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WATER LAW AND DEVELOPMENT

COMPARATIVE PERSPECTIVES

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BLAZING THE TRAIL

Professor Charles Okidi's Enduring
Legacy in the Development of
Environmental Law

Edited by

PATRICIA KAMERI-MBOTE AND COLLINS ODOTE

CHAPTER 21

Water Law and Development: Comparative Perspectives

PHILIPPE CULLET

I. INTRODUCTION

Among the various areas of research to which Professor Okidi has been drawn, water law has been a central concern that he has engaged with in various forums and on various occasions. His concerns have centred around water in general and particularly water-related legal issues at the basin and international level.¹ Environmental concerns have progressively been integrated in international water law, and water scholarship in part because of the effort of early environmental law scholars, such as Professor Okidi.

At the domestic level, water law has been an important concern in many countries but the main areas of focus have been for long relatively narrowly defined, with the emphasis being put mostly on property rights-related issues and irrigation. Drinking water has been a concern for a long time but the main issues that have attracted lawyers' attention relate to distribution of water, mostly in urban areas, including issues of quality. Professor Okidi has contributed to fostering a broader reading of water law that in a sense led to the explosion of interest in the subject witnessed over the past couple of decades, as reflected, for instance, in the fast-growing interest that lawyers developed in the human right to water from the late 1990s onwards.

Many countries in the Global South now put significant emphasis on water regulation. This is in keeping with the progressive realisation that the old frameworks that give landowners priority access to water lead to increasingly socially inequitable and environmentally unsustainable outcomes.² This is particularly the case in a context of increasing water use, changing inter-sectoral allocation and increasing pressure on ecosystems that support surface flows and groundwater recharge. All this takes place within the context of global environmental change that brings additional uncertainty to rainfall patterns. The increasing fear that there may not be enough water for all water uses has led most countries of the world to use the concept of physical water scarcity as

1 See Charles Odidi Okidi, 'International Law and Water Scarcity in Africa' in Edward HP Brans et al (eds), *The Scarcity of Water – Emerging Legal and Policy Responses* (Kluwer Law International 1997) 166-80; Charles Odidi Okidi, 'Legal Issues in Sustainable Management of Fresh Water Resources' 278-95.

2 For instance for South Africa, Synne Movik, *The Dynamics and Discourses of Water Allocation Reform in South Africa* (2009) STEPS Working Paper 21 <https://steps-centre.org/wp-content/uploads/Reform_web_version.pdf> accessed 4 November 2018 7-8.

a premise for water law and policy making since the 1990s.³ This has taken place in a context of wide-ranging economic and policy reforms whose main underlying rationale has been the transformation of water from a shared substance not subject to appropriation by anyone to a commodity that can be traded, including separately from the land, like any other 'natural resource'.⁴

This chapter examines some of the issues that arise in terms of the development of water law in a context where (sustainable) development, which remains in practice largely focused on economic growth, has remained the ideal that all countries want to attain.⁵ It is ironical that more than 30 years after the publication of the Brundtland Report,⁶ while sustainable development has been mainstreamed to the extent of becoming the standard bearer of existing development policy with the adoption of the Sustainable Development Goals,⁷ most countries still focus on economic growth as the main driver of poverty eradication. In this context, water remains trapped in a policy context that looks at it mostly in terms of the economic value that it can contribute to the process of development. This is so despite the fact that water is central to any effort to eradicate poverty and to realise a variety of human rights.

II. WATER POLICY EVOLUTION: COMMODIFICATION, POVERTY AND IMPOVERISHMENT

In the past few decades, water has become an increasingly visible and contested policy issue. This is not to say that it was not significant earlier. Rather, in the context of the neoliberal reforms that accelerated exponentially after the end of the Cold War, the search for new expansion opportunities led to identifying water as having immense growth opportunities because of its central role in human survival, livelihoods and economic growth.⁸ Bringing water to the market economy was in one sense an extension of water rights being linked to land ownership and land rights being tradable. This constituted a premise towards considering water as a commodity like other land-based natural resources. At the same time, this went completely against the widely held view that water is a shared resource that cannot be appropriated by anyone and should be available for free, at least for fulfilling domestic and livelihood needs.

The project of turning water into a new commodity that should be paid for and that could be traded like any other good was thus started against the prevailing view that water should not be

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

4 cf Mark W. Rosegrant and Hans P. Binswanger, 'Markets in Tradable Water Rights: Potential for Efficiency Gains in Developing Country Water Resource Allocation' (1994) 22 *World Development* 1613-25.

5 Eg World Bank, *Inclusive Green Growth – The Pathway to Sustainable Development* (The World Bank, 2012).

6 WCED, 'Report of the World Commission on Environment and Development: Our Common Future' (20 March 1987) UN Doc A/42/427.

7 UNGA, *Transforming our World: The 2030 Agenda for Sustainable Development* (25 September 2015) UN Doc A/RES/70/1.

8 Eg Erik Swyngedouw, 'Dispossessing H₂O: The Contested Terrain of Water Privatization' (2005) 16 *Capitalism Nature Socialism* 81-98.

commodified.⁹ Another reason water had always been treated separately from natural resources was its fluidity, which ensured that it was impossible to impose the same rules of ownership as for resources attached to the land permanently.¹⁰ Addressing these multiple and long-standing concerns thus required a strong policy push that would lead to persuading water users (that is all of us) that the substance they had always understood as a gift of nature that belonged to no one was a tradable resource like any other good.

