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REVIEW OF RIGHT TO WATER: HUMAN RIGHTS, STATE LEGISLATION, AND CIVIL SOCIETY INITIATIVES IN INDIA

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Centre for Interdisciplinary Studies in Environment & Development

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LIST OF ACRONYMS

CAT	:	Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
CEDAW	:	Convention for Elimination of Discrimination Against Women
CRC	:	Convention on the Rights of the Child
GATS	:	General Agreement on Trade in Services
GATT	:	General Agreement on Trade and Tariffs
GWP	:	Global Water Partnership
HCBL	:	Hindustan Coca-Cola Beverages Ltd.
ICCPR	:	International Covenant on Civil and Political Rights
ICERD	:	International Convention on the Elimination of All Forms of Racial Discrimination
ICESCR	:	International Covenant on Economic, Social and Cultural Rights
IWRM	:	Integrated Water Resource Management
MMISFA	:	Maharashtra Management of Irrigation Systems by Farmers Act
MSWP	:	Maharashtra State Water Policy
MWRRA	:	Maharashtra Water Resources Regulatory Authority Act
NWP	:	National Water Policy
PIL	:	Public Interest Litigation
PIM	:	Participatory Irrigation Management
PRIs	:	Panchayati Raj Institutions
RBA	:	Rights-based Approach
SOPPECOM	:	Society for Promoting Participative Ecosystem Management
TAC	:	Technical Advisory Committee
UDHR	:	Universal Declaration of Human Rights
UNCHR	:	United Nations Commission on Human Rights
UNDP	:	United Nations Development Programme
WTO	:	World Trade Organization
WUA	:	Water Users' Association

SUMMARY

This study is basically a desk-top review of the rights discourse in the context of water, based on academic and popular literature on rights and civil society initiatives as well as government documents regarding water and related subjects. The study has two broad motivations. Firstly, engagement with the idea of rights (and the right to water) helps to bring questions of social justice and equity to the forefront. Secondly, a study linking rights and water provides a bridge between different discourses (economics, legal pluralism, development studies, human rights, natural resource management) and different groups of actors (lawyers and activists dealing with human rights, social scientists dealing with the question of 'development'), thereby opening up possibilities of synergies between them.

There are four parts to the study. The first part reviews the different rights-based concepts which are relevant to water: human rights, right to water, water rights, right to development, rights-based approach to development, and entitlements. This helps to clarify the distinctions between these different concepts and to understand what is at stake in each of them – for instance, for the role of the state, as well as for different dimensions of a right to water. Further, the debates that are found in different versions of rights, be it human rights or rights-based approaches or the right to development (the relative importance of legal versus non-legal aspects, the role of the state, the implications of power inequalities at various levels) are relevant to issues of water too. Rights could also be a useful strategic instrument, especially in negotiations with governments and donors. However, one must bear in mind the pitfalls of using over-simplified versions of rights. Finally, the discussion of rights, entitlements, and endowments gives a theoretical foundation for linking a rights-based framework to equity.

The second part clarifies the content of the right to water by unpacking its different dimensions. The different possible dimensions

of the right to water include the precise nature of the rights/entitlements, the unit to which the right should be assigned, what kind of needs should be considered within the ambit of the right (drinking, household needs, livelihood requirements), the quantity and quality requirements for each of these, questions of accessibility and affordability of water, the responsibilities of the state and of right-holders, ownership of water resources, the kind of system put in place for water delivery, pricing of water, participation, the relation of the right to water to other rights such as right to housing or right to development, and the impact of globalization on various aspects of the right to water. This discussion brings out the inter-connections between different dimensions and re-enforces the fact that even defining a right to water is complex and context-specific (let alone realizing it).

The third part discusses the extent to which legislation and policies at different levels support various elements of the right to water. While there are a number of different discourses at the international level that have influenced water, the right to water has been most often discussed in the human rights literature. While there is support for such a right, the most important statement to date – the General Comment 15 of the United Nations, leaves a lot of issues undefined. At the India-level, the legal status of 'right to water' is discussed by focusing on constitutional support for the right to water, followed by an analysis of how the contours of such a right are actually shaped by water-related policies, legislation, and judicial judgments. But while a basis for a right to water has been found in the Indian constitution under a fundamental right viz., right to life, neither the judiciary, nor the government has engaged with the General Comment in particular, or the human rights discourse in general (at least in the context of a right to water), which, in turn, is an indication of the hegemony of other water discourses. The specific discussion of different dimensions of water shows, on the whole, that

from the point of view of a meaningful right to water, there are several lacunae in central-level policies and legislation, particularly in the form that current changes in the irrigation and drinking water sector have taken. This results in limitations in the working of the right to water at the state level. Further, the division of labor between the centre and the state means that some of the recommendations made by the centre are non-statutory in nature, and not necessarily followed by the state governments.

