

Right to Water in a Humanitarian Perspective: A Comparative Legal Analysis between Sri Lanka and South Africa

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Abstract – Right to water is essential for human survival. Thus, this research aims at identifying the importance of right to safe drinking water and sanitation in a humanitarian perspective. Therefore, this study mainly focuses on finding out whether there is an express right to safe drinking water within the legal framework of Sri Lanka. The objectives of this research are to identify the issues relating to the right to water in Sri Lanka, to identify whether there is an express right to water and sanitation and to propose necessary amendments to the existing legal regime. The methodology of this research is a combination of black-letter and comparative approach. Furthermore, this research would employ a qualitative analysis of primary data such as constitutional provisions, international instruments and judicial decisions and secondary data of books, journal articles and internet. The Sri Lankan legal regime relating to the right to water will be discussed under three main topics namely slum-dwellers, plantation sector and schools. Moreover, the South African legal regime will also be discussed in order to conduct a comparative analysis relating to the said area. The study reveals that there are certain laws with regard to right to water in Sri Lanka. Simultaneously, it also identifies that there are some policies on the right to water, even though they do not have any binding effect. Finally, the study concludes with a view that right to water under the Sri Lankan legal regime is unsatisfactory while providing recommendations to the said issue such as recognizing the right to water and sanitation as a self-standing right.

Keywords: Right to Water, Sanitation, Humanitarian Perspective.

I. INTRODUCTION

“Safe drinking water and adequate sanitation are crucial for poverty reduction, crucial for sustainable development and crucial for achieving any and every one of millennium goals”

-Ban-Ki-Moon-

Right to water could be considered as a basic human need because it is essential for human survival. Further, it is important to note that unsanitary water results in various diseases such as diarrhea. And, at present right to water has received international and domestic recognition through various mechanisms due to its importance. For instance, water as a fundamental right was firstly recognized at the UN Water Conference in 1977.¹ Furthermore, UN declared 2003 the ‘International Year of Fresh Water’ with a view of reasserting the UN’S Millennium Declaration Goal illustrating the significance of recognizing access to water as a human right. Apart from this, UN has identified clean water and sanitation as a Sustainable Development Goal with a view of achieving a more sustainable future for everyone, thus highlighting the importance of right to safe drinking water and sanitation.

When analysing the Sri Lankan context, it could be identified that, slum-dwellers and residents residing near tea estates are the mostly affected groups due to the issues relating to water and sanitation. These factors pave the way to look into the necessity of introducing an explicit right with regard to right to water and sanitation. However, when analysing the Sri Lankan legal regime it is of importance to note that there is no explicit right to water and sanitation. Being the supreme law of the country, even the 1978 Constitution of Sri Lanka does not expressly recognize such a right.

¹ Arachchi, 2017, ‘Right to Water and Sanitation of Slum-Dwellers in Sri Lanka’, Proceedings of Academicsera 9th International Conference, <

http://www.worldresearchlibrary.org/up_proc/pdf/1133-15115072081-5.pdf>

II. METHODOLOGY AND EXPERIMENTAL DESIGN

The research methodology would be a combination of Black-Letter (doctrinal) Methodology and Comparative Research Methodology. Black-Letter Methodology will be used in order to provide a descriptive legal analysis on the area. Under the Comparative Research Methodology, a comparative analysis between the Sri Lankan and South African jurisdictions will be conducted in order to distinguish the features in law. Furthermore, the research would employ a qualitative analysis of primary data such as international instruments, constitutional provisions, legislations and judicial decisions and secondary data of books, journal articles and internet.

III. RESULTS AND DISCUSSION

i. International legal regime on human right to water

As mentioned above, the concept of right to water was firstly established at the UN Water Conference in 1977. In addition, right to water was recognized under the International Law by the General Comment No.15 by the Committee on Economic, Social and Cultural Rights. This is illustrative of Articles 11 and 12 of ICESCR. Further, according to Resolution 2/104 passed by the Human Rights Council in 2006, addressed 'Human Rights and access to water', The UN High Commissioner for Human Rights emphasized that it is high time to consider access to safe drinking water and sanitation as a Human Right. Apart from this, according to UN Resolution 7/22, Human Rights Council decided to appoint a special rapporteur for 3 years relating to the issue of access to water and sanitation. Further, in 2010, right to water and sanitation was recognized by the UN General Assembly and Resolution 64/292 acknowledged that clean drinking water and sanitation are integral to realisation of Human Rights. And UNGA Resolution 24/18 reaffirmed the Human Right to water and sanitation. Moreover, it is important to note that the World Health Organisation has set up guidelines for proper water and sanitary services.

