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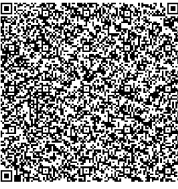
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# Role of Courts in Ensuring Water Justice in India: Brasília Declaration on Water Justice and Beyond

Gayathri D Naik\*

## Abstract

Water being a scarce resource, questions of its allocation and distribution, coupled with concerns of its depletion have troubled policy makers, legislators, and judges alike. While, over the years there has been significant development on the discussion surrounding the rights-duty paradigm of water resources, by establishing the obligation of states, discussion surrounding a certain value-based approach to guide the minds of important stakeholders in creating and enforcing policy has gained far less traction comparatively. It is in this context that this paper explores an alternative justice-based approach to water, drawing from the works of Amartya Sen on capabilities and more so the Brasilia Declaration of Judges on water justice and the various principles. This paper explores how judges can incorporate such an approach through their judgements. The paper also attempts to shift the focus from the hitherto considerations of an anthropocentric and economic nature that have governed water policy and adjudication, and further elaborates upon water as inherently a public good and an environmental necessity and the need for bolstering water management techniques on these grounds.

**Keywords:** Article 21 of the Indian Constitution, Capabilities Approach, General Comment 15, Human Rights, Sustainability

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## **1. Introduction**

Water demands worldwide are expanding with increasing demand from the growing population, industrial requirements and agricultural growth. These increasing demands stress water resources, resulting in water access inequity among many water users, leading to overt and covert water conflicts. Water could encourage transboundary co-operation and at the same time trigger conflicts as well (Boelens, Vos & Perreault, 2018). Water is an integral component of the environment,<sup>1</sup> playing a dynamic role in ecosystem maintenance and management of nature. It is an economic commodity as well as a human entitlement (Grover, 2006). Notwithstanding its nature as a public good defined by its 'non-excludability and non-rivalness,' millions worldwide lack access to clean and safe drinking water. One in ten persons lacks access to safe drinking water, yet water use and consequent demand increases by approximately 1% every year, driven by factors like population growth, socio-economic factors and unsustainable consumption patterns (UN World Water Development Report 2019).

Dwindling water availability in various areas with floods and droughts and the consequent water crisis is a significant characteristic of India's water situation (Joy & Paranjappe, 2007). In many cases, water scarcity results from physical shortage and is a factor in political and economic decisions (Mehta, 2003). For many, the political and economic decisions in water management and governance result in water deprivation, creating artificial water scarcity. For instance, issues related to water governance led to access, control, and management of water being inaccessible to several categories of people, like depressed classes, despite the recognition of the right to water as a fundamental right in India and calling upon the state to ensure its equitable distribution and management.

Indiscriminate water exploitation by multinational companies (Bijoy, 2006), reallocation of drinking and irrigation water to industries (Cullet, 2015) and the daily struggles of ordinary people

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<sup>1</sup> See Sec 2(a) Environment (Protection) Act, 1986. No. 29 OF 1986.

in accessing water from public taps (Paranjappe & Joy, 2011) are only a few instances of water injustice in India. These access, control, management, and governance issues continue with concerns of distributive and procedural equity among water users, leading to inequities among water users, despite the judiciary's pro-active role in recognising the equitable right to water. Nevertheless, with its pro-active, pro-environment role, the higher judiciary in India remains the last resort for every ordinary citizen, who approach the courts to redress their grievances and the belief that courts could ensure justice and establish a situation where the rule of law is guaranteed to every citizen. On similar lines, this belief extends to ensuring water justice for all, in similar lines to Indian jurisprudence. Where judicial contribution to environmental and water governance is highly significant, global attention and call for an increased role of the judiciary in water management is on the rise. In this context, the Brasília Declaration on Water Justice of 2018, adopted by judges worldwide under the auspices of International Union for Conservation of Nature (IUCN), arguing for the increased role of judiciary and judges in applying water justice principles in settling water disputes, attracts significance.

This paper builds on this judicial adoption of the Brasília Declaration on Water Justice, to examine the judicial contribution for strengthening water governance in India. The rationale for adopting such an examination highlighting the judicial contribution is the similarities in this Declaration and the principles adopted in India's judicial development of environmental/ water law, which reflect a broader approach to water governance where both move beyond the rights-duties process with respect to water to highlight the application of environmental principles to water management.

The paper begins by examining the need to explore the right to water from a justice perspective that moves beyond the hitherto rights-duty paradigm in the human rights perspective. The next section explains the context and contents of the Brasília Declaration on Water Justice that argues for the increased role of judges in water justice and the application of environmental law principles in water management. The role of the Indian judiciary in water justice through its contribution to strengthening the water rights

jurisprudence as an extended application of environmental law principles is explained in the next section, followed by the exploration of the ways forward in water justice by applying this Declaration.

## **2. Exploring the ‘justice’ and ‘injustice’ in Water Access: An essentiality to Assure Equitable Water Access**

The right to water is a human right recognised internationally and domestically across the world (Committee on Economic, Social and Cultural Rights; Resolution on The Human Right). General Comment 15 to the International Covenant on Economic, Social and Cultural Rights (ICESCR) upheld the human right to water as containing the elements of freedoms and entitlements by recognising everyone’s entitlement to sufficient, safe, acceptable, accessible, and affordable water for personal and domestic uses<sup>2</sup>. Despite recognising the right to water as a human right across the world, access and allocation of water have never been universal and equitable. Millions worldwide face inequity in water access in different forms. These injustices range from everyday injustices at the tap points in access to water, to the displacements over dams and the influence of multinational companies in policy decisions (Boelens, Vos & Perreault, 2018).

Inequitable water access and allocations violate the human right to water and lead to the infringement of several other human rights. However, analysing this from a human rights perspective restricts the scope of analysis, whereby arguments shall only confine to the non-performance of the duty of the State in ensuring the human right to water for all in their jurisdiction. This restricted analysis of the human right to water will remain an isolated interpretation, unless it involves a justice perspective that recognises the right to water from an equity perspective.

