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FOSTERING THE REALISATION OF THE RIGHT TO WATER: NEED TO ENSURE UNIVERSAL FREE PROVISION AND TO RECOGNISE WATER AS A COMMON HERITAGE

—Philippe Cullet*

Abstract The fundamental right to water has long been formally recognised in India. However, notwithstanding this and numerous governmental interventions over the years, universal provision of water is yet to be achieved. The author traces the divergent trends in the way the realization of the right to water has been conceived over the last few decades. On the one hand, the idea of water as a public trust good has strengthened - on the other hand, however, there is a rising commodification of water in recent water sector reforms. The author challenges this position and analyses the various implications of treating water as an economic good - leading to a stress on affordability at the core of the right. The author argues that the right to water must be viewed through the 'common heritage of mankind' lens and operationalized so as to prioritize the needs and interests of rights holders. This stems from the 'common' nature of water supply - a resource contingent on global weather conditions and independent from sovereign claims. Further, the author details the higher judiciary's treatment of the public trust doctrine and examines its shortcomings in ensuring universal access to water. Finally, he concludes that an expanded view of common heritage of mankind, along with international collaboration on policy frameworks, is essential moving forward.

* Professor of International and Environmental Law, SOAS University of London and Senior Visiting Fellow, Centre for Policy Research, New Delhi. Contact: pcullet@soas.ac.uk, pcullet@cprindia.org.

I. INTRODUCTION

The provision of sufficient domestic water to all has been a priority of governments for decades,[1] much before the fundamental right to water was formally recognised by the Supreme Court.[2] This recognition triggered a substantial change, insofar as the government became duty-bound to ensure the realisation of the right to water. Yet, at this juncture, not every person has access to sufficient safe water.

At present, 71.8% of the rural population is deemed to have access to sufficient safe water.[3] The challenge is thus to provide the remaining 28.2% either by 2030, which is the internationally agreed goal,[4] or by 2022, which is the more ambitious national target of providing safe drinking water and access to sanitation to all habitations.[5] Both goals are appropriate but raise further questions. Indeed, the goal of providing universal access to water is not a new one and the Accelerated Rural Water Supply Programme ('ARWSP') was already supposed to achieve universal coverage of all rural habitations by 1997.[6] In other words, despite multiple and repeated interventions, universal provision has not been achieved yet.

The lack of success in achieving the universal realisation of the right to water to-date can be ascribed to multiple reasons, and successes and shortcomings of drinking water supply policies are widely discussed.[7] Yet, among these factors, the shift towards understanding water as an economic good and the implications that this has had on the realisation of the right to water has not been given enough attention. This article examines the extent to which the commodification of water has progressively influenced the content of the right to water. The introduction of pricing as a central component of the right has, for instance, contributed to the shift from provision to access and to increased reliance on private sector actors in water supply. Further, commodification is

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1 The first water supply and sanitation programme was launched by the Central Government in 1954. *See* Planning Commission of India, India Assessment 2002 – Water Supply and Sanitation 19 (2002).

2 Subhash Kumar v. State of Bihar, AIR 1991 SC 420.

3 NITI Aayog, SDG India Index – Baseline Report 2018 at 83 (2018).

4 Sustainable Development Goals and Targets, *in* U.N. General Assembly, Transforming our World: The 2030 Agenda for Sustainable Development, Goal 6, UN Doc. A/RES/70/1 (2015).

5 NITI Aayog, *supra* note 3, at 77 and Department of Drinking Water and Sanitation, *infra* note 16.

6 Accelerated Rural Water Supply Programme Guidelines, 1999, § 1(2).

7 *See, e.g.*, Shilpi Srivastava, Swajaldhara: 'Reversed' Realities in Rural Water Supply in India, 43/2 IDS Bull. 37 (2012); Biraja Kabi Satapathy, Safe Drinking Water in Slums: From Water Coverage to Water Quality, 49/24 Econ. & Pol. Wkly 50 (2014), Pankaj K.P. Shreyaskar, Contours of Access to Water and Sanitation in India, 51/53 Econ. & Pol. Wkly 144 (2016). *See also* Report of the Comptroller and Auditor General of India on Performance Audit of National Rural Drinking Water Programme (Ministry of Drinking Water and Sanitation Report No. 15 of 2018, Performance Audit).

largely antithetical to the view of water as a commons and thus undermines the social and environmental bases of the right to water.