While there is some recognition of right to water in international human rights as well as in the Indian constitution, at the level of state legislation and policies in India, different dimensions of right to water do not get much support. This is true even of cases like Maharashtra, where a particular version of rights (viz., entitlements to water) has been put forward in the context of Participatory Irrigation Management. On the one hand, the recent reforms undertaken in the realm of Maharashtra indicate the influence that central-level policies and legislation have on the states, even though water is technically a state subject. On the other hand, while the

changes in Maharashtra have potential in increasing the rights of some groups (like WUAs), the nature of these rights are limited; in fact, they are more in line with a narrow, tradable permits version of water rights.

The fourth part discusses the kind of civil society initiatives being undertaken in water, including differences in the actors involved, the particular dimensions of water that they deal with, and the strategies they adopt. Two cases at the India-level – the anti-Coke struggles at Plachimada in Kerala and the agitations against the privatization of the Sheonath river in Chhatisgarh, are discussed in some detail, along with civil society initiatives in water in the specific case of Maharashtra. These initiatives have engaged with more dimensions of the right than the human rights discourse and state legislation. For instance, the idea of water for livelihoods and the relation between water and development has been an important part of at least some of these struggles. But more importantly, the use of rights language and efforts to engage with the state indicate the potential for synergies between different domains.



CHAPTER 1

INTRODUCTION

1.1 INTRODUCTION TO THE STUDY

The discourse of development (that is, both its practice as well as ways of speaking and thinking about it) has seen a wide variety of changes since it came into focus in the post-World War II period. For instance, the last two decades of the twentieth century have seen emphasis on dimensions such as participation, sustainable development, empowerment, governance, social capital, and respect for indigenous knowledge. New dimensions have been added primarily in response to critiques of development and demands by the disaffected, and many of these responses have in turn become the subject of further critiques (Kamat, 2002). One dimension that has become the object of much interest since the 1990s and to date is the concept of rights. How long this interest will last and whether the rights discourse has anything new to contribute to the analysis of particular issues has been a matter of some contention. But even while the debate about rights continues, the concept continues to be extended to a variety of realms such as development and environment, as evinced by the institution of new rights such as the right to development and environmental rights.

As a resource that is relevant to concerns about both development and environment, the domain of water has also seen discussions of different kinds of rights such as (human) right to water, water rights, and rights-based approach to water. In the international realm, for instance, the United Nations Committee for Economic, Social and Cultural Rights adopted the General Comment (No.15) on the right to water in 2002. The idea of water as a right (as against water as a need) has been a contentious issue in the triennial World Water Forums. Civil society initiatives and social movements have used the language of 'right to water' to resist attempts at privatization of water services (for instance, in Latin America), and in struggles against a mode of industrial development that pays little attention to the water needs for drinking and

agriculture (such as the anti-Coke struggles in India). At the level of national legislation also, a formal right to water can be implicitly or explicitly found in many constitutions, although the version of rights found in enabling laws is often more commensurate with a neo-liberal version of marketable water permits than with a fundamental right to water stemming from any notion of human dignity.

Given the centrality of both rights discourses and water to our times, this study reviews rights discourses in the context of water, drawing on discussions in the domains of human rights, state legislation and civil society initiatives, with the following four aims:

1. To bring about greater conceptual clarity about the meaning of 'rights', especially in the context of water;
2. To unpack different dimensions of a 'right to water';
3. To discuss the extent to which legislation and policies at different levels support various elements of the right to water and
4. To discuss how civil society initiatives engage with different elements of the right to water.

Undertaking such an exercise is useful for two reasons. Firstly, engagement with the idea of rights (and the right to water) helps to bring questions of (redistributive) social justice and equity to the forefront, especially in an era when such concerns increasingly seem to be put on the backburner. Equity (however defined) is an important element of a society where everyone can develop to his or her full potential. Jain (2002) goes so far as to say that the language of rights is replacing development, because (mainstream) development has not been able to engineer change with equity and justice. For instance, in the realm of water, the process of reform in urban areas often ends up focusing on increasing tariffs to recover operation and management costs, while an equally (if not more) important question to ask

might be why poorer communities should pay for improved infrastructure for a city water supply (WaterAid, 2005). The idea of right to water could help emphasize this equity dimension. In general, since right to water on the ground is determined by an intersection of gender, caste, and class (Ahmed, 2005a), engagement with the idea of right to water has the potential to question hierarchies based on these dimensions.

