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WATER USE AND RIGHTS

INDIA

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Water Use and Rights (India)

Water use is regulated by a number of laws, rules, and principles in India. These include rights of control asserted by the government and individual usufructuary (i.e., use rather than ownership) rights. Water use is also regulated through much broader pronouncements, such as the fundamental right to water. In recent years, water law reforms have introduced significant changes, including the establishment of water regulatory authorities and water user associations.

Water rights in India are complex, and laws and practices involving them have been fast evolving since the late twentieth century. These include a series of different, and sometimes contradictory, concepts and perspectives ranging from sovereign and individual appropriation of water to a prohibition of the ownership of water and the existence of a fundamental human right to water. The different rules and principles governing water use are found in a variety of contexts, including national law and laws specific to any of the states or union territories, high court and Supreme Court judgments, common law, and customary rules. Additionally, water is for the most part a state subject, and a significant part of the legal framework governing water use is thus developed by each individual state. The complexity of the system is accentuated by the fact that water law has developed for the most part in a sectoral manner. As a result, partly contradictory principles can coexist in different parts of the legal framework despite attempts by the Supreme Court to foster a sense of unity in water law by setting on paper some principles that are applicable everywhere for every water use. The lack of an overall single framework for water rights can also be attributed to the absence of a framework water law. In practice, this leads to a situation where there are still different rights concerning, for instance, groundwater and surface water in the same locality.

The discussion below briefly examines the different forms of control over water use in India and points out some of the ongoing reforms that are impacting rights related to water use.

State and Individual Control

The development of water use rights over time has been marked in India, as in a number of other countries, by two contradictory tendencies. On the one hand, in recognition of the special nature of water as a source of life, it has often been suggested that water cannot be owned. On the other hand, administrators understanding the importance of water have often tried to assert as much control as they could over its use. The dichotomy between these two opposed perspectives has also allowed the development of a series of individual rights over water, mostly of a usufructuary nature (i.e., use rights rather than ownership rights).

India's current framework for access to and control over water has been largely influenced by its colonial history, which had a significant impact in shaping various laws and principles that are still applied today. Two of the main forms of control that have been recognized in modern times are state control and individual rights.

State Control

Since at least the second half of the nineteenth century, the government has sought to justify its control over water as an extension of its sovereign control over all resources under its jurisdiction. This led to the assertion of control in the public interest in the late nineteenth century with the Canal and Drainage Act of 1873, which declared in its preamble the right of the government to “use and control for public purposes the water of all rivers

and streams flowing in natural channels, and of all lakes.” This later culminated in the assertion of full control, as for instance in the Madhya Pradesh Irrigation Act of 1931, which stated that “all rights in the water of any river, natural stream or natural drainage channel, natural lake or other natural collection of water shall vest in the Government” (section 26). Such absolute assertion of control can still be identified in the much more recent Bihar Irrigation Act of 1997, which restates word for word the provision of the 1931 act.

The case law also provides a continued reassertion of the controlling interest of the state over water. A relatively early decision of 1936 specifically indicated that the state had the sovereign right to regulate the supply of water in public streams (*Secretary of State v. PS Nageswara Iyer*, AIR 1936 Mad 923, Madras High Court, 1936). Much more recently, the Supreme Court has reaffirmed that “undoubtedly the state is the sovereign dominant owner” of water (*Tekaba AO v. Sakumeren AO* (2004) 5 SCC 672, Supreme Court of India, 2004). In the latter decision judges understand the power of the state as extending even where there are acknowledged customary norms that govern control over water.

Since the last decades of the twentieth century, challenges to the state’s assertion of complete power over water have been raised. The most significant development in legal terms has been the assertion by the Supreme Court that all surface waters fall under the doctrine of public trust. Underlying the concept of public trust is the idea that the state holds certain resources in trust for the public because they are intrinsically valuable to the public and cannot be owned by any person. It also implies that the trustee has a fiduciary duty of care and responsibility to the general public. In the words of the Supreme Court, “the State is the trustee of all natural resources which are by nature meant for public use and enjoyment. Public at large is the beneficiary of the sea-shore, running waters, airs, forests and ecologically fragile lands. The State as a trustee is under a legal duty to protect the natural resources. These resources meant for public use cannot be converted into private ownership” (*MC Mehta v. Kamal Nath* (1997) 1 SCC 388, Supreme Court of India, 1996). The Supreme Court has since then extended in principle the scope of the application of the public trust to groundwater (*State of West Bengal v. Kesoram Industries* (2004) 10 SCC 201, Supreme Court of India, 2004).

The introduction of the doctrine of public trust to water is a significant step forward in curtailing the power of the state over water. Yet this has had no impact in practice beyond the specific decisions where courts have used this principle. Indeed, neither have individual states 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.