On this basis, this article argues that it is necessary to rethink some of the central elements underlying the right to water to ensure that existing policy goals can be realised. It focuses on the need to reclaim free provision of water from the dominant discourse that has promoted the notions of access to affordable water.[8] It also emphasises the need to reclaim water as a commons, specifically as a common heritage of humankind, as a premise towards ensuring the realisation of this social right.

This article first introduces the right to water and its scope. The next section goes on to look at the notion of water as an economic good and its pervasive influence on the realisation of the right to water. It then argues that it is crucial to make free provision a central component of the right, to ensure its social promise is effectively realised. The third section moves on to look at the need to emphasise the nature of water as a commons. A step in this direction has been taken with the introduction of the notion of public trust that prohibits, in principle, private appropriation. This first valuable step is, however, limited and a much broader rethinking is needed to ensure that the right to water is effectively realised for all. This can be done by recognising water as a common heritage linked to the principle of subsidiarity, which recognises the nature of challenges arising from the local to the global level.

II. RECOGNITION AND SCOPE OF THE RIGHT TO WATER

The right to water has been well established in India since the 1990s,[9] and this was subsequently reinforced by its progressive recognition at the international level.[10] The repeated recognition of the right by the courts has ensured that its status is firmly established. At the same time, there is still only a limited framework for implementation, with the noticeable absence of any legislation directly referring to the right. The content of the right thus remains largely unspecified in legal terms.

This gap has been filled partially through different interventions of the government, such as water policies adopted several times at the Union level and

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[8] *See, e.g.*, U.N. Economic and Social Council, General Comment 15: The Right to Water (arts. 11 and 12 of the International Covenant on Economic, Social and Cultural Rights), UN Doc. E/C.12/2002/11 (2002).

[9] *See, e.g.*, Subhash Kumar, *supra* note 2, F.K. Hussain v. Union of India, AIR 1990 Ker 321; Hamid Khan v. State of M.P., 1996 SCC OnLine MP 287; Vishala Kochi Kudivella Samrakshana Samithi v. State of Kerala, 2006 (1) KLT 919.

[10] *See, e.g.*, U.N. General Assembly, The Human Rights to Safe Drinking Water and Sanitation, UN Doc. A/RES/72/178 (2017).

in various individual states.[11] More specifically, there has been emphasis on ensuring provision of water for every person for decades, and the importance accorded to drinking water supply has increased over time, with distinct interventions proposed for rural and urban areas. In rural areas, the various administrative directions adopted have been the backbone of government efforts to ensure universal supply of safe water.[12]

The result is that there already existed a strong framework of government interventions concerning water supply before the right's recognition. Yet, this recognition has not necessarily led to the kind of changes one might have expected. On the one hand, this has provided the basis for a progressive strengthening of the existing priority given to drinking water allocation.[13] This has now reached the point where any inter-sectoral allocation decision in favour of drinking water is virtually beyond contestation, even if the right to water is not directly referred.[14] On the other hand, there has not only been limited reliance on the right's language but in some instances it has been specifically excluded. This is, for instance, the case of the National Rural Drinking Water Programme, where the first version that made reference to the right made way to a new version that excluded any reference to a rights framework. [15]This corresponds with a progressive increase in references to 'beneficiaries' to refer to rights holders.[16] There has thus been a progressive shift away from a rights discourse.

This limited visibility of the right in interventions that contribute to its realisation is problematic because this means that the actual content of the right remains largely undefined. This is, for instance, the case with regard to the vexed question of the amount of water that is covered by the fundamental right to water. A minimum figure of forty lpcd has been the accepted lowest threshold since the 1970s for rural areas (now fifty-five lpcd with an aspiration of seventy lpcd).[17] Figures for urban areas are higher and the bigger the city, the higher the aspiration. Interestingly, this is explained by the idea that smaller

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[11] *See, e.g.*, National Water Policy (1987, 2002, 2012); Odisha State Water Policy, 2007; Himachal Pradesh State Water Policy, 2013.