Adopting a justice approach provides a widened approach to the right to water. Different contexts provide the rationale for this argument. Firstly, confining the right to water to a rights-duty paradigm limits the focus to State and its duty to ensure the human

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<sup>2</sup> Economic, Social and Cultural Rights, at para. 7, General Comment 15.

right to water. This discourse however, doesn't focus on equity and justice- distributive, procedural or recognitional justice assured to water users in enjoying their human rights. A narrow focus on the right without justice deprives the chances of exploring the reasons and causes of inequity in water access and allocation which is, particularly significant as scholars have highlighted the grounds of water scarcity as anthropocentric (Mehta, 2003). Scholars like Lyla Mehta and Ioris have demonstrated through the examples of India and Lima, that water scarcity is not natural, but created by human factors like maladministration (Mehta, 2005; Ioris, 2016).

The second context arises from this human interference that argues for adopting a justice approach to water governance. Water is a natural resource that is closely connected to human society and human relations. Water plays a significant role in our social, cultural, economic, and political lives. Human decisions like dams determine the water flow, and water influences human choices. Therefore, decision makers should also understand and incorporate these complex social and cultural relations with respect to water governance (Boelens et al., 2016; Lena Hommes et al., 2019).

Thirdly, social factors also influence access to and allocation of water. For instance, in India, the social group one belongs to determines water access (K J Joy et al., 2014; Prakash, 2005). In that context, the marginalised sections like Dalits and the downtrodden, face discrimination and exclusion in water allocations. The right to water discourse intertwined with the duty-rights paradigm limits the scope of ensuring justice to these sections, who face historically embedded biases in human rights. Similarly, the indigenous communities, relocated from their lands for multipurpose dams and development projects, remain vulnerable and are subject to violations of their rights (Bhagat Ganguly, 2019; Krishnan & George, 2014; Rose Johnston, 2018).

Lastly, the current discourse on the human right to water at the international and domestic level, reflects an anthropocentric bias, where water policies prioritise, human water demands over non-human and environmental water needs. Water supply demands get attention over ecological demands and water conservation in water policies, though these concerns have slowly received focus in recent water policies due to greater attention towards sustainable

development<sup>3</sup>. Adequate focus on environmental matters in water is inevitable to assure sustainability in water supply and to implement the human right to water.

Since all these contexts are influential in assuring universal access and allocation of drinking water, while acting as a hindrance to the state's efforts in ensuring the human right to water for all, it is highly essential to reconceptualise our approach in water governance, which now focuses on the state's duty and people's human right to access water. In this context, the capability approach of Amartya Sen, helps to move beyond the restricted rights-based approach, to a justice-based approach in water governance.

### **2.1. Capability and Entitlement Approach to Water: Extending Water Governance to Address (in) justice in Water Access**

The current human rights-based right to water discourse focuses on the state's duty to provide sufficient, adequate and affordable drinking water to all its citizens. The social, cultural, economic and political factors that influence the implementation of this right at the ground level get relegated in discussions that focus on this rights-duty paradigm. Considering the multifaceted nature of water and its significance in human life, and the influence of social, cultural, political, technological factors and property rights in determining access and allocation of water, the right to water discourse should include the analysis of causes of injustices and inequities. In that context, Sen's Entitlement Approach and Capability Approach helps examine these injustices and reconceptualise water governance to balance human needs and environmental water demands (IEP).

Capability, according to Sen, is the freedom to choose alternatives or combinations. This approach equips people to choose among diversities and choices. Applying the Capability Approach to water governance, Sudhir Anand argues that this approach to water requires a paradigm shift in the current water governance, with an analysis based on the quantity of water supplied, to examine what

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<sup>3</sup> See National Water Policy 2012; See Also Draft National Water Framework Bill 2016.

“function” a particular extent of water supply will help the user achieve. For instance, India’s current water policies and supply schemes focus on the particular amount of water required by people (like 40 lpcd in the Accelerated Rural Water Supply Programme (ARDWSP) and the National Rural Drinking Water Programme (NRDWP); and targeted 55 lpcd in the Jal Jeevan mission (JJM)) in their supply targets. The water requirements for different sections of society like women, the disabled, and children being different, this differential treatment is absent in such schemes, making choices improbable.

The Capability Approach to water helps to address this inequitable water management and argues for incorporating differential needs and demands of a diverse society. It is essential to include a Capability Approach in water governance considering India’s socio-economic and political situation where the Dalits, after years of independence and guaranteed constitutional protection, face deprivations and denials in water access and allocations. It also helps to address the sanitation challenge in the country that currently focuses on the race to build toilets, rather than considering the differential water and sanitation demands of women and girls at home and in public spaces.

The Entitlement Approach supplements the Capability Approach in water that encompasses each section’s different needs and totality of all freedoms. The Entitlement Approach focuses on each individual’s entitlements to commodity bundles like food and water that each individual can command in society, using their rights and opportunities. These entitlements earned by people can help an individual to achieve their choices.

The right to water as recognised as a human right by General Comment 15, highlights the inclusion of freedoms and entitlements to water. Recognising water as an entitlement of individuals, equips people to demand the right to water from the State and react against arbitrary deprivations and disconnections of water supply. The Entitlements approach also incorporates the individual needs of people, while considering deprivation and denials faced by certain sections like Dalits and downtrodden with respect to access and allocation of water, water management and governance, and addresses public health issues in water supply.



