

The Human Right to Water in India: In search of an alternative commons-based approach in the context of climate change

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Introduction

Water is central to climate change. The impacts of climate change primarily centre upon too much water (e.g. floods, sea level rise), too little (e.g. droughts), or a shift in its composition (e.g. ocean acidification). The centrality of water to climate change and its importance to life mean that there are significant concerns about how climate change will impact the human right to water (“HRW”) (Singh, 2016; UN High Commissioner for Human Rights, 2010). However, the underlying relationship between water and climate is also mediated by political, social and economic processes (Taylor, 2015; Boelens et al., 2016). Thus, the hydro-climatic injustices and rights breaches around water are intertwined with questions of gender, class, and caste, as well as the allocation of water for economic production, as much as they are caused by “environmental” or “climatic” processes (Linton, 2012; Taylor, 2015).

The dominant interpretation of the HRW both in legal and political discourse has been centred upon a fixed relationship between the rights-bearing subject and a quantity and quality of water (Linton, 2012). For example, in India, for many decades the dominant policy approach for implementing the HRW centred upon providing access to a quantity of water for drinking, cooking, and domestic use (Cullet, 2017). As will be analysed, when one considers the way hydro-climatic change materialises this approach comes across as narrow and fails to respond to the way injustices and rights issues occur across the hydro-commons. Accordingly, it will be argued that the HRW needs to be reformulated to mean not just a consumption or entitlement right, but a right to transform the hydro-social conditions out of

which water is currently accessed. Commons-based principles are integral to this remapping of the HRW, recognising the inter-connected social and ecological dimensions of water.

The second part of this paper looks at the opportunities for reframing the HRW in this way in India. India is an interesting case study for several reasons. First, hydro-climatic issues in India have been particularly acute in recent years. Floods, droughts, heat waves and other climatic conditions have affected the country severely. India faces major issues around water pollution, scarcity, and access to basic water (Biswas, Tortajada, & Saklan, 2017; Water Aid, 2016). Second, India was one of the first countries to recognise the HRW, more than twenty years ago, having been read into the Constitutional right to life by the Supreme Court of India (*Subhash Kumar v. State of Bihar & Ors*, 1991). The judiciary has also incorporated of commons-based principles such as the common heritage of mankind and the public trust doctrine into Indian jurisprudence and linked them to the HRW. Finally, in recent years there has been an effort to update the national framework of water law and policy through the release of a Model Groundwater (Sustainable Management) Act 2016, and Draft National Water Framework Bill 2016. The second part of the paper thus analyses the development of the HRW and common-based principles by the judiciary and legislature and the prospects of reframing the HRW.

Connecting the Dots: Water, Climate, Society and the Commons

The impacts of climate change, such as extreme rainfall events, droughts, and sea level rise, will have significant implications for the global water cycle. The risks of climate change creating water scarcity is perceived as an important threat to the HRW (UN High Commissioner for Human Rights, 2010; Singh, 2016). However, it is not simply a physical water scarcity issue. Basic water use (for drinking domestic and subsistence livelihood) only takes a small fraction of physical water sources. Hence, while climate processes may undermine physical water availability in particularly regions, it does not follow that it will also undermine the HRW (Darrow, 2017, p. 175). As the United Nations Development Programme (UNDP) (2006, p. v) has stated, the roots of the “water crisis” can be traced to “poverty, inequality and unequal power relationships, as well as flawed water management policies that exacerbate scarcity”.

The materialisation of climate processes and their impacts on access to drinking, domestic and livelihood water are dependent on several interacting processes. These include the climate and hydrological processes, and how social actors and institutions shape the flows

of water (Linton, 2010; Linton and Budds, 2014). An example of how the impacts of droughts and floods on the HRW are tied to social processes such as power relationships, land ownership, and technology is provided by Taylor (2015). He observes a drought in 2012 in the Deccan Plateau in India. First, surface water becomes scarce. This scarcity is linked to climatic factors (the lack of rain) but also to the over consumption of water (by certain sectors) and water pollution which have dwindled water availability. Increasingly thirsty communities begin to extract more and more groundwater to meet their water needs. This undermines the production of fodder, which requires groundwater and is an important product for small farmers who hold cattle as their main livelihood. Distressed farmers are forced to sell cattle to richer merchants and landowners, producing relational dependency and increasing vulnerability. Moreover, rich merchants and landowners also start to control the extraction and distribution of groundwater. Drilling deep borewells is expensive and those who have access to capital can purchase the technology and gain significant power through not only depleting sources of their neighbours but also selling water extracted at a significant cost.

