Water law and development

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X.29.1 Introduction

Water law has been a crucial component of development policies for centuries. Water is not only the source of human life on Earth, but also a crucial input for most livelihoods and economic activities. Consequently, water use has been a central concern in all societies.

Water law reflects an interesting paradox. The life-giving nature of water and its fluidity ensured that it was often not subjected to the usual rules of ownership. Yet water has been so important as an input for economic activities that it has also been treated as a natural resource like oil or minerals. Water law reflects both tendencies, but unequally. Overall, the focus has been much more on uses of water, such as for irrigation, rather than on the social and environmental dimensions of water.

This chapter analyses water law in a South-North context. Focusing on countries of the global South reflects the fact that water is central to their greater needs for social and economic development compared to those in the North. This is linked in part to irrigation, the largest use of water overall, which remains central to economic development in most global South countries, and even where its share is diminishing, it remains crucial in terms of livelihoods.

X.29.2 The evolution of the regulation of water as a natural resource for development

The development of water law is linked to the idea that water is to be used for productive purposes. Protection is often only relevant to the extent that it contributes to uses, linked to the idea that any drop of water that flows to the sea is wasted water.[1] Traditional water law is thus in line with an understanding of development as economic growth that has long been prevalent, even after the introduction and mainstreaming of the concept of sustainable development.[2]

The different concerns at the root of water law are reflected in the water rights regimes that developed over time.[3] The principle of non-ownership of water itself has remained relatively strongly ingrained in policymakers' psyche although a host of usufructuary rights have been condoned. These have often been framed as rights linked to land rights and been based around the idea that they are tied to the land since many productive uses of land are dependent on access to water. In addition, states have also come to see water as a central resource and various attempts have been made over time to control its use. In a colonial context, this culminated in the direct assertion of power over water in certain cases.[4]

X.29.3 The current status of water as a natural resource for development

Since the 1990s, increasing water use, diminishing water quality, and changing environmental conditions have led countries to rethink the bases of water law, resulting in

[1] Eg, the statement of Gifford Pinchot (then [1913] former Director of the US Forest Service), quoted in Gray (2000) 214.

[2] *Transforming Our World: The 2030 Agenda for Sustainable Development* ('*Sustainable Development Goals*') UNGA Res. A/RES/70/1 (2015).

[3] Dellapenna and Gupta (2009).

[4] Eg Kenya Water Act, in effect 7 May 1952, § 3, http://extwprlegs1.fao.org/docs/pdf/ken1275.pdf; Madhya Pradesh Irrigation Act, enacted 1931, § 26, https://www.indiacode.nic.in/bitstream/123456789/12576/1/chhattisgarh_irrigation_act%2C_1931.pdf.

major reforms. That water was becoming scarce was used to justify turning water into an economic good and adopting new legal frameworks centred around this new understanding of water. Simultaneously, the rapid development of environmental law since the 1970s and the strengthening of social rights led to measures focusing on the protection of water and on its recognition as a human right. These different reforms can only be partly reconciled and there have been major tensions between the push for water sector reforms centred on commodification, privatisation, and user participation,[5] and the push to reclaim the common nature of water through broadening the public trust doctrine and enshrining its recognition as a human right.[6]

X.29.3.1 Water law reforms based on commodification: user participation and economic regulators

The starting point for reforms was concern over water scarcity. This very real concern for various areas of the world (but not all) was transformed into a universally valid proposition warranting the introduction of new universal principles governing water. The new principle that water should be considered an economic good in all its uses was presented as the answer to scarcity.[7] This went completely against the idea of water as a shared commons. This idea was strongly contested by some and strongly welcomed by others.[8] The problem arose from the attempt to make all water uses fit a single paradigm, whereas in earlier times there had been multiple co-existing understandings of water. The global reforms that started in the 1990s were thus not only a new twist in water policy but an attempt to reduce or eliminate the flexibility that had marked water law until then. Indeed, even where formal laws regulated water, customary arrangements regarding access to water at the local level often survived.[9]

The new conceptualisation of water went alongside the broader neoliberal reforms whose premises included a general distrust of state intervention in the economy.[10] There was thus a

[5] See Dellapenna, Chapter X.7 in this book; Schwartz and Tutusaus, Chapter X.30 in this book.