## **2.2. Adopting a justice-based Water Governance: Steps Towards Ensuring Water Justice for all**

Adopting the Entitlement and Capability Approach can help to move beyond the state oriented duty-based rights-focused water supply system to include a justice-based approach where distributive, procedural and recognitional equity attracts due attention in water governance with demands of various differential requirements addressed. However, this remains insufficient to address water inequities and injustices, as a broader focus only on water supply to humans has damaged ecosystems and water sources. Uncontrolled extraction and exploitation of water resources for quenching water supply demands have caused water resource deterioration and depletion. Nevertheless, the concrete steps and prudent interference of the judiciary in dealing with pollution and environmental depletion issues also directs our attention to the need for moving beyond the rights-duties paradigm in water issues. The judiciary's application of environmental principles in water governance and management also leads the way to adopt this reconceptualization, wherein it recognises environmental concerns in water, as necessary as assuring sustainable supply to water users<sup>4</sup>. Understanding water governance from equity and justice perspectives can have two advantages. It can implement the rights-duty paradigm upheld by fundamental right jurisprudence in India. Secondly, it can also help the state address the issues arising from the influence of power and politics in water allocations (Sultana & Loftus, 2015).

If justice matters in water governance, what constitutes water justice? Political ecologists point to the tripartite form of water justice that could help decipher and understand injustices in water access and allocations and address these injustices in water governance. The three components are: distributive equity, recognitional justice, and procedural fairness (Zwarteveen & Boelens). These three interconnected components of water justice can make water governance meaningful by making it inclusive, equitable and reasonable. Distributive equity addresses the concerns of water injustices of marginalised and downtrodden in

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<sup>4</sup> See *infra* notes 26-63 and accompanying text.

the society, particularly the issues of injustice faced by Dalits and socially downtrodden in India. It focuses on the inequitable access to water supply and allocations, rural-urban water divide, and other inequitable water-related concerns.

The second component is closely tied to the first, whereby it unpacks and foregrounds the struggles and sufferings of the victims of inequalities in water distribution. Recognition Justice opens the scope for foregrounding the voices of these forgotten sections, acknowledging the historical injustices committed and recognising their diversity and identity (Scholsberg, 2007). It is particularly significant in the context of atrocities against Dalits, discriminating them out of access to water (Tiwary & Phansalkar, 2007) and displacement of indigenous people in developmental schemes.

The third component assures procedural fairness in decision making whereby the stakeholders, including water users and marginalised sections, can participate in water-related policymaking. Procedural fairness also ensures transparency, accountability and responsibility of the state in its water policies and schemes (Scholsberg, 2013). These three interrelated components are essential for water governance to guarantee human rights to water. These elements foreground the concerns and issues of injustice beyond a rights framework and emphasise the significance of addressing justice and equity in governance.

However, it is essential to point out that the water governance framework, with the human rights paradigm informed by the water justice framework, remains incomplete without incorporating the environmental concerns of water management. These components focus on water supply, equitable distribution and allocations, but ignore the impacts of excessive focus on human water demands and developmental activities on the environment. Hence, it is vital to adopt environmental law principles in water governance to control the over-exploitation and deterioration of water resources resulting from our developmental activities. In this context, the role of the judiciary and the influence of the Brasília Declaration on water justice that focuses on

harmonisation between human and environmental water concerns are relevant.

### **3. Brasília Declaration on Water Justice and Environmental Law Principles**

The Brasília Declaration of 2018 on Water Justice (herein referred to as Declaration), involves identifying and adopting certain vital environmental principles for ensuring water justice through the active involvement of the judiciary (IUCN). This Declaration, enunciated by the sector, which exercises a crucial role in justice delivery, helps guarantee human right to water in several jurisdictions. The Declaration articulates ten core principles of environmental law that helps to address water rights and justice. This section unpacks the significance of these ten core principles included in the Declaration.

Principle 1 of the Declaration promotes the concept of water as a public interest good, where the state holds the stewardship of comprehensive water resources<sup>5</sup>. The state's stewardship over water resources aims to protect water resources and promote their ecological functions to benefit present and future generations, and the sustainability of community life on Earth. This principle emphasises two major environmental law concepts: stewardship and intergenerational equity. The state exercises stewardship over water resources in several countries, and water is a public good in these countries (Preston, 2009). For instance, in Australia, the High Court of Australia<sup>6</sup> upheld the stewardship of the state over water resources, including groundwater. The court rejected the contentions of farmers who challenged the state's policy decision over aquifer access licenses implemented through the Water Management Act, 2000, replacing the more liberal Water Act, 1912. The new law further restricted the limit of water, accessible to farmers. Focus on state stewardship over water resources is a prudent step to assure human rights to water and ensure water users' equitable and reasonable water rights. It aims to replace

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<sup>5</sup> Principle 1 - Water as a public Interest Good. Brasilia Declaration of Judges on Water Justice

<sup>6</sup> ICM Agriculture Pty Ltd v. The Commonwealth (2009) 240 CLR 140.

private property rights over water resources. (Lucy & Mitchell, 1966) Stewardship over natural resources like water, limits the property rights control over water resources but has a trust like control where stewards possess only limited rights to exclude, control and alienate natural resources but exercise great responsibility for the conservation and protection of such resources (Lange & Shephard, 2014). This is necessary for the present time where millions worldwide face water injustices locally and globally.

The idea of stewardship for water conservation and preservation contrasts with the tragedy of global commons, where private property rights are the panacea for the mismanagement of global commons (Garrett, 1968). Private control over global commons like water, turned out to be the primary reason for the deprivation of several human rights. For instance, groundwater supports India's drinking and agricultural water needs. However, the legal regime controlling groundwater resources allows private control over its access, thus limiting access and management control to other landowners (Cullet, 2014). The private land-water rights deprives social and distributive justice among water users, denying the fundamental right to water for all. In such a context, articulating state stewardship can mitigate the impacts of injustices caused by this individual control over water resources.

Many jurisdictions have used the public trust doctrine to exercise stewardship over water<sup>7</sup>. The public trust doctrine also upholds the trust principle, replacing private control over natural resources. The state is the trustee of all-natural resources where it holds the resources for the benefit of people, enjoying the responsibility of protecting natural resources. The doctrine imposes restrictions on the state in conveying the trust property to private use. It restricts the state from conducting the sale of the resources and calls upon the state to maintain the resources for the particular types of benefits for which it is used (Sax 1970).

