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WATER SECTOR REFORMS AND COURTS IN INDIA

LESSONS FROM THE EVOLVING CASE LAW

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Water Sector Reforms and Courts in India: Lessons from the Evolving Case Law

Philippe Cullet

This article analyses the evolving Indian case law concerning water, with a special focus on the fundamental right to water, as well as issues related to control over water, and the links between environment and water. While courts have long engaged with water law, activities in recent years have been particularly important because of the introduction of water sector reforms and water law reforms that seek to reshape the water sector. The response of courts to these developments is particularly important. However, there has been no unified response to ongoing changes as Indian courts have given varying responses to the variety of cases submitted to them.

INTRODUCTION

Over the past couple of decades, water law and policy has evolved significantly in many countries of the world in the context of a set of policy reforms generally known as water sector reforms. In India, the various policy reforms that have been introduced over the past two decades in the water sector have been supplemented since the late 1990s by a series of sweeping reforms of water law.¹

In India, water sector reforms have been proposed by a variety of domestic and international actors, including the World Bank and the Asian Development Bank, to remedy the perceived ills affecting the water sector in general.² The basic justification for the policy interventions that have been introduced has been increasing water scarcity.³ Water sector reforms are thus intrinsically linked to a broad environmental agenda.⁴ The

actual reforms proposed have tended not to address water scarcity in its various dimensions but rather to focus on some specific issues. Thus, water sector reforms suggest the need to rethink the governance of the water sector with particular emphasis on the management of water.⁵ This includes, in particular, proposals to restrict the role that government plays in managing water resources and in institutional reorganization from the local to the State level.⁶

Beyond policy reforms, a number of water law reforms have been introduced in India.⁷ Most of these new laws seek to ensure the viability of reforms beyond project-specific interventions. These reforms have quick-started a process that will likely lead to an overhaul of water law in coming years.

The outcome of these two sets of sweeping reforms is that the whole water sector in India is undergoing tremendous changes that will go on for a number of years. In particular, the laws seeking to introduce new water regulatory authorities have the potential to completely redraw the map of the water sector in the medium term.⁸

Courts have traditionally played a key role in the development of water law in India. This is partly due to the relative under-development of formal water law and to the fact that access to and control over water has been governed since colonial times through common law rules. The case law of the past two decades must be understood in the context of the changes affecting the water sector, as well as the broader policy changes that have taken place in India. In particular, the economic and financial reforms that were unleashed after 1991 have not bypassed the courts.⁹

¹ See generally, P. Cullet, *Water Law, Poverty and Development – Water Law Reforms in India* (Oxford University Press, 2009).

² See R. Madhav, 'Context for Water Sector and Water Law Reforms in India', in P. Cullet et al. (eds), *Water Law for the Twenty-First Century: National and International Aspects of Water Law Reforms in India* (Routledge, 2010), 109.

³ See Dublin Statement on Water and Sustainable Development, International Conference on Water and the Environment (Dublin, 31 January 1992).

⁴ See M. Finger and J. Allouche, *Water Privatization – Trans-National Corporations and the Re-Regulation of the Water Industry* (Spon Press, 2002).

⁵ See, for instance, World Bank, *Water Resources Sector Strategy – Strategic Directions for World Bank Engagement* (World Bank, 2004).

⁶ See, for instance, World Bank, *India – Water Resources Management Sector Review – Report on the Irrigation Sector*, Report No 18416 IN (World Bank, 1998), chapter 3.

⁷ See R. Madhav, n .7 above.

⁸ On water regulatory authorities, see P. Sangameswaran and R. Madhav, 'Institutional Reforms for Water', in P. Cullet, et al., n. 2 above, 138.

⁹ See P. Bhushan, 'Supreme Court and PIL', 39:18 *Economic & Political Weekly* (2004), 1770.

The result of these various influences is that the water case law has taken multiple directions. Indeed, courts have given completely different responses to the issues they were asked to address in different contexts and there is thus no single trend that can be identified. In part, the recent case law reflects the variety of water issues that courts have addressed for some time, ranging from issues of control over water in general, to sectoral issues concerning, for instance, irrigation, water pollution and drinking water.

The Indian judiciary has played an important role in adjudicating disputes on the basis of existing legal principles and statutes. At the same time, the judiciary has also contributed to the development of water law. On the one hand, courts have developed the basic structure of water law, making up for the lack of a framework water legislation by, for instance, strongly asserting the existence of a fundamental right to water in India, as well as by changing the basic principle of control over water by declaring all surface water to be covered by the principle of public trust.¹⁰ On the other hand, courts have in certain decisions played a key role in undermining certain rights and principles, for instance in the context of displacement, where the fundamental right to water has been used to undermine the fundamental rights (including the right to water) of oustees (displaced people).¹¹

This article highlights some of the main trends in the water-related case law in India during a phase of tremendous policy and legal changes in the water sector. It does not purport to provide an exhaustive analysis of all water-related cases over the past two decades. It rather chooses to identify some of the main areas addressed by the courts and examines these decisions in relation to the existing and evolving water law framework.

FUNDAMENTAL RIGHT TO WATER AND DRINKING WATER

FUNDAMENTAL RIGHT TO WATER – RECOGNITION WITHOUT SPECIFICITY

Courts have discussed water in relation to fundamental rights and have repeatedly asserted the existence of a fundamental right to water. The right has in general been linked to Article 21 (right to life) of the Indian Constitution and the broader perspective on the right to

life that has informed the case law for the past couple of decades.¹²

This right has been upheld at a theoretical level in a variety of decisions at the State and Union levels. However, courts have done little more than confirm and restate the existence of a fundamental right to water. In other words, they have not focused on its scope and content but rather used it as a building block for the specific decisions they were taking. Nevertheless, courts have addressed some of the general lineaments of the content of the right in some cases. Thus, in *Vishala Kochi Kudivella Samarkshana Samithi v. State of Kerala*, the court specifically provided that the government 'is bound to provide drinking water to the public' and that this should be the foremost duty of the government.¹³ Additionally, the judges ruled that the failure of the State to 'provide safe drinking water' to citizens amounted to a violation of Article 21 of the Constitution.¹⁴