[12] Government of India, Accelerated Rural Water Supply Programme Guidelines (1999) and Ministry of Drinking Water and Sanitation, National Rural Drinking Water Programme – Movement Towards Ensuring People's Drinking Water Security in Rural India (2013) (hereinafter "NRDWP 2013").

[13] *See, e.g.*, National Water Policy § 1(3)(vi) (2012).

[14] *See, e.g.*, Philippe Cullet et al., Inter-Sectoral Water Allocation and Conflicts – Perspectives from Rajasthan, 50/34 Econ. & Pol. Wkly 61 (2015).

[15] Department of Drinking Water Supply, National Rural Drinking Water Programme – Movement Towards Ensuring People's Drinking Water Security in Rural India (2009) § 12(1) and the next version published in 2010.

[16] Department of Drinking Water and Sanitation, Ensuring Drinking Water Security in Rural India – Strategic Plan – 2011- 2022, § 3(8).

[17] Government of India, *supra* note 12, at Para 2.2.1; Department of Drinking Water and Sanitation, *supra* note 16, at Para 2(2).

cities without sewerage need less water.[18] These different allocations for people living in different parts of the country do not sit well with the idea that the right is a universal entitlement. In addition, in a context where the distinction between urban and rural is fast disappearing with fast urbanization leading to many areas being peri-urban, the distinction is even less welcome.

There is thus no consensus on the question of the basic amount of water that is deemed sufficient to ensure a minimum level of realisation of the right water. One of the reasons for this is that there is no consensus on what the right to water covers. The lowest threshold is centred around drinking water, water for food and some other domestic uses but does not fully include water-based sanitation and hygiene. The consensus further evaporates concerning the extent to which the right to water covers access to water for livelihoods.[19] A positive answer is obvious to the extent that livelihoods are linked to the realisation of various fundamental rights. At the same time, this may require finding ways to distinguish livelihood from commercial uses or to distinguish kitchen gardening from recreational uses. Yet, these are not insurmountable problems as some boundaries can easily be set, such as excluding recreational activities like filling swimming pools. With regard to water for livelihoods, setting limits can be linked to broader water reforms that are urgently needed, including the need to incentivise water-saving forms of irrigation and the need to provide incentives for growing crops that do not guzzle water.

III. FROM WATER AS AN ECONOMIC GOOD TO UNIVERSAL FREE PROVISION OF WATER

The recognition of the right to water can be read as strengthening the social dimensions of water law and policy. In practice, however, this recognition took place at the same time as the introduction of a set of water sector reforms that sought to address scarcity and emphasised economic tools to manage water more efficiently. These twin influences have marked the past couple of decades and have led to a situation that is unstable and lopsided. At one level, every actor involved in the water sector agrees that drinking water is the first sectoral priority. Further, there is consensus around the fact that every person should have access to sufficient safe water. However, in a context where the fundamental right to water is not accompanied by any implementing legislation, the push for making pricing a compulsory component of water supply policies has come at the expense of long-standing policies promoting free water provision.

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18 *See, e.g.,* National Commission for Integrated Water Resource Development Plan, Report 63 (1999).

19 *See, e.g.*, Ralph P. Hall et al., The Human Right to Water: The Importance of Domestic and Productive Water Rights, 20 Sci. Eng. Ethics 849 (2014).

A. Water as an Economic Good: An Inappropriate Framework for Realising the Right to Water

The 1990s witnessed policy changes that were supposed to address what was identified as the shortcomings of state-led provision of water. The state was deemed to have failed in its mission to provide universal access to drinking water and failed to use available funds efficiently.[20] It was accused of having "misallocated and wasted water" and having "neglected the need for economic pricing, financial accountability, and user participation and have not provided services effectively to the poor".[21] This thus called for fundamentally rethinking the role of the state in the water sector. The new policy also fostered the idea that non-state actors were better placed to deliver water, be it for-profit companies or NGOs.