The doctrine received significant attention in water resource conservation across the world. After its usage in National Audubon

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<sup>7</sup> Infranotes 64-95 and related text.

*Society v. Superior Court of Alpine City (Mono Lake)*<sup>8</sup>, the doctrine received a more expansive interpretation, leading to the protection of all environmental and recreational values, beyond the initial application to the trio i.e. navigation, fishing and commerce. The allegorical interpretation also led to its application to groundwater protection, breaking the traditional notions of navigability<sup>9</sup>. The doctrine also received judicial attention in India, where the Supreme Court applied it to natural resources, including water resources<sup>10</sup>.

A closer analysis of the applicability of state stewardship over water resources or the relevance of the public trust doctrine for extended state control over all water resources has been only at the national levels. By recognising the necessity of this principle for water justice in the Brasília Declaration at an international forum, this hitherto domestically applied principle has now attracted international attention and acknowledgement of its significance. Additionally, the Declaration stresses its applicability to ensure inter and intragenerational equity. The stewardship and public trust doctrine also has inter and intragenerational equity centrality. The increased role of the State in water conservation is highlighted here.

Principle 2 of the Declaration recognises the interconnection between water justice, land use and ecological functions of the property<sup>11</sup>. Recognition of this closer interaction brings forth the idea of sustainability, where it recognises the duty of any person with a right or interest to use water or land, to maintain the ecological functions and integrity of water and the ecosystem. The principle of sustainability brings together the coordinated management of land-water and ecosystem (Bosselman).

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<sup>8</sup> *Nat'l Audubon Soc'y v. Superior Court of Alpine City (Mono Lake)* (658 P2d 709, 712 (Cal 1983)).

<sup>9</sup> *In re Water Use Permit Applications (Wai'Hole Ditch)* 9 P3d 409 (Haw 2000).

<sup>10</sup> *MC Mehta v. Kamal Nath* (1997) 1 SCC 388; *Reliance Industries Limited v. Reliance Natural Resources Limited* (2010) 7 SCC 1.

<sup>11</sup> Brasília Declaration, *supra* note 27, at Principle 2 – Water Justice, Land Use, and the Ecological Function of Property.

The concept of sustainable use and management is the core of this second principle, which is also essential to balance the source of water resources' source and supply sustainability. For instance, excessive reliance on groundwater in countries like India has triggered aquifer depletion (Shah, 2009). Extreme extraction threatens the supply of water and the source. The land-water nexus in groundwater regulation restricts effective groundwater conservation, pushing for coordinated management of land-water and ecosystem to balance extraction and recharge (Shah, 2008). The Declaration calls upon the states, and the judiciary, to address the imbalance created by our unsustainable water use patterns by addressing the land-water-ecosystem balance. It is important to call upon the courts to consider this issue as the cases relating to water pollution and water extraction increase with increased emphasis on the developmental needs of the burgeoning population. In addition to the focus on ecological sustainability, the Declaration also promotes recognitional justice by mainstreaming the contribution of indigenous and tribal people in water justice. Scholars point to the significance of recognitional justice to environmental justice<sup>12</sup>, which also influenced the water justice movements across the globe (Boelens, Perreault & Vos). Principle 3 of the Declaration recognises the relation of the indigenous and tribal people's rights to customary water resources and ecosystem<sup>13</sup>.

It also extends, the prior informed consent required for access to biodiversity benefits to any activity affecting water resources. This step is crucial in this era where developmental activities deprive the indigenous people of their local habitat, access to water resources, and livelihood (Jackson, 2016). For instance, the Sardar Sarovar Project over the Narmada River, hailed as one of India's most significant multipurpose projects, has always attracted attention from an environmental justice perspective. The developmental project deprived the indigenous people of their land rights and natural justice (Dash, 2009).

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<sup>12</sup> Scholsberg, *supra* note 24.

<sup>13</sup> Brasilia Declaration, *supra* note 27, at Principle 3 – Water Justice and Indigenous and Tribal Peoples and Mountain and Other Peoples in Watersheds.

The Declaration promotes participation among these communities. The state mechanism should develop and implement appropriate tools to utilise the knowledge of these indigenous communities in the conservation of ecological and hydrological integrity. Incorporating their knowledge and experience in water conservation is a way to ensure the recognitional justice pillar of water justice and address the historic wrongs done to these sections of the society. Addressing the issues of marginalised sections helps to assure distributive justice among water users and water uses.

The Declaration also addresses the importance of procedural justice in water governance. The procedural justice achieved through the right to information, participation in decision-making, and access to justice promoted by several environmental treaties also helps achieve water justice (Naik, 2021). Through public involvement in decision making, the water users and other stakeholders can participate in water policymaking and implement the rules and regulations. Public participation that involves purposeful activities through which the citizens can participate in governance has four components: purpose of involvement, types of action, people involved, and government entities targeted (Spyke, 1999).

Access to appropriate and timely information is essential for meaningful participation, whereby the participants can make significant decisions. The participation should also be succeeded by the right to access judicial and administrative forums for redressal of grievances (Cramer, 2009; Razzaque, 2009). While the treaties and conventions call upon the states to ensure procedural justice through participatory mechanisms, including the right to information and access to justice (UNECE, 1998), the Declaration widens the responsibility of ensuring procedural justice to the judiciary. As per Principle 10, the judges should ensure that every person has access to appropriate information, the opportunity to participate in decision-making, and the right to access effective remedies<sup>14</sup>. By entrusting this responsibility to the judiciary, the Declaration strengthens the people's trust in judicial mechanisms that act as the guardian of human rights.

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<sup>14</sup> Brasilia Declaration, *supra* note 27, at Principle 10 – Procedural Water Justice.