Individual Control

Individual entitlements over water include a variety of rights of access to water, rights to use water, or rights to use water-based resources such as fish. Most of these rights are linked to control over land, and as a result access to land has until recently been the main precondition for asserting water rights.

In certain cases landowners have been granted entitlements to appropriate water flowing past their land. This amounts to a usufructuary right to use a portion of the flow of a watercourse. Another type of individual entitlement concerns rights to use a specific quantity of water. This can take the form of a water license for designated uses, such as irrigation. These entitlements are usually linked to property rights in land. There is no right to the water itself but rather a right to a certain allocation of water, which may be conditioned by such factors as actual availability in a given year.

A different set of entitlements obtains in the case of groundwater. The distinction is due to the fact that groundwater has usually been considered separately from surface water. Since groundwater has a direct link to the land above, a link was established between ownership of the land and control, if not outright ownership, of the water found underneath the plot. While no specific groundwater legislation arose until the late 1990s, basic principles of access and control can be derived from the Indian Easements Act of 1882. Under these principles, landowners have easementary rights to collect and dispose of all water found under their land. There is thus an indissociable link between land ownership and control over groundwater.

In recent years, several states have adopted groundwater laws in response to the increasing depletion of groundwater. These laws reflect a model first proposed by the central government in 1970. From a water rights perspective, the main feature of these acts is that they do not address the crucial issue of groundwater rights. They keep the status quo intact and do nothing to ensure that groundwater regulation progresses toward twenty-first century concerns about the environmental sustainability of use and the inequitable access to groundwater resulting from the link with access to land, a resource that is controlled by a minority of people.

Fundamental Right to Water

The intrinsic link between water and survival makes water a central part of any catalog of fundamental human rights. Yet in practice, in India as in various other countries, the fundamental right to water remained unstated until the late twentieth century. While the Indian constitution still does not specifically recognize a fundamental right to water, courts have repeatedly affirmed and

progressively delineated the broad contours of the right in three essential ways.

Firstly, the Supreme Court has repeatedly derived a human right to water from the right to life recognized at Article 21 of the Constitution (e.g., *Subhash Kumar v. State of Bihar*, AIR 1991 SC 420, Supreme Court of India, 1991).

Secondly, courts have also derived the human right to water from Article 47 of the Constitution (Duty of the state to raise the level of nutrition and the standard of living and to improve public health). In the Hamid Khan case of 1996, the complaint focused on the health consequences of the supply of water with excessive fluoride content. The Madhya Pradesh High Court found that under Article 47 the state has a duty “towards every citizen of India to provide pure drinking water” (*Hamid Khan v. State of Madhya Pradesh*, AIR 1997 MP 191, Madhya Pradesh High Court, 1996, para 6).

Thirdly, courts have found on repeated occasions that the human right to water includes a duty on the part of the state to provide water. This was, for instance, the case in the Hamid Khan decision. The same position has been restated in strong terms in *Vishala Kochi Kudivella Samarkshana Samithi v. State of Kerala* ((2006)(1), KLT 919, High Court of Kerala, 2006), where the High Court of Kerala stated that “we have no hesitation to hold that failure of the State to provide safe drinking water to the citizens in adequate quantities would amount to a violation of the fundamental right to life enshrined in Article 21 of the Constitution of India and would be a violation of human rights. Therefore, every Government, which has its priorities right, should give foremost importance to providing safe drinking water even at the cost of other development programmes” (para 3).

Overall in India at a broad level, the fundamental right to water is well structured and partly delineated in the case law. The actual entitlements that ensue from the recognition of this right are, however, not well determined in Indian law. This is mainly due to the absence of a broad-based drinking water legislation that would take forward the fundamental rights mandated at the legislative level.

Water Rights and Law Reforms

Since the beginning of the twenty-first century, there has been significant legislative activity related to water. Numerous new water laws have been adopted in various states of India. Most of these new laws, such as those providing for establishment of water user associations for irrigation, affect the water use rights of water users even though they may not address the issue of water rights directly.

Some laws, such as those providing for establishment of water regulatory authorities, have much more direct impact on water use rights. In the case of the Maharashtra Water

Resources Regulatory Authority Act of 2005, the regulatory authority is thus specifically called upon to issue water entitlements and to set up criteria for trading these entitlements. This constituted a complete departure from the existing legal framework, which did not specifically provide for any trading of water rights independently of land rights.

Water law reforms are ongoing in most sectors of Indian law. Further important changes to the structure of water use rights in India can thus be expected in years to come. The rationale for nearly all the reforms taking place is a broad concern for the environment. Yet this concern about the environment is first narrowly focused on issues of water scarcity. Further, the actual laws that have been adopted in recent years do not integrate environmental concerns.

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See also Activism, Judicial; Agriculture (South Asia); Five-Year Plans; Gandhism; Ganges River; The Himalaya; Public Health; Rule of Law; Tibetan Plateau; Utilities Regulation and Energy Efficiency; Water Security

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