Courts have also explored different bases for the right. In some cases, the right has thus been linked primarily to Article 47 of the Constitution. In *Hamid Khan v. State of Madhya Pradesh*, the government was sued for not taking appropriate precautions to ensure that the drinking water supplied through handpumps in Mandla District was free from excessive fluoride.¹⁵ It was ruled that, under Article 47, the State has the responsibility to 'improve the health of public providing unpolluted drinking water'.¹⁶ The judges first ruled on this 'primary responsibility' of the State and then went on to state that Article 21 also covers the issue. They concluded on the basis of Articles 47 and 21 that the State has a duty 'towards every citizen of India to provide pure drinking water'.¹⁷

In general, courts have sought to expand rather than restrict the scope of the right. For instance, in *Dr K.C. Malhotra v. State of Madhya Pradesh*, the High Court made the link between water, health and sanitation in the context of fundamental rights. In this case, it was alleged that the Municipal Corporation of Gwalior and the Public Health and Public Health Engineering

¹² See, for instance, *Subhash Kumar v. State of Bihar*, AIR 1991 SC 420 (Supreme Court) (9 January 1991), available at <<http://www.ielrc.org/content/e9108.pdf>>.

¹³ *Vishala Kochi Kudivella Samarkshana Samithi v. State of Kerala*, 2006 (1) KLT 919 (High Court of Kerala) (20 February 2006), para. 3, available at <<http://www.ielrc.org/content/e0642.pdf>>. Similarly, in *Lucknow Grih Swami Parishad v. State of Uttar Pradesh*, 2000 (3) AWC 2139 (High Court of Allahabad (Lucknow Bench)) (20 April 2000), para. 4, available at <<http://www.ielrc.org/content/e0013.pdf>>, the court ruled that 'it is the bounden duty of the State to assure the supply of sufficient amount of qualitative drinking water to its people'.

¹⁴ See *Vishala Kochi Kudivella Samarkshana Samithi*, *ibid.*, para. 3.

¹⁵ *Hamid Khan v. State of Madhya Pradesh*, AIR 1997 MP 191 (Madhya Pradesh High Court) (30 October 1996), available at <<http://www.ielrc.org/content/e9613.pdf>>.

¹⁶ *Ibid.*, para. 6.

¹⁷ *Ibid.*

¹⁰ See 'Rethinking Basic Principles of Water Law' section below.

¹¹ See 'Environment, Water and Fundamental Rights' section below.

Departments had failed in their duty to avoid the spread of an epidemic of cholera, resulting in the death of 12 children in 1991 and further deaths in 1992.¹⁸ The judges ruled that all individuals, even from lower classes and weaker sections, benefit from the protection of Article 21. This put a duty on the government to ensure, for instance, that the sewer should be covered and regularly cleaned public toilets should be provided.¹⁹

Yet, the case law is not uniform insofar as some decisions have specifically sought to circumscribe the scope of the right, as reflected in *Venkatagiriappa v. Karnataka Electricity Board*, where the court indicated that the right to water does not cover water for irrigation and business purposes.²⁰ While this is not particularly surprising, the court failed to consider whether irrigation water for subsistence crops and for livelihood should be treated in the same way. As a result, it refrained from engaging with some of the more difficult issues concerning the scope of the right which are in need of answers.

The above cases confirm that courts have frequently upheld the fundamental right to water and used it in different contexts. In most cases, the assertion of the fundamental right to water has been made in a context which seeks to expand the realization of the right to all citizens. There are, however, some cases which are more problematic. This is in particular seen in the 2000 judgment concerning the Sardar Sarovar Dam which strongly asserted the right to water of the citizens that were the potential beneficiaries of the project without taking into account the implied negative impacts of this decision on the realization of the right to water of the oustees.²¹

DRINKING WATER CASE LAW – FAILING TO FILL LEGISLATIVE GAPS

Drinking water is universally acknowledged as being the first priority among water uses and Indian courts have not failed to give drinking water the priority it deserves in cases where issues of inter-sectoral allocation of water have arisen. Drinking water has also been frequently mentioned in the context of discussions on the fundamental right to water since it constitutes the

core content that all decisions give to the right implied under Article 21 of the Constitution. Yet, while decisions discussing the fundamental right to water mention drinking water on many occasions, drinking water is the immediate focus only in some instances, as in the case of *F.K. Hussain v. Union of India*, where a scheme to augment drinking water supply in the Lakshadweep islands focusing on groundwater extraction was challenged on the ground that it would lead to an intrusion of salt water and would consequently affect the fundamental right of the petitioners under Article 21 of the Constitution.²²

The fact that drinking water is given the highest priority in terms of inter-sectoral allocation does not indicate how far courts have engaged with the more specific issues arising in this area and the contribution they have made. In practice, the case law illustrates that courts have addressed a number of important issues but they have failed to fill the gaps left by the absence of a framework drinking water law, either at the Union level or in the States.

No single pattern can be identified among the relevant case law as courts have addressed widely different issues. Certain cases address drinking water in the context of inter-State water allocation. In *Comdr. Sureshwar D. Sinha v. Union of India*, the Supreme Court considered the issue of drinking water from the point of view of the allocation of bulk entitlements to different States. In its order, the court showed its concern for the residents of Delhi in general and for some specific pockets inhabited mostly by higher middle class residents. The court did not, however, use this opportunity to consider how this additional water could be made available to the most disadvantaged groups in Delhi.²³

In certain situations, courts have addressed drinking water in the context of regulation pertaining to new buildings. In *DLF Universal Ltd v. Prof. A. Lakshmi Sagar*, drinking water was considered from a health and environment perspective in the context of the construction of buildings next to a reservoir used for urban drinking water needs. The court put a number of conditions for the acceptability of new buildings but did not specifically put drinking water and water quality before other concerns.²⁴

Further, courts have also addressed drinking water in the context of disputes that were in fact commercial

¹⁸ *Dr K.C. Malhotra v. State of Madhya Pradesh*, AIR 1994 MP 48 (Madhya Pradesh High Court) (7 May 1993), available at <<http://www.ielrc.org/content/e9310.pdf>>.