In addition to the assurance of water, with justice pillared on three spheres - distributive justice, recognitional justice and procedural justice; the Declaration also calls upon the judiciary to adopt several core principles of environmental law for water justice among water users and communities. Adoption of these principles of environmental law is essential and helpful to protect water resources from encroachment and ensure the sustainability of the ecosystem with coordinated management of land, water, and ecosystem. It also helps hold the state accountable for actions that impact environmental integrity.

Principles 4-7 discuss environmental principles like prevention, precaution and the polluter pays principle. Prevention of future harm to water resources and the ecosystem is promoted through Principle 4. Such prevention aims to avoid ex-post measures to rehabilitate, treat or develop new water systems<sup>15</sup>. The prevention principle should take precedence over the redemption of past harm by adopting the best available technologies and environmental practices. By focusing on prevention and precaution, the Declaration covers all types of harm. The precaution principle requires the state to adopt measures that protect the environment, despite lacking scientific evidence or adequate technology to prevent such damage (Sadeleer, 2020). The regulation applies where the harm is unpredictable, whereas the prevention principle applies where the harm is known and can be controlled with appropriate intervention (Duvic-Paoli, 2018). The prevention principle replaces the curative approach adopted in several environmental treaties where past injury attracts remedy or redressal. Prevention focuses on the prevention of future known harm.

The principle of precaution also receives similar attention in the Declaration, through Principle 5<sup>16</sup>. The judiciary should apply this principle to water-related disputes, where judges should uphold or order necessary protective measures in such dispute resolution,

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<sup>15</sup> Brasilia Declaration, *supra* note 27, at Principle 4 – Water Justice and Prevention.

<sup>16</sup> Brasilia Declaration, *supra* note 27, at Principle 5 – Water Justice and Precaution.



notwithstanding the scientific uncertainty or complexity regarding the existence or extent of risks of severe or irreversible harm to water, public health or the environment. The call to adopt a precautionary approach is not a novel approach for the judiciary. Instead, it strengthens the judiciary's attempts to apply principles of environmental law for environmental protection, which now extends to water resources. For instance, the Supreme Court of India has used this principle in several environmental law cases (Gill, 2019).

Principle 7 of the Declaration deals with the polluter pays principle, the user pays principle and the internalisation of external environmental costs<sup>17</sup>. While dealing with water issues, especially pollution cases, the judiciary should include environmental costs in valuating and pricing water resources and their services. For the same, the Declaration points to the use of these three principles. As per the Declaration, the polluter pays principle applies to those who cause pollution and degradation of water and ecosystem. The polluter should bear the cost of reclamation of the environment, including fees of containment, avoidance and abatement of harm caused. Under the user pays principle, the water users in commerce or industry should pay prices for water supply and ecosystem services, including waste disposal and environmental costs. The user pays principle strengthens the efforts of the judiciary to hold the polluter responsible and accountable by attaching user charge fees for water supplied to large water users. The polluter pays principle usually applies to large-scale water users like industrial and commercial users, whose activities create irreparable damage to water resources and the ecosystem<sup>18</sup>. The Declaration holds the polluters responsible and accountable. It makes sure that the water user and the landowners possess the legal obligation to restore the ecological conditions of water resources, which is not terminated by the transfer of use or title.

Principles 6, 8 & 9 address the governance dimension that the courts should emphasise upon while dealing with water issues. The

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<sup>17</sup> Brasilia Declaration, *supra* note 27 at Principle 7 – Polluter Pays, User Pays and Internalisation of External Environmental Costs.

<sup>18</sup> See *Vellore Citizen's Welfare Forum v. Union of India*, (1996) 5 SCC 647.

principle of *dubio pro natura* is the core of Principle 6. According to this principle, in case of uncertainty in determining environmental and water controversies, the courts should interpret laws and rules in a pro-nature manner, to ensure water resource protection and conservation<sup>19</sup>.

The significance of good governance in water justice, led to its inclusion in the Declaration. Principle 8 calls upon the courts to ensure that they work independently, upholding and enforcing the rule of law, assuring transparency, accountability and integrity in governance<sup>20</sup>. Good governance patterns pillared on transparency, accountability and integrity are essential for effective implementation and enforcement of water laws for the protection, conservation and sustainability of water resources. Lastly, besides these sound governance principles for effective implementation of water laws, the judges who crafted this Declaration also recognised the coordinated integration of environmental and ecosystem considerations in water law implementation. This is a part of recognising an interrelated ecosystem where water and environment closely integrate, and harming one can cause severe repercussions on others<sup>21</sup>.

The principles highlighted in this Declaration are not novel, but they reflect the integrated approach of environmental and water law principles for assuring the sustainability of water supply and water resources. The most significant element here is that it is moving forward or beyond the shackles of the executive and legislature, to include powers and responsibilities of the judiciary in water justice. It underlines the most vital role of the courts in water justice delivery to all, ensuring equity, equality, fairness and transparency.

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<sup>19</sup> Brasilia Declaration, *supra* note 27, at Principle 6 – In Dubio Pro Aqua.

<sup>20</sup> Brasilia Declaration, *supra* note 27, at Principle 8 – Water Justice and Good Water Governance.

<sup>21</sup> Brasilia Declaration, *supra* note 27, at Principle 9 – Water Justice and Environmental Integration.

#### **4. Courts and Water Jurisprudence in India: Expanding Environmental Jurisprudence to Human Right to Water**

The framework and justification of environmental jurisprudence in India is closely knit to constitutional rights. Even though ecological protection found its way into the Constitution by the 42nd Amendment of 1976, it was added as a non-justiciable right under Part IV of the Constitution, directing the state to adopt measures for environmental protection. The contribution of the judiciary to environmental law, by interpreting the right to the environment as a fundamental right under Part III of the Constitution and upholding the rights-duty paradigm in environmental rights strengthened environmental governance in India<sup>22</sup>.