[6] See Misiedjan and Obani, Chapter X.12 in this book.

[7] International Conference on Water and the Environment, *The Dublin Statement and Report of the Conference* (1992) principles 1 and 4, https://www.ircwash.org/sites/default/files/71-ICWE92-9739.pdf.

[8] Eg Bakker (2011) 347.

[9] *Tekaba AO v Sakumeren AO* (2004) 5 SCC 672 (India).

[10] Dellapenna (2008).

twin movement towards commodifying water and restricting the footprint of the state in a sector where it had had an overwhelming presence for decades, such as in the drinking-water sector. The new policy framework was, for instance, enthusiastically, though controversially, adopted in Chile.[11] Yet it went against the common perception of the majority of the world's population that water is a gift of nature that belongs to no one.

The push towards turning water into an economic good would have been quickly rejected in a world facing immense poverty if it had not been supported by a sustained campaign 'to communicate the message that water is a scarce resource and must be managed as an economic good',[12] and if its promoters had not sought to address the impacts of the policy changes on the poor. This led to the extraordinary move to justify the new policy in the name of its benefits for the poor. One of the central arguments was that the poor were displaying 'willingness to pay' and therefore pricing water was not the issue in itself.[13] It was also argued that the poor would be the first beneficiaries of policies imposing pricing on everyone because the poor were at the mercy of private vendors overcharging people without access to water from the local utility whose per litre charge was much lower.

These proposals were completely removed from reality. For instance, in Kenya the World Bank noted that 'the unit costs incurred by both the poor and the non-poor are very high, and there is no statistically significant difference in the mean unit costs that they incur for their water'.[14] In India, the overwhelming majority of rural denizens get access to free water, but even in urban areas many of the poor unserved by piped water services access water through a variety of free options provided by the government or elected representatives (Members of the Legislative Assembly and/or Members of Parliament).[15] These examples confirm that the argument that the poor are willing to pay is fallacious. In practice, people pay for water because they are aware that water is closely linked with survival, even if this implies diverting very limited resources from slightly longer-term priorities, such as nutritious food and non-life-threatening health expenditure.

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[11] Bauer (2004).

[12] World Bank (1998) 53.

[13] Eg World Bank (2008).

[14] Gulyani and others (2005) 27.

[15] Word Bank (2008) 4.

Commodification of water laid the ground for various forms of privatisation, as well as withdrawal of the state from some of its functions. This could be achieved in part through existing water laws that were often drafted so that they did not prescribe state or private management. At the same time, the massive failures of some so-called big bang privatisation projects in the 1990s, particularly in Latin America,[16] led to a realization among reform-minded policymakers that changes needed to be brought in more progressively and less directly. This led to an increased reliance on water law reform to achieve the aims of the policy framework set in motion in the early 1990s.

India constitutes one of the most important examples of this strategy: Significant emphasis was put first on the adoption of water policies (at the Union and state level) and of specific water laws in a number of states. Where the reform agenda was not shared by the political dispensation in place, funding for specific water projects was sometimes conditioned on the adoption of specific laws.[17]

Reform-oriented laws adopted from the mid-1990s onwards in Indian states fall into two main categories. The first is laws on water user associations, based on the international model of participatory irrigation management. The second is laws establishing economic water regulatory authorities meant to divest the state from some of its water-related functions to ensure more efficiency in allocating water and (sometimes) to foster the creation of tradable water entitlements.

Water user associations align with the discourse on participation of users in decision making.[18] At the same time, they are part of the broader model of participation that sees public participation as an end in itself and does not equate 'participation' with the right to decide.[19] Participation, as it has developed over the past few decades, is a misnomer for a process of consultation that does not directly affect decision making. This fits the jargon pushing for state disengagement in favour of 'users', without significantly affecting power

[16] Eg Shultz (2008); Gupta and Bosch, Chapter X.23 in this book.

