



International Environmental  
Law Research Centre

# A LESSER FUNDAMENTAL RIGHT TO WATER

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Published in: *The Statesman*, 05 March 2015, p. 16.

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# A lesser fundamental right

A RECENT ORDER OF THE BOMBAY HIGH COURT UPHOLDS THE FUNDAMENTAL RIGHT TO WATER FOR SLUM-DWELLERS BUT SAYS THEY CANNOT ENJOY A RIGHT AT PAR WITH OTHER RESIDENTS, SAYS SUJITH KOONAN

Slums or the so called 'illegal' or 'unauthorised' settlements in urban areas are known for inadequacy or lack of water supply and sanitation services. Lack of ownership over land and property renders the slum dwellers ineligible for basic services that are provided by the government including local bodies.

In many cases, slum dwellers depend on water tankers provided by the local bodies or private parties to meet their drinking and domestic water needs. Recently a new mechanism known as water ATMs or water kiosks has been introduced in slums by the government as well as corporate social initiatives to supply drinking water where people have to use prepaid cards. Thus, the existing water supply through tankers which is mostly provided by local bodies free of cost, although inadequate and erratic, is being slowly replaced by a mechanism based on prepaid cards.

The government and some international funding agencies have been promoting the idea of full cost recovery, corporatisation and commercialisation of water for some time. Recently, the Indian judiciary has also started endorsing these changes in the water supply sector. A recent order of the Bombay High Court in a case on water supply to slums in Mumbai has endorsed the mechanism of water supply to slums on the basis of prepaid cards. This order raises a number of critical questions on how life, fundamental rights and entitlements of the people in slums are being determined on the basis of their rights over the land they occupy.

On 15 December 2014, the Bombay High Court issued an Interim Order in a public interest litigation on the fundamental right to water. The order has been praised for its declaration of water as a fundamental right under Article 21 (right to life) of the Constitution of India. The order adds to the list of decisions by the Supreme Court of India and various high courts that recognise water as a fundamental human right.

The public interest litigation, which was filed by Pani Haq Samiti (a right to water collective), challenged the policy of the Maharashtra Government and the Municipal Corporation of Greater Mumbai (MCGM) that denies water sup-

ply to slums on the ground that their stay in the slums is illegal. Specifically, the petition questioned the direction of the MCGM under the Mumbai Municipal Corporation Act, 1888 that limits water supply provisions to slum dwellings constructed before 1 January 2000. The petitioner argued that the MCGM's policy is a violation of the fundamental human right to water because the Constitution does not permit the denial of fundamental rights on the basis of the nature of land rights or tenure.

The MCGM justified its policy as a step necessary to discourage construction of illegal slums. This argument undermines the foundations of the fundamental rights guaranteed in the Constitution because their enjoyment cannot be dependent on a person's right over land or a house. It is alarming that the government has adopted a violation of the fundamental right to water as a policy to prevent the construction of illegal slums. Instead of addressing the critical issue of lack of affordable housing, the government chose the most convenient, but improper, solution. This is yet another example where policy goals and strategies make the constitutional rights and norms virtually non-existent.

Fortunately, the High Court refused to accept the MCGM's arguments. As a result, the order explicitly provides that the fundamental right to water is guaranteed under the Constitution and that 'the State cannot deny the water supply to a citizen on the ground that he is residing in a structure which has been illegally erected' (para 11). The High Court directed the MCGM to formulate a policy, by the end of February 2015, for providing water supply in some form to the occupants of the slums that came into existence after 1 January 2000 (para 21). The order is indeed a landmark achievement of the right to water campaign in India. It highlights the potential of using the language of the fundamental right to water to compel the government (including local bodies) to take measures to ensure water for everyone irrespective of their land rights; and to challenge government orders that deny or affect the fundamental right to water, particularly of poor and vulnerable people. However, some of the observations and sev-



eral directives in the order are fraught with implications for the fundamental right to water and other basic human rights of people living in slums.

First, the court endorsed the fundamental right to water and held that people living in illegal slums are entitled to water supply. However, this legal position was diluted significantly in the operational directive which provides that the occupants of 'illegal' slums 'cannot claim a right to supply drinking water on par with a right of law abiding citizen who is occupying lawfully constructed premises having occupation or completion certificate' (emphasis added, para 21). Instead of delinking the fundamental right to water of slum dwellers from their land rights, this directive seems to legitimise a system of differential fundamental right to water for slum dwellers.

Second, the order supported the policy of charging slum dwellers a higher rate than the rate charged for water supply to the people living in authorised constructions. This suggests that the court favoured a policy that makes enjoyment of the fundamental human right to water for slum people more expensive than

the 'legal occupants' of the city and thus amounts to punishing the poor because they are poor. This is contrary to the idea of fundamental right to water as a universal right. This is also contrary to the court's own observation that poor people stay in slums because of lack of availability of affordable houses in the city.

Third, the court supports the introduction of the system of prepaid cards in slums. This suggests that the court understands the fundamental right to water as a right that people can enjoy as long as they pay for it. This amounts to recognising a right in principle and rendering it ineffective through operational norms besides reducing the fundamental right to water to an entitlement to access a water source subject to payment of a price. This is clearly a neo-liberal redefining of the fundamental rights enshrined in the Constitution.

Fourth, the court in several parts of the order highlighted the illegality of life in slums and directed the MCGM 'to take action of prevention of construction of the unauthorised slums and to take action of demolition...' (para 21)

The court also directed the municipal authorities to take action against officers negligent in their duty to prevent construction of illegal slums in the city. By issuing such a direction, the court has overlooked the systemic reasons for the increase in slum population in India. Further, the direction is likely to result in mass evictions leading to violation of fundamental rights including the fundamental rights (water, housing, livelihood etc.) that are highlighted in the order. The court appears to have favoured the easiest and perhaps the most convenient way to address the issue (i.e., eviction). From a fundamental right to water perspective, there is a contradiction in the order where on the one hand, the court directs the MCGM to take measures to provide water supply to slums and on the other hand, it directs the MCGM to demolish slums. This amounts to an inconceivable co-existence of recognition and violation of fundamental rights.

The order of the High Court is indeed a symbolic victory for the right to water campaign in India to the extent it explicitly recognises the fundamental right to water. At the same time, one needs to be aware

of the implications of the order for the fundamental right to water and other fundamental rights of slum dwellers such as the right to housing and livelihood. It should also be noted that the order has not recognised a universal fundamental right to water. Instead, it has endorsed an economic model for enjoyment of the fundamental right to water by the slum dwellers – a fundamental right subject to payment of a price, that too of a higher price than that paid by the 'legal occupants' in the city. In effect, the order has recognised what can be described a 'lesser fundamental right to water' for slum dwellers in Mumbai. Understanding and critiquing these implications are important for the right to water campaign in India because the campaign presumably stands for a universal fundamental right to water and particularly for the fundamental right to water of poor and vulnerable people.

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