Taylor (2015) observes that the lines between what is hydrological, climatic or social in these situations become blurred. Moreover, the misallocation of water furthers inequitable relations around water and can be viewed as failure of adequately recognising water as a commons resource that is essential for all life. As will be analysed in the second half of this chapter, groundwater law in India gives individual landowners a licence to drill without concern for the wider social, ecological and commons-based dimensions of their groundwater use. Relational power between landowners, subsistence farmers, as well as the availability and access to credit and technology all play important roles in the production of hydro-climatic injustices that see the human rights of some realised over the rights of others. The intertwined hydrological, climatic and social processes described above thus underly the importance of a commons perspective towards water.

Developing a Law for the Commons

Commons-based principles put forward a governance system that recognises that water is a flow resource with social and ecological dimensions. It recognises that water has

no owners and must be managed collectively. For example, Barlow (2011, p. 24) states that the water commons recognises that water:

belongs to the earth, other species, and future generations as well as our own. Because it is a flow resource necessary for life and the health of the ecosystem, and because there is no substitute for it, water must be regarded as a public good to be preserved as such for all time in both law and practice.

There is no single definition of the commons. Different types of commons regimes exhibit different levels of individualism and communality, as well as exclusion (see: Schmidt & Mitchell, 2014). For example, a communal pond shared by a specific group of individuals or households, akin to a common property resource, can be from the very start exclusive. On the other hand, a wider idea of water or atmospheric commons, is more akin to prohibiting the appropriation of the resource. Furthermore, the role of the state in the commons can vary and in some situations the state (or a group of states) could play an important role as a trustee of an area or resource, especially when we consider larger ‘global commons’ (Bosselmann, 2015). The broader point here is the distinction between systems of water governance that are based on private property and individualistic rights to appropriate water and a system that recognises water as a resource that cannot be ‘owned’ and is managed for the benefit of all (human and non-human natures).

Law and legal principles have an important role in the process of ‘commoning’. The principles of common heritage of humankind, as well as the public trust doctrine have often been used to challenge sovereignty-based or individual property-rights notions of water. The principle of common heritage emphasises that some resources or spaces are so important that they should not be appropriated. Rather the population manages such resources and shares in any rewards from exploiting them. While its exact scope can vary, certain elements are key characteristics when applied to common areas. These are that the resource cannot be appropriated, that it will be used for peaceful purposes, that its use and access will fall under a common management system and any benefits derived shall be equitably shared and reserved for future generations (Bosselmann, 2015, p. 76).

Similarly, the public trust doctrine reflects a commons-based understanding of water. The public trust doctrine holds that a group, a state or the international community holds a resource in trust for the public’s use and enjoyment. Like a private trust, a trustee is identified (often the government) with a corresponding fiduciary duty. While the public trust doctrine is

important in furthering a commons based approach away from property rights, at the same time it has been highlighted that the notion of the public trust has no direct links with social concerns of human rights (Cullet, 2009, p. 44). Thus, how the public trust doctrine operates and how it can further the wider concerns of a HRW requires further clarification, for example through integrating human rights principles with the public trust doctrine.

Apart from changing the legal status of water, recognising the rights of people to participate in the governance of a common resource is integral to well- functioning commons. Participation can also be an important element to the HRW and, depending on the form it takes, a way to respond to the concerns about the individualism of rights. This aspect is explored later in this chapter. Participation and relatedly subsidiarity (the devolution of power to local democratic forms of government) are also integral if water is held by the state in public trust, to avoid giving unbridled powers to the State such that it would prevent democratic control over water.

Often, those who argue for a commons-based approach for water have also largely been supportive of the claims for a HRW (Barlow, 2011; Weston & Bollier, 2014). Weston and Bollier (2014) argue that a well-managed commons system should also, to the maximum extent possible, name human rights and nature rights an explicit and integral part of its governing system. However, it does not automatically flow that a commons and human rights are integrated. For instance, the dominant narratives on human rights have been criticised for being individualistic and having an underlying tension with the collectivists aspirations of the commons (Bakker, 2007). In the next section I explore the tensions between the water commons and the HRW. However, a commons approach can be integrated with the human right to water, if the HRW itself is remapped or reimagined from its current form.

