on broadly two levels: (i) the legislative or statutory measures at the State level and (ii) the administrative directions at the Central level (Cullet 2013a). The domestic policy at these two levels will be examined below in the context of water and sanitation in turn. It is to be noted, with respect to the study of policy and legal framework in relation to water, that this paper concerns itself only with those policies and laws dealing with supply of drinking water.

Supply of drinking water

The Central Government, given the absence of a Constitutional mandate allowing it to legislate with respect to water, made its interventions through policy programmes and schemes. Its foremost intervention was made in the context of rural drinking water supply through its flagship programme, the Accelerated Rural Water Supply Programme (ARWSP), in the early 1970s. The Guidelines evolved under the ARWSP served as the central framework for State Governments to undertake concrete measures to supply drinking water to all habitations in rural areas. In 1990 this programme was renamed the National Rural Drinking Water Programme (NRDWP). The major contribution of ARWSP to shaping the policy on drinking water supply in the country was the litre per capita (Lpc) concept. Taking into account an average individual's requirement for water, it set the basic cut off at 40 Lpcd per day. This has now been raised to 55 Lpcd under the NRDWP by the XIIth Five Year Plan (National Rural Drinking Water Programme Guidelines 2013). Increasing coverage and building infrastructure were the primary goals of this programme. The programme was soon followed by sector-reforms in 1991 whereby a demand-based system was set in place to mobilise community participation in the use and maintenance of drinking water sources. These reforms were expanded to the Swajaldhara programme. While the concept behind the programme was quite promising, it faced several obstacles in its implementation, such as lack of funds, slow adoption of reforms by the local officials etc.

Deviating from the Lpc per day norm, the NRDWP introduced a concept of 'drinking water security' in which the household was recognised as one unit of measure of supply in order to increase coverage. However, the latest development with regard to drinking water was a reversion to the original concept of the Lpcd per day under the Rural Drinking Water, Strategic Plan (2011–2022); a goal of 70 Lpcd was sought to be achieved by 2022.

This more or less covers the range of drinking water policies and programmes implemented across time at the Central level. Coming to the State level, where the actual domain of legislation on the subject of water lies, this section looks at three areas of legislation in the water sector in order to study them from a rights-based perspective. These three areas pertain to laws creating Water User Areas (WUAs), Water Resource Regulatory Authorities and groundwater management laws (Upadhyay 2011).

Water users' associations

WUAs were created between the years 1997 and 2010 across 15 states with a view to involving farmers in the

operation and management of irrigation, as they are the direct beneficiaries of irrigation policies. Laws such as the Andhra Pradesh Farmers' Management of Irrigation Systems Act, 1997, Orissa Pani Panchayat Act, 2002, and Maharashtra Management of Irrigation System by Farmers Act, 2005, have implemented this model of WUAs in their respective states. These areas are administrative units governed by democratically elected WUAs comprised of the landowners and members within the area. While this model recognises rights of the WUA, such as the right to receive water in bulk from the irrigation department, right to receive water according to the approved time schedule, and right to obtain information about opening or closing of canals in the year, no remedy is available to the WUAs if their rights are not upheld by the department. In other words, the Government's right to water remains unchallenged here, and its obligations to deliver water are not legally binding. A crucial step of laying down a legally binding minimum entitlement of the WUA within the law is missing in these legislations which would help in securing the water rights of these users' associations in the real sense.

Water resources regulatory authority

Laws such as the Maharashtra Water Resources Regulatory Authority Act, 2005, have created and defined the role and powers and functions of regulation of these authorities. An important function of this authority is to determine criteria for trading of water entitlements or quotas by the water entitlement holder. Thus water entitlements are equated to quotas, thereby ruling out any discussion of the extent of distribution of these entitlements. All that the law ends up creating is a notion of entitlement, without the reciprocal obligation of actually providing it to them. Therefore, the entitlement or the water right here exists devoid of a right to demand and receive, which in effect amounts to nothing (Koonan & Bhullar 2012).