Another entry point for reform was that water is increasingly scarce and must consequently be managed efficiently. This led to a complete rethinking of the idea of water and the progressive turn towards understanding water as an economic good.[22] The practical impacts of these changes for users have been the introduction of pricing as a central mechanism for regulating access to water, "where users get the service they want and are willing to pay for".[23] This is seen as the best way to ensure its efficient use and to reduce consumption overall.

Water privatisation constitutes one of the meeting points of the progressive state withdrawal from provision and the understanding of water as an economic good. This covers a range of situations, from complete privatisation of water utilities to the involvement of private sector actors in different tasks and at different levels. What these different initiatives all have in common is that they are based on the rejection of water as a shared commons, since this does not provide the basis for pricing of water. This basic tension explains in part why water privatisation has been the source of a variety of conflicts.[24]

Recognising water as an economic good is problematic from several angles. Firstly, water is often understood and managed as a commons.[25] The legal

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[20] New Delhi Statement, Global Consultation on Safe Water and Sanitation for the 1990s, UN Doc. A/C.2/45/3 (1990), principle 4.

[21] World Bank, Water Resources Management – A World Bank Policy Paper 9-10 (1993).

[22] Dublin Statement on Water and Sustainable Development, International Conference on Water and the Environment, Dublin, Jan. 31, 1992, principle 4 and "Action Agenda: Water Conservation and Reuse".

[23] Ministry of Rural Development, Guidelines on Swajaldhara 2003, § 1(2). *See also* National Water Policy, 2012, § 7.

[24] *See, e.g.*, Cory Fletcher et al., Water Privatization, Hegemony and Civil Society: What Motivates Individuals to Protest About Water Privatization?, 14/3 J. Civil Soc'y 241, 241 (2018).

[25] *See e.g.*, Paul Trawick, *Scarcity, Equity, and Transparency: General Principles for Successfully Governing the Water Commons*, *in* Mountains: Sources of Water, Sources of

framework reflects this in prohibiting the appropriation of water *perse*, even though various use rights have been condoned over time. The imagination that informs the right to water is also based on the idea that water is a commons rather than a commodity, as implied by the idea that the right to water is a social right.

Secondly, pricing is one of the main instruments used to implement the idea of water as an economic good. Yet, it is not the neutral mechanism that it is made out to be. Indeed, there are various situations where the very fact of introducing pricing may mean that some people may not be able to access water because they simply cannot pay. The counter-argument given has been that universal pricing is in fact a pro-poor measure because the poor often pay much more than the middle classes on a per litre basis for their water.[26] This is something that obtains in situations where some people do not get any supply from the local utility and have to rely on informal vendors. This is a reality for many urban dwellers in unauthorised colonies but is not a universal proposition. Free provision is organised for many urban dwellers by the municipality through tankers or through the Members of Parliament Local Area Development Scheme and Member of Legislative Assembly Local Area Development Scheme. In addition, in rural areas, this does not obtain since the overwhelming majority of people have not paid for water supply, which they often self-provide, for instance, through hand pumps. Further, the pro-poor discourse does not hold in all situations, as witnessed in a case adjudicated by the Bombay High Court concerning access to water for people whose houses were deemed illegal. In this situation, the Court asserted that it may be appropriate to ask the poor to pay more for water than people living in nearby residential colonies.[27]

Thirdly, recognising water as an economic good is linked to the partial or complete withdrawal of the state from the provision of water, as still called for by the latest UN Water report asserting that the state should limit itself to regulate and that, "the actual provision of services [should be] carried out by non-state actors or independent departments".[28] Where the state only acts as a regulator and the market serves as an allocation mechanism, this has the potential to lead to a situation where the most marginalised are left behind. This is inappropriate in terms of policy goals, with the Sustainable Development Goals being centred around the 'leave no one behind' catchphrase.[29] This is even more inappropriate in terms of the right to water that puts the state centre

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KNOWLEDGE 43 (Ellen Wiegandt ed., 2008).

[26] *See, e.g.*, U.N. Water, Leaving No One Behind – The United Nations World Water Development Report 2019 at 4 (2019).

[27] Pani Haq Samiti v. Brihan Mumbai Municipal Corporation, Public Interest Litigation No. 10 of 2012, High Court of Judicature at Bombay, Dec. 15, 2014.

[28] *Id.* at 3.