[17] Eg World Bank (2004).

[18] International Law Association, 'Final Report on the Berlin Rules on Water Resources', *Report of the 71st Conference of the International Law Association* 334 (2004) ('*Berlin Rules*') arts 18–20.

[19] Eg Madhav (2010) 205.

structures in place. All farmers can do is participate in the 'management' of existing infrastructure.

The introduction of water user associations along the lines of international models is particularly odd in India. Local irrigation control already existed in some parts of the country and the laws could have been modelled on the experience gained with those institutions. Panchayats (elected village councils in rural areas) already have control over irrigation and there is no need to set up additional bodies to do this.[20] In addition, water user associations are more regressive than panchayats in terms of membership – they only include landowners and make no provision in favour of women and/or scheduled castes/scheduled tribes.[21] In this sense, the water user association laws constitute an example of a one-size fits all intervention that is at best inappropriate, at worst unwelcome. This is particularly so where in the name of decentralisation and participation, a single model is adopted in the laws of different states all around a vast country like India despite the wide variations in irrigation practices and different socio-economic histories, climates, and agricultural practices.

At about the same time, a number of acts were passed by Indian states to establish the water regulatory authorities. Unlike participatory irrigation management that had its own antecedents in India, economic regulators were a novelty devised by policymakers seeking to enshrine the concept of water as an economic good. This was pushed partly by international development agencies and partly by the Government of India. The rationale for these was the perceived incapacity of state governments to manage water efficiently and to ensure transparency.

The Maharashtra Water Resources Regulatory Authority is the only such authority that has been functional.[22] The bases on which the authority was established essentially collapsed within five years. The regulatory authorities are supposed to ensure that bulk allocation is

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[20] Eg *Uttar Pradesh Panchayat Raj Act*, enacted 7 December 1947, amended 22 April 1994, § 15, http://panchayatiraj.up.nic.in/docs/ActsnRules/GP-Act-1947-English.pdf.

[21] There is one exception, the *Chhattisgarh sinchai prabandhan me krishkon ki bhagidari adhiniyam* CG Act No. 20 of 2006, § 5, https://www.latestlaws.com/bare-acts/state-acts-rules/chhattisgarh-state-laws/chhattisgarh-sinchai-prabandhan-me-krishkon-ki-bhagidari-adhiniyam-2006/.

[22] Maharashtra Water Resources Regulatory Authority Act, Mah Act No. XVIII of 2005, https://www.indiacode.nic.in/bitstream/123456789/7034/1/the_maharashtra_water_resources_regulatory_athority_act_2005_%2818_of_2005%29_%28modified_23.01.2018%29.pdf.

done on a non-political basis, to be achieved by making the authority 'independent' of the government. This was never fully achieved because the chairperson has to be someone 'who is or who was of the rank of Chief Secretary'.[23] Despite this, the strongly political nature of water ensured that the government decided as early as in 2011 that it needed to repatriate some of those powers to itself.[24]

The broader lessons of the attempt to set up economic regulators in the water sector is that, in the name of efficiency, they end up bypassing elected representatives with a technical body that is not suited to understanding the social, cultural, or environmental dimensions of water. These regulators thus fail to demonstrate that they do a better job than the government. In addition, they replace top-down institutions with other top-down institutions, thus failing to provide for locally-based decision making.

X.29.3.2 Alternative bases for water law reform: right to water and public trust

The focus on turning water into an economic good and the associated push for privatisation have been partially successful, as shown by the explosion of the use of bottled water over recent decades. This is due in part to the sustained campaign to make people believe that water has to have an economic price in all its uses and in part to concerns about fast diminishing water quality. Yet, while the middle classes have to a certain extent allowed themselves to be convinced that water is a commodity, this leaves out poor people. Those who cannot afford the water sold by the litre in sealed bottles and those who cannot afford filters at home to purify the often unsafe water supplied to them, are left out. In many countries of the global South, this happens to be the majority of people.