Human Right to Water – Moving beyond a narrow approach

The HRW has received a significant legal and political recognition over the last two decades. Under international law, the most significant development has been the adoption of General Comment 15 by the UN Committee on Economic, Social and Cultural Rights (“CESCR”) recognising a right to water under the International Covenant on Economic Social and Cultural Rights (“ICESCR”). The CESCR interpreted a right to a “sufficient, safe, acceptable, physically accessible and affordable water for personal and domestic uses”(UN Economic and Social Council, 2002).

In India, the judiciary has widened the scope of an existing constitutional right, the Right to Life that is guaranteed under Article 21 of the constitution, to include the HRW (*Subhash Kumar v State of Bihar* 1991). Over the last twenty years, the judiciary has confirmed the status of the right numerous times. However, with some exceptions, the Court has provided very little definition given to its scope and content. Furthermore, the legislature has largely ignored this development, failing to explicitly integrate it into the National Water Policy 2012 or the National Rural Drinking Water Plan, the primary policy framework for implementing drinking water in rural areas.

Nevertheless, while the Government itself has not consistently and explicitly recognised the HRW in its policies, this does not mean it hasn't been active in efforts to implement the right (Cullet, 2017). For many years, drinking water policies (and thus the implementation on the HRW) centred upon providing access to a specific quantity of water for drinking, cooking, and domestic use. This reflects the broader paradigm at an international level, where the HRW has been interpreted in a narrow technocratic way. Even on discussions of expanding the HRW to recognise livelihood water uses, the quantification of allocation has been the focus (Woodhouse & Langford, 2009). A plausible explanation for this is that implementation of the HRW, has been significantly influenced by development agencies, NGOs, and inter-governmental organisation that focus on indexes, indicators, and statistics in relation to developmental goals. However, a solely statistical approach to water access as a national policy to implement a constitutional right is inadequate, particularly as the right overlaps with several other rights, such as the right to a healthy environment and the right to equality.

The inadequacy of this narrow approach can be observed in the seminal Mazibuko case from South Africa (*Mazibuko v City of Johannesburg*, 2009). This case centred upon the correct quantity of water the state had to provide to meet the requirements of the constitutionally guaranteed HRW. The Constitutional Court held that pre-paid water meters and supplying a minimum amount of water to residents was sufficient to meet the constitutional HRW. However, the Court deferred the question of "how much" water needed to be provided, stating that it was a matter for the government to decide. There was a significant focus by the plaintiffs on a minimum quantity of water and the responsibilities of the Government around providing it. Takacs (2016) contends that a major oversight by both lawyers and judges in the case was overlooking the ecological components of the HRW, particularly the responsibilities of the state under the commons-based public trust doctrine

that is a principle of the National Water Act 1998. On the one hand, there may have been fears for the plaintiffs that reminding the Court of these requirements might reallocate water from the poor for ecological purposes, at least in the short term. On the other hand, Takacs argues that this presumption (of ecology versus providing for the poor) was false as only through managing water responsibly, according to public trust doctrine that is enshrined under South African law, could the minimum core quantity even be provided to all citizens. A holistic interpretation of the public trust would have forced the Courts to not only look at how water was shared between the poor, for water conservation, but also how it was wasted through leakages and the overconsumption of water by the rich. Thus, the public trust doctrine would require the Court to consider the HRW with reference to sustainability and stewardship of water and equity of water use. Such an interpretation moves us from the HRW as a “consumptive right” to recognising the ecological and social dimensions of water. The HRW would be closer to being recognised as a right to transform the hydro-social conditions out of which water is currently accessed (Linton, 2012; Bond, 2013; Goff and Crow, 2014). In the context of relational dependency to access water, inequitable water use, and climate vulnerability the right to water cannot be simply a right to a particular quantity of water. Rather the HRW needs to recognise water as a shared resource and crucially a right to participate and deliberate in the governance of the water commons.

This alternative framework for the HRW recognises that water as firstly, a flow resource constantly moves, from precipitation, condensation, infiltration, evaporation, and surface and subsurface flows. Second, that climatic, hydraulic, social, ecological and cultural processes also interact and transform some underlying assumptions around these flows. As water flows through the earth, it touches different domains, and changes in use, management, and socio-political organisation. It is abstracted, captured, polluted, manipulated, such that we cannot view it outside from these social, cultural and ecological worlds in what a number of scholars refer to as the ‘hydro-social’ cycle (Linton & Budds, 2014; Swyngedouw, 2009). As the example provided by Taylor (2015), discussed earlier, illustrates water access is mediated through this hydro-social cycle. In this way, the HRW can be used to frame a commons-based approach to water laws, moving towards a better recognition of the intertwined nature of these ecological, social, cultural dimensions.