Secondly, a study linking rights and water provides a bridge between different discourses (economics, legal pluralism, development studies, human rights, natural resource management) and different groups of actors (lawyers and activists dealing with human rights, social scientists dealing with the question of 'development'), thereby opening up possibilities of synergies between them. For instance, usually the environment and our relationship to it are not considered to be a human rights issue. The result is that denial of human rights due to environmental contamination or lack of provision to participate in decision-making on environmentally sensitive works ends up being addressed through mechanisms that do not have a human rights framework as a guide, and are therefore treated with a lower set of standards and priorities than would be human rights concerns (Picolotti and Taillant, 2003). The right to water (especially when it includes water for the natural environment) could help environmentalists and human rights advocates to communicate with each other. Similarly, the rights-based approach to development helps to link human rights and development by integrating familiar concepts such as participation, accountability, and transparency with less familiar ones such as explicit reference to government obligations deriving from international human rights law and procedures.

With this brief justification for undertaking a review of rights in the context of water, I will introduce the two key concepts – rights and water – that form the heart of this review and then outline the plan of the report.

1.2 A BRIEF DISCUSSION OF RIGHTS

The concept of rights has a long history of usage, ranging from philosophical discussions about social justice and equity to political science concepts about what freedoms and duties entail, as well as to actual usage in struggles such as anti-colonial struggles. Given the wide variety of usages, it is not surprising that there are many versions of rights, all of which have different implications.

Consider, for instance, the following definitions of rights:

"Rights are just claims or entitlements that derive from moral and/or legal rules" (Freeman, 2002: 6).

"A (subjective)¹ right refers to a moral relationship between a person or a group of persons and a thing or action or state of affairs" (Edmundson, 2004).

"'Rights' are entitlements backed by the coercive apparatus of the state, whereas 'claims' are more social in nature and may not be expressed as legal entitlements" (Wilson and Mitchell, 2003).

Even a cursory reflection of just these three definitions is enough to bring out a number of differences among them. One is the basis of the rights – whether they are so-called only when they derive from law, or also when they derive from moral rules, without any legal support. This, in turn, implies differing roles for the state. Implicit in at least one of the definitions is also a notion of justice and fairness, although what constitutes 'justice' or 'fairness' would need further discussion. This range of meanings that rights can take on is an important reason why they have come to be widely used, including by people all across the political spectrum.

Edmundson (2004) distinguishes between two periods in history when 'rights' talk was widely prevalent. The first was the period of the Enlightenment (that is, the early seventeenth to eighteenth century), when both the Church and the ancient Greek authorities began to be questioned and a new, anti-dogmatic, and

¹ Note that 'subjective' here only refers to a focus on the 'right-holder' and not something that is in the eye of the beholder (Edmundson, 2004). Edmundson distinguishes a subjective right from an objective right, which is a global moral evaluation of a state of affairs. It is the former sense in which rights are used when referring to 'right to....', and it is this that will form the focus of this study.

inquisitive approach to the study of nature was applied to human affairs. The second is the period from 1948, when the Universal Declaration of Human Rights was put forth, to date. Even within this second period, it is the period since the 1990s that has seen a particular proliferation of rights talk. The motivations for this new interest are almost as varied as the different versions of rights used. But one can distinguish between three strands of discussion in the modern day rights discourse; one involves the concept of human rights, the second involves rights-based approaches, and the third strand includes applications and extensions of Sen's idea of endowments and entitlements. While the last strand is often found in academic work, the first two strands are usually found in discussions of international and national development agencies, donor discourses, governments, civil society groups, and social movements. These different strands will be analyzed in greater detail in Chapter 2. But the questions raised by the various definitions of rights – the importance of legal versus non-legal aspects, the role of the state, differing notions of equity and justice – find reverberation in the discussion of these three strands too. As mentioned in the previous section, one of the major motivations for undertaking this study is to bring questions of equity and justice to the forefront. While these questions are implicitly or explicitly present in the discourses on rights at least to some extent, a clear articulation of a vision of social justice is important. It is far beyond the scope of this study to review the different visions that have been put forward, but in the concluding chapter, I will go back to this question and see what a rights-based approach in water has to offer in terms of a vision of social justice and equity.