There are International Treaties that recognize right to water and sanitation such as The Convention on the Elimination of All Forms of Discrimination against Women², The Convention on the Rights of the Child³ and

the Convention on the Rights of Persons with Disabilities.⁴ Thus it could be identified that there are adequate references relating to right to water and sanitation in international level. But here a question arises as to whether why does Sri Lanka still lacks right to water and sanitation irrespective of recognition of such right in international level.

ii. South African legal regime and judicial decisions

South Africa is one of the few countries which recognizes right to water in their Constitution. In addition, it is a country which recognizes the right of a person to have sufficient amount of water. Further, the country has made a significant progress in understanding the need of people to consume sufficient amount of water. Subsequently, they have worked towards achieving this aim in light of this understanding. Yet, even at the present scenario, there are thousands of people who are suffering due to the lack of water supply and sanitation. The ground reasons for this could be identified as the climate change and the drought.

Section 27 (1) (b) of the South African Constitution grants a legal right for every person in the country to have access to sufficient amount of water. Further, the regulations under Section 9 and 10 of the Water Services Act No.108 of 1997 of the country prescribes 25 litres per person per day as the minimum standard of basic water supply. Here, it is noteworthy to mention the importance of hard law to govern water supply and to have access to right to water. This is what creates a legal obligation over the government while enabling the citizens to go before the courts for violation of their rights. And thereby the courts may place emphasis on their constitutional right to access to water.

Correspondently, there are several judicial decisions that have been decided in terms of right to access to water in South Africa. In the judgement of the case brought by Lindiwe Mazibuko against the City of Johannesburg, the court held as follows; "At the time the Constitution was adopted, millions of South Africans did not have access to the basic necessities of life, including water. The purpose of the constitutional entrenchment of social and economic rights was thus to ensure that the state continues to take reasonable legislative and other

² Article 14(2)

³ Article 24, 27(3)

⁴ Article 28

measures progressively to achieve the realization of the rights to the basic necessities of life.”⁵

iii. National standards on right to water and sanitation

Right to water and sanitation are not explicitly recognized under the 1978 Constitution of Sri Lanka nor there are any legislations which recognize these rights separately. However, in Sri Lanka there is a Board which has been established to govern the water supply and matters relating to sanitation under the National Water Supply and Drainage Board Law No.2 of 1974. Under Section 16(1)(a) of this law, “It shall be the duty of the Board to develop, provide, operate and control an efficient, coordinated water supply and to distribute water for public, domestic or industrial purposes.” Thus, the National Water Supply and Drainage Board is the main authority responsible for development and maintenance of drinking water and sanitation. Moreover, the Sri Lankan government had set up several National Water Policies. However, in this study only the relevant water policies will be discussed. Simultaneously, this right has been referred to under the National Environmental Policy as well. In Addition to this, Section 270 of the Penal Code imposes punishment for fouling the springs and the reservoirs voluntarily.

National Water policy on water supply and sanitation was introduced in August 2002 with the vision of ‘improving the standard of living, promoting economic prosperity, and preserving the environment by providing access to safe drinking water and adequate sanitation facilities to the people of Sri Lanka’⁶. This policy was brought in with the intention of achieving several goals. For instance, it was introduced with a view of providing safe drinking water for 85% of the population of Sri Lanka by 2010 and to provide 100% of safe drinking water by 2025. In addition, this policy intends to upgrade the sanitation facilities and consequently aims at providing adequate sanitation to 70% of the population by 2010 and the policy also intends to make adequate sanitation available for every person in Sri Lanka by 2025.