The Dublin Statement adopted in early 1992 as part of the process of preparation of the Earth Summit provided an ideal opportunity for not only pushing the boundaries of the policy consensus on water but also for redefining it altogether.¹¹ In a statement adopted by a technical meeting that had little political legitimacy, an entirely new view of water was proposed that sought to emphasise water as being exclusively an economic good in all its uses.¹² It went even further and introduced what is in principle unthinkable, the subordination of the human right to water understood as an economic good.¹³

The Dublin Statement was never incorporated in the Earth Summit outcomes or endorsed by the UN General Assembly and should have remained a footnote in the history of water law and policy. In reality, however, various actors quickly used it to provide legitimacy for a view they could not have voiced in other forums at that point. A clever clubbing of Rio and Dublin led some people to refer to the Dublin/Rio principles,¹⁴ thereby giving the Dublin Statement a moral authority it never had. This was particularly problematic because Agenda 21 carefully stayed away from the extreme rhetoric of the Dublin Statement. At the same time, this is not to say that Agenda 21 rejected the general orientation of water policy since its own push for a socio-economic approach to water was only a slightly more refined and politically acceptable formulation seeing “water as an integral part of the ecosystem, a natural resource and a social and economic good”.¹⁵

The push towards turning water into an economic good in all its uses would have quickly been rejected in a world facing immense poverty if it had not been supported by a sustained campaign “to communicate the message that water is a scarce resource and must be managed as an economic good”,¹⁶ and if its promoters had not sought to address the impacts of the policy changes on the poor. This led to the extraordinary move to justify the new policy in the name of its benefits for the

9 cf Riccardo Petrella, *Le manifeste de l'eau : Pour un contrat mondial* (Lausanne : Editions Page deux, 1999) 109.

10 Eg Dante A. Caponera, *National and International Water Law and Administration – Selected Writings* (Kluwer Law International, 2003) 83.

11 Dublin Statement (n 3).

12 *ibid*, principle 4.

13 *ibid*.

14 eg Richard Hoare et al, *External Review of Global Water Partnership – Final Report* (Performance Assessment Resource Centre 2003) 4.

15 UNCED (Agenda 21) ‘Report of the United Nations Conference on Environment and Development, Rio de Janeiro’ (3-14 June 1992) UN Doc A/CONF.151/26/Rev.1 (Vol. 1, Annex II) c 18(8).

16 World Bank, ‘India- Water Resources Management Sector Review – Rural Water Supply and Sanitation Report’ (28 January 1998) Report No. 18323, 53.

poor. One of the central arguments used was that the poor were displaying 'willingness to pay' and therefore pricing water was not the issue in itself.¹⁷ Further, it was argued that the poor would be the first beneficiaries of policies imposing pricing on everyone because it was the poor that were at the mercy of private vendors overcharging people without access to water supply from the local utility whose per litre charge was much lower.¹⁸ As a result, by 2001, the Asian Development Bank could adopt a policy advocating "the phased elimination of direct subsidies to the poor for accessing basic water services".¹⁹

This is in fact an inappropriate basis for policy-making as seen in different parts of the world. In Kenya, the World Bank noted that "the unit costs incurred by both the poor and the non-poor are very high, and there is no statistically significant difference in the mean unit costs that they incur for their water".²⁰ In India, until recently not only did virtually everyone in rural areas get access to free water but even in urban areas, most of the poor unserved by piped water services were accessing water through a variety of free options provided by the government or their representatives (Member of Legislative Assembly and/or Member of Parliament).²¹ In all, the argument that the poor are willing to pay should rather be reframed as desperation to stay alive and live a dignified life, a very different starting point for paying for water.

Another argument used was the distrust of the state at the root of neoliberal reforms. In the water sector, this translated in part in a push for privatisation of water services in urban areas, something that has often been justified as a way to foster 'participation' of private sector actors in sectors previously under the control of state utilities.²² The same idea of 'participation' was also used to foster disengagement of the state in favour of rural water users taking control of the infrastructure used to access drinking water. The justification given for the disengagement of the state was the promotion of 'ownership' by users.²³ This increased 'participation' was meant to ensure that users would get the infrastructure that they were 'demanding' rather than something supplied by the state without consultation with users. The quid pro quo was that the state would disengage from not only infrastructure but also from operation and maintenance that would become the responsibility of users.

17 eg World Bank, 'Rural Water Supply in India – Willingness of Households to Pay for Improved Services and Affordability' (1 June 2008) Policy Paper 44790.

18 eg Ashok Nigam, 'Urban poor pay for water: evidence and implications for going to scale' (2000) UNICEF Staff Working Papers, Number EPP 00-002 <https://www.unicef.org/evaldatabase/files/Global_2001_Urban_Poor.pdf> accessed 4 November 2018.

19 Asian Development Bank, 'Water for All – The Water Policy of the Asian Development Bank' (16 January 2001) para 45.

20 Sumila Gulyani, Debabrata Talukdar and R. Mukami Kariuki, 'Water for the Urban Poor: Water Markets, Household Demand, and Service Preferences in Kenya' (2005) 5 World Bank: Water Supply And Sanitation Sector Board Discussion Paper Series 27.