1.3 WHY WATER?

As previously indicated, rights discourses have been applied to a variety of domains. Similarly, the goals of equity and social justice can also be met via a number of routes. This review focuses on the application of the concept of rights to water, and also implicitly on whether a right to water can serve as the means of improving equity in a society.

The choice of water is motivated by a number of factors. The first is its importance in satisfying basic household needs (drinking,

cooking, washing, and so on) as well as economic needs. This is particularly because water has multiplier effects on both agricultural and non-agricultural activities; in fact, in agriculture, water is not just another input, but a necessary means of production without which primary production is impossible. Ideally, one should focus on all uses of water together (one example of this would be the approach based on the concept of integrated water resource management). However, while this is useful when one thinks of management of water at macro levels such as the river basin, in terms of thinking about the right to water itself, it is more useful to make a distinction between different kinds of functions. This study will focus on drinking water use of water (though the dimension of sanitation is not discussed in detail) and irrigation (particularly participatory irrigation management).

Secondly, water is also critical in maintaining ecological balances; sustainability of water supplies is important for sustainability of the ecosystem. Thirdly, control over water also helps to determine social and political power at all levels (and vice-versa). For instance, when the Bangladeshi NGO Proshika helped landless groups to obtain water rights in the 1980s and sell the water to landowners, not only did the economic condition of the landless improve, but they also began to enjoy better social and political status, as well as increased leverage and bargaining power in other arenas such as informal credit, grazing rights, and wages (Wood *et al.*, 1990). Hence access to water as well as to the decision-making process about water can become an important means of redressing both class-based and gender-based inequalities. This has led to water serving as the basis for redistributive social and political movements (albeit generally to a lesser extent than land).

The first two factors are fairly obvious, but the third factor (particularly whether water can serve as a redistributive device) is a little more controversial. What constitutes equity in water distribution itself is a subjective question. A number of different options have been put forward with respect to water rights – equal volumes, equal watering times, water rights proportionate to contribution made or land area, and prior appropriation (whoever first exploits a resource establishes a right to continue to do so) (Chambers, 1988). Further, these criteria

of equity could be applied across different groups (large and small farmers, landed and landless, head-end and tail-end farms). When one goes beyond the question of just equity in water and tries to address the question of how to use water to achieve equity or social justice in general, the situation gets more complicated; in fact, attempts to address inequities in resource rights by allocating water rights equally among all landholders, tenants, and landless people have usually had limited success (see, for instance, SOPPECOM, 2002; van Etten, 2002). But irrespective of how the use of water as a redistributive device works out in practice, the existence of such a possibility is one of the motivations for a study on the issue of right to water.

Apart from the theoretical reasons to focus on water, there is also the fact that water has come into a great deal of focus in recent times. One reason for this is the importance of the UN Millennium Development Goals,² one of which has the target of halving the proportion of people without sustainable access to safe drinking water by 2015. Another reason is the perception of a looming or already existing water crisis. There are differences of opinion about whether a crisis rhetoric is appropriate in the context of water. For instance, Mehta (2000) argues that scarcity is often manufactured by anthropogenic interventions or discursive constructions, and not real in the sense of having biophysical or social manifestations. In fact, crisis narratives often have their roots in neo-Malthusian perspectives concerning environment and development. The implication of the idea that scarcity of water is a created concept and that droughts are not 'natural' disasters means that the argument that a universal 'right to water' is not feasible because there is not enough water to go around is not tenable. Similarly, Petrella (2000) (cited in Mehta, 2000) argues that many international, national, and regional conflicts ostensibly over water are caused by other factors such as ethnic rivalries, nationalism, and power politics that extend to the cultural, political, and economic spheres. This point is important because the management of water resources has been reduced to crisis management – of

floods, droughts, and inter-state disputes (Anonymous, 2002b), instead of considering these events as symptoms of deeper problems. But even as one problematizes the crisis rhetoric, what one can agree upon is that a lot of people do not have access to water, and that while the water issues being faced today are not novel, the scale of the problem is new.

The context of globalization has also led to an increased focus on water. While the precise impact of globalization on policies and legislation at the international, national, and state levels becomes more evident in the discussion in Chapters 4 and 5, there are two broad ways in which globalization has led to an increased focus on water. Firstly, there is increased corporate attention to water, because it is now a resource that is perceived to offer opportunities for profit-making. In fact, the close alliance between governments, the World Bank, the United Nations, and water companies often gives corporations the power to shape government policies (like deregulation and free trade, and favored access to upcoming water contracts) in ways that favor their interests (Barlow, 2001). Secondly, movements against globalization have also begun to focus on the increased commodification of water (viz., the effort to move water from the public to the private domain and to define it as an economic good). For instance, Latin Americans have protested against the increased water charges resulting from the handing over of public water utilities to foreign companies.