Critical Perspectives on the Human Right to Water

While the HRW has been widely recognised and the above has argued for a reimagined HRW, there are significant doubts about the efficacy of human rights. Critical perspectives reflect on the value of rights in general, as well as its compatibility with the collective aspirations of a water commons (Bakker, 2007).. Human rights have been criticised for being individualistic and dependent on the autonomy of the individual as its subject (Bakker, 2007) . Rights have been articulated in individualistic terms, designed to prohibit the collective and interpersonal infringements. Linton (2012) writes that the HRW has been framed to mean a fixed relation between an individual human body and a quantity of water. This individualisation can be seen in how debate and litigation can often centre around what quantity of water is adequate. ‘Rights talk’ has also been accused of limiting the opportunities for real change to power, politics, and justice that give rise to hydro-climatic injustices (Douzinas & Gearty, 2012; Kennedy, 2012). In other words, it is argued that by articulating hydro-climatic concerns through rights, the processes that give rise to those injustices, are not adequately challenged.

To date, there has been a lively debate about the compatibility of the HRW with privatisation of water services (Sultana and Loftus, 2012). Movements against privatisation and commercialisation of water supply around the world have often asserted the HRW to defend water commons. However, Bakker (2007) has questioned whether framing water as a human right is the best way to recognise the ecological and social values of water. She argued that it is sloppy to assert that HRW was the opposite of privatisation. To oppose privatisation, she asserts, is to go to the heart of property rights. Individual human rights did not foreclose private sector involvement in the water sector. Rather, the HRW as “anthropocentric and individualistic” is fully compatible with the privatisation. Organisations, such as the World Bank that were influential in the drive for privatisation, recognised the HRW while also advocating privatisation and commercialisation of water (Salman and McInerney-Lankford, 2004).

Notwithstanding the shortcomings of human rights and the interpretations of the HRW to date, there is still merit in engaging with the right towards reframing it to a commons-based framework for several reasons. First, while the HRW may be compatible with privatisation under its current interpretation, this does not mean that it is the best strategy for the realisation of the HRW for all. In other words, a commons-based approach is also compatible with the HRW and may also be preferable. Academics and activists are thus constantly engaged in reframing the HRW (Sultana and Loftus, 2012; Harris, Rodina, and

Morinville, 2015). Second, a common criticism is that “rights-talk” can narrow the radical possibilities of change, but this view is not universal. O’Connell (2018) has argued that while there is merit in the critique of rights narrowing radical change, when one looks closely at the practices of social movements and human agency in rights based activism, it does not necessarily prove a narrowing of claims. For example, he finds that the “Right2Water” struggle in Ireland mobilised both a human rights struggle and a broader campaign against austerity, neo-liberalism and structural causes of injustice. Similarly, Bakker (2012, pp. 37–38), in a post- script to her 2007 article that questioned the HRW, writes that defending and extending the HRW remains necessary and a crucially useful tactic in activism. Like O’Connell, she believes that rights can also be recaptured and interpreted more broadly. Third, while there are conceptual criticisms of human rights from critical legal studies scholars, there is still an enduring appeal to human rights. While critiquing the western human rights paradigm, Rajagopal argues that unlocking the transformative or counter-hegemonic potential of the human rights discourse requires to focus on the voices and perspectives of the historically marginalised, including through expanding the scope of socio-economic rights

Human Right to Water and the Commons in India

Building on the discussions above, this final section considers how the HRW in India has begun to link many aspects of the commons through both judicial decisions and legislative and policy reforms. Furthermore, this section considers the prospects for a reformulated HRW. The reforms to date need to be viewed in their socio-political context to ascertain the prospects towards reimagining the HRW. Accordingly, this section first introduces the legal framework in India and then analyses how commons-based perspectives have been introduced in the water law framework. Looking ahead, the discussion will emphasise the legislative direction being pushed by the Union government.

Legal Framework of Water in India

India lacks an umbrella water framework law to regulate water in all its dimensions. Rather, the laws and policies of water have developed in a piecemeal fashion. The Constitution of India delineates responsibilities and powers between the Union government, states, and local bodies (rural *panchayats* and municipalities). Under the Constitution, the primary competence for regulating water is given to each state. This reflects a need to regulate across a variety of conditions and needs. The Constitution also recognises a number

of fundamental rights, and while it does not explicitly recognise the HRW, the judiciary has repeatedly confirmed its existence through reading it in under Article 21, the right to life (*Subhash Kumar v. State of Bihar & Ors*, 1991; *MC Mehta v Kamal Nath*, 1997). The role of the judiciary has been integral to the development of human rights, and environmental rights, with rights-based public interest litigation since the 1980s leading to a substantial rights-based jurisprudence.