Groundwater laws

Several groundwater legislations have been enacted across various states in the past decade, such as the Karnataka Groundwater (Regulation for protection of sources of drinking water) Act, 1999, the Andhra Pradesh Water, Land and Trees Act, 2002, etc. All these laws have instituted a State-level groundwater authority to oversee the use of groundwater. The important question to address with respect to water rights in this context is the legal status of groundwater. The Himachal Pradesh Groundwater Act, 2005, clearly states that any user of groundwater has to pay royalties to the State Government for the extraction of groundwater. Therefore, while traditionally and legally speaking groundwater is an easement to the land over which the owner of the land has unlimited right to enjoy, the groundwater legislation seems to suggest that the right of the owner is only that of user rights and not that of ownership over the resource. This shift is also evidenced by the centralisation of administration of groundwater, without vesting any power within the village and local-level bodies in planning and management of groundwater.

An important implication of such centralisation of decision-making power is unchecked exploitation of resources by private parties. This was the case in the legal battle over groundwater between Coca Cola and a village *panchayat* in Kerala. In the case of *Perumatty Grama Panchayat* v. *State of Kerala* (2004(1) KLT 731), the village *panchayat* had opposed the over-extraction of groundwater by the soft-drink company in their village. The High Court of Kerala held that the company has a right to receive groundwater without inconveniencing others. Based on a scientific report of the expert committee, the Court overruled the *panchayat*'s decision to oppose the grant of licence to the company. Perumatty *Panchayat* appealed against the ruling of the High Court, and the case is now being heard at the Supreme Court.

From an overview of the State legislation in the water sector, it is understood that although mechanisms of supply and distribution of water are set in place, and authorities created with the responsibility to oversee them, no legally enforceable right to water with binding obligations exist. The Indian schemes, laws and regulations for drinking water at the Centre and State levels over the past four decades may also be viewed against the background of the fluctuating approaches adopted in framing the National Water Policy (NWP) at various points of time (Kumar & Bharat 2014). The water policy sought to set the parameters and serve as the precursor to the legal framework on water governance for the country (Down to Earth 2012). The NWP was first adopted in 1987. In its earliest form, it identified an

order of prioritisation for allocation of water to various sectors. Drinking water was given the primary place of allocation for usage, followed by irrigation, hydro-power, navigation, and industrial and other uses. However, this order was subject to modification depending on the regional considerations. The policy received its first revision in 2002. While the NWP (2002) document did away with the rider for modification, thereby making the order of prioritisation mandatory, it allowed private sector participation in the planning, development and management of water resources, thereby encouraging private ownership of water resources (Cullet *et al.* 2015).

The latest change of the policy occurred in 2012. The wording of the NWP (2012) seems to suggest a different approach to prioritisation for allocation of water (National Water Policy 2012). The Government of India press note states that '*Safe drinking water and sanitation are defined as pre-emptive needs followed by high priority allocation for other domestic needs (including needs of animals), achieving food security, supporting sustenance agriculture and minimum eco-system needs*' (2012). Thus, there appear to be differing views on prioritisation of allocation of water resources under NWP (2012). Cullet (2013a, 2013b) believes allocation priorities are retained, but Seth (2012) argues that the NWP 2012 removed explicit priorities provided under earlier NWPs. However, the most significant and controversial change brought about in this policy document is the recognition of water as a community resource to be held by the state under public trust, while simultaneously treating it as an economic good. Consequently, the role of the state was altered from a *provider* of services to *the regulator and facilitator* of services (Seth 2012).

The India WASH Forum (2012) has criticised this shift in policy focus from water as a public resource to an economic good, thereby increasing tariffs for water and sewerage. It points to the lack of emphasis on water as a common public resource within the preamble of the policy. It also expresses concern over the lack of a clear order of prioritisation of agricultural use over industrial use, leading to the possible domination of the private sector over water resources.