The above discussion offers justification for focusing on water. However, any study of water is complicated by the fact that water has multiple facets. Water is divergently perceived as life support, basic right, common pool resource, economic good, property of the state, cultural symbol, and so on. While no single study can claim to do justice to all of these aspects, it is important to keep this factor in mind, because many of the divergent prescriptions around water problems (such as community-management, legal clarification of property rights, water markets, state control) arise because people focus on particular aspects to the exclusion of others (Iyer, 2005a). At the international level, for instance, Mehta (2004)

² MDGs are a set of wide-ranging development goals to be achieved by 2015 which were adopted by the Millennium Assembly of the United Nations in 2000.

points out how problems and necessary solutions in the water sector are presented very differently in the several global assessments with different assumptions about costs, technology inputs, and even the goals themselves. Similarly, public and private systems often coexist side by side, and rural and urban people make opportunistic choices between different types of water provisioning, dependent on a variety of choices that may not seem entirely rational to outsiders (Mehta, 2004). The discussion of a human right to water is also often mixed up with arguments over private versus public services and pro- and anti-commodification of water (Newborne, 2004).

1.4 METHODOLOGY AND PLAN OF CHAPTERS

This study is basically a desk-top review, based on academic and popular literature on rights and civil society initiatives as well as government documents regarding water and related subjects. However, field work done in the course of a previous study (Sangameswaran, 2005) – particularly interviews with NGOs working on issues of water in Maharashtra – does feed into it, especially in the discussion of the conceptualization of water rights in state legislation in Maharashtra (Chapter 5) and in civil society initiatives in water (Chapter 6).

Chapter 2 offers a more detailed discussion of different kinds of rights, especially insofar as the context of water is concerned. The question of access to water and equity in distribution of water has been a part of the development literature for a long time. In the environmental literature, the question of quality of water has received emphasis. But in formal terms, the question of the right to water has been discussed most in the human rights literature. Hence a large part of the discussion in this chapter focuses on human rights.

Chapter 3 discusses the various elements that *should* be a part of any discussion of right to water, drawing from the critiques of human rights. While it is not possible to understand what water rights and water management forms are and how they function in isolation from the actual political and social context in which they are used and discussed (Boelens and Zwarteveen, 2005), there is also a need to lay down certain common norms (either as minimum

requirements or as providing the normative vision). Right to water is not just about access to water, or even to adequate, safe water. The different possible dimensions to the right to water include the precise nature of the rights/entitlements, the unit to which the right should be assigned, what kind of needs should be considered within the ambit of the right (drinking, household needs, livelihood requirements), the quantity and quality requirements for each of these, questions of accessibility and affordability of water, the responsibilities of the state and of right-holders, ownership of water resources, the kind of system put in place for water delivery, pricing of water, and the relation of the right to water to other rights such as right to housing or right to development.

The discussion of these elements brings out some of the issues raised in the debates about human rights, but also raises some concerns that are specific to the nature of water. Further, not only is each of these dimensions complex and context-specific, but there are also inter-connections between them. For instance, fifty percent of the urban slum population in India do not have adequate access to safe water (WaterAid, 2005). The issue of coverage for slum populations in urban areas is linked to the tenure status of large floating populations and settlements (authorized versus unauthorized, legal versus illegal). That is to say, one has to bring in the question of how access to water is linked to access to housing, as well as one's political status (in terms of citizenship) and ability to prove domicile (possession of documents like a ration card). One also has to deal with the power dynamics of the informal water providers who would lose out if slum-dwellers were given access to water. The lack of coverage is also linked to poor and disadvantaged people being excluded from participation in decision-making on water issues, a point which becomes especially important in the context of protests about water privatization by the middle-class, which do not necessarily focus on water for slums. The inter-connections between different dimensions make the realization of right to water even more difficult; further, though any particular actor might need to focus on specific aspects, complementarity between them is needed.

The evolution of the right to water at the international level will be discussed in Chapter 4, along with a discussion of the constitutional support that the right to water has at the India level, and how legislation and policies at the central level (including court decisions pertaining to water) affect the formulation of right to water in different states. While the presence of suitable policies and legislation is no guarantee that the right to water is met for all, they constitute an important arena in which different elements of the right are shaped. This discussion also sets the scene for more nuanced, context-specific analysis.