At the dawn of independence, the focus of the drafters of the Constitution was to establish a welfare state based on the principles of equality, liberty and fraternity highlighted by the preamble and an egalitarian state through affirmative actions, and to reduce socio-economic disparities among the citizens (Thiruvengadam, 2017; Plyee, 2005; Seervai, 2004; Jain, 1987; Rao, 1966; Austin, 1966; Basu, 1953). At that juncture, the environment, and natural resources, which were plenty, weren't resources to be protected, but to be explored for the social and economic development of the country. Increasing global attention on negative externalities on the environment created by developmental activities resulted in international environmental treaties, which recognised ecological protection as the state's duty or obligation. The rationale of a non-rights-based approach or a duty-based approach in environmental protection as recognised by the international treaties arose from acknowledging the states' contribution to environmental harm, which over-emphasised economic development and poverty reduction to ecological conservation.

It also created reverberations in domestic jurisprudence with its addition to the Constitution and enactment of the statutory framework for environmental protection. The addition of environmental protection as a Directive Principle of State Policy

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<sup>22</sup> See *Virendra Gaur v. State of Haryana* (1995) 2 SCC 577; *Subhash Kumar v. State of Bihar* (1991 (1) SCC 598.

(DPSP) is a consequence of this international development, whereby the state added ecological conservation as a directive to the state<sup>23</sup>. However, the judicial interpretation of DPSP, which is non-justiciable but fundamental to the country's governance, has been dynamic and evolving; from being interpreted as subsidiary to Fundamental Rights<sup>24</sup> to enjoying equal status with Part III and essential for its fulfilment, as one may more fully observe from the holding of Chief Justice Das, who had earlier given the verdict in *State of Madras v Champakam Dorairajan*<sup>25</sup>. The dynamic judicial interpretation of DPSP, including Article 48-A, helped to engage with environmental protection and develop a rights-duty paradigm for the environment, which also helped evolve water jurisprudence in India<sup>26</sup>.

The recognition of the right to a clean environment in India interpreted from Article 21 and Article 48-A of the Constitution opened a plethora of judicial directions to the state to ensure effective implementation of legislation for environmental protection, including the creation of statutory authorities<sup>27</sup>. For instance, in *Virendra Guar v State of Haryana*<sup>28</sup>, the Supreme Court held that a hygienic environment is an integral facet of the right to a healthy life, and it would be impossible to live with human dignity without a human and healthy environment. In several cases, the Supreme Court has pointed out that any action that interferes with ecological balance, causing pollution of the

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<sup>23</sup> See India Const. art. 37.

<sup>24</sup> *State of Madras v. Champakam Dorairajan* AIR 1951 SC 226; Mohd. Hanif Qureshi & Ors. v. The State of Bihar [1959] S.C.R. 629.

<sup>25</sup> See *Re: Kerala Education Bill 1957* [1959] S.C.R. 995; See Also *Minerva Mills Ltd v. Union of India* (1980) 2 SCC 591.

<sup>26</sup> See *Virendra Gaur v. State of Haryana* 1995 (2) SCC 571; *Indian Council for Enviro-Legal Action v. Union of India* AIR 1996 SC 1446; *M. C. Mehta v. Union of India* AIR 1998 SC 1037; *Rural Litigation & Entitlement Kendra, Dehradun v. State of Uttar Pradesh* AIR 1988; *Kinkeri Devi v. State of Himachal Pradesh* AIR 1988 HP. 4; See Also *T Damodar Rao v. The Special Officer, Municipal Corporation of Hyderabad* AIR 1987 AP 171.

<sup>27</sup> *MC Mehta v. Union of India* (1997)11 SCC 312.

<sup>28</sup> *Virender Gaur & Ors. v. State of Haryana & Ors* 1995 (2) SCC 577.

environment and threatening human dignity, would violate Article 21<sup>29</sup>. The fundamental right to the environment also included enjoying clean air and pollution-free water.

#### **4.1. Right to Water in India: Judicial Creation of Rights-Duties Paradigm and Application of Environmental Principles**

Every government involved in the development and implementation of water management systems should aim to ensure access to safe, clean and sufficient water for all and regulate the use and management of water through comprehensive laws and policies (Zodrow, 2010). In India, currently, the drinking water supply in the country is regulated by a patchwork of policy documents and fragmented rules and regulations (Cullet, 2009). The right to water is recognised as a fundamental right, carved from Article 21 of the Constitution of India<sup>30</sup>. In its several judgments, the courts in India have reiterated that water is essential for survival, an integral part of the right to life as enshrined under Article 21, with the Supreme Court having specifically held the right to water to be a fundamental right in the case of *A.P. Pollution Control Board*<sup>31</sup>.

The Indian judiciary, in its judgments on fundamental rights, especially water-related rights under the right to life, has highlighted the three obligations of the state mentioned in General

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<sup>29</sup> See *M. C. Mehta v. Union of India* (2004) 12 SCC 118; *M. C. Mehta v. Union of India* (1997) 2 SCC 411; *M. C. Mehta v. Kamal Nath* (1997) 1 SCC 388; *T. N. Godhavarnam Thirumulpad v. Union of India* (1997) 2 SCC 267; *S. Jagannath v. Union of India* (1997) 2 SCC 87; *M. C. Mehta v. Union of India* (1997) 2 SCC 353; *M. C. Mehta v. Union of India* (1996) 8 SCC 462; *Vellore Citizens Welfare Forum v. Union of India* (1996) 5 SCC 647; *Indian Council for Enviro Legal Action v. Union of India* (1996) 5 SCC 281; *Subhash Kumar v. State of Bihar* (1991) 1 SCC 598; *Rural Litigation Kendra v. State of UP* AIR 1987 SC 2426.

<sup>30</sup> See India Const. art.21.

<sup>31</sup> See *Subhash Kumar v. State Of Bihar* 1991 AIR 420; *Narmada Bachavo Antholan v. Union of India* AIR 2000 SC 3751; *A.P. Pollution Control Board v. Prof. M.V. Nayudu (Retd.) & Ors.* (2001) 2 SCC; See also *Vishalakochi Kudivella Samprakshana Samiti v. State of Kerala* 2006 (1) KLT 919 & *Attakoya Thangal v. Union of India* 1990(1) KLT 550.