21 eg Philippe Cullet, 'Right to Water in India – Plugging Conceptual and Practical Gaps' (2013) 17/1 International Journal of Human Rights 56, 68.

22 eg UNESCO, 'Water – A Shared Responsibility; The United Nations World Water Development Report 2' (22 March 2006) UN Doc UN-WATER/WWAP/2006/3, 75.

23 Agenda 21 (n 15) 18.76 stating that states should 'promote community ownership'.

One of the places where this was implemented with much gusto was the World Bank's Swajal project, started in 1996 in northern India, that sought not only to make users pay for the full operation and maintenance of the infrastructure built to ensure access to drinking water but also to make them pay for capital costs.²⁴ In a context of poverty where the state had entirely subsidised infrastructure for accessing drinking water supply, it was understood that it would be impractical, in addition to being unacceptable; to impose full cost recovery immediately. A 10 per cent contribution was thus requested as a starting slab but this was meant to increase progressively towards full cost recovery and an increase from 40 litres per capita per day (lpcd)²⁵ to 55 lpcd already attracted a 20 per cent contribution in the late 1990s.²⁶ In any event, while the World Bank policy framework became national policy for seven years from 2002 onwards under the name of Swajaldhara,²⁷ the very idea of capital cost contributions by users was eventually abandoned in 2009.²⁸ This was due to people obstinately believing that drinking water should not be paid for and in more pragmatic terms to the absence of resources to pay. The option to pay the contribution only partly in cash and the rest in kind had been provided for from the time of the Swajal project.²⁹ The cash contribution was increased to half under the Swajaldhara Guidelines,³⁰ but eventually abandoned under the National Rural Drinking Water Programme.³¹

While the story of rural India is not well known, that of the impacts of privatisation in cities is much better documented. The first decade of so-called big bang privatisation in the 1990s led to disasters of the kind witnessed in Cochabamba, Bolivia.³² This was not only a disaster for the World Bank and private investors, since the project had to be abandoned, but also a disaster from the point of view of demonstrating to the world that private sector actors would necessarily do better than the state in providing water to the unserved poor.

Since the beginning of the century, water privatisation has become much more insidious insofar as it is implemented much more progressively, on a task-specific basis and without much publicity. This has made it less controversial politically but the impacts on the ground are not very different. The negative impacts of privatisation have been felt in different ways in various parts of the world. In England and Wales where full privatisation was kick-started in the late 1980s, there is an increas-

24 World Bank, 'Staff Appraisal Report – Uttar Pradesh Rural Water Supply and Environmental Sanitation Project' (18 May 1996) Report No 15516-IN.

25 The minimum level set by the Government of India in the 1970s as a first step in ensuring sufficient access to water, always considered only as a first step.

26 Government of India, 'Accelerated Rural Water Supply Programme Guidelines' (1999-2000) s 2(3)(1).

27 Government of India (Ministry of Rural Development, Department of Drinking Water Supply), 'Guidelines on Swajaldhara' (25 December 2002).

28 Government of India (Ministry of Rural Development, Department of Drinking Water Supply) 'National Rural Drinking Water Programme – Movement Towards Ensuring People's Drinking Water Security in Rural India – Framework for Implementation' (23 April 2010) [hereafter NRDWP].

29 Uttar Pradesh Rural Water Supply (n 24) 142.

30 Swajaldhara Guidelines (n 27) s 5.3.

31 NRDWP (n 28).

32 eg Degol Hailu, Rafael Guerreiro Osorio and Raquel Tsukada, 'Privatization and Renationalization: What Went Wrong in Bolivia's Water Sector?' (2012) 40(12) World Development 2564-77.

ingly shared consensus that this has neither worked out for water users nor for the country.³³ In the Global South, there have been an increasing number of campaigns against privatisation projects.³⁴

III. WATER LAW DEVELOPMENT IN COUNTRIES OF THE GLOBAL SOUTH

Water law is a relatively old field of law, in particular compared to human rights and environmental law. It has progressively evolved over time and in some ways, acceleration can be noted over the past few decades. This increasing pace of change is linked in large part to the policy changes highlighted in the previous section. Water law reforms adopted since the 1990s thus tend to be largely influenced by the perspective on water propounded by the Dublin Statement. The focus on law reform in different countries is not fortuitous. The 1990s saw an increasing number of controversies linked to the attempt to impose privatisation of water services in developing countries through full-scale handover of operations to a private sector actor, often with the financial backing of a development agency. Progressively, a new strategy was introduced in the 2000s that privileged law reforms as a first step towards enshrining a new water ethics before letting local governments implement these laws progressively on the ground.³⁵

India constitutes one of the most important examples of this strategy that saw significant emphasis being put, first on the adoption of water policies (at the centre and state level) and progressively of specific water laws in a number of states.³⁶ Where the reform agenda was not shared by the political dispensation in place, funding for specific water projects was sometimes made conditional on the adoption of certain specific laws.³⁷ Interestingly, a series of laws adopted from the mid-1990s onwards fall into two main categories. The first is laws on water user associations (WUAs), based on the international model of participatory irrigation management and legislated upon without making the effort of aligning the institutions set up with the existing institutions of local governance already in charge of irrigation at their level.³⁸ The second is laws seeking the setting up of so-called independent water regulatory authorities meant to divest the state from some of its water-related functions to ensure more efficiency in allocating water, and in some cases to foster the setting up of tradable water entitlements.³⁹

33 Eg Jonathan Ford and Gill Plimmer, 'Pioneering Britain has a Rethink on Privatisation' *Financial Times* (London, 22 January 2018) <<https://www.ft.com/content/b7e28a58-f7ba-11e7-88f7-5465a6ce1a00>> accessed 4 November 2018.