Driven by such intermittent policy, which lacks the certitude and the enforcing ability of law, the regulatory framework of water governance in India has remained fragmentary and ineffectual. Another crucial consequence of such policy has also been to [in]advertently push the role and duty of the states to the margins. This approach is inconsistent with the view of recognising water and sanitation as fundamental rights of citizens, a view which has been upheld by the judiciary in several instances (Cullet 2012a, 2012b). The judiciary's approach will be dealt with in greater detail in the following section.

Access to sanitation facilities

Sanitation, like drinking water, is a subject within the legislative and regulatory domain of the State and local bodies – the municipalities and *panchayat* bodies. Notable Central Government initiatives in this regard are the Central Rural Sanitation Programme (CRSP) launched in 1986, which was essentially a subsidy programme offering an incentive of Rupees 2000 for every rural household to install a flush-latrine system. A significant policy change occurred in 1999 when the Total Sanitation Campaign (TSC) was launched in place of the CRSP. It sought to involve local institutions under the leadership of the *Gram panchayats* to secure the objective of eliminating the practice of open defecation and bringing down the incidence of diseases in rural areas.

In 2012, this Campaign was renamed the *Nirmal Bharat Abhiyan* (NBA) and undertook capacity-building and awareness-generating activities to raise the demand in rural areas for sanitation facilities. The policy framework signalled an expansion of sanitation goals to other related issues of social importance, such as hygiene, water management etc., along with a further strengthening of the incentive mechanism (the *Nirmal Gram Puraskar*).

At the level of the statutory framework, several States have attributed the responsibility of sanitation facilities to the *Panchayats* in rural areas, through enactment of Panchayat Acts. Urban areas also lack a comprehensive legislation dealing with sanitation, thereby relying upon the mechanisms under pollution control laws of the Central Government, municipal laws, building and sanitation bye-laws, public health law etc. The National Urban Sanitation Policy was introduced in 2010, following which the Jawaharlal Nehru National Urban Renewal Mission (JNNURM) was also introduced, which brought private sector interventions into urban sanitation (Bhullar 2013). The Swachh Bharat

Mission is the most recent flagship programme launched by the Government to achieve universal sanitation *Swacch Bharat Kosh* 2014; *Swacch Bharat Mission* (*Gramin*) 2014.

An overview of the domestic policy in relation to sanitation brings to one's attention a narrow, incentive-based policy approach towards concerns of sanitation.

Challenges faced and the shortcomings of the domestic legal framework in addressing them

The Government of India declared its commitment to achieve the goals set out under the WASH programmes and to achieve total sanitation and water coverage by 2015 under its 11th Five Year Plan. It is now set to undertake the 17 SDGs from 2016. At this critical juncture, it is crucial to carry out an assessment of the policies that emerged from the development goals identified by the MDGs.

The core issue concerning the water crisis in India is to ensure an equitable access of drinking water supply to all sections of population across the country, bearing in mind the gross socio-economic inequalities that are prevalent. An important step in this direction would be to recognise the inseparable nexus between an individual's need to access drinking water and his right to life, basic nutrition, health and a decent standard of livelihood, and possibly recognise water as a fundamental right (see Cullet 2013a, 2013b). However, National legal policy is prevented from taking such an approach due to its basic view of water as an economic commodity and hence following a demand-driven policy rather than a supply-based one.

In relation to sanitation, the overwhelming concerns increasingly felt across the country pertain to the widespread practice of open defecation resulting in severe safety concerns, particularly in the case of women. The study undertaken by Bhullar & Koonan (2014) on the access to safe sanitation for women reveals the shockingly high incidence of rapes and sexual assaults of women, resulting solely out of instances of open defecation. The second concern pertaining to sanitation is the issue of basic human dignity in the case of manual scavengers and sanitation workers. Despite multiple policy revisions and laws (The Employment of Manual Scavenging and Construction of Dry Latrines (Prohibition) Act, 1993, and The Prohibition of Employment of Manual Scavengers and their Rehabilitation Act, 2013), the practice of manual scavenging remains deeply entrenched in India. While the caste connotations attached to the job of manual scavenging are an undeniable reason for the same, the isolative policy of sanitation, separating it from the network of issues surrounding it, such as access, safety, dignity, privacy etc., is a significant contributor to the continued plight of manual scavengers. On the basis of this analysis, it is argued by the authors that granting basic sanitation facilities the status of a fundamental human right in theory and in practice is in order. To that effect, it is suggested by the authors that the Indian judiciary has already made some progress.