National policy on drinking water attempts to address the goal of providing safe-drinking water to every person in the country. Hence, the policy defines its goal as recognizing the access to safe drinking water as a basic right and also to provide adequate quantities of safe drinking water to the entire population. Under this policy there are certain policy principles to be followed. For instance, planning and development of water supply will follow people centred participatory approaches. Further, the government will act as the custodian of water resources and management of such resources on behalf of the people in an efficient manner while considering the needs of the present and future generations. Moreover, the policy could be applied to both the rural water supply and urban water supply. Apart from this, there are two separate policies introduced by the authorities in order to set out the goals for rural water supply and urban water supply including sanitation. Subsequently, the government intends to ensure the rights of all citizens to have access to safe drinking water while establishing guidelines to ensure efficient use of resources by adopting the principles of equality, transparency and accountability.

Furthermore, the Ministry of Environment in Sri Lanka has set up a national policy in 2003 which states that, planning for management measures should be done at the national level. Principle 1 of the policy states that uninterrupted and adequate supply of water of the required quality should be maintained in order to meet the national needs. In addition, the policy brings up 12 other principles with a view of ensuring the protection of reservoirs as well as to provide clean drinking water to all the people in the country.

As a whole, it is important to note that Policies are considered as soft laws which have been introduced to achieve short term goals. Further, if these goals are not achieved as expected there won't be any liability over the matter of non-achieving since they do not have any binding effect.

In a recent judgement, *Ravindra Gunawardena Kariyawasam v Central Environment Authority and*

⁵ Sujee,2018,'Using the court to secure water rights', University of the Witwatersrand, Johannesburg,<<https://www.wits.ac.za/news/latest-news/research-news/2018/2018-05/using-the-court-to-secure-water-rights.html>>

⁶ Arachchi, 2017, 'Right to Water and Sanitation of Slum-Dwellers in Sri Lanka', Proceedings of Academicsera 9th International Conference, <http://www.worldresearchlibrary.org/up_proc/pdf/1133-15115072081-5.pdf>

*Others*⁷, it was stated that “the 8th respondent company has operated a thermal power station in Chunnakam in a manner which has polluted groundwater in the Chunnakam area and made ground water unfit for human use.” Here, Prasanna Jayawardena J. applied the Polluter Pays Principle and made the 8th respondent liable to pay Rs.20 million among persons who reside within a 1.5Km radius of the 8th respondent’s thermal power station and whose wells have been contaminated with oil and grease to clean the wells. Thus, this emphasizes the need to have clean drinking water.

iv. Issues in Sri Lanka relating to right to water and sanitation

Despite Sri Lanka being ahead in the region in the race of achieving Millennium Development Goals, there were three key areas which were lagging behind. Those vulnerable areas were the slums, plantation sector and schools.⁸

According to UN Resolution in 2010, the human right to safe drinking water and sanitation is derived from right to adequate standard of living. This also relates to human dignity, right to life and right to education. Most of the time slum dwellers lack access to social services and property rights. This could be considered as a violation of their human right on the grounds of discrimination and unequal treatment. Sometimes slum dwellers use common wells and common washrooms. According to research statistics nearly 380 persons have only four toilets and one water tap⁹ to use. This has resulted in long queues in common wells and toilets which has ultimately affected the daily lives of these people adversely.

In the tea plantation industry specifically in the ‘line-houses’¹⁰ where the employees of the particular tea plantations reside can be identify as having poor conditions of water and sanitary facilities. In most of the plantations, the workers and their families share only

one or two toilets. Moreover, these toilets are common toilets. Consequently, both women as well as men use the same common toilet which can be identified as an issue for the privacy of the young girls and women in the scheme. This is an issue which is needed to be addressed promptly because it relates to the privacy of the girls and women in the scheme. In addition, one of the main issues faced by the plantation workers and families is the issue of unavailability of clean water. The backbone reason for this issue is not the unavailability of water resources but that they are not in a consumable condition. Various types of chemicals and fertilizers that are being injected to the plantations are said to be mixed to the springs, fountains and other natural resources around the plantations converting them into an inconsumable status. For instance, an employee of the “Wallawala A” grama division mentioned that before receiving a water tank from “Sirasa Gammadda program”, around 500 people were suffering due to the unavailability of clean-drinking water. Further, it is important to note that most of these line-housing schemes have only one pipeline to the whole scheme and the women of these housing schemes have to wait in the ques and take water in baskets to use for daily household activities. Accordingly, this situation explains that families living in the plantation sector has to undergo number of fundamental rights violations even without them being aware of the fact that their basic fundamental rights are being violated.