34 eg Gaurav Dwivedi, Rehmat and Shripad Dharmadhikary, *Water: Private, Limited: Issues in Privatisation, Corporatisation and Commercialisation of Water Sector in India* (Revised edn, Manthan Adhyayan Kendra 2010).

35 Cf John Briscoe and RPS Malik, *India's Water Economy – Bracing for a Turbulent Future* (The World Bank and Oxford University Press 2006) 41 arguing that building the new Indian water state will involve among others ensuring that 'the government will develop a set of laws, policies, capacities, and organizations for defining and delivering an enabling environment'.

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

37 eg Andrés Olleta, 'The Role of the World Bank in Water Law Reforms' in Philippe Cullet et al. (eds), *Water Law for the Twenty-first Century: National and International Aspects of Water Law Reforms in India* (Routledge 2010) 81.

38 eg Roopa Madhav, 'Law and Policy Reforms for Irrigation' in Philippe Cullet et al. (eds), *Water Law for the Twenty-first Century: National and International Aspects of Water Law Reforms in India* (Abingdon: Routledge 2010) 205, 225.

39 See generally Priya Sangameswaran and Roopa Madhav, 'Institutional Reforms for Water' in Philippe Cullet et al. (eds), *Water Law for the Twenty-first Century: National and International Aspects of Water Law Reforms in India* (Abingdon: Routledge 2010) 138.

WUAs are interesting in the context of this chapter because they align with the discourse on participation of users in decision-making. At the same time, they are part of the broader model of participation that sees public participation as an end in itself and that does not equate ‘participation’ with the right to decide. In other words, participation, as it has developed over the past few decades is in effect a misnomer for a process of consultation that does not directly affect the process of decision-making. This thus happens to fit the jargon pushing for state disengagement in favour of ‘users’, without significantly affecting power structures in place. Indeed, all that farmers can do is participate in the ‘management’ of existing infrastructure. In addition, in the Indian context, the introduction of WUAs modelled after the international model is odd. First, local irrigation control already existed in some parts of the country and the laws could have been modelled on the basis of the experience gained with those bodies.⁴⁰ Second, panchayats already have control over irrigation and there was no need to set up an additional body to do this.⁴¹ Third, water user associations are more regressive than panchayats in terms of membership because they only include landowners and apart from one exception, do not include reservation in favour of women and/or scheduled castes/scheduled tribes.⁴² In this sense, WUA laws constitute an example of a one-size fits all development intervention that is at best inappropriate, at worst unwelcome, in particular where in the name of decentralisation and participation, a single model is adopted in the laws of different states all around India despite the wide variations in irrigation practices in different states with different socio-economic histories, climate and agricultural practices.

The case of water regulatory authorities (WRAs) is much more problematic since it constitutes an attempt to impose a new water management system that Indian states were not likely to adopt on their own. WRA legislation is the brainchild of policy makers wanting to enforce the concept of water as an economic good. The rationale given is the need for the state to be sidestepped because of its inefficiency and the need to ensure transparency, in a context of water scarcity.⁴³ WRA laws were indeed passed in a number of states but interestingly, there has only ever been one that has really been set up and made to work -- the Maharashtra Water Resources Regulatory Authority (MWRRA).⁴⁴ In other states where legislation was adopted, its implementation was left at different stages but on the whole, state governments did not feel particularly enthused by the legislation adopted.⁴⁵ The MWRRA is thus the only example that can be used to assess the proposed model.

40 Madhav (n 38) 217.

41 eg Uttar Pradesh Panchayat Raj Act 1947 (as amended in 1994), s 15.

42 The exception is the Chhattisgarh *sinchai prabandhan me krishkon ki bhagidari adhiniyam* 2006, s 5.

43 eg Esther Gerlach and Richard Franceys, ‘Economic Regulation’ in Richard Franceys and Esther Gerlach (eds), *Regulating Water and Sanitation for the Poor - Economic Regulation for Public and Private Partnerships* (Earthscan 2008) 21.

44 While the Andhra Pradesh Water Resources Development Corporation Act 1997 came earlier, it was of an earlier model of reform, as confirmed by the fact that it was meant to be superseded by the Andhra Pradesh Water Resources Regulatory Commission Act 2009 (not yet set up).

45 At some point, the Central Government decided to try and impose the introduction of water regulatory authorities on states through financial conditionality. Government of India, ‘Thirteenth Finance Commission 2010–2015’ (Volume I. Report, 2009) para 12(5).

Despite a lot of attention and prodding from diverse institutions, including the World Bank,⁴⁶ the Authority has not yet managed to fully implement all the tasks that were originally assigned to it. In particular, it has remained cautious with regard to tradable entitlements.⁴⁷ More importantly, the very basis on which the MWRRA was adopted essentially collapsed within five years. Indeed, one of the major things that WRAs are supposed to do is to ensure that bulk allocation is done on a non-political basis. This is to be achieved by making the authority 'independent' of the government. Even in the case of the MWRRA, this was never fully achieved as the chairperson had from the start to be someone "who is or who was of the rank of Chief Secretary".⁴⁸ Yet, even in this context, the strongly political nature of water ensured that the government decided as early as in 2011 that it needed to repatriate some of those powers to itself.⁴⁹ The broader lessons of the attempt to set up WRAs is that in the name of efficiency, they end up bypassing elected representatives with a technical body that does not understand the social, cultural or environmental dimensions of water. In addition, it replaces a top-down institution with another top-down institution, thus not providing the basis for locally based decision making.