In reaction to the reforms introduced to the water sector, counter-trends arose. These include, in particular, the recognition of the human rights to water and sanitation and the recognition of water as a public trust. The former constitutes a major step forward in formalising the importance of water for survival, a life of dignity, and as an input for the livelihoods of hundreds of millions. The link between the recognition of the right to water and development

[23] Ibid, § 4(1).

[24] Maharashtra Water Resources Regulatory Authority (Amendment and Continuance) Act, 2011, https://mwrra.org/wp-content/uploads/2018/07/MWRRA-Amendment-Act-2011-Eng.pdf.

is well illustrated by the fact that it is mostly countries of the Global South that have sought to formalise the right.[25]

The recognition of the right to water has in principle a significant transformative potential, in particular as a counter to the push for commodifying water. In practice, this transformative potential has not yet been effectively realised, in part because it has often been recognised as a right to 'access' water that signals to the duty bearer (the state) that its duties do not extend to provision. In fact, the right to water has progressively become a vehicle for spreading the concept of water as a commodity. It is then unsurprising to find that multinational water companies do not oppose recognition of the right to water and in fact welcome it, as long as water is not free.[26]

This has led to unfortunate developments. The *Mazibuko* case from South Africa is an example.[27] In this decision, the South African Constitutional Court asserted that the minimum quantity of water deemed sufficient for a minimum level of realisation of the right does not need to be raised beyond 25 litres per capita per day, despite the fact that this level is widely understood as failing to ensure a life of dignity on top of not allowing for the realisation of water-dependent rights, such as the rights to sanitation and health.[28] This decision also found that the state cannot be forced to allocate the necessary resources to provide better water services, thus confirming that a right of access limits the scope of the duties of the state.

The second major development is the broadening of the understanding of the public trust doctrine, first propounded in California[29] and subsequently adopted in some countries of the global South. This is in part linked to the development of environmental law whose scope includes water. Since the 1970s, there has been an increasing focus on the protection of water, even though this has taken place mostly outside of water law. The lack of connection between environmental law and water law remains an issue in many countries because water laws have often not been updated to reflect the rise of environmental consciousness. The

[25] Eg South Africa, Constitution, § 27(1)(b); Constitución política de la República Oriental del Uruguay, art 47.

[26] Russell (2011).

[27] *Lindiwe Mazibuko v City of Johannesburg* [2009] ZACC 28.

[28] Dugard (2010) 185.

[29] *National Audubon Society v Department of Water and Power of Los Angeles* (1976) 658 P.2d 709 (California).

public trust doctrine has helped fill this gap by providing a new way to understand water. This includes prohibiting ownership by either the state or private parties. This also includes protecting and using water as a commons held by all water users. Further, it includes a commitment to protect the resource and therefore limit uses within this constraint.

The transformational potential of the public trust doctrine derives from its strong signal to the state that it cannot behave as the owner of water and to everyone else that water cannot be used like other natural resources if only because of its common nature. The importance of this conceptual change is shown by South Africa where it provided the basis for signalling that the post-apartheid legal regime would be completely different from its predecessor.[30] For India, where recognition of water as a public trust was led by the higher judiciary,[31] the state seems to have simply decided to ignore the judiciary because no statutory change has been adopted over the past twenty years and the potential of the public trust to effect change has not been realised. Even the courts have wavered, going as far as condoning some forms of privatisation despite their original statement in 1996 that private ownership was not possible under the public trust.[32] There has been no serious attempt to consider the need for the public trust to be based on the principle of subsidiarity and therefore to apply it from the local to the national level. The transformative potential of the public trust in countries of the global South has been hampered by the fact that the trustee remains the state and there is no effective accountability mechanisms besides the difficulties courts face to force the state to behave as trustee rather than owner.

X.29.4 The future

The push for turning water into an economic good has failed to deliver benefits for the majority of individuals and failed to deliver either water security or water justice. The commodification of water creates business opportunities, but this has been at the cost of social equity and environmental protection.[33] The lack of 'developmental' benefits of these reforms is confirmed by the privatisation of urban water services that often relies on massive state investments to provide the bulk water that is to be supplied to individuals by for-profit

[30] van der Schyff (2010) 124.

[31] *MC Mehta v Kamal Nath* (1997) 1 SCC 388 (India).

[32] *Mrs Susetha v State of Tamil Nadu* AIR 2006 SC 2893 ¶ 9.

[33] Phansalkar (2007).

companies. This also debunks the myth that the private sector is better suited to managing the water sector since its involvement remains focused on specific tasks that have the potential to be profit-making, leaving the rest to the state. The role of the state has in fact never been more important in a context where increasing water scarcity and increasing flood risks make state interventions crucial.

In this context, the recognition of the right to water and the introduction of the public trust have a significant transformational potential. They both address some of the negative social and environmental consequences of the shift towards commodification. Yet the way they have been realised on the ground does not fulfil their potential. In both cases, the push for the commodification of water has affected the measures taken. There is thus a need to go beyond existing developments to give new impetus to the social and environmental dimensions of water law.

This section takes up two crucial elements that need to be urgently given centre stage to ensure that water law can effectively contribute to social equity and environmental protection to counter the failures of neoliberal reforms: the need to go beyond the public trust and think of water in legal terms as the common heritage of humankind and to give a fillip to the transformative potential of the human right to water by integrating free water as a core component of the right, clearly ending the creeping commodification of the right to water that has occurred in recent decades.

X.29.4.1 Water as a common heritage of humankind

The principle of the common heritage of humankind is well known in international law, where it has been applied in several legal regimes concerning resources not under the sovereignty of individual states,[34] notably in the case of deep seabed minerals in the high seas.[35] Conceptually, the principle advances the idea that the world should not be seen only through the lens of the appropriative principle of sovereignty that has defined international relations for centuries because a number of challenges are common to humanity and should be addressed as such.

[34] Matz-Lück (2010) 61.

[35] *UN Convention on the Law of the Sea*, art 136, opened for signature 10 December 1982, entered into force 16 November 1994, 16 UNTS 3.

The ‘common heritage of humankind’ principle is out of fashion in mainstream literature.[36] This is not surprising. It has a strong differential treatment dimension because its introduction was promoted by the global South, which feared that the global North would corner the benefits of exploitation of these resources. In the global North, the principle is seen as antagonistic to the international liberal order. In reality, it is necessary because crucial global issues, such as the global water cycle, cannot be addressed effectively on the basis of sovereignty.[37]

The principle of common heritage has until now been applied mostly to governing resources not under state sovereignty. The main exception is seeds whose common heritage status was recognised in 1983.[38] As this shows, ‘common heritage’ is a tag that can be applied to all common resources, from the local to the global level.

It is urgent to apply the common heritage principle to water at all levels. This must be done on the basis of the principle of subsidiarity, in recognition of the fact that water is first a local concern for every individual and community. At the same time, since local water needs can only be met if water is managed on an aquifer, basin, transboundary, and global basis, this local dimension must be integrated within broader perspectives. The key issue that comes up here is that the local level should get priority in terms of regulation. This requires reversing the top-down priority still visible in current applications of the public trust doctrine and requires a new understanding of the seamless interactions between the national, transboundary, and global dimensions of water. The need for this has in principle become abundantly clear with the changes that anthropogenic climate disruption is causing to the global water cycle,[39] but policymakers have been very slow in grasping this dimension.

X.29.4.2 A universal right to free water?

[36] Wolfrum (2009).

[37] Cullet (2011).

[38] International Undertaking on Plant Genetic Resources, Res. 8/83, adopted 13 November 2001, FAO Doc. C83/REP.

[39] Bates and others (2008).

The right to water is now recognised in a number of countries of the global South.[40] It has also been recognised in resolutions of the UN General Assembly.[41] Much more needs to be done to ensure that the right is realised for all. The main challenge that the right has faced has been the economic reforms seeking to commodify water, even in the context of human rights.[42] This has had various implications, two of which are singled out here.

Even though all liberal human rights are premised on universality, this has been a challenge in certain situations. When affordability is made a component of a human right and this is sought to be implemented in countries where most people are poor, policymakers must come up with a response to the resulting dilemma. The argument that the poor display a willingness to pay does not provide an answer to the fact that millions cannot pay.[43] The answer is to provide what are sometimes outrageously known as 'lifeline tariffs'.[44] The choice of words notwithstanding, the broader issue is that this 'targeting' of a small number of individuals implies that a cut-off point needs to be determined. This is always an arbitrary decision that does not sit well with the idea of universality, in addition to being framed in the first place as an exception rather than a principle. At worst, this can lead to targeted measures that are anti-poor, as was the case in an order of the Bombay High Court where it was found appropriate for the poor to pay more for water than people living in nearby residential colonies based on the different legal status of their dwellings.[45]

The very idea that the right to water is a right that needs to be paid for is a construction of policymakers seeking to impose the idea that water is an economic good. Defining a social right as a right that needs to be paid for is conceptually inappropriate. Indeed, if a qualification has to be added to the right, it is that of free realisation, as in the case of education. Otherwise, rights have been defined in neutral terms that do not impose but also do not prohibit free provision. This is crucial, as confirmed by the case of India where the

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[40] Bernal (2015) 277.

[41] *The Human Right to Water and Sanitation*, adopted 3 August 2010, UNGA Res. A/RES/64/292, last reaffirmed in UNGA Res. 74/141, 18 December 2019, UN Doc. A/RES/74/141.

[42] Dugard (2010).

[43] World Bank (2008).

[44] Asian Development Bank (2001) 25.

[45] *Pani Haq Samiti v BMMC*, PIL 10/2012, Order of 15 December 2014.

state has sought to bring down the price of food and introduced legislation to foster food security.[46] In addition, the Supreme Court has introduced free midday meals in schools, which has a significant impact on children's school attendance. Allowing the right to water to be defined as a right that prohibits free provision by definition would thus not only go against longstanding policies of free provision in particular in rural areas, but also against the framing of the human right to water as a social right.

The push against free provision is not surprising given that the private sector has welcomed the recognition of the right to water as long as it is not a right to free water. This confirms the relevance and importance of free water policies introduced in different parts of the world. South Africa has led the way in terms of enshrining a free water policy in its regulatory framework. At the same time, this remains a relatively modest step and the *Mazibuko* challenge failed to move the Constitutional Court to broaden the reach of the right.[47] This is in part because South Africa has found itself trying to push forward different incompatible pro-privatisation business-friendly water policies while introducing at the same time a strong fundamental right to water. This can be contrasted with the case of Delhi where a universal and relatively generous free water policy was introduced in 2015.[48] This followed an attempted World Bank-supported privatisation project that was withdrawn in 2005 following a civil society campaign led by the current Chief Minister of Delhi, who was thus well aware of the extent that realisation of the right to water matters to people.[49] The current policy needs further improvements, in part because it only covers households having access to piped water supply, but it constitutes a strong reminder to the rest of the world that free water is possible and only requires allocating resources according to social priorities, even in a country whose human development ranking has improved relatively little over the past three decades despite fast economic growth for a number of years.[50]

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[46] *The National Food Security Act*, enacted 12 September 2013 (India), http://www.egazette.nic.in/WriteReadData/2013/E_29_2013_429.pdf.

[47] *Lindiwe Mazibuko* (n 27).

[48] Delhi Jal Board, Notification, DJB/DOR/Policy/2014-15 (27 February 2015).

[49] Bhaduri and Kejriwal (2005).

[50] UN Development Programme (2020) 349.

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