¹⁹ *Ibid.*, para. 14.

²⁰ *Venkatagiriappa v. Karnataka Electricity Board, Bangalore*, 1999 (4) KarLJ 482 (High Court of Karnataka) (15 July 1998), available at <<http://www.ielrc.org/content/e9813.pdf>>.

²¹ *Narmada Bachao Andolan v. Union of India*, AIR 2000 SC 3751 (Supreme Court) (18 October 2000), available at <<http://www.ielrc.org/content/c0001.pdf>>. See further 'Environment, Water and Fundamental Rights below.

²² *F.K. Hussain v. Union of India*, AIR 1990 Ker 321 (High Court of Kerala) (26 February 1990), available at <<http://www.ielrc.org/content/e9002.pdf>>.

²³ *Comdr Sureshwar D. Sinha v. Union of India* (2000), 8 SCC 368 (Supreme Court) (Order of 10 May 2000), available at <<http://www.ielrc.org/content/e0006.pdf>>.

²⁴ *DLF Universal Ltd v. Prof. A. Lakshmi Sagar*, AIR 1998 SC 3369 (Supreme Court) (2 September 1998), available at <<http://www.ielrc.org/content/e9805.pdf>>.

disputes. In *Municipal Corporation Chandigarh v. Shantikunj Investment*, the Supreme Court discussed, in the case of commercial properties, whether drinking water should be part of the amenities provided by the municipal corporation. It decided that there was no obligation on the part of the authorities to provide such amenities and that this did not preclude the full enjoyment of the leased properties. In deciding that the lack of amenities such as drinking water did not provide the private investors the right not to pay the amount due under the lease, the Supreme Court only attempted to balance this with a request to the High Court to consider whether the lack of such amenities could provide the basis for 'proportionate relief' to the leaseholders.²⁵ It is likely that the court would have taken a different view of the matter in the case of residential buildings but this decision seems to indicate that the provision of drinking water to any building, regardless of the use to which it is put, is not compulsory. This is problematic, in particular in the context of all so-called unauthorized residential colonies, where a large section of the population live in technical illegality because their situation has not been regularized, not because they seek to evade the law.

Courts have also addressed drinking water from the point of view of economic interests involved in its provision. In *Lucknow Grih Swami Parishad v. State of Uttar Pradesh*, the court adjudicated a dispute over the levying of water charges by the Jal Sansthan.²⁶ In *M/s. Noorulla Ghazanfarulla v. Municipal Board of Aligarh*, the court adjudicated a dispute between a former private supplier of drinking water and the Municipal Board of Aligarh following the revocation of the licence to ensure better supply to the residents.²⁷ In this case, the court was concerned with the economic consequences of the takeover and did not specifically consider the issues posed in terms of drinking water.

The question of water quality has also been addressed directly and indirectly in the context of bottled drinking water. In *Cauvery Mineral Waters Private Limited v. Bureau of Indian Standards*, it was found that water which can be used for human consumption as drink or food is not excluded from the definition of food under the Prevention of Food Adulteration Act 1954.²⁸ Further, in *Bureau of Indian Standards v. Pepsico India Holdings Private Limited* in the context of a dispute over the labelling of drinking water as 'pure', it

was found that the Bureau of Indian Standards (BIS) has ample power in relation to the labelling of articles and that it can prohibit activities which mislead the public about the nature, origin, composition and properties of any good or article sought to be marketed under the BIS standard mark.²⁹

On the whole, the drinking water-related case law is vast in scope but has not contributed to the development of any fully fledged body of principles in this area. This is unfortunate in the context of something as basic as drinking water, given that the courts have not hesitated to enter the policy arena in various contexts where the government or the legislature has failed to take the initiative. It is particularly noteworthy in view of the absence of a framework piece of drinking water legislation.

CONTROL OVER WATER – TRADITIONAL AND NEW PERSPECTIVES

Indian courts have traditionally devoted significant attention to issues of control over water because of the direct link the Indian legal framework makes between land ownership and access to and control over water. In this respect, the last two decades have witnessed some significant developments, in particular with the attempt by the Supreme Court to redraw completely the legal landscape with the introduction of the doctrine of public trust to water. At the same time, this has not led to broader changes beyond the specific decisions where the public trust has been applied and courts have neither effectively challenged the control that the State exerts over water nor the socially inequitable and environmentally unsustainable control that landowners have over water.

RETHINKING BASIC PRINCIPLES OF WATER LAW – PUBLIC TRUST

One of the main contributions that Indian courts have made to the basic structure of water law is to determine that the principle of public trust applies in India to all surface waters. In *MC Mehta v. Kamal Nath*, the dispute revolved around interference with the course of a river by property developers as they were seeking to force back the Beas River into a course which would not affect their property interests.³⁰ The Supreme Court

²⁵ *Municipal Corporation Chandigarh v. Shantikunj Investment*, AIR 2006 SC 1270 (Supreme Court) (28 February 2006), available at <<http://ielrc.org/content/e0613.pdf>>.

²⁶ See *Lucknow Grih Swami Parishad*, n. 13 above.

²⁷ *M/s Noorulla Ghazanfarulla v. Municipal Board of Aligarh*, AIR 1995 SC 1058 (Supreme Court of India) (7 February 1995), available at <<http://www.ielrc.org/content/e9504.pdf>>.

²⁸ *Cauvery Mineral Waters Private Limited v. Bureau of Indian Standards*, 2003 (1) KarLJ 265 (Karnataka High Court) (29 August 2002), available at <<http://www.ielrc.org/content/e0224.pdf>>.

²⁹ *Bureau of Indian Standards v. Pepsico India Holdings Private Limited*, 2008 INDLAW DEL 1591 (Delhi High Court) (21 November 2008), para. 23, available at <<http://www.ielrc.org/content/e0813.pdf>>.