The example of India can be compared with that of Kenya that has adopted two water statutes since the beginning of the century. Both the 2002 and the 2016 acts are framed around an understanding of water as ultimately governed and owned by the state. Indeed, even the more recent legislation stating that water is held in trust by the national government does this in a provision entitled 'ownership of water'.⁵⁰ The Kenyan acts distinguish themselves by a relatively high level of proposed centralisation that makes little attempt to provide for effective decentralisation, let alone subsidiarity. In addition, the two acts are overwhelmingly focused on water use. This is even more marked in the 2016 legislation whose long title does not even mention conservation anymore. Beyond this, conservation and protection dimensions are reflected, for instance, in the establishment of a reserve and in water pollution-specific provisions.⁵¹ There is, however, no focus on conservation as a pre-condition for use and no basin-wide or aquifer-wide conservation and regulation framework. At the same time, the law provides for inter-basin transfers, a very controversial issue from an environmental perspective.⁵² On commodification, the 2016 legislation recognises that the basis for domestic water supply is commercial services. At the same time, it

46 World Bank, 'Maharashtra Water Sector Improvement Project (23 June 2005) Project Appraisal Document Report No. 31997-IN, 1 wherein the Bank lauds the Government of Maharashtra for having 'taken a number of bold and path-breaking actions' between 2003 and 2005, a period during which the Bank acknowledges that it was 'a critical knowledge/advocacy partner to the state'.

47 eg Shripad Dharmadhikary, 'Value as a Justification in Water Resource Development' in Kanchi Kohli and Manju Menon (eds), *Business Interests and the Environmental Crisis* (Sage 2016) 105, 117.

48 Maharashtra Water Resources Regulatory Authority Act 2005, s 4(1). The one change introduced by the 2016 amendment is that a retired high court judge can now also be appointed as chairperson. See Maharashtra Water Resources Regulatory Authority (Amendment) Act 2016, s 5.

49 Maharashtra Water Resources Regulatory Authority (Amendment and Continuance) Act 2011.

50 Kenya Water Act 2016, s 5.

51 Ibid, s 2(1), 58.

52 eg WWF Global Freshwater Programme, 'Pipedreams? Interbasin Water Transfers and Water Shortages' (June 2007) Concerning India's 'interlinking of rivers', see Dharmadhikary (n 47) 113.

specifically provides that in some rural areas, commercial services may not be viable and counties need to take appropriate action to ensure that no one is deprived of water.⁵³ This is the least one would expect in a context where the law specifically refers to the human right to water recognised under the Constitution.⁵⁴

IV. HUMAN RIGHT TO WATER AND PRIVATISATION: CONFLICT AND CONTRAST

Water law reforms that have been introduced since the 1990s are to be seen in relation to other developments taking place in parallel. Among these are the progressive recognition of the human right to water at the international level and its formal recognition in a number of countries of the Global South. At first sight, it seems anomalous that the right to water would not have been recognised earlier. Indeed, it is impossible to think of a catalogue of human rights that does not include water,⁵⁵ and the only explanation that can be given to its invisibility in early human rights treaties and constitutions before the 1990s is that it was too obviously linked to life to need separate mentioning.

In any event, the absence of formal recognition was eventually taken up. At the international level, efforts including the adoption of a General Comment on the right to water have contributed to giving the right more visibility.⁵⁶ At the same time, while the UN General Assembly has in the meantime adopted a series of resolutions on the right to water, the first such resolution was met with hostility by more than 40 countries that abstained.⁵⁷ At the national level, the formal recognition of the right to water has progressed relatively fast over the past two decades but with a clear North-South divide, whereby only countries of the Global South have sought to formalise the right. This is particularly important since water law reforms have also taken place mostly in the Global South where water is on the whole even more important than in the Global North because irrigation is a key dimension of agriculture that remains the main livelihood of most people.

The recognition of the right to water is a major step forward in formalising the importance of water for survival, a life of dignity and as an input for the livelihoods of hundreds of millions. At the same time, the form of the recognition warrants further comments. Indeed, in most cases, the formulation used in recognising the right to water qualifies it with the word 'access'.⁵⁸ This is meant to distinguish it from 'provision' that implies a positive duty for the state. This is of central importance because human rights are based on the dichotomy between rights holders and the state as the duty

53 Kenya Water Act 2016, s 93.

54 Constitution of Kenya 2010, s 43.

55 Peter H Gleick, 'The Human Right to Water' (1999) 1(5) *Water Policy* 487, 493.

56 Committee on Economic, Social and Cultural Rights, 'General Comment 15: The Right to Water (Articles 11 and 12 of the International Covenant on Economic, Social and Cultural Rights)' (20 January 2003) UN Doc E/C.12/2002/11 [hereafter General Comment 15].