[29] U.N. General Assembly, Transforming Our World: The 2030 Agenda for Sustainable Development, ¶4, UN Doc. A/RES/70/1 (2015).

stage as duty bearer. A lot of time has been devoted in international debates to try and reconcile the two, essentially by arguing that the right to water allows the state to delegate some of its functions but does not exempt it from its obligations as duty bearer.[30] This is an unsatisfactory answer to the broader underlying question of the justification for turning water into an economic good in the first place, especially as it relates to provision of water within the scope of the right to water. In particular, even if ultimate accountability remains with the state, this becomes largely theoretical when rights holders are seen as consumers by private entities. The only real accountability that remains in terms of the right to water is through the higher judiciary, something that is not desirable because only a tiny minority of people can or will reach out to the courts in such matters.

B. Reclaiming the Social Dimensions of the Right to Water: Towards Universal Free Provision

The idea that water should be provided free is often dismissed. Yet, the idea stands on strong grounds. Free provision of the basic content of fundamental rights is nothing unusual. Indeed, other rights have been realised through universal free provision, as in the case of the right to education and components of the right to food like the mid-day meals.[31] In both cases, the central dimension of the free elements provided is that they are provided universally. In the case of water, the government has sought to provide free water for decades to the vast majority of the population. In fact, free provision was undertaken much before the courts intervened and formally recognised the fundamental right to water. This was not only uncontroversial but seen as a duty of the government and implemented throughout the country.

There is thus no practical or conceptual contradiction in the provision of free water and this should in fact be seen as a mandate of every government given the life-saving and life-giving nature of water. There are various reasons why water needs to remain free for everyone. Firstly, the right to water is a universal right and everyone has an entitlement to a minimum quantity of water to live a dignified life. This is what the Delhi Government's free water policy does admirably by not limiting its ambition to an amount of water necessary to meet survival needs but an amount that is, in principle, sufficient to meet domestic needs linked to the realisation of the rights to water, sanitation, health, and food.[32]

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[30] *See, e.g.,* U.N. Human Rights Council, Human Rights and Access to Safe Drinking Water and Sanitation, UN Doc. A/HRC/RES/15/9 (2010).

[31] *See, e.g.*, The Right of Children to Free and Compulsory Education Act § 3 (2009).

[32] Delhi Jal Board, Notification – Free Water Supply Upto 20 Kl per Month to Every Household Having Domestic Water Connections Including Group Housing Societies, DJB/DOR/Policy/2014-15 (Feb. 27, 2015). This is equivalent to around 666 litres per day per household.

Secondly, pricing is a self-contradictory proposition in terms of the right to water. The starting point is the idea that everyone must pay for water. Yet, policy-makers usually recognise that people in absolute poverty do not have the capacity to pay. An exception is then carved out for them, sometimes framed as a 'lifeline tariff',[33] a phrase that unfortunately reflects an idea that the duty of the government is essentially limited to ensuring survival needs. The idea that an exception can be carved out for the poorest is an inappropriate starting point for policy measures to realise the right to water. On the one hand, any categorisation is problematic because the threshold chosen to distinguish the poor from the rest will always be arbitrary. On the other hand, if a distinction needs to be made and a group singled out, it should be the richest whose capacity to pay is unchallenged. In a context where the right is universal and where the majority of people are poor, the starting point should be a policy that provides water to everyone.

Thirdly, it is true that free water involves using taxpayers' money but this is what the government must spend on and it spends even where water is priced. Indeed, the state remains the primary investor in bulk water infrastructure and in laying down costly pipes that provide the basis for individual piped water supply.[34] This expenditure acts as a massive subsidy that is never passed on to water users because this would make prices unaffordable to all but the richest users. In other words, the idea that subsidies should be eliminated because allocation through pricing is more effective, is deceptive, as the price that water users pay remains heavily subsidised. In this sense, provision of free water at the level of individual users is only a minor extension of this massive state investment and presents no conceptual difficulty.