³⁰ *M.C. Mehta v. Kamal Nath* (1997), 1 SCC 388 (Supreme Court) (13 December 1996), available at <<http://www.ielrc.org/content/e9615.pdf>>.

started from the premise that '[t]he area being ecologically fragile and full of scenic beauty should not have been permitted to be converted into private ownership and for commercial gains'.³¹ It then expanded existing legal concepts and determined that water is covered by the public trust doctrine. The court then concluded that where the public trust applies, such resources are meant for public use and cannot be converted into private ownership.³²

The notion of public trust refers to the idea that an entity holds certain resources in trust for the public because they are intrinsically valuable to the public and cannot be owned by any person.³³ It also implies that the trustee has a fiduciary duty of care and responsibility to the general public. In the context of water, it provides a basis for considering water without starting from the perspective of property rights. Further, under the public trust doctrine, the trustee is bound to distribute existing water so that it neither deprives any individual or group from access to domestic water nor significantly affects ecosystem needs.³⁴ The trustee cannot alienate the trust nor can it fundamentally change its nature and can at most hold a usufructuary right in water.

The recognition that water is covered by the public trust has been re-affirmed.³⁵ In different words, the High Court of Rajasthan has stated that '[w]ater is the property of the people of India and is dedicated to their use'.³⁶ The Supreme Court has also extended the scope of the application of the public trust to groundwater.³⁷ This may need to be confirmed in a more water-specific case since the court discussed this point here in the context of a discussion on the power of the legislature to impose taxes on land.

The crucial recognition by the Supreme Court that water is a public trust has, however, had no impact in practice beyond the specific decisions where courts have used this principle. Indeed, States have not amended legislation that recognizes State ownership of water nor have any of the many legislative enactments concerning water adopted since 1997 taken notice of

this principle. Further, some cases have tended to restrict the application of the principle. In *Mrs Susetha v. State of Tamil Nadu*, 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'.³⁸ In the context of that case where a shopping complex had been sanctioned at the spot of a disused temple tank, the court found that since there was no shortage of water in the village and since the tank had been unused for a long time, it had to take a 'pragmatic view' of the doctrine of sustainable development and could thus condone the alienation of the property.³⁹ The only additional element the court requested was to direct the State and gram panchayat (village council) to ensure that *other* tanks in and around the village are properly maintained. This decision seems to empty the principle of public trust from its inner substance since the court did not base its decision on an assessment of the water needs of the area in the long term but only balanced present day use against availability. One of the basic points of the public trust doctrine is to take a long-term view of the resource conservation and use, something which is in fact also central to the doctrine of sustainable development used here as a basis for the decision.

SOVEREIGN AND PRIVATE APPROPRIATION – LIMITED EVOLUTION

Indian courts have addressed in many cases over a long period of time issues related to control over water linked to land rights. There has been frequent recourse to the courts for many years to settle disputes between landowners related to water. The courts have generally applied common law principles introduced during the colonial period in part because there is still no framework legislation providing an updated structure for addressing these issues. The evolution of the case law over the past couple of decades indicates that courts have found it difficult to move beyond the traditional principles that have been at the core of water law for decades, even after the introduction of the principle of public trust.

First, courts still discuss water in terms of the property rights of the State. This was not surprising in the case of *N. Sankappa Shetty v. State of Karnataka* that was decided before the 1997 decision making the public trust effective throughout the country.⁴⁰ It is more surprising to find a similar position in the 2004 *Tekaba v.*

³¹ *Ibid.*, para. 22.

³² *Ibid.*, para. 34.

³³ See, for instance, M. Moench, 'Approaches to Groundwater Management: To Control or Enable?', 29:39 *Economic & Political Weekly* (1994), A135.

³⁴ See, for instance, C. Singh, *Water Rights and Principles of Water Resources Management* (Tripathi, 1991), at 76.

³⁵ See *Intellectuals Forum, Tirupathi v. State of Andhra Pradesh*, AIR 2006 SC 1350 (Supreme Court) (23 February 2006), available at <<http://www.ielrc.org/content/e0606.pdf>>.

³⁶ See *D.M. Singhvi v. Union of India*, AIR 2005 Raj 280 (High Court of Rajasthan (Jaipur Bench)) (2 May 2005), para. 15, available at <<http://www.ielrc.org/content/e0513.pdf>>.

³⁷ *State of West Bengal v. Kesoram Industries Ltd* (2004), 10 SCC 201 (Supreme Court) (15 January 2004), available at <<http://www.ielrc.org/content/e0420.pdf>>.

³⁸ See *Intellectuals Forum*, n. 35 above, para. 60.

³⁹ *Mrs Susetha v. State of Tamil Nadu*, AIR 2006 SC 2893 (Supreme Court of India) (8 August 2006), para. 9, available at <<http://www.ielrc.org/content/e0608.pdf>>.

⁴⁰ *N. Sankappa Shetty v. State of Karnataka*, 1992 (3) Kar LJ 474 (High Court of Karnataka) (25 June 1992), available at <<http://www.ielrc.org/content/e9212.pdf>>.

Sakumeren decision. In this case, two clans from two villages of Nagaland brought a dispute over the sharing of a source of water governed by customary rules. The Supreme Court simply restated that the 'state is the sovereign dominant owner' of water.⁴¹ This does not coincide with the decisions concerning the public trust and tends to indicate that a clear trend in the development of water law principles cannot be identified.

Second, courts have also addressed the relationship between the rights of the State and those of landowners. In *Orient Papers and Industries Limited v. Tashildar-cum-Irrigation Officer*, a riparian owner had been drawing water since 1939 for the manufacture of paper and for domestic use of employees. Following the construction of the Hirakud Dam, a dispute ensued because it was averred that the riparian owner had lost its pre-existing rights since it was now drawing water from the reservoir of the dam. The conflict was thus over whether the impoundment of the Dam had affected the rights of the owner over the river. In substance, the Supreme Court analysed whether riparian rights can be trumped by rights of the State.⁴² The court found that the construction of a dam that creates a reservoir displaces the rights that landowners can claim over running water at common law. This confirms that the State has wide-ranging power over water even where private rights are well established.