In Chapter 5, I discuss the case of a specific state – Maharashtra – concentrating on the water policy in the post-independence period (especially with respect to participatory irrigation management). The case is interesting because Maharashtra is one of the states that have been at the forefront of giving greater rights to communities of water users; in fact, it has explicitly used the language of entitlements (which can be regarded as a particular form of rights). But there are limitations in the way entitlements have been conceived as well as in the broader policy context within which these entitlements are situated.

The renewed focus on water is not restricted just to the domain of human rights and state legislation. Civil society initiatives of different

kinds have also engaged with the right to water. Freeman (2002) points out that the relation between social movements and rights is dialectical in that movements seek rights, and rights empower movements. In fact, the state may also have an interest in buying legitimacy by granting concessions in the form of rights. How various civil society initiatives have engaged with the right to water will form the subject of Chapter 6. I briefly discuss two India-level cases – the Anti-Coke struggles at Plachimada in Kerala and the agitations against the privatization of the river Sheonath in Chhattisgarh, and then turn to civil society initiatives in water in Maharashtra.

Chapter 7 summarizes the insights from the preceding chapters and indicates some ways forward.

1.5 CONCLUSION

This introductory chapter describes the aims of the report and the rationale for undertaking a review of the right to water. Irrespective of whether or not a formal, explicit right to water is formulated at the international or national level, the study hopes that thinking through these questions would help to flag the range of issues that have to be dealt with in more specific contexts, and the importance of complementary action and synergies in the interventions to be made by different actors.



CHAPTER 2

RIGHTS-BASED CONCEPTS: A BRIEF REVIEW

2.1 INTRODUCTION TO RIGHTS

This chapter reviews the different rights-based concepts which are relevant to water – human rights, right to water, water rights, right to development, rights-based approach to development, and entitlements. The aim is to clarify the distinctions between these different concepts and to understand what is at stake in each of them – for instance, for the role of the state, as well as for different dimensions of a right to water.

Since a major focus of this review is on the right to water, and human rights constitute an important discourse in which this has been put forth, both of these are particularly relevant to the current study. While I consider human rights in this chapter, the concept of right to water will only be briefly introduced here and discussed in greater detail in Chapter 3. Although right to development is a (non-binding) human right, and rights-based approaches to development are also related to human rights, their relation with each other and with water is interesting, and therefore they are considered separately. The concept of water rights, which is often conflated with the right to water, is then unpacked; among other things, this serves to problematize the question of ownership of water. Finally, the relation of 'entitlements' with 'rights' is briefly discussed. The term 'entitlement' is often used in rights discourse, sometimes as a substitute for rights (e.g., when a water entitlement is used to refer to a water right), sometimes as a subset of rights (when positive rights are referred to as entitlements in contrast to negative rights or claims),³ and sometimes in the sense that Sen used it (where entitlements result in capabilities).

2.2 HUMAN RIGHTS

2.2.1 Introduction

The kind of rights that have received the greatest amount of attention in recent times are human rights. The efforts to ensure an explicit 'right to water' as well as rights-based approaches to development are both often articulated in the context of human rights. While there are a number of theoretical and practical problems with human rights, many of the debates in the context of human rights offer useful insights in terms of deciding whether the idea of a 'right to water' (irrespective of whether it is formally recognized as a human right or not), as well as a rights-based approach (in water specifically and in development in general), are both viable and useful, especially from the point of view of equity. Hence it is useful to undertake a brief review of human rights.

The immediate origin of the current regime of human rights can be traced to the Declaration of Human Rights in 1948 by the United Nations, although its history goes back much further. In the Western world, for instance, one precursor to the present form of 'human rights' can be found in discussions of 'natural rights' in Locke, wherein every human being has certain rights that derive from their nature and not from their government or its laws, and the legitimacy of government rested on the respect that it accorded to these rights (Freeman, 2002).

Both the origin of human rights as well as the history of emergence of their current regime is controversial. For instance, there is the question of whether human rights depend on any prior theory of 'divine', 'moral' or 'natural'. Similarly, many of the historical moments deemed important in the emergence of human rights such as the addition of the Bill of Rights to the

³ Legally, in positive rights, there is an obligation on the state (or on whom the corresponding duty falls) to do something to facilitate the enjoyment of the right; in the case of negative rights, there is an obligation to refrain from doing anything which could come in the way of enjoyment of the right (Singh, 1992).