Fourthly, pricing goes against the very idea that turning water into an economic good is a way to address the very real issue of scarcity. This is due to the fact that pricing essentially implies that those who can afford can use water, while others may desist. The problem is not just that this ends up denying access to people who cannot pay but also that those who can afford can use as much water as they want. The result is that there is a transfer from use by everyone to use by the rich, but this does not ensure that use is overall reduced. Further, the very premise that domestic use needs to be reduced is unfortunate in a context where it amounts to less than 10% of overall water use. The scarcity that exists is thus not caused mostly by domestic uses, and this also needs to be taken into account.

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[33] *See, e.g.*, Asian Development Bank, "Water for All – The Water Policy of the Asian Development Bank", Para 46 (2001).

[34] *See, e.g.*, G. Seetharaman, *The Private Sector has Transformed India's Highways, Airports – Can it do the Same for Water Supply?*, The Economic Times (Nov. 25 2018), https://economictimes.indiatimes.com/news/economy/infrastructure/the-private-sector-has-transformed-indias-highways-airports-can-it-do-the-same-for-water-supply/articleshow/66787613.cms?from=mdr.

IV. A COMMONS PERSPECTIVE TO STRENGTHEN THE RIGHT TO WATER: FROM PUBLIC TRUST TO COMMON HERITAGE

The long-standing recognition of water as a commons has ensured that ownership of water *perse* has been prohibited. There are thus strong grounds on which to build an understanding of water as a shared substance. At the same time, the importance of water as a source and sustainer of life has made it something very valuable for centuries, leading governments and individuals to try to assert control over water. As a result, water law has reflected certain compromises between an ideal of non-appropriation and the attempts of landowners and businesses to control water.[35]

Condoning usufructuary rights as well as the state's indirect or direct control over water was always conceptually inappropriate as it partially negated the prohibition of appropriation of water. At the same time, it constituted a pragmatic way to satisfy powerful actors in the water sector and explains why this system endured. The limits of this system became increasingly apparent over time. In particular, the growth of environmental consciousness since the 1970s led to the realisation that the ancient wisdom that held water to be a commons was not only appropriate but needed to be revived in terms of the new challenges faced.

A. Recognition of Water as a Public Trust: A Limited Step in the Right Direction

The public trust doctrine implies that the trustee cannot behave as the owner of the resource but has a fiduciary duty of care and responsibility to the general public. The trustee must distribute existing water so that it neither deprives any individual or group from access to domestic water nor significantly affects the needs of the ecosystem.[36] Further, it cannot alienate the trust nor fundamentally change its nature. The public trust doctrine is built around the idea that the trust is intrinsically valuable to the public and cannot be owned by any person.

The Supreme Court formally recognised water as falling under the public trust doctrine in 1996,[37] following similar developments in other countries.[38] In the first case where the doctrine of public trust was extended to water, the

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[35] *See, e.g.,* Philippe Cullet, Water Law, Poverty and Development – Water Sector Reforms in India (2009).

[36] *See, e.g.,* Chhatrapati Singh, Water Rights and Principles of Water Resources Management 76 (1991); David Takacs, *The Public Trust Doctrine, Environmental Human Rights, and the Future of Private Property*, 16 N.Y. U. Env. L.J. 711 (2008).

[37] M.C. Mehta v. Kamal Nath, (1997) 1 SCC 388.

[38] National Audubon Society v. Superior Court, 33 Cal 3d 419 (1983).

dispute revolved around interference with the course of a river by property developers as they were seeking to force back the river into a course, which would not affect their property interests.[39] The Supreme Court found in this context that where the public trust applies, such resources are meant for public use and cannot be converted into private ownership.[40] In other words, the public trust doctrine severs the link with traditional property rights. This has proved to be a difficult position to maintain over time as private interests have vied to undermine the recognition of the new status of water. Thus, in *Susetha*,[41] the Supreme Court used an earlier statement it had made that the public trust, "does not exactly prohibit the alienation of the property held as a public trust".[42] It ruled concerning a shopping complex that had been sanctioned at the spot of a disused temple tank, that it had to take a 'pragmatic view' of the doctrine of sustainable development and could thus condone the alienation of the property.[43]