Third, in cases involving landowner claims over water, Indian courts have for the time being failed to induce an evolution in the old common law principles. Such an evolution is called for by the fact that common law principles are today inappropriate insofar as they fail to be in consonance with existing environmental law. They have also become increasingly socially inequitable in a context of increasing water scarcity since they give landowners undue control over a life-sustaining substance. The limited evolution of the case law is illustrated in the *Plachimada Case* concerning groundwater extraction by a bottling plant of the Coca Cola Company. Interestingly, the first judge who looked at the issue proposed that common law principles were not relevant in the present scenario anymore and the public trust notion should apply to groundwater as well.⁴³ This was in fact the correct position as it happened to come in the same year as the Supreme Court decision referred to above stating that groundwater is covered by the public trust.⁴⁴ Yet, a subsequent decision

of the High Court reversed this and suggested that traditional rules that give landowners and occupiers largely unfettered access to groundwater should be upheld.⁴⁵ The case has been pending with the Supreme Court for some time but it now appears that it will be dormant for the foreseeable future. As a result, it is likely that no significant changes can be expected in this area in the near future. This is not inappropriate in the sense that such decisions should be taken by the legislature. Yet, in view of the very slow response that States have given to the need to address groundwater depletion, an impetus from the courts would be welcome.

WATER AND ENVIRONMENT – CONSTRUCTIVE AND CONTROVERSIAL ENGAGEMENT

Indian courts have devoted significant attention to environmental issues over the past couple of decades with mixed results from a social and environmental point of view.⁴⁶ The widely varying case law in the area of water and environment is surprising at first sight because there is a general understanding that the development of environmental law over the past four decades has been a positive development bringing welfare improvements for everyone. Yet, over the past two decades the environment has increasingly been used as a fig leaf to justify certain reforms that have nothing to do with the environment. It is in this context that various cases that seem to be addressing issues from an environmental point of view end up neither fostering environmental sustainability nor the welfare of the poorest and most disadvantaged.

POSITIVE SYNERGIES BETWEEN ENVIRONMENT AND WATER

Indian courts have engaged with issues linking the environment and water on numerous occasions. The kinds of interventions the courts have made range from extremely broad statements to relatively specific technical issues. At a general level, the courts have, for instance, emphasized the key role of water for life on earth.⁴⁷ They have also recognized the government's duty to 'keep the rivers in the country pure and clean so that the water there is drinkable and free of diseases',⁴⁸

⁴¹ *Tekaba v. Sakumeren*, AIR 2004 SC 3674 (Supreme Court) (29 April 2004), available at <<http://www.ielrc.org/content/e0408.pdf>>.

⁴² *Orient Papers and Industries Limited v. Tashildar-cum-Irrigation Officer*, AIR 1998 SC 3330 (Supreme Court) (7 September 1998), available at <<http://www.ielrc.org/content/e9807.pdf>>.

⁴³ *Perumatty Grama Panchayat v. State of Kerala*, 2004 (1) KLT 731 (High Court of Kerala) (16 December 2003), available at <<http://www.ielrc.org/content/e0328.pdf>>.

⁴⁴ See *State of West Bengal v. Kesoram Industries*, n. 37 above.

⁴⁵ *Hindustan Coca-Cola Beverages v. Perumatty Grama Panchayat*, 2005 (2) KLT 554 (High Court of Kerala) (7 April 2005), available at <<http://www.ielrc.org/content/e0515.pdf>>.

⁴⁶ See P. Bhushan, n. 9 above.

⁴⁷ See *D.M. Singhvi*, n. 36 above.

⁴⁸ *Mahendra Prasad Sonkar and Surya Prakash Singh v. State of Uttar Pradesh through Secretary Urban-Development* (High Court of Allahabad) (6 August 2004), available at <<http://www.ielrc.org/content/e0414.pdf>>.

as well as used the basic life-supporting role of water as a basis for inter-State allocation of water, as in the case of the dispute between Delhi and Haryana over additional water supply for Delhi's increasing population.⁴⁹

The courts have gone into more detail in a number of separate areas related to water pollution. The general context for these decisions is often the Water (Prevention and Control of Pollution) Act 1974. In *M.C. Mehta v. Union of India (Calcutta Tanneries)*, the case revolved around water pollution caused by tanneries.⁵⁰ The court discussed at length the shifting of the polluting units and the possibility of setting up effluent treatment plants. The importance of this decision is that it affirmed the relevance of the prevention and precautionary principles in the context of water. These central principles of environmental law were recognized as applicable to water and by extension as principles of water law in general. Courts have also considered issues of water pollution arising directly under the Water Act.⁵¹

The link between water pollution and drinking water was also made in *Indian Council for Enviro-Legal Action v. Union of India*, where the Supreme Court addressed the issue of the pollution of the drinking water sources of the inhabitants of the village of Bichri in Rajasthan from the point of view of the right to life in Article 21 of the Constitution. The severe pollution caused by industrial units led the court to discuss remedial measures from the point of view of liability rules. In a significant move, it indicated that the principles developed a decade earlier following the Bhopal tragedy were applicable to the damage caused to the soil and groundwater.⁵² This also has indirect consequences on the extent of landowners' control over groundwater, as this case indicates that even under common law rules, interests beyond those of the landowners are at stake, at least in the worst cases.⁵³

In *Andhra Pradesh Pollution Control Board II v. Prof. M.V. Nayudu (Retd)*, the Supreme Court ruled that the fundamental objective of the Water Act is to provide

clean drinking water to people.⁵⁴ The court decided that the State government was not in a position to grant an exception to rules seeking to protect sources of drinking water from pollution to a given industry. Not only did the court determine that this was arbitrary and contrary to the public interest but it also ruled that it was a violation of the fundamental right to clean water.⁵⁵ Additionally, the court made the link with the precautionary principle, thus confirming that there should be no barriers between water law, environmental law and fundamental rights.