JUDICIAL INITIATIVES ON WASH

Comparing water sector legislation with other rights-based issues in India, such as Right to Education Act, 2009, The National Food Security Act, 2013 (Right to Food Act) etc., which attained legislative mandate after decades of intense public discourse and judicial intervention, right to water as a legislative mandate is still a work in progress. A possible explanation for this could be that Constitutional recognition of right to water across the world is a modern phenomenon and it has followed largely from international discourse on water rights. The Constitution of South Africa is often cited as an example, where an explicit mandate for 'right to access sufficient food and water' is provided under the Bill of Rights Chapter [Chapter 2, Section 27 clause (2)]. South Africa enacted The Water Services Act, 1997, and The National Water Act, 1998, to implement this right legislatively. While the interpretation of this right and the law has seen many challenges, South African courts consistently supported enforcing this as a basic right. Therefore, an explicit right to water recognised constitutionally is a far more effective means of safeguarding citizens' right to water.

The Indian Supreme Court's existing jurisprudence on Water, Sanitation and Hygiene can be considered to be an outcome of years of evolution. Since the early days of independence, the Indian judiciary has received and delivered decisions on numerous disputes on the subject of access to water, sanitation and hygiene. A consistent outcome of the wide jurisprudence on water and sanitation has been the conferment of a status of rights on the facilities of water

and sanitation, despite their non-inclusion under the chapter of Fundamental Rights of the Constitution. It appears that the judiciary has, over time, adopted various approaches in recognising and protecting the citizens' right to access of drinking water and sanitation. The authors recognise three distinctive dimensions to the rights-based approach adopted by the Courts through an analysis of the following Supreme Court and High Court decisions. It is suggested that these dimensions functioned as the basis for the recognition of rights of water and sanitation.

The foremost dimension of the rights-based approach that is identified is the recognition of the *duty of the State to implement measures to ensure access to water and sanitation facilities*. The second dimension is the *application of well-established doctrines of environmental justice and equity*. The third dimension is the *expansive interpretation of the fundamental right to life and liberty (Article 21 of the Constitution) and the duty of the State to raise the level of nutrition, standard of living and public health (Article 47 of the Constitution)*.

Duty of the State

The scheme of the Constitution clearly relegates the subjects of sanitation and water supply to the exclusive legislative domain of the States under Entries 6 and 17 under the Seventh schedule, respectively. As the institutional structures of local self-governance gradually came into operation in urban and rural areas, their duties of providing and protecting citizens' rights to clean drinking water, sanitation and hygienic conditions increased in proportion to the complexity of their network and functions.

One of the earliest cases in which the roots of water and sanitation jurisprudence in India can be found is *Dharangdhara Chemical Works Ltd. v. Dharangdhara Municipality* (1988 174 ITR 77 Guj). Dealing with an enquiry into discharge of effluents by a factory, the Court held that such an enquiry could be made by an officer appointed by the municipality to determine whether public nuisance was caused due to discharge of effluents by any such factory or not. It was held that the enquiry must, however, be carried out without any undue delay so that health of the community and fertility of the soil remained protected. Here, one notices the earliest signs of the courts empowering the municipality to protect citizens' rights to potable drinking water and protecting against the ill effects of factory effluents. Even as early as the 1960s we could see the traces of judicial intervention with respect to sanitation. In the case of *M/s. BhikuseYamasa Kshatriya v. Union of India and Anr* (1963 AIR 1591), the Supreme Court dealing with the validity of a notification under the Factories Act, 1948, made an observation on the sanitary problems caused by a sudden influx of population into cities after the introduction of factory systems into the method of manufacturing. The Court noted that cheap and insanitary dwellings were constructed hurriedly in the vicinity of factories. Recognising the legislation to be one of social welfare for factory workers, the Court acknowledged the duty of the State to appoint inspectors to supervise the working conditions and dwellings of the workers.