The recognition of the public trust as a basis for controlling and conserving water was an important first step taking the conversation around water appropriation to a new level. Yet, this was only a first step that has proved to be insufficient. Firstly, the judiciary itself found it difficult to uphold the strict principles it had put forward, and the exceptions that have crept into the prohibition of private appropriation significantly restrict the reform potential that the public trust doctrine had at the outset. Secondly, there has been no implementation of the doctrine in regular administrative practice, even though the National Water Policy, 2012, does call for the adoption of framework legislation integrating the public trust doctrine.[44] Three draft framework water legislations have already been drafted but have not gone beyond the drafting committee stage.[45] Thirdly, the understanding of the public trust doctrine proposed by the Supreme Court and the draft framework legislation provides a limited shift away from eminent domain. It effectively fails to displace the state from the overbearing position it has occupied for a long time and fails to provide an institutional framework to ensure the accountability of the trustee. In addition, the current understanding of the public trust is limited to reposing faith in the Central or State government. The conceptual limitations of the public trust doctrine, as recognised over the past couple of decades, make it an unlikely ally for ensuring that the common nature of water is reflected in law in such a way that it leads to real change in the practice of all organs of state.

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[39] M.C. Mehta v. Kamal Nath, (1997) 1 SCC 388.

[40] *Id*. at para 34.

[41] Susetha v. State of T.N., AIR 2006 SC 289.

[42] The earlier case was Intellectuals Forum v. State of A.P., AIR 2006 SC 1350, ¶ 60.

[43] Susetha v. State of T.N., AIR 2006 SC 2893, ¶ 9.

[44] National Water Policy §§ 1(3)(iv) and 2(2) (2012).

[45] Draft National Water Framework Act, 2011; Draft National Water Framework Bill, 2013; Draft National Water Framework Bill, 2016.

B. Strengthening the Commons Dimension of Water: Establishing Water as a Common Heritage from the Local to the Global Level

The idea that water can be regulated mainly through the state is a fiction at several levels. Firstly, it ignores that states do not actually control water availability, since most of the water used comes from rainfall. In a context where precipitations are still mostly governed by natural phenomena, this confirms that the majority of countries are mostly dependent for availability of water on global weather patterns. A global understanding of water is sorely missing at the international level and even the relatively unsuccessful attempts to address climate change appear stellar in comparison with the virtually non-existent work done to address water globally.[46]

This calls for a completely new perspective that recognises water as a commons from the local to the global levels. The legal principle that best reflects this perspective is the principle of common heritage of humankind already recognised at the international level.[47] This principle's starting point is the need to work together rather than simply cooperate on the basis of individual sovereign interests. It is also informed by equity concerns, and its development at the international level can be directly linked to attempts by the global South to ensure that shared global resources should be governed through a regime of common regulation and common management.[48]

In a context where sovereignty remains at the root of international cooperation and where the global North felt that the principle of common heritage went largely against their interests, it is unsurprising that there has been a lot of resistance to its introduction and limited progress.[49] Yet, the principle has been enshrined in binding legal instruments. Its most advanced recognition is found in the context of the law of the sea where it governs the protection and use of deep seabed minerals.[50] In this case, the legal regime in place is based on the absence of sovereign claims and around international management in recognition that no state should be able to appropriate the resources.[51]

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[46] *See, e.g.,* Philippe Cullet, *Water Law in a Globalised World: The Need for a New Conceptual Framework*, 23/2 J. Envtl L. 233 (2011).

[47] *See, e.g.*, U.N. General Assembly, Agreement Governing the Activities of States on the Moon and Other Celestial Bodies, art. 11, UN Doc. A/RES/34/68 (1979).

[48] *See, e.g.,* R.P. Anand, Studies in International Law and History: An Asian Perspective 183 (2004).

[49] *See, e.g.,* Rüdiger Wolfrum, *Common Heritage of Mankind, in* Max Planck Encyclopedia of Public International Law, ¶ 28 (2009) stating that "the notion has gone out of fashion recently".

[50] United Nations Convention on the Law of the Sea, Montego Bay, Dec. 10 1982, 1833 UNTS 3.

[51] *Id.* Part XII.