Interestingly, some cases make further links between water, environment and economic development. In *Tirupur Dyeing Factory Owners Association v. Noyyal River Ayacutdars Protection Association*, the Supreme Court restated the central position of the prevention and precautionary principles and of the guiding notion of sustainable development. It acknowledged the central role by Tirupur in the export of fine garments and the contribution of about Rs 100 billion that it makes to India in addition to providing livelihoods to a large number of people. At the same time, it found that on balance there should ensue no pollution to the river and that industrial units must 'carry out their industrial activities without polluting the water'.⁵⁶ It noted that it was the responsibility of the polluting units to meet the expenses involved in tackling environmental damage.

ENVIRONMENT, WATER AND FUNDAMENTAL RIGHTS – TOWARDS DIFFERENT RIGHTS FOR DIFFERENT GROUPS OF PEOPLE

The intrinsic relationship between water, the environment and fundamental rights has ensured that courts have had to address the links between these different issues. In fact, since water and the environment are fundamental rights in themselves, the link is always present, though not necessarily acknowledged or visible. In this context, several types of decisions can be highlighted.

First, in some cases, courts have attempted to deal separately with the different issues that arise and have not recognized the links between rights. In *M.C. Mehta v. Union of India (Calcutta Tanneries)* mentioned above, the court addressed the issue mainly from an

⁴⁹ *Delhi Water Supply and Sewage Disposal Undertaking v. State of Haryana*, AIR 1996 SC 2992 (Supreme Court) (29 February 1996), available at <<http://www.ielrc.org/content/e9603.pdf>>.

⁵⁰ *M.C. Mehta v. Union of India*, 1996 (9) SCALE 397 (Supreme Court) (19 December 1996), available at <<http://www.ielrc.org/content/e9710.pdf>>.

⁵¹ *State of Madhya Pradesh v. Kedia Leather and Liquor Ltd*, AIR 2003 SC 3236 (Supreme Court) (19 August 2003), available at <<http://www.ielrc.org/content/e0311.pdf>>; and *Akhil Bharat Gosewa Sangh v. State of Andhra Pradesh*, 2006 (3) SCALE 617 (Supreme Court) (29 March 2006), available at <<http://www.ielrc.org/content/e0615.pdf>>.

⁵² *Indian Council for Enviro-Legal Action v. Union of India*, AIR 1996 SC 1446 (Supreme Court) (13 February 1996), available at <<http://www.ielrc.org/content/e9605.pdf>>.

⁵³ For the current understanding of groundwater rules in less extreme cases, see *Hindustan Coca-Cola Beverages*, n. 45 above.

⁵⁴ *Andhra Pradesh Pollution Control Board II v. Prof. M.V. Nayudu (Retd)*, 2000 (3) SCALE 354 (Supreme Court) (1 December 2000), available at <<http://www.ielrc.org/content/e0010.pdf>>.

⁵⁵ *Ibid.*, para. 43.

⁵⁶ *Tirupur Dyeing Factory Owners Association v. Noyyal River Ayacutdars Protection Association*, (Supreme Court) (6 October 2009), para. 27, available at <<http://www.ielrc.org/content/e0904.pdf>>.

environmental perspective. A brief reference is made at the end of the judgment to the consideration of the consequences for workers of the relocation of the tanneries.⁵⁷

Second, courts have sometimes addressed conflicts between different actors and ignored rights issues. In *Kachchh Jal Sankat Nivaran Samiti v. State of Gujarat*, the High Court considered the claims of the people of Kachchh to a higher allocation of the Narmada water allocated to Gujarat.⁵⁸ The court disposed of the case by stating that there was no obligation on the State of Gujarat to revisit the water allocation proposed by the Narmada Water Disputes Tribunal in 1979 and that the petitioners had no enforceable right to demand such a revision.⁵⁹ The noteworthy aspect of this case is that the petitioners argued in effect for reviewing water allocation on the basis of water needs, environmental considerations and equity, Kachchh being much drier than the rest of the State, less well endowed in water resources and economically poorer. While the government may in principle be in a better position to determine such issues, it is surprising to see the court siding with the government on the basis that no further time should be wasted depriving the people of the benefits of the Sardar Sarovar Project (SSP).⁶⁰ This is even more surprising in a context where the expected benefits of SSP, a project that the government of Gujarat has been promoting for the past several decades, are yet to be delivered to the people, even though most of the dam is built.⁶¹ The Kachchh case has been on appeal with the Supreme Court since 2006.

Third, courts have addressed in several cases the immediate intersection between water, environment and fundamental rights, particularly in the context of dam-induced displacement. In the main judgment delivered by the Supreme Court on SSP in 2000, judges were forced to consider the different rights of different categories of people. On the one hand, Justice Kirpal saw SSP as a project that provided significant benefits to the country as a whole. He went so far as stating that 'large-scale river valley projects *per se* all over the country have made India more than self-sufficient in food'.⁶² He thus approached the issue from the point of view of the benefits of SSP. One of the consequences was that one of the justifications he gave for the project was the realization of the fundamental right to water of project ben-

eficiaries, a right he clearly acknowledged as part of fundamental rights. On the other hand, Justice Kirpal determined that displacement did not '*per se* result in the violation of [the oustees'] fundamental or other rights'.⁶³ In his view, the government was in fact doing oustees a favour in displacing them. He stated that it was 'not fair that tribals and the people in undeveloped villages should continue in the same condition without ever enjoying the fruits of science and technology for better health and have a higher quality of life style'.⁶⁴ As a result, ousting people becomes a positive feature of the dam that will provide the basis for their 'assimilation in the mainstream of the society [and this] will lead to betterment and progress'.⁶⁵ One of the important aspects of Justice Kirpal's judgment is that he turned on their head various principles that are otherwise well settled to justify the catastrophic displacement of an acknowledged 40,827 families (as estimated in the 2000 judgment). In effect, the judgment excludes oustees from the protection of the fundamental right to water and determines without factual basis that their fundamental rights will be better realized after displacement. This is surprising in a case of the fundamental right to water since the people who are being displaced lived close to the Narmada River, which fulfilled in direct and indirect ways most of their fundamental living and livelihood needs. The environmental dimension of the project was also a major issue in the context of the 2000 judgment. Indeed, whether the required environmental clearance was in fact granted in 1987 or not, the main issue is that since 1994 a legal framework made it binding to undertake a full environmental impact assessment that was valid for only five years.⁶⁶ On any of these counts, SSP should have been subjected to a full impact assessment procedure. Justice Kirpal, however, chose a different line of reasoning and not only condoned the insufficient assessment undertaken but also justified the dam on other grounds by, for instance, finding that in an era where global warming matters, a dam that displaces more people than a thermal power plant is preferable because the 'pollution caused by the thermal plant and the adverse effect on the neighbourhood could be far greater than the inconvenience caused in shifting and rehabilitating the oustees of a reservoir'.⁶⁷ The 2000 judgment has been followed by a string of other judicial interventions in the case. While the judgment given in 2005 by the court showed that the plight of the oustees had eventually been heard with a kinder ear by the judges, a string of orders coming up in the following year was again on the whole unfavourable to the grievances of the oustees who were at this stage not even

⁵⁷ See *M.C. Mehta v. Union of India*, n. 50 above.