57 United Nations, 'General Assembly Adopts Resolution Recognizing Access to Clean Water, Sanitation as Human Right, by Recorded Vote of 122 in Favour, None against, 41 Abstentions' (*United Nations*, 28 July 2010) <<https://www.un.org/press/en/2010/ga10967.doc.htm>> accessed 4 November 2018.

58 eg South Africa Constitution 1996, s 27.

bearer. A formulation that seeks to diminish the central role of the duty bearer implies conversely that rights holders may have duties related to the realisation of their rights.

In the context of water, a dangerous paradigm has progressively crept into the recognition of the right at the international level and in various countries. This starts with the qualification of the right to water as a right of 'access'. That access is then divided into different categories, which according to General Comment 15 are physical accessibility, economic accessibility, non-discrimination and information accessibility.⁵⁹ Economic accessibility should have nothing to do with the definition of a human right, especially where the realisation of human rights is meant to focus in priority on the most marginalised and disadvantaged. Its introduction and the related concept of 'affordability' indicate a new conceptualisation of human rights that makes pricing of water a central element of the recognition of the right. This not only implies that free water is seen as an anomaly that needs to be rectified but also that disconnections of water supply are not banned *per se* and indeed all that General Comment 15 seeks to ban are 'arbitrary disconnections'.⁶⁰ The inappropriateness of such policies is well illustrated in the case of Kenya. Disconnections have been part of water services policy for decades as in many other countries.⁶¹ What is more surprising and worrying is the fact that recent legislation that has among its objectives to 'secure and sustain progressive realization of the human right to water',⁶² not only assumes that disconnections are acceptable but goes much further and makes it an offence for employees of the corporation to "willfully fail[ing] to disconnect water services for customers in default, in accordance with rules established by the Board".⁶³ This is probably to be expected in a context where the act only knows rights holders as 'customers'.

In such a context, the right to water can become a vehicle for the spread of the concept of water as a commodity, as has in fact happened over the past couple of decades. It is then unsurprising to find that the biggest multinational water companies not only do not oppose the recognition of the right to water, as could have been expected, but in fact welcome it as long as water is not free.⁶⁴ This has led to unfortunate developments in different parts of the world. The *Mazibuko* case is to-date the only constitutional court discussion in South Africa of the right to water. It confirms that the recognition of a right of 'access' to water to which a free water policy has been added can still lead to a result where the constitutional court can find that the minimum content of the right does not need to be raised beyond 25 lpcd, a level widely understood as failing to ensure a life of dignity on top of not allowing for the realisation of water-dependent rights, such as the rights to sanitation and health.⁶⁵ Further, the same decision finds that the state cannot be forced to allocate

59 General Comment 15 (n 56) para 12.

60 *ibid*, paras 10, 44(a).

61 City of Nairobi (Water Supply) By-Laws 1974, s 7.

62 Mombasa County Water and Sewerage Services Act 2016, s 3.

63 *ibid*, s 25(3).

64 Anna FS Russell, 'Incorporating Social Rights in Development: Transnational Corporations and the Right to Water' (2011) 7(1) *International Journal of Law in Context* 1, 19.

65 cf Guy Howard and Jamie Bartram, *Domestic Water Quantity, Service Level and Health* (World Health Organisation 2003) WHO Doc WHO/SDE/WSH/03.02.

the necessary resources to provide better water services.⁶⁶

This can be compared with the understanding of the right to water in Delhi where a privatisation project was stopped in 2005.⁶⁷ Within a decade, the new government elected to replace the one that had proposed privatisation in the first place chose as one of its key policy measures the introduction of a free water policy that provides 20kl per month to each family, or around 133 litres a day for an average family of five.⁶⁸ This policy has its own shortcomings because it only covers households that have access to piped water supply and because any household (even a much larger poor household) consuming more than 20kl a month must pay for all water, including the first 20kl.⁶⁹ At the same time, it shows that a free water policy that seeks to ensure a life of dignity is possible, even in a country that is much poorer on a per capita basis than South Africa, confirming that resources is not the issue. It boils down to prioritisation in the allocation of existing resources.

The example of free water policies confirms that the recognition of the right to water can be used as a starting point for positive steps that strengthen the position of rights holders. At the same time, in the broader context of neoliberal economic policies, the right to water is also often used to introduce measures that are at best doubtful in their intent and at worst harmful. The latest in a string of such initiatives that bear the direct hallmark of attempts to turn water into a commodity is the introduction of so-called water automated teller machines (ATMs). These devices have been given various names, sometimes quite neutral like water dispensers, but the term water ATMs has stuck in quite a few places and reflects quite accurately what these are and the message they want to convey to water users. In general, a water ATM is a machine that provides water on a per litre basis (often in 1 and 20 litre increments) that is accessed with a pre-payment card. The touch of the card against the machine triggers the dispensing of filtered water, which is usually the selling point of the said water ATM. Such ATMs have rapidly become ubiquitous in public spaces in some cities in India or on railway platforms. In this sense they contribute to the privatisation and commodification of water, particularly where water used to be provided free to all, as was the case in railway stations in India until now. These developments have not gone unnoticed and the push towards making travellers pay for water is being challenged, as in the case of an ongoing dispute concerning access to free water in the Delhi Metro.⁷⁰

Water ATMs are even more controversial where they are used as the main source of drinking water supply in certain urban areas deprived of piped water, or in villages where they may provide the only source of safe drinking water. In such cases, while water ATMs may offer 'access' to water for

66 *Lindiwe Mazibuko v City of Johannesburg* [2009] Case CCT 39/09 ZACC 28 (Constitutional Court of South Africa).