In the case of *Municipal Council, Ratlam v. Shri Vardhichand & Ors*. (1980 AIR 1622), the Supreme Court introduced a new judicial trend by applying the tort law principle of public nuisance to check the non-performance of public duties by municipalities. An unchecked release of harmful effluents by the factory into its surroundings was recognised as a violation of the duty of the municipality to provide healthy and sanitary living conditions to the poor and backward classes.

In the case of *Dr K.C. Malhotra v. State of Madhya Pradesh* (AIR 1994 MP 48), the Madhya Pradesh High Court acknowledged a link between the right to water and a network of rights such as health and sanitation. The Court ruled that the Public Health and Public Health Engineering Departments had failed in upholding their responsibility when 12 children died from an outbreak of cholera. This approach of the High Court maintaining a rights-based position continued in *P.R.Subhash Chandran v. Government of A.P* (2001(5)ALD771 (DB)), where the Division Bench of Andhra Pradesh High Court held that the State Government is bound constitutionally to take all measures to ensure adequate supply of drinking water to all the citizens.

Doctrines of environmental justice and equity

An important aspect of the rights-based approach towards water and sanitation is its recognition of their implicit

relationship with general concerns of environmental protection against pollution. In acknowledging this relationship, the judiciary has incorporated relevant principles of environmental justice within its jurisprudence of water and sanitation rights.

Two important judgments in the year 1996 firmly established the 'precautionary principle' and 'polluter pays' principle in the Indian environmental jurisprudence, and had their effect on the protection of water and sanitation rights as well. The *Indian Council for Enviro legal Action v. Union of India* (1996 AIR 1446) was the first one of the series. The case was a classic example of private industries using their monetary might to twist and abuse the law, to the detriment of the common people. The outcome of the release of toxic untreated waste water to flow out was highly destructive. Though the production of these acids was stopped and the industries producing the same were closed after agitation by the villagers, the Court accepted the petitions to ensure that the rights of the villagers were protected due to the long-term livelihood damages done to soil, water and cattle by the production of these acids.

Vellore Citizens Welfare Forum v. Union of India (AIR 1996 SC 2715) was the second of these judgments, establishing 'precautionary principle' as a part of India's environment jurisprudence. The Supreme Court, looking into the question of discharge of toxic effluents and applying the principles of 'polluter pays' and 'precaution', held the tanneries discharging the effluents liable. In a similar vein, the Court in the case of *M.C. Mehta v. KamalNath* (AIR 1996 SC 2715) applied the doctrine of 'public trust' to establish the duty of the State government not only to regulate water supply but also to realise the right to healthy water and to prevent health hazards.

Interpretation of Article 21 and Article 48 of the Constitution

While the Constitution has not explicitly granted the status of fundamental right to water, Article 21, referred to as the right to life in short, has presented courts with an ample scope for interpretation to allow the right to water to be read into it. The Supreme Court's jurisprudence in this regard, with respect to clean drinking water, is remarkable.

In *Subhash Kumar v. State of Bihar* (1991 AIR 420), the Supreme Court recognised the right to pollution-free water and air as essential to enjoying the right to life under Article 21 of the Constitution. This view was upheld in the case of *State of Karnataka v. State of A.P* (AIR 2000 SC 3751) that closely followed. Drawing from the UN resolution in the UN Water Conference in 1997, to which India is a signatory, the Supreme Court in the case of *Narmada Bachao Andolan v. Union of India* (AIR 2001 SC 1560) recognised water as '*the basic need for the survival of human beings*' and an integral part of the right to life enshrined under Article 21.

In the case of *Vishala Kochi Kudivella Samarkshana Samithi v. State of Kerala* (2006 (1) KLT 919), the Supreme Court, further contributing to the jurisprudence under Article 21, attributed the provision of safe drinking water as a paramount duty of the Government. Water and sanitation were recognised as basic human rights in the case of *LK Pandey v. Union of India* (1987 AIR 232) and the Court considered adequate access to services of water, sanitation and hygiene as essential for a child to realise his full potential of growth (Cullet 2010).