Comment 15 - respect, protect and fulfil. Thus, in *Subhash Kumar v Union of India*<sup>32</sup>, the Supreme Court of India noted:

Right to life is a fundamental right under Article 21 of the Constitution, and it includes the right of enjoyment of pollution-free water and air for full enjoyment of life. If anything endangers or impairs that quality of life in derogation of laws, a citizen has the right to have recourse to Article 32 of the Constitution for removing the pollution of water or air, which may be detrimental to the quality of life.

Similarly, in many subsequent cases, it was persistently observed 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."<sup>33</sup>

Later judgments of various courts, including the Supreme Court, extended the recognition of the right to water, reiterated the nature of the right to water as fundamental to the very existence of life, and reminded the state of its duty to adopt progressive and sustainable measures in order to realise this right. Thus, by ordering the state to facilitate, promote and provide measures, the typology of obligations mentioned in General Comment 15, has already been implicitly recognised in India.

In *Vishala Kochi Kudivella Samprakashana Samiti v State of Kerala*<sup>34</sup>, the court reminded the state of its obligation towards its citizens, stating that:

Water is one of the primary needs of man, second only to air. Water is, in fact the elixir of life. Any government, whether proletarian or bourgeois and certainly a welfare state committed to the cause of the common man, is bound

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<sup>32</sup> *Subhash Kumar v. State of Bihar* 1991 AIR 420.

<sup>33</sup> See *Attakoya Thangal v. Union of India* 1990(1) KLT 550, *Narmada Bachavo Antholan v. Union of India* AIR 2000 SC 3751; *A.P. Pollution Control Board v Prof. M.V. Nayudu (Retd.) & Ors.* (2001)2SCC 62.

<sup>34</sup> *Vishalakochi Kudivella Samprakashana Samiti v. State of Kerala* 2006 (1) KLT 919; See also *A.P. Pollution Control Board v. Prof M.V. Nayudu (Retd.) & Ors* (2001)2SC C 62.

to provide drinking water to the public, which should be the foremost duty of any government. When considering the priorities of a government, supply of drinking water should be on the top of the list.

The Andhra Pradesh High Court recapitulated the role of the State to provide every citizen with adequate clean drinking water. In *P. R. Subas Chandran v Govt. of A.P. & Others*<sup>35</sup>, the High Court held that the state should provide every citizen with adequate drinking water and protect water from getting polluted, as it is not only a core Directive Principle in the governance of the state, but is also a penumbral right under Article 21 of the Constitution of India. Thus, the state is not only bound to regulate the water supply but should also help realise the right to healthy water and prevent health hazards<sup>36</sup>.

Despite these judicial developments, no legislation has been enacted, neither by the Central nor State governments, to recognise the right to water as a fundamental right. The water policies and supply schemes also follow a welfare-based approach with the conspicuous absence of recognition of a rights-based approach. Additionally, neither the legislation nor the water policies emphasise concerns of injustices and inequities in the access and allocation of water resources in India. The lack of recognition of a rights-based approach also contributes to this inadequate focus on water inequities.

Nevertheless, judicial recognition of the rights-based approach emphasised water as a positive right with a duty to protect, respect and fulfil the right. This can be further substantiated by constitutional provisions and decisions of the executive. As per Article 141 of the Constitution, 'The law declared by the Supreme Court shall be binding on all courts within the territory of India', and though this provision mentions applicability to all courts, it has been interpreted that law declared by the Supreme Court of India is the law of the land. Article 39(b) provides that the State shall, in particular, direct its policy towards securing the ownership and

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<sup>35</sup> *P. R. Subas Chandran v. Govt. Of A.P. & Others*, 2001 (5) ALD 771.

<sup>36</sup> *D. Viswanatha Reddy & Company v. Government of Andhra Pradesh* 2002 (4) ALD 161

control of the material resources of the community and are so distributed so as to best to subserve the common good. The Government of India constituted the Central Ground Water Authority (CGWA) under Section 3(3) of the Environment (Protection) Act, 1986 for the purposes of regulation and control of ground water, development and management in the country after the Supreme Court of India's directive in *M. C. Mehta v Union of India*<sup>37</sup>. To fulfil the State's role, since recognising the right to a clean environment, the courts have consistently reiterated this right as a reminder to the State of its constitutional command to protect the environment and its constituents and fulfil its duty towards the citizens<sup>38</sup>.

Courts in India have applied international environmental law principles like the precautionary principle<sup>39</sup>, public trust doctrine<sup>40</sup>, polluter pays principle<sup>41</sup> and intergenerational equity for domestic regulation of activities that cause environmental degradation and depletion of water resources. These interpretations and application of the international tenets strengthened the implementation of the right to water in India. It included applying these principles as a reminder to the State to ensure its duty of protecting and conserving the water resources<sup>42</sup>. Thus, an analysis of the trajectory of courts' contribution to the development of the right to water and water jurisprudence through constitutional interpretations is an extension of environmental rights jurisprudence in India,

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<sup>37</sup> See India Const. art.141; *M. C. Mehta v. Union of India* (1997) 11 SCC 312.

<sup>38</sup> *Court On Its Own Motion v. Union Of India* Delhi Suo Motu Writ Petition (Civil) No. 284 OF 2012; *Jal Board v. National Campaign for Dignity & Rights of Sewerage & Allied Workers*(2011) 8 SCC; *In Re: Noise Pollution v. Unknown* AIR 2005 SC 3136; ; *Narmada BachaoAndolan v Union of India* (2000) 10 SCC 664; *Vellore Citizens' Welfare Forum v Union of India*1996 (5) SCC 647.

<sup>39</sup> *A.P. Pollution Control Board v. M. V. Nayudu*(1999) 2 SCC 718.

<sup>40</sup> *M. C. Mehta v. Kamal Nath* 1997 (1) SCC 388.