⁵⁸ *Kachchh Jal Sankat Nivaran Samiti v. State of Gujarat* (High Court of Gujarat at Ahmedabad) (4 October 2005), available at <<http://www.ielrc.org/content/c0509.pdf>>.

⁵⁹ *Ibid.*, para. 33.

⁶⁰ *Ibid.*, para. 25.

⁶¹ See S. Parasuraman, H. Upadhyaya and G. Balasubramanian, 'Sardar Sarovar Project: The War of Attrition', 45:5 *Economic & Political Weekly* (2010), 39.

⁶² *Narmada Bachao Andolan v. Union of India*, n. 21 above, para. 265 (emphasis added).

⁶³ *Ibid.*, para. 91.

⁶⁴ *Ibid.*, para. 267.

⁶⁵ *Ibid.*, para. 91.

⁶⁶ Government of India, Ministry of Environment and Forests, *Environmental Impact Assessment Notification* (Government of India, 27 January 1994).

⁶⁷ See *Narmada Bachao Andolan v. Union of India*, n. 21 above.

asking for the project to be stopped but only for the promised rehabilitation package to be effectively implemented.⁶⁸ Yet, the actual authorization for the last remaining stretch of the dam was not provided immediately and it is only in early 2010 that a 'conditional' authorization was granted by the environment subgroup of the Narmada Control Authority while further litigation goes on.⁶⁹

Fourth, courts have in the past decade taken an increasingly keen interest in the application of rights in matters of urban planning. In Delhi, in particular, courts have been proactive in using environmental arguments to justify displacement. Beyond cases concerning industry relocation that are not water-specific, one of the cases that attracts attention in the context of this article is the displacement of people in the area known as Yamuna Pushta. The decisions taken here must be seen in the context the Delhi-Haryana case mentioned above, where the court argued that people living near the bank of the river should not remain thirsty. Yamuna Pushta was a settlement near the river. In the broader process of so-called beautification and preparation for the 2010 Commonwealth Games, the whole settlement was to be destroyed. This was challenged in the High Court. In *Wazirpur Bartan Nirmata Sangh v. Union of India*, the court made a number of significant findings. First, it asserted that the pollution that affects the Yamuna is caused not only by the dumping of industrial or medical waste but is also caused by the fact that the river's embankment has been 'unauthorizedly and illegally encroached by construction'.⁷⁰ Second, in a city where a large part of the sewage flows into the same Yamuna River untreated, the court lambasted the residents of Yamuna Pushta for constructing houses with no drainage facility.⁷¹ The court then used the holy status of the Yamuna in religious terms to label its present pollution as 'shocking'.⁷² This led the court to put a duty on all residents of Delhi to cooperate in addressing this problem but, at the same time, to single out the special duty of people living along the banks of the river. As a result, the court could say that the removal of houses on the embankment would provide 'help not to few but all the citizens of Delhi as river Yamuna is the lifeline, for the Capital'.⁷³ In an earlier order, the court had been even more precise in determining who had what kinds of rights. On the one

hand, it found that the residents of Yamuna Pushta had no legal right to stay in the bed of the Yamuna. It also termed the destruction of their houses and consequent displacement an 'inconvenience'.⁷⁴ On the other hand, it found in effect that the other residents of Delhi had a right to demand this sacrifice from their co-residents because the construction of houses on the river bed would 'convert Yamuna into a huge sewage drain causing irreparable damage to the vast majority of the citizens of Delhi'.⁷⁵ One of the key points to emerge from this judgment is the court's statement that '[t]he right of people of Delhi to have clean potable water from river Yamuna and health[y] and friendly environment from its bed and embankment is a constitutional right'.⁷⁶ This confirms Justice Kirpal's rationale in the 2000 *Sardar Sarovar* judgment that justified that project in terms of the fundamental rights of the people of India, while deciding that oustees were done a favour by the State. In other words, in Delhi it is only certain kinds of people that benefit from the constitutional or fundamental rights that the court recognizes.

EVOLVING CASE LAW IN THE CONTEXT OF WATER SECTOR REFORMS

The case law related to water from the past two decades shows that Indian courts have provided a variety of different answers to address the issues they were faced with. On the one hand, some of the case law exhibits an unwillingness to move beyond old concepts and principles, as in the case of the control that landowners claim over different sources of water. On the other hand, courts have not been unmindful of the changing environment, in particular the introduction of major economic reforms and more specifically the introduction of water sector reforms.

The engagement of courts with water during this period is characterized by a number of different strands. First, courts have made some significant contributions to the basic structure of water law; for instance in the context of the fundamental right to water and the introduction of the public trust doctrine. Yet, courts have refrained from going beyond broad pronouncements. This is appropriate to the extent that doing anything more than setting out broad principles might infringe on the competences of the legislature and the executive. Yet, in a context where neither the legislature nor the executive has, for instance, taken much notice of the fact that the

⁶⁸ See P. Cullet, 'The Sardar Sarovar Dam Project: An Overview', in P. Cullet (ed.), *Sardar Sarovar Dam Project: Selected Documents* (Ashgate, 2007), 1.