In the case of *Virender Gaur v. State of Haryana* ((1995) 2 SCC 577), the Supreme Court, in considering the prospective uses of a land under Haryana's Town Planning Scheme for environmental purposes, recognised the intrinsic link between sanitation and pollution-free water and environment, and their necessity to enjoy a right to life that envisages a life with human dignity. Therefore, the link between the right to sanitation and right to life and dignity was established. The Supreme Court also recognised the right to sanitation as a right embedded within a network of interrelated fundamental rights, such as right to health (*Consumer Education And Research Center v. Union of India*, (1995) 3 SCC 42), right to water (*Subhash Kumar v. State of Bihar*, (AIR 1991 SC 420)) and right to a clean environment (*Hamid Khan v. State of Madhya Pradesh*, (AIR 1997 MP 191)). A right to sanitation was also recognised as a fundamental right recently by the High Court of Himachal Pradesh where it directed the State to provide public toilets on all highways, in keeping with the judicial trend of the Supreme Court (CWPIL No. 6 of 2017).

The right to clean drinking water was also read into the Constitution through the Directive Principles of State Policy under Article 47. In the case of *Hamid Khan v. State of Madhya Pradesh* (AIR 1997 MP 191), the Madhya Pradesh

High Court recalled the responsibility of the State to '*improve the health of public providing unpolluted drinking water*' under Article 47 of the Constitution and held the Government liable for failing to ensure that the drinking water supply through handpumps in Mandela district was free from excessive concentration of fluorine. Here, additionally, a dimension of Article 21 was read into the issue.

In the *Ratlam Municipal Council* case (1980), citing the State's duty to improve public health as a priority under Directive Principle of State Policy (Article 47), the court ordered the municipality to complete basic sanitation and public health projects first, focusing on elitist projects later. The court extended the judiciary's oversight on functioning of an executive body like a municipality by empowering the magistrate to inspect the progress of work ordered every six months. The discharge of hazardous effluents by factories was considered as a violation of the social justice component of law. The judiciary was put under a duty to protect and prevent the same, and any order of the judge was to be considered as an order of a public servant, the violation of which is punishable by imprisonment that may extend up to six months (under S. 188 of the Indian Penal Code). Similarly, in a recent case involving access to drinking water to the slum-dwellers of Kaula Bandar in Mumbai (2014), the Bombay High Court ordered the city government to provide access to the central drinking water supply to non-notified slum residents. It based its reasoning on a human rights framework, noting the importance of the right to water to recognise right to life of citizens under Article 21 of the Constitution (Subbaraman & Murthy 2015).

On the basis of the recognition granted to the right to water and sanitation as fundamental rights, the Supreme Court proceeded further to crystallise these rights and implement them through its orders. For instance, in the *Environment & Consumer Protection Foundation v. Delhi Administration and others* ((2011) 7 SCC 55)), the Court issued directions to all States to implement toilet and water facilities in all schools irrespective of whether they were State or privately owned, aided or unaided, minority or non-minority. It stated categorically that in the event that these measures were not implemented by the States within six months of the directions issued, the aggrieved parties were free to move the Court for appropriate orders against the State. This step of judicial activism indicated a much-needed measure to transform the recognition granted to these rights into a reality.

While continuing to play an important role in bringing about policy change, justice rendered by the Court is nevertheless done on an individual basis, only on specific issues raised in a particular case. Therefore, it is not uniform, but is sporadic and in several instances incomplete due to the non-implementation of the decisions of the Courts. In the instance of the Sardar Sarovar Dam, the Supreme Court recognized the State's duty of providing for water supply and upheld the construction of the dam, not heeding the vast scale of displacement of people that resulted from the decision. In the case of *Venkatagiriyappa v. Karnataka Electricity Board* (1999 (4) KarLJ 482), the Supreme Court circumscribed the right to water and held that the right is not inclusive of water for irrigation and business purposes, thereby creating a very narrow concept of the right to water. Therefore, it is possible that the rights jurisprudence has also resulted in counterproductive outcomes in certain instances.