American constitution in 1791, are problematic because they ignore significant sections of the population (such as American Indians or slaves). This study will not go into the details of these debates, but focus instead on the features of the current usage of human rights and the debates that these have provoked (although some of the debates about the origin and historical emergence of human rights do leave their mark on these other debates). In doing so, the intent is not to disregard the ideological baggage that human rights come with, but rather to think of ways in which to best use the concept for a specific goal such as equity.

Before turning to the evolution of human rights at the international level and the major debates that have taken place in this realm, I will just briefly discuss the two broad usages of the term.

One usage of the term 'human rights' holds that they stem from human dignity, so that their existence is independent of formal recognition in international or national law (see, for instance, Marks, 2004; Klawitter and Qazzaz, 2005). The fact that they exist irrespective of any social or institutional endorsement is, as Gavison (2004) argues, both its strength and weakness; this also has the limitation of drawing attention away from the social nature of rights. Interpretations of human dignity also vary: it could stem from the basic humanity of persons or from moral standards (as in Gavison, 2004), it could involve a minimum standard common to all cultures and times or offer space for differing conceptions. Although the idea of a transcendental and essential human nature as forming the basis for the derivation of human rights has been subject to considerable critique in recent times, Chandhoke (1998) argues that dismissing this idea would adversely affect both the moral basis of rights and the political weight ascribed to them.

The second way in which the term 'human rights' is used (for instance, in Hausermann, 1999) is as those rights that have been recognized by the global community in the 1948 Universal Declaration of Human Rights (UDHR) and in subsequent international legal instruments

binding on states. The main feature of this usage is that it emphasizes the need for formal recognition, and therefore implicitly on the legal aspects of human rights. Further, even as the relationship between the individual and the state is emphasized, the concept of human rights (by granting rights to individuals) limits state sovereignty, so that human rights abuses within state borders, even when perpetrated by a government against its own people, are no longer matters solely within the purview of domestic affairs (Doyle and Gardner, 2004).

These two usages are not mutually exclusive, but drawing them out distinctly serves the purpose of bringing out important features of the way human rights are currently conceived. Further, as we will see in the ensuing discussion, this distinction plays itself out in the context of the other rights-based concepts also.

A relatively newer strand in the human rights discourse – an anthropological formulation of human rights – stresses human sociality as the foundation for human rights. This views human rights as a property of relationships and interconnections between social persons who exercise moral agency, rather than a consequence of the essential capacities of asocial individuals (the view that is found in conventional liberal accounts) (Wilson and Mitchell, 2003).

2.2.2 Evolution of human rights at the international level

Human rights received worldwide attention through the United Nations, and in particular, via the 1948 Universal Declaration of Human Rights (UDHR). Although UDHR is not binding on states,⁴ many of its provisions are now considered to be customary international law, and the broad human rights found there have since been reasserted in many international covenants, conventions, or agreements. Whatever the philosophical limitations of UDHR, there is no doubt that it has had great legal and political influence. For instance, there are now two hundred international legal human rights instruments, as well as movements of human rights at the international and national level.

⁴ A declaration is a statement of basic principles of inalienable human rights and imposes only moral, not legal weight on members. Such declarations often either express already existing norms of customary international law or may over time crystallize into customary norms. Conventions and covenants, on the other hand, are treaties that are legally binding on signatories.

There are six core human rights treaties (contracts signed by states that are legally binding) confirmed in international law:

- 1) International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), adopted in 1965 and entered into force in 1969;
- 2) International Covenant on Economic, Social and Cultural Rights (ICESCR), adopted in 1966 and entered into force in 1976;
- 3) International Covenant on Civil and Political Rights (ICCPR), also adopted in 1966, and entered into force in 1976;
- 4) Convention for Elimination of Discrimination Against Women (CEDAW), adopted in 1979 and entered into force in 1981;
- 5) Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), adopted in 1984 and entered into force in 1987 and
- 6) Convention on the Rights of the Child (CRC), adopted in 1989 and entered into force in 1990.

(Source: Klawitter and Qazzaz, 2005)

These international treaties impose obligations on states and governments to enforce the rights of their citizens. However, implementation remains a problem. Although the United Nations Commission on Human Rights (UNCHR)⁵ established in 1946 is supposed to monitor human rights on a global scale and examine violations of human rights, the main element of international supervision of the domestic implementation of treaty obligations is reporting, which has limited usefulness and even this is not undertaken fully. This has led to the characterization of the international human rights regime as a relatively strong promotional regime, a relatively weak implementation regime and not an enforcement regime, which Donnelly (1989) (cited in Freeman, 2002) argues is because of the threat that the regime poses to state sovereignty.