⁶⁹ G. Parsai, 'Conditional Clearance for Crest Gates at Narmada Dam', *The Hindu* (8 May 2010), available at <<http://www.thehindu.com/2010/05/08/stories/2010050855340300.htm>>.

⁷⁰ *Wazirpur Bartan Nirmata Sangh v. Union of India* (High Court of Delhi) (29 September 2006), para. 9, available at <<http://www.ielrc.org/content/e0636.pdf>>.

⁷¹ *Ibid.*, para. 9.

⁷² *Ibid.*, para. 10.

⁷³ *Ibid.*

⁷⁴ *Wazirpur Bartan Nirmata Sangh v. Union of India* (CM No 8740/2006, CMs 4715/2006 and 6310/2006 in WP(C) No 2112/2002 and WP(C) No 689/2004) (High Court of Delhi) (20 July 2006).

⁷⁵ *Wazirpur Bartan Nirmata Sangh v. Union of India* (WP(C) No 2112/2002 and CMs 4715/2006 and 6310/2006 and WP (C) No 689/2004) (High Court of Delhi) (1 June 2006).

⁷⁶ *Ibid.*

public trust has been given a central place in water law by the courts, the implication is that the courts' pronouncements remain empty promises that have little impact in the broader world.

Second, Indian courts have responded to the different water issues they have faced in a somewhat unsystematic manner. The latter comment is not an indictment of the courts' way of addressing water law but rather a reflection of the fact that water law itself remains a relatively undelimited area of law because it is made of various layers including constitutional principles, Union and State acts, common law principles and customary principles. Additionally, what constitutes water law itself is subject to debate because water, like the environment, pervades many other areas of the law. This is possibly more acute in the context of water where the only Union legislation adopted since the 1970s is an Act which has been considered as much a piece of environmental legislation as part of water law. The response of courts to what is in effect a legal maze is understandably not straightforward. Additionally, water law has been quickly evolving over the past 15 years in the context of water sector reforms. This explains, in part, why certain decisions focus on certain principles or provisions, while others do something different. Yet, this is problematic because it is, for instance, in part the lack of a clear understanding of the scope of the fundamental right to water that leads some judges to take decisions that, in effect, prioritize the realization of the right for certain categories of people at the expense of others who are usually among the poorer and more disenfranchised sections of society.

Third, the case law is not consistent with regard to the principles that are applied. Thus, whereas the principle of public trust has been clearly accepted as applicable throughout the country, this has not stopped the same Supreme Court affirming that the State is the sovereign dominant owner of water. With regard to the fundamental right to water, a similar phenomenon surfaces. On the one hand, the right has been repeatedly asserted in a variety of contexts. On the other hand, in cases that are dam-related or address urban displacement issues, the fundamental right is used in such a way that its realization for some comes at the cost of the realization of fundamental rights for other people. The argument according to which oustees are only 'inconvenienced' and that certain things need to be done for the broader social or environmental welfare is suspect in a fundamental rights context because it undermines the very essence of a fundamental rights perspective that emphasizes the primacy of the situation of the poorest and most disenfranchised.

Fourth, the case law of the period that has seen significant economic and water sector reforms does not reflect the tremendous policy and law changes that have occurred over the past 15 years. To some extent,

this reflects the fact that decisions taken by the courts often concern issues that arose long before they reach the higher judiciary. This is also due to the fact that water sector reforms were in the first place introduced mostly through projects that did not necessarily imply changes in the existing legal framework. Further, this reflects the lack of attention that civil society has given to the adoption of all the new water laws that have come up over the past decade or so. Indeed, water law reforms have been characterized by their lack of visibility. As a result, while water has been one of the areas where major reforms largely based on the broader principles of overall economic reforms have been adopted, this has not yet reached the stage where courts adjudicate cases related to water law reforms. The present case law points to two different directions that courts may take when faced with water law reform-related cases. On the one hand, they may use these cases to give more content to some of the broad principles they have introduced or recognized in the legal framework, such as the public trust and the fundamental right to water. On the other hand, they may follow the kinds of arguments used in displacement-related cases by emphasizing the new economic rationale that recent water laws give to most issues in the water sector and confirm, for instance, that water being an economic good, urban dwellers are worthier of accessing it than the people displaced by a dam that contributes to the drinking water supply of cities.

Finally, the case law shows that certain issues are recurrent while other issues do not surface. This is in part due to the types of cases that are brought to courts but the point is still to be noted. Some of the issues that attract significant judicial attention include property rights-related issues and broad issues such as constitutional principles, and adjudication related to major development projects such as dams and urban planning. Some of the issues that do not feature prominently in the case law include drinking water needs in rural areas, irrigation needs of small farmers and the problems associated with urban/rural inequalities inbuilt in the drinking water policy framework.

CONCLUSION

Water has been, is and will continue to be one of the most fundamental issues that the Indian judiciary has to address in terms of its importance to people's daily lives and the environment in general. The progression of the case law shows that Indian courts have put significant emphasis on the fundamental right to water over the past couple of decades. They have used the right to water together with other principles, such as the application of the public trust to water, to address some of the shortcomings of water law with respect to the lack

of framework legislation that sets out the basic principles governing water. The courts have also attempted to react to the fact that a lot of water law on the statute books as well as other general principles of water law are in a number of cases antiquated and not adapted to current realities.

At the same time, courts have tempered their use of a fundamental rights-based approach by looking at water with traditional eyes when it comes to certain issues such as major economic development projects or urban planning and development. Rather than emphasizing the basic nature of water as key to human survival, agriculture and civilization, Indian courts have often looked at water from the perspective of its contribution to aggregate economic development and thereby emphasized the position of the already privileged people in society. While this has not taken place directly in the context of ongoing water law reforms, these decisions fall within the broader paradigm of the economic reforms and the new economic ethos that has developed over the past two decades in India. On this basis,

it is possible that the case law will tilt further towards an economic conception of water when judges start adjudicating disputes related to new legal frameworks. Indeed, given the emphasis given to the notion that water is an economic good in ongoing water sector reforms and water law reforms, it is likely that the case law may increasingly foster the approach proposed in Indian policy documents adopted over the past decade and focus less on fundamental rights-based approaches.

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