Ownership and Control of Water

The legal status of water is central to whether a common-based governance system is possible or not. A property right over water is a controversial subject because of how important water is to the survival of human societies. The history of water in Indian society suggests that private ownership of flowing water was generally prohibited even though various forms of private appropriation, such as through tanks, were accepted (Cullet & Gupta, 2009, p. 157). However, the need for some form of control and regulation within this system was also present (Cullet & Gupta, 2009, p. 162). Since the nineteenth century, access to water has been largely controlled by English common law principles. Rights over water have been linked to control over land. Water law has also developed along different rules for surface water and groundwater, partly due to a lack of knowledge around groundwater. While flowing surface water could not be owned, the development of riparian rights gave individual landowners the right to appropriate water flowing through a river for their own private use. Such riparian rights are indirectly codified in the Indian Easements Act, 1882, and have been further developed through litigation (Cullet & Koonan, 2017, p. 62).

A different set of rules developed for groundwater. Originally, this was because the link between surface water and groundwater was not known when the rules were developed. The prohibition of ownership of surface water did not apply and groundwater came to be seen as a chattel of the land, as it developed in both case law and the Indian Easements Act, 1882 (Cullet & Koonan, 2017, p. 62). Hence, the legal position in India today remains that landowners have an uncontrolled right to extract groundwater from the land. No legal action can be taken against a landowner who has overexploited groundwater and depleted neighbouring wells. This framework of land based groundwater rights creates large scale inequalities, ecological depletion, and rights issues for landless and poor (Koonan, 2016). Groundwater law in particular remains conceptually disconnected from the global water cycle and the existing legal framework for groundwater has been described as “insensitive to, and

unprepared to deal with, climate-change related challenges and implications” (Cullet, Bhullar, & Koonan, 2017, p. 649).

Invoking the Commons through the Judiciary

There have been a number of water related decisions in India, in particular since the early 1990s as public interest litigation, as well as water and environment related conflicts have risen. This sub-section considers the decisions relating to the HRW and commons-based legal principles, including the socio-political context of those decisions.

The judiciary in India have been active in recognising the HRW, as well as several commons-based principles. In 1997, the Supreme Court held that the public trust applied to all “running waters” (i.e. surface waters) and that the Government as the trustee is required to “protect the resources for the enjoyment of general public rather than to permit their use for private ownership or commercial purpose” (*MC Mehta v Kamal Nath*, 1997, para. 25). Three years later, in *MI Builders Private Ltd v Radhey Shyam Sahu* (1999) the Supreme Court commented that the “public trust doctrine in our country, it would appear, has grown from Article 21 of the Constitution”. Accordingly, in a short span of time, the Court not only confirmed the application of the public trust doctrine in India but directly linked it to the HRW that is recognised under Article 21. The Court has further clarified that there is a distinction between the Government’s duties to act “for public benefit” and the “special, more demanding obligation which it may have as a trustee of certain public resources” (*Intellectuals Forum, Tirupathi v State of A.P. and Ors.*, 2006). Thus, the Court was asserting firmly that there was a different set of responsibilities for the state in its role as a trustee, being a duty to protect and manage such resources for the benefit of all.

The Courts have on occasions also recognised a common heritage of water. In both *MC Mehta v Kamal Nath* (1997) and *Intellectuals Forum* (2006, para. 76) the Supreme Court linked public trust to the principle of common heritage. The Court stated that “it is an affirmation of the duty of the state to protect the people's common heritage of streams, lakes, marshlands and tidelands, surrendering that right of protection only in rare cases when the abandonment of that right is consistent with the purposes of the trust”. Nevertheless, while this phrase introduced the idea of common heritage and linked this to public trust and water, it has never resulted in a more comprehensive approach towards recognition of water as common heritage of humankind. Groundwater (the primary source for people in India) was not included in the wording of the Court.

On the face of it, these cases suggest a shift towards a commons-based HRW. Takacs (2008) has suggested that the Indian judiciary has put the public trust doctrine “in service” of constitutionally guaranteed environmental rights, bolstering the demands on the government to advance the HRW on a common-based platform. However, there are reasons to be sceptical as there are still several major gaps and uncertainties. First, there is still uncertainty about the application of the public trust doctrine to groundwater. The Plachimada cases, which centred upon the Coca Cola’s over exploitation of a village aquifer initially extended the public trust doctrine to groundwater (*Perumatty Grama Panchayat vs State Of Kerala*, 2003). However, on appeal, the division bench of the High Court overturned the decision and rejected the scope of the public trust doctrine (*Hindustan Coca-Cola Beverages (P) Ltd v Perumatty Grama Panchayat*, 2005). Confusingly, in between these two cases, the Supreme Court mentioned in passing that the public trust doctrine extends to groundwater (*State of West Bengal v Kesoram Industries*, 2004). But, as the *Kesoram* case was not primarily about water, the question of the application of the public trust doctrine to groundwater remains uncertain. Second, national and state legislation have failed to recognise the change in legal status of water or asserted a different status. For the most part the legislature has ignored the Court’s judgments. For example, the Jammu and Kashmir Water Resources (Regulation and Management) Act 2010 asserts that the government owns all the water in the state (section 3). Finally, the judiciary itself has also been inconsistent in its conceptual understanding of the public trust, for example stating that public trust doctrine “does not exactly prohibit the alienation of the property held as a public trust” and thus leaving scope of the appropriation of resources held under public trust (*Intellectuals Forum, Tirupathi v State of A.P. and Ors.*, 2006; see also: *Susetha v State of Tamil Nadu*, 2006).

The actions of the judiciary must be viewed in its socio-political context of public interest litigation (“PIL”) in India today. The Court has been influential over the last 30 years in expanding Article 21, the right to life, to incorporate a range of human rights such as water, environment, food, health and livelihoods. It has also introduced several commons-based principles and linked them to Article 21 as described above. However, critics have argued that the market-based neo-liberal ideologies and aspirations of the state have enveloped the Courts, including their interpretations of socio-economic rights. Whereas in the 1980s and the early 90s, the rise of PIL was seen as a ray of hope for the poor, as well as broader landscape of Indian law and justice (Baxi, 1985), by the early 2000s the Court was said to be betraying a “lack of sensitivity towards the right of the poor and

disadvantaged”(Bhushan, 2004). The Court became increasingly individualistic in its reasoning. For instance, when there were petitions to stop slum demolitions that would render poor, mostly migrant residents homeless, the Court shot back that “nobody forced you to come to Delhi. Is there a right to live in Delhi only? Stay where you can. If encroachment on public land are to be allowed, there will be anarchy”(Mahapatra, 2006).

Such an ideology has also affected the judiciary’s interpretations of the HRW, in the *Narmada* case the right to water was affirmed but only for the beneficiaries of the dam (urban dwellers), not those who were affected by the construction of the dam and reallocation of water (mostly rural tribal populations) (*Narmada Bachao Andolan v Union of India and Others*, 2000). Similarly, the High Court of Delhi held that the pollution of the river Yamuna was caused by not just industrial and medical waste but also the ‘encroachments’ of slums where sewage flows into the river (*Wazirpur Bartan Nirmata Sangh v. Union of India*, 2006a, para. 9) . The court chose not to focus on the rights issues of the people living in the slums, including their rights to a healthy environment, water and sanitation. Rather, it stated that the slum dwellers had no right to their houses and that the residents of Delhi had a right to “clean potable water from the river Yamuna and health and friendly environment from its bed and embankment” as a constitutional right (*Wazirpur Bartan Nirmata Sangh v. Union of India*, 2006b; see also Cullet, 2014). Thus, the right to water was protected for certain people over others. More recently, in 2014 an interim order confirmed that the HRW introduces the idea that the right can apply differentially depending on the legal status of one’s dwelling, thus limiting the rights of slum dwellers (*Pani Haq Samiti v Brihan Mumbai Municipal Corporation*, 2014).

The Court has also been viewed as adopting a particular definition of the environment that has centred on protecting aesthetics and the “leisure and lifestyle” of the urban middle classes (coined as “bourgeois environmentalism” by Baviskar(2002)). Accordingly, the ‘environment’ has been used as a reason to demolish slums and render people homeless, based on the ‘unhygienic’ conditions of not having drainage infrastructure that was never provided by the state. Moreover, Menon (2014) points out that in addition to privileging the ‘environment’ over people, the Court has also adopted a formula of ‘development over environment’. So, when it comes to large development projects such as the Narmada or Tehri dam, decisions are made without concern for the environment or local populations through utilitarian and economic rationality. Accordingly, the state is justified in its activities based on a logic of a ‘justifiable sacrifice’ by affected communities (Rajagopal, 2005).

Opportunities to further a commons-based HRW through the Court in the future must be seen in this context. The Court, as the previous paragraphs indicate, have increasingly taken an approach to the HRW which does not recognise water beyond its utility as an economic good. Furthermore,

ecological dimensions are only emphasised in a limited capacity. Recently, the Supreme Court had the opportunity to provide more content to the HRW, as well as confirm application of the public trust doctrine over groundwater in the appeal of the Plachimada case against Coca Cola mentioned earlier. However, the Court avoided a substantive statement as it said Coca Cola was no longer operating in the region (“Coca-Cola not to go back to Plachimada,” 2017). The pronouncements of the Court over the years, through invoking the HRW and several common-based principles have been significant in giving legal authority to rights and principles. However, avenues of litigation through the Court can only be one tool in a box of strategies. Moreover, one that may provide significant pitfalls for activists.

Invoking the Commons through the Legislature

The development of water law in India has been also been fragmented. First, many rules, statutes, and policies have been developed on a sectoral basis. Much of water legislation and policy has been driven by a need to harness the ‘productive use’ of water (such as irrigation or industrial uses) and have not paid enough attention to socio-ecological and rights-based considerations (Cullet & Koonan, 2017, pp. 5–7). The underlying assumption has been a private right to use water without considering the impacts across a wider hydro-social cycle. Second, several critical gaps exist in the assumptions underpinning the rules around water. For example, there are different rules for ground and surface water, without sufficient understanding of how they are connected. Third, several different sources and instruments make up the water law framework in India. Apart from the statutes and judicial orders, administrative directions and policies have also played an important role in development of water law in India. Particularly, in the context of the HRW, its implementation has largely been through administrative directions by the executive on drinking water.

As mentioned earlier, the legislature at both national and state levels have largely ignored the judicial developments on human rights and commons-based principles. Only recently, in the context of a widely acknowledged water crisis across the country, the legislature has been forced to take further action. Two proposed reforms are worth noting:

1) The Draft National Water Framework Bill 2016 (“Water Framework Bill”) aims to provide a comprehensive approach to water regulation providing a set of common principles and assumptions; and

2) the Model Groundwater (Sustainable Management) Act, 2016 (“Model GW Act”), which updates a 2012 version, offers a fresh approach to comprehensive groundwater regulation in tune with its importance to communities and ecosystems (Cullet, 2012).

Constitutional division of responsibility between states and the centre over water means that the Water Framework Bill can only translate into actual national level law if two or more states pass a resolution recognising the Water Framework Bill. In that case, the Union government can adopt the law, and it would be applicable for the states that passed such resolutions. Otherwise, it aims to be a “model bill” for states to pass their own legislation based on the Water Framework Bill 2016 and adapted to local conditions. Similarly, Model GW Act is a model legislation that individual states can use frame their own legislation. Accordingly, individual states now have an important role in how these legislative reforms will move ahead.

Importantly, the legislative reforms seek to restate water as a human right, a public trust and common heritage resource. First, water is recognised as a fundamental right for all (Draft National Water Framework Bill, 2016, sec. 3). While the state may delegate the provision of water services to private agencies, it cannot delegate or evade from its human rights duties. Furthermore, under the fundamental HRW, the privatisation of water itself is prohibited (Draft National Water Framework Bill, 2016, sec. 3). Second, water is recognised as “a common heritage of the people of India” and held in public trust, not amenable to ownership by anyone (Draft National Water Framework Bill, 2016, sec. 4(1)). The state is entrusted to protect, preserve and conserve water, and passes this on to future generations (Section 4(4)). Accordingly, these sections assert the way water should be managed, that is through commons-based principles of stewardship, intergenerational justice, and sustainable development. Third, public trust and common heritage recognition also extends to groundwater, as the Water Framework Bill 2016 recognises the unity of groundwater and surface water (Water Framework Bill, 2016, preamble). Furthermore, the Model GW Act confirms the same and the prohibition of ownership of groundwater (Model Groundwater (Sustainable Management) Act, 2016, sec. 9). In the same section, a link is made towards ensuring that groundwater exploitation does not deprive neighbouring users’ fundamental

rights (Model GW Act, 2016, sec 9(4)). Thus, the Model GW Act 2016 also links the HRW directly with common heritage and public trust.

The recognition of water in public trust and as a common heritage resources is a significant step. Nevertheless, an earlier version of the Water Framework Bill, drafted in 2011 by a sub-committee of the Planning Commission of India, went further to recognise water as a “common natural heritage of humanity” rather than just of the “people of India”. It went on to recognise water as “a bounty of nature to be shared with all other forms of life, with fellow humans of one’s own and other groups, villages, States and countries, and with future generations” (Draft National Water Framework Act, 2011, sec. 3). The difference would be to recognise water as a true flow resource, in its global (and inter-generational) form. Such a provision conceptually links water from a national to the global hydro-commons, having implications for climate change and transboundary water issues. While the political nature the reform procedure likely saw this wording change, from a commons-based perspective this represent a lost opportunity to truly connect water to the global water cycle.

Subsidiarity, participation and the HRW

Finally, as mentioned in the first part of this paper, participation is important to the integrity of a commons-based governance system. Moreover, a key element to a HRW that is based on the right to transform the hydro-social conditions of access to water. Participation in water governance in India has taken two divergent paths. The first is under the 73rd and 74th Amendments to the Constitution, adopted in 1992, where local bodies of governance in rural and urban areas have been given significant power in the water context, including over drinking water supply and domestic water uses. These reforms envision a much more participatory water governance framework, through decisions around water being made through local democracy. Nevertheless, the implementation of such decentralisation has been uneven across the country. This can often be because state’s themselves have not incorporated such reforms into their own framework.

The second path developed is based on viewing water as an economic good to foster the management and efficiency of use. This has largely arisen from developments in international policy and pushed by developmental banks. Here, participation is separate from one’s constitutional right, or democratic local body, but rather based upon one’s ability to pay. For example, the *Swajaldhara* drinking water scheme is premised on the principle that the local community is able to participate, but only individuals who are able to pay their share

of the capital costs can do so (Cullet, 2007). This form of participation is antithetical to the universality of the HRW, or the inclusiveness of commons-based governance systems.

To date, the participation in water governance in India has grown in these parallel paths and remains incomplete in making the relevant links to the public trust, commons-based governance, and the HRW. As discussed above, neither the judiciary nor the legislature have provided enough content or broadened the scope of the HRW. But, the recent law reforms attempt to bring some coherence to these issues as both the Water Framework Bill 2016 and the Model GW Bill 2016 link the principle of subsidiarity with the public trust. This means that a “trustee” should be the lowest possible democratically elected body that can regulate an entire waterbody or aquifer. The Model GW Bill (sec.6) for example, integrates subsidiarity and decentralisation as a basic principle. Conservation and sustainability innovations, such as groundwater security plans, to protect groundwater protection zones are to be prepared by the lowest possible administrative level that encompasses the whole aquifer (Section 13, Model GW Bill 2016). These reforms try to reconcile the divergent trends in participation and foster a form of democratic participation that is based upon the Constitution. For our purposes, it also furthers the goal of water being governed in commons (based upon public trust doctrine and common heritage) and grounded upon the HRW.

It is important to remember that reforms in legislation and policy are not a panacea. First, while subsidiarity means decisions are made at the lowest level, water as a flow resource is both local and global, as is hydro-climatic change. While local level decision making is seen as appropriate because access to basic water is often mediated at the local level, there is sufficient scope to integrate participative decision making across all levels of government, as well as improve the co-ordination between different local governments that are in the same watershed or river-basin. A second serious concern is that local democracy and decentralisation may not necessarily mean equal participation of all people on the ground. ‘Elite capture’, where participatory processes are co-opted by powerful groups (including the elites of political parties), remain an important critique to decentralised and local commons based governance (Chakrabarti, 2016; Kothari, 2001). Moreover, concerns of gender and caste are particularly important in the Indian context. However, both these concerns do not negate the potential benefits of a participatory HRW. Rather, they emphasise the need for a greater emphasis of the principles of the commons, human rights, deliberation, as well as strengthening local democracy.

Conclusion

There is a long way to go for the HRW to be transformed into a commons- based human right. This chapter has argued that such a right is necessary to reconfigure socio-natural relations around water, climate and society. In the Indian context, the strides of the judiciary in the last twenty years to recognise and introduce concepts of HRW, public trust and common heritage provide the basis for a commons-based approach. However, the fragmented nature of water law and policy in India has meant this has never translated in a coherent way. Moreover, the judiciary's approach in recent times means activism towards a broader HRW through the Courts is problematic. Recent legislative reforms provide hope that further coherence can be brought to Indian water law. Importantly, such reforms have the fundamental elements to gradually transform water as a common resource, based on human rights and inclusive participation. Ultimately, much of this now rests with how such legislation is taken up by individual state governments. An opportunity remains for civil society and activists to use these legal tools and principles to demand for a broader commons-based human right.

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