From the above discussion of case law, it may be observed that the most important contribution is made by the rights-based jurisprudence on water and sanitation by recognising and locating the right to sanitation and water supply within a network of interrelated fundamental rights such as right to dignity, health, nutrition and privacy, all of which are ultimately essential to enjoy the right to life. This is a crucial development in the context of the WASH programmes, in the manner of creating an opening for policy-making to that effect.

A pertinent question that arises here is with respect to the effectiveness of these judicial pronouncements. Baxi (2010) summaries this issue fittingly as '*There is no question that judicial pronouncements of the Supreme Court of India and High Courts have often been ignored by the political state; indeed, how may it be otherwise? Yet, the Supreme Court of India has variously deployed its "hope and trust" jurisdiction to persuade the recalcitrant executive, and when this rhetoric has failed, taken some determined steps to discipline and punish an errant executive.*' Here, the authors recognise the scope for a distinctive research inquiry requiring empirical work across States to see the level of implementation of judicial orders.

CONCLUSIONS

On the basis of the detailed analysis of the policy and legal framework for water and sanitation, the authors seek to conclude that the changes in policy that resulted from the MDGs and the WASH programmes are sorely lacking in any scope to recognise the fundamental rights of citizens to access of drinking water and sanitation, in the absence of an explicit Constitutional right to water. Under the policies introduced so far, the measures being initiated are often subject to funds and are not made enforceable duties of the State.

An important reason for this is identified as the basic concept of the MDGs itself. Goal 7C of the MDGs does not envisage a universal right to water and sanitation, but rather targets the half of the population whose water and sanitation needs had not been met by 2000. The implication of this approach appears in the practical implementation of the goals. For instance, excessive focus on incentives to trigger demand in constructing toilets in the case of sanitation and entry of the private sector into the water sector are the result of policies in India. Further, a significant drawback of the MDGs also stemmed from an obfuscation of the collective goals with national targets without adequately transposing them. It is crucial to translate the global goals into individual national targets in order to be able to frame meaningful and effective policies based on them.

From a glimpse into the legal framework of water and sanitation in India, the fragmented nature of the legislations was quite evident. While the reason for this may be imputed to the Constitutional frame of distribution of powers itself to a certain extent, the lack of a strong and consistent national policy which grants drinking water and sanitation the status of basic rights is a telling sign of weak legislation in these domains. The implications of such a disjointed legal framework have been visible in the form of a parallel growth of the rights jurisprudence evolved by the Supreme Court and High Courts through their decisions in various cases where they upheld drinking water and sanitation as basic rights of the citizens. The courts, observe the authors, essentially based their jurisprudence upon the provisions of Part III of the Constitution. Nevertheless, in doing so, they have opened up an important avenue for recognising drinking water and sanitation as basic human rights, and in effect established a means to achieve the ultimate targets set by the WASH goals.

The SDGs, which came into force from 2016, appear to focus on an affirmation of the universal right to access of drinking water and sanitation facilities, unlike their predecessors. At a critical moment of transition from the MDGs to the SDGs, it is necessary to ensure that the new goals are adequately translated into policy models and implemented with the help of a concrete regulatory framework. This calls for a rigorous reassessment and reform of the existing policy and legal framework. Of critical importance at this point is not only to incorporate and define clearly the right to water in Part III of the Constitution as a fundamental right of citizens, but also to ensure an effective continuity between the water supply mandates of the urban and rural water management infrastructure in the country though various laws. Decentralisation of water management becomes increasingly important in order to recognise the rights of water users on the ground. In this regard, the authors seek to point out that the path laid down by the courts through their rights jurisprudence with respect to drinking water and sanitation, although *ad hoc* in nature and lacking legislative backing, serves as an important (re) starting point to inform or influence any policy or legal reforms or revisions that might occur in the wake of the SDGs and the drinking water and sanitation goals under them.

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