The same logic should be applied to water because it is a global commons and in any case individual countries have no control over the global water cycle. In a context where climate change is a leading cause of environmental change and where rainfall patterns have been evolving, it is urgent to recognise that water is a single issue from the local to the global level and that this must be reflected in the law and policy frameworks governing water. This ties in with the need to ensure that no individual country influences the environment in such a way that rainfall in other countries may be affected, something that will be increasingly possible with the further development of cloud seeding.[52] There should thus be no appropriation of water by individual states. Yet, international water law is oblivious to the need for a different conception of water and in addition has not even started addressing global dimensions of water.[53]

The notion of common heritage is also relevant domestically in the case of the right to water. Firstly, while each country is responsible for realising the right to water in its own jurisdiction, this cannot be done without reference to the global water cycle that conditions water availability. In this regard, the conversation concerning transboundary aspects of social rights has progressed in recent years and there is an increasing recognition that countries must stop pretending that they can fulfil their duties exclusively on their own.[54] Secondly, the premise of common heritage that challenges the hegemony of sovereignty as a basis for international law is similarly relevant at the national level to challenge the monopoly of state either when it asserts the power of eminent domain or when it acts as a public trustee. The principle of common heritage acts as a reminder that state governments and the Central government neither effectively control water nor should have such powers. Thirdly, the unitary nature of water from the local to the global level calls for the application of a single set of principles. This must, however, be organised in view of the fact that the realisation of the right to water for rights holders depends often on local sources of water. As a result, common heritage must be linked to decentralisation and the principle of subsidiarity that calls for taking action at the lowest possible level while acknowledging multi-level approaches. This is, for instance, already integrated in the Groundwater Model Bill, 2017, that includes the principle of subsidiarity.[55]

Overall, common heritage provides a new basis to foster the realisation of the right to water that can give priority to the needs of rights holders at the local level while recognising the links going from the local to the global level. This is a crucial step to ensure that the state stops seeing rights holders

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52 *See, e.g.,* Savita B. Morwal et al., *The history of Cloud Seeding in India*, 17/2 BULL. IMSP 7 (2018).

53 U.N. General Assembly, Convention on the Law of the Non-navigational Uses of International Watercourses, UN Doc. A/51/869 (1997).

54 *See, e.g.,* TAKELE SOBOKA BULTO, THE EXTRATERRITORIAL APPLICATION OF THE HUMAN RIGHT TO WATER IN AFRICA (2014).

55 Model Groundwater (Sustainable Management) Bill § 6 (2017).

as beneficiaries of measures it takes concerning a resource it sees as under its control.

V. CONCLUSION

The realisation of the right to water has been particularly affected by the push for recognising water as an economic good. Incentives given to non-state actors to take over some of the functions of the state in drinking water supply have led to an understanding of the right to water based on the idea that scarcity justifies pricing of all water and government's perceived inefficiency justifies handing over certain tasks to the private sector. These developments entirely sideline the long-standing understanding of water as a commons, life-giving substance whose ownership by the state or individuals must be banned.

The promise of the right to water is immense. Its recognition signalled that the social policies that the state had pursued for decades were not only part of what the state was duty-bound to undertake but were also entitlements that every individual could claim from the state. This promise has not been fully realised yet as the decades that have followed the recognition of the right by the higher judiciary have been marked by water policy interventions that were only partly successful from the point of view of the realisation of the right to water. It is thus possibly not surprising that everyone does not yet have access to sufficient safe drinking water in 2019.

The failure of the model based on water as an economic good to ensure provision of sufficient safe water to all, calls for rethinking the basis on which the right to water is implemented. Firstly, the right must be a right to free water. This is critical in a context where the single-minded focus on pricing to address water scarcity has taken us away from the central social dimensions of the right to water. Secondly, water must be reclaimed as a commons in a much broader way than what the public trust doctrine offers. It should be recognised as a common heritage of humankind to reflect the common nature of water, the need to emphasise its protection, and the local to global dimensions of water.

Overall, the priority should be to frame measures for the realisation of the right to water around the right and needs of rights holders who have, for too long, been relegated to the position of 'consumers' and 'beneficiaries'. They must regain the central place that they should have been given once the right was formally recognised in the 1990s. This will make a significant contribution to the realisation of the proposed goals to provide safe drinking water to all.