<sup>41</sup> *Vellore Citizens' Welfare Forum v. Union of India*1996 (5) SCC 647; *Research Foundation for Science v. Union of India* (2005) 13 SCC 186; *Indian Council for Enviro-Legal Action v. Union of India*(1996) 3 SCC 212.

<sup>42</sup> *M.C. Mehta v. Kamal Nath* MANU/SC/1007/1997



developed from a broader interpretation of the right to life. Right to the environment, expanded to include water, evolved as an essential component of/for enjoying the right to life under Article 21 of the Constitution.

Constitutional interpretations particularly benefited through fundamental rights jurisprudence, equipped people to fight injustices with respect to water, access judicial remedy for inequitable access and allocations, and address deprivations and denials of their human right to water. In addition to this substantial component, the right to water also benefited from Public Interest Litigations (PILs), which boosted environmental rights and the law regarding the same. Though Article 32 guarantees affected persons to approach the courts for redressal of violation of fundamental rights, it was earlier confined to the victims alone<sup>43</sup>. However, Public Interest Litigation has relaxed this rule of 'locus standi' and expanded the ambit of judicial remedy through distributive access to justice mechanisms for the disadvantaged sections of the society (Cassels, 1989). Thereby, any public-spirited persons could act on behalf of the public and those unable to access remedies for reasons of poverty, helplessness, disability, or socio-economic disadvantages<sup>44</sup>.

The court has visualised PIL to be a collaborative effort by all stakeholders - the petitioner, the state and the judiciary, to widen the justice delivery mechanism, secure observance of constitutional values and objectives<sup>45</sup>, ensure participatory justice<sup>46</sup> and act as a tool for ensuring human rights to the deprived classes<sup>47</sup>. It has helped in taking steps to realise the environmental rule of law in the country, by reminding the state of its obligation towards citizens, the environment and providing equal treatment to every

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<sup>43</sup> See India Const. art. 32.

<sup>44</sup> S. P. Gupta v. President of India & Ors AIR 1982 SC 149.

<sup>45</sup> People's Union For Democratic Rights v. Union Of India 1982 AIR 1473.

<sup>46</sup> Fertilizer Corporation Kamagar Union Regd., Sindri & Others v. Union of India & Others AIR 1981 SC 844.

<sup>47</sup> Ramsharan Autyanuprasi & Another v. Union of India & Others AIR 1989 SC 54.

citizen in environmental matters, and by striking down arbitrariness and inequality.

PIL has transformed this derived status of the right to clean and healthy environment, and water, to the most sought after right, and has expanded the domains of accessing and implementing environmental justice to all sections of the society (Razzaque, 2007). Relaxation in standing rules saw flexibility in the courts' approach toward public issues, expansion in the meaning of fundamental rights, adoption of a harmonious construction of DPSP and fundamental rights to achieve full recognition of human rights, and application of several international standards for the implementation of human rights. These public interest litigations often act as catalysts to the 'judicial democracy' movement, transforming the courts into a 'liberated agency with a high socio-political visibility' from its narrow traditional role (Baxi, 1985). It also strengthened the water rights jurisprudence in India by interpreting the right to water as a fundamental right and acting as a reminder to the State of the necessity in applying environmental law principles for water conservation.

## **5. Significance of Brasília Declaration in Assuring Water Justice: Drawing Parallels and Leading the Way**

Through the Brasília Declaration on Water Justice, judges worldwide tried to foreground the significance of water justice in determining water-related disputes. The relevance of this Declaration arises from its context and participants. With the increasing cases of impacts of climate change across the world, and rising concerns of water scarcity, water disputes and transboundary effects of water governance on human rights, this Declaration is significant in the context of water governance. Similarly, with increasing number of water disputes from local to global reaching courts for settlement, the judiciary's role in water justice is also vital. An analysis of environmental cases in India shows that there is a significant number of water-related litigations. Similarly at the international level, there are arbitrations of water

disputes like Kishenganga<sup>48</sup>. Furthermore, there are also judicial verdicts on transboundary water disputes by bodies like the ICJ in cases like that of the Gabčíkovo-Nagymaros Project<sup>49</sup>,

Brasília Declaration of Judges on Water Justice acknowledges the impending water crisis triggered by climate change and highlights the need for urgent action with more power to the judiciary, and argues for participatory water management in water policies. The recognition of water as a public good with state stewardship in water management, emphasising sustainability and intergenerational equity deviates from the 1992 Dublin Principles, which started the movement for recognition of water as an economic good and involvement of multinational development banks in water governance while moving the state away from its fundamental obligation.

## **6. Conclusion**

The contribution of the judiciary in implementing these principles is remarkable. The courts in India have applied these principles in environmental law for adjudicating water disputes and water-related cases, particularly pollution cases. Hence, these principles strengthen the judicial efforts to reconceptualise water governance from an ecological perspective. It boosts the state's efforts in implementing the fundamental right to water by maintaining the source sustainability, quality and quantity of water resources. The Brasília Declaration also found its place in Indian environmental jurisprudence, when a recent judgment in 2018, by the Goa Bench of Bombay High Court by Justice Nitin Jamdar, in a litigation disputing land-use planning administrative decision, (WP No.14 Of 2016) applied these principles. Though these principles have been used in individual cases earlier by the courts, this compilation of regulations could strengthen their role in protecting human rights, environmental rights, and the ecosystem. Thus, the Declaration has

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<sup>48</sup> Indus Waters Kishenganga Arbitration, Pakistan v. India, Final Award, ICGJ 478 (PCA 2013), 20th December 2013, Permanent Court of Arbitration [PCA].

<sup>49</sup> Gabčíkovo-Nagymaros Project, Hungary v. Slovakia, Judgment, Merits, ICJ GL No 92, [1997].

the potential to draw parallels with domestic jurisprudence and strengthen the efforts of the domestic judiciary in promoting water justice.

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