In addition, there are also regional conventions such as the European Convention on Human Rights in 1983, the American Convention on Human Rights in 1978, and the African Charter

on Human and People's Rights in 1983. There is, however, no regional convention in Asia (Gleick, 1999).

The details of the emergence, specific content of various human rights instruments, and their working (or lack thereof) have now been widely documented (see, for instance, Vijapur and Suresh, 1999). Here I will concentrate on two important features of the rights discourse at the international level. One relates to the different kinds of rights that have emerged since UDHR and the relationship amongst them. The second relates to the emergence since the 1990s of what Wilson and Mitchell (2003) call 'rights talk' in a variety of realms.

Beginning with civil and political rights such as right to free speech and right to association, rights have been extended not only to economic, social, and cultural domains (such as right to health), but also to group rights (ranging from the rights of minority protection within states to rights to national development within a global order, right to self-determination, and right to environment). For instance, the Right to Development was proposed as a human right in the early 1970s and accepted by the UN General Assembly's 1986 Declaration on Right to Development. These three kinds of rights are often said to correspond to three generations of rights, because of the order in which they gained prominence in the human rights regime. The relationship between the first two sets of rights has been particularly controversial, the point of contention being whether they are separate and distinct or inter-dependent, and whether one set can be prioritized over the other, or whether both sets of rights have to be aimed at simultaneously. This point is important because the nature of obligations of the state under a possible right to water would depend on which of the two sets of rights it is perceived as belonging to.

One view is that the two groups of rights are separate and distinct, and that civil and political rights should be prioritized over social and economic rights; further, the former set of rights are seen as negative rights (and therefore supposedly implying a lesser role for the state) and the latter as positive rights. However, others argue that the two sets of rights are inter-

⁵ The UNCHR has recently been replaced by the Human Rights Council.

dependent. For instance, while civil and political rights are necessary to fight effectively for socio-economic rights, at the same time, some forms of adequate standards of living may be necessary background conditions for exercising civil and political rights (Gavison, 2004). Hence both sets of rights are equally important to human welfare and must be considered equal in importance and status. Further, the distinction between positive and negative rights is held to be problematic in that *both* involve state intervention and commitments for their protection (Mehta and Madsen, 2003).

While the second vision is implicitly present in the 1948 UDHR and explicitly affirmed in the Vienna declaration of 1993,⁶ the two 1966 Covenants and much actual practice treat the two sets of rights differently (Freeman, 2002). The result is that even today, there are differences in the enforceability of the two sets of rights. In the case of ICESR, the duty of the state is only to reach an adequate level of protection, but in the case of ICCPR, a higher degree of duties are imposed on the state. Further, Gavison (2004) argues that while the international community accepts some responsibility (at least in theory) for ensuring that civil and political rights are not violated, especially when the violations are crimes against humanity, there is no similar commitment in the context of economic and social rights (other than a general commitment to cooperation and coordination).

I now move on to the second feature of the rights discourse at the international level. In spite of a plethora of human rights instruments, until the early 1990s, international human rights law had been a marginal topic confined to a small community of utopian community lawyers. This changed in the 1990s not only with the development of a global human rights machinery, but also with 'rights talk' in other areas such as rights-based approaches to development and the (re)conceptualization of concerns over gender inequality as 'women's human rights'. Wilson and Mitchell (2003) see this rise of rights talk and institutions of global justice as affording an opportunity to create a more expansive and inclusive approach to democracy, citizenship, and justice. Similarly,

Baxi (2002) points out that even though international human rights standards and norms are not radically ameliorative of here-and-now human suffering, they do empower people's movements and conscientious policy-makers everywhere to interrogate practices of politics. At the same time, the proliferation of rights has led to increasing skepticism about the validity of their claims, as well as concern about the varying (and often incommensurable) positions that they often stem from (Chandhoke, 1998).

2.2.3 Debates about human rights

The idea of human rights has been subject to critique on a variety of counts, the most important being their individualistic nature and the imposition of a particular set of values. Both of these stem from the notion of universality of human rights discourse (Gledhill, 2003), and is seen as yet another instance of Western tyranny. There is also a more recent anthropological critique of human rights which focuses on the working of rights at the level of social practice.

The first critique focuses on the fact that the human rights regime locates individuals as the bearers of rights, whereas many groups may seek to define their entitlements in collectivist terms. Further, the individualistic nature of rights might result in the erosion of solidarity and bonds of community. However, some of the so-called second and third generation rights combine individual and collective aspects – trade union freedoms, rights of the family, people's rights such