Article 24(c) of the ‘Child Rights Convention (CRC) and Article 14(2) of the The Convention on the Elimination of All Forms of Discrimination against Women, adopted in 1979 states that state parties are required to pursue full implementation and should take appropriate measures in relation to clean drinking water and hygiene facilities. However, it is disconsolate to notice that most of the urban as well as the rural government schools in Sri Lanka have very poor conditions relating to sanitation. Around 1000 schools in Sri Lanka do not have proper toilet facilities. Simultaneously, around 17 schools in the North Western district do not even possess a single toilet to the school.¹¹

⁷ SC FR Application No.141/2015

⁸ Nizam,2016, ‘Schools Lack Proper Water and Sanitation Facilities’, The Sunday Leader, <<http://www.thesundayleader.lk/2016/05/29/schools-lack-proper-water-and-sanitation-facilities/>>

⁹ Arachchi, 2017, ‘Right to Water and Sanitation of Slum-Dwellers in Sri Lanka’, Proceedings of Academicsera 9th International Conference, <http://www.worldresearchlibrary.org/up_proc/pdf/1133-15115072081-5.pdf>

¹⁰ Nizam,2016, ‘Schools Lack Proper Water and Sanitation Facilities’, The Sunday Leader, <<http://www.thesundayleader.lk/2016/05/29/schools-lack-proper-water-and-sanitation-facilities/>>

¹¹ Sujee,2018, ‘Using the court to secure water rights’, University of the Witwatersrand, Johannesburg, <<https://www.wits.ac.za/news/latest-news/research-news/2018/2018-05/using-the-court-to-secure-water-rights.html>>

As a country which has ratified the CRC as well as the CEDAW Convention and the ILO, violation of the sanitation rights of the children as well as the young women can be considered as a violation of the international rights. In reference to the school's unavailability of the toilets on gender basis can be identified as a violation of the privacy rights of female students and the lady teachers. This violation equally applies to the women who live in the plantations as well as slum-dwellers. This can be considered as a violation of their labour rights despite the country has ratified many International Labour Conventions.

IV. OBSERVATIONS AND RECOMMENDATIONS

As the Sri Lankan legal regime lacks references relating to right to water and sanitation, it is of great importance to take immediate measures in order to safeguard basic fundamental rights of people who reside in the country. Consequently, following observations and recommendations were made after comparing right to water in a humanitarian perspective between the Sri Lankan and South African legal regimes.

- Water is an essential aspect of human wellbeing. Thus, right to water and sanitation should necessarily be a state implemented right.
- One of the main reasons for the violation of this basic human right of people is the fact that they are not being aware of their rights. Consequently, the government is required to make people aware of their right to clean-drinking water and sanitation by conducting appropriate awareness programs.
- Since the right to have clean drinking water and to live under good hygiene conditions can be considered as a basic human need of people, it is crucial to recognize it as a basic fundamental right under the Constitution. Accordingly, it is required to explicitly recognize right to water and sanitation under the Fundamental Rights chapter of the Sri Lankan Constitution as a self-standing right.
- Setting adequate standards in relation to clean-drinking water and sanitation in order to uphold living standards of people.
- Since the punishments imposed by Section 270 of the penal code for fouling springs and reservoirs cannot be considered as adequate, it is needed to make amendments to the said section.

- A proper monitoring mechanism should be established in order to ensure right to water and sanitation in the country.

V. CONCLUSION

The study reveals that the Sri Lankan legal regime lacks express right to water and sanitation. In Sri Lanka, even though, there is a Board which has been established to govern the water supply and matters relating to sanitation under the National Water Supply and Drainage Board Law No.2 of 1974, still it has failed to address the issues faced by slum-dwellers, plantation sector and schools in the practical context. It should also be noted that there are certain policies enacted with regard to right to water in Sri Lanka even though they do not have any binding effect.

Thus, as a whole, when analyzing the above facts it is clear that there are many issues which have been arisen due to lack of safe drinking water and sanitation, especially among slum dwellers, plantation sector and schools. Therefore, it would be effective to explicitly recognize right to water and sanitation under the Fundamental Rights Chapter of Sri Lankan Constitution as a self-standing right.

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