67 eg Amit Bhaduri and Arvind Kejriwal, 'Urban Water Supply: Reforming the Reformers' (2005) 40(53) *Economic and Political Weekly* 5543.

68 Delhi Jal Board, 'Notification – Free water supply upto 20 Kl per month to every house hold having domestic water connections including Group Housing Societies' (27 February 2015) Doc No DJB/DOR/Policy/2014-15.

69 eg Philippe Cullet, 'In Defence of Free Water – Beyond the Delhi Experiment' *The Statesman* (Kolkata, 2 March 2014) 6.

70 *Kush Kalra v Union of India* [2017] WP(C) 4273/2015 (High Court of Delhi, Order of 21 August 2017).

residents, this is on an affordability basis. In addition, they raise concerns with regard to quality. Water ATMs are sometimes installed under direct supervision of the government but often set up either by local private enterprises or as part of corporate social responsibility (CSR) initiatives where quality control is essentially within the hands of the promoter. Even more worrying, in various situations, water ATMs do not actually provide water on a continuous basis even if the machine is functional because the possibility to recharge cards is not available continuously.⁷¹ This is without taking into account the basic conceptual shortcoming of water ATMs that can lead to disconnection of supply without procedural safeguards. Where credit has run out, the rights holder is left without access to water until such time as they have the necessary cash to recharge their card. This can be compared to the situation with piped water supply where water users are always warned before disconnection for non-payment and where a procedure exists that allows the rights holder to discuss their case with the provider. Water ATMs offer none of that and where the water is provided by a commercial enterprise, the personal circumstances of the individual will likely only be taken into account on the basis of a personal relationship that transcends access to water.

The introduction of water ATMs in such diverse countries as India and Kenya under the same name confirms that these are understood as being part of a broader movement towards ensuring that rights holders pay for their water, whether they can afford it or not. The reality is that water is so important and vital for survival that everyone will allocate sufficient resources to water before, say non-emergency health expenses. This is unacceptable because it involves trading the realisation of one human right for another. This is, however, what people on the ground seem to be doing, for instance, where groundwater has become unsafe to drink (including for cattle) and where the only options left to people are to purchase from whichever provider will be selling water.

On the whole, the progressive recognition of the human right to water is not as positive as one would have assumed 20 years ago. Both Kenya and India have recognised the right to water, yet this has not provided human rights activists an effective tool to counter privatisation. This is probably not surprising since at the UN level, it has been emphasised specifically that there is no contradiction between the two.⁷² As a result, privatisation has flourished alongside the recognition of the right to water and in fact can be said to have been further fostered by the latter because it puts stronger obligations on the state to provide the infrastructure through which people will 'access' water. This is possibly not surprising because human rights have been realised in part through private sector interventions for decades. What is more surprising is the specific policy push to ensure that private sector actors be given a central role they did not have earlier, something that would not have happened by itself because of the widespread understanding that water must not be appropriated by anyone and is a public resource that should not be privately owned.

71 eg in Jhunjhunu district, Rajasthan, some cards for use at the water ATM are only rechargeable once a month when someone visits the village where the water ATM is installed.

72 UN Human Rights Council, 'Human Rights and Access to Safe Drinking Water and Sanitation' Res 15/9 (30 September 2010) UN Doc A/HRC/RES/15/9 para 7; Catarina de Albuquerque and Inga T. Winkler, 'Neither Friend nor Foe: Why the Commercialization of Water and Sanitation Services is not the Main Issue in the Realization of Human Rights' (2010) 17 *Brown Journal of World Affairs* 167.

V. EMERGING RESPONSES TO FOSTER EQUITY AND CONSERVATION

The previous section has shown that the recognition of the right to water has not been the antidote to commercialisation and commodification one could have expected it to be. As a result, the human right to water has not necessarily provided the basis for resistance to neoliberal policies. While the recognition of the right is something to celebrate since it was long overdue, it does not provide all the necessary keys to fight the assault both against the understanding of water as a public substance to be shared equitably and the provision of free domestic water. Other forms of resistance have thus progressively emerged.

At a legislative level, the wave of water laws supported and informed by the idea of its commodification has given way to a broader variety of interventions. Thus, in India, after 15 years marked by the relentless push for ‘water sector reforms’ and a strong policy presence by the World Bank that sent its main water representative to Delhi for more than five years, the government has started coming up with proposed laws that are informed by a partly different imagination. This is the case of the Draft National Water Framework Bill, 2016, and the Groundwater (Sustainable Development) Model Act, 2016.⁷³ Both draft laws propose a return to an understanding of water based on its shared nature, its social dimensions, its environmental dimensions, its livelihood dimensions and its local nature that requires decentralised regulation. Both proceed from the basis of existing laws and principles and can thus be criticised on this basis for not going far enough. At the same time, they would force the government at all levels to reconsider its view of water and to prepare itself for a new regulatory framework able to address existing crises.

At another level, there has been resistance around the world to privatisation. Further, remunicipalisation – the return of previously privatised water supply to public service delivery⁷⁴ – has been taken up in various places, based on complaints with private service provision, including poor performance, under-investment, soaring water bills, monitoring difficulties, lack of financial transparency and poor service.⁷⁵ This can also be seen in parallel to the development of the Alternative World Water Forum (AWWF) that seeks to reclaim water policy making from the World Water Forum that has been one of the main instruments for the propagation of water sector reforms, privatisation and commodification of water over the past couple of decades. The last AWWF organised in 2018 was in fact specifically premised on the idea that ‘water is a right, not a commodity’.⁷⁶

73 Draft National Water Framework Bill 2016 <http://mowr.gov.in/sites/default/files/Water_Framework_18July_2016%281%29.pdf> accessed November 2018; Groundwater (Sustainable Development) Model Act 2016 <www.ielrc.org/content/e1605.pdf> accessed 4 November 2018.

74 Emanuele Lobina, ‘Calling for Progressive Water Policies’ in Satoko Kishimoto, Emanuele Lobina and Olivier Petitjean (eds), *Our Public Water Future – The Global Experience with Remunicipalisation* (Transnational Institute 2015) 6,7.

75 Satoko Kishimoto, Olivier Petitjean and Emanuele Lobina, ‘Reclaiming Public Water Through Remunicipalisation’ in Satoko Kishimoto, Emanuele Lobina and Olivier Petitjean (eds), *Our Public Water Future – The Global Experience with Remunicipalisation* (Transnational Institute 2015) 112, 118.

76 Fórum Alternativo Mundial da Água, ‘Call to the People for the Alternative World Water Forum - Fama 2018’ (*Fórum Alternativo Mundial da Água*, 12 June 2017) <http://www.fenae.org.br/portal/main.jsp?lumPageId=8A8A81BD5C77F84B015C781718AA7E40&lumA=1&lumII=8A8A81BD5C77F84B015C781719937E46&locale=en_US&doui_processActionId=setLocaleProcessAction> accessed 4 November 2018.

Finally, there has also been specific resistance to large-scale water infrastructure, in particular dams. One of the major flashpoints over dams was the crisis of confidence triggered by the World Bank's withdrawal from the Sardar Sarovar Project (SSP) in India, the one and only time in the bank's history that it had to withdraw from an incomplete project on the basis of non-compliance with its own policies.⁷⁷ This led to the setting up of the Inspection Panel that has dealt with a number of dam-related cases in the past two decades. This also led to the setting up of the World Commission on Dams, whose 2000 report gave a new lease of life to large dam building in the Global South but within a context that imposed new procedural safeguards, in particular for displaced people.⁷⁸ These limited steps were made possible by the strong push of civil society actors, in this specific case the Narmada Bachao Andolan (Save the Narmada Movement, NBA) that was instrumental in getting the World Bank to withdraw from the SSP.⁷⁹ The success of the NBA in the 1990s was not the end of a process but rather one step in a long process of trying to ensure that the legal framework governing the project be effectively implemented, and in particular that the hundreds of thousands of displaced people be given land for land as agreed by a tribunal set up for this purpose.⁸⁰ While the SSP was inaugurated in 2017, the struggle is ongoing in courts and on the ground as the process of resettlement and rehabilitation is not complete.⁸¹

Overall, the inequity of some older water laws and the additional burden put on the majority of the population in the Global South through the law and policy reforms introduced since the 1990s seeking to turn water into a commodity have been met with various forms of resistance. This has taken diverse forms and the outcomes are varied. There is as yet no rollback of the commodification and privatisation reforms at a global level, but significant changes have been introduced progressively in view of the failure of the new policies and resistance by people affected by water laws and policies.

VI. CONCLUSION

Water is one of the most crucial areas of law but one that remains strangely off the radar for most lawyers. At the international level, this is due to the fact that existing water law is essentially limited to a focus on international watercourses that constitutes only one of many crucial issues of concern in the water sector, with global dimensions of the water cycle being for instance, completely absent from policy debates at present. At the national level, water was for a long time addressed primarily through property rights and land and therefore did not attract the attention of environmental lawyers for a number of years beyond the conservation dimension.

77 Bradford Morse and Thomas R. Berger, *Sardar Sarovar – Report of the Independent Review* (Resource Futures International 1992).

78 World Commission on Dams, *Dams and Development – A New Framework for Decision-Making* (London: Earthscan 2000).

79 eg Chittaroopa Palit, 'Monsoon Risings – Mega-dam Resistance in the Narmada Valley' (2003) 21 *New Left Review* 81-100.

80 Narmada Water Disputes Tribunal, 'Final Order and Decision of the Tribunal' (12 December 1979).

81 eg Lyla Bavadam, 'Sardar Sarovar - Unkept Promises' *Frontline* -41(Chennai, 13 October 2017) 38.

Since the 1990s, water law has taken centre stage in many countries of the Global South where major reforms were introduced. This coincided with the strong push to turn water into a commodity that could be traded like any other good and would provide new business opportunities to investors in search of new markets. This was bound to meet with stiff resistance because water has always been considered as a separate substance that was too important for human life and life on Earth to be privately owned. The progressive formalisation of the human right to water that happened alongside was partly in reaction to the push for commodification. At the same time, this belated recognition of an implied right has not escaped the commodification trend, as reflected in the focus on affordability.

In recent years, various countries have seen growing resistance to the reform model proposed since the 1990s. This has taken different forms, from civil society opposition to privatisation, to government-led efforts to draft water legislation that is more focused on social equity and environmental conservation. The need to bring back water law and policy to a place where it better reflects the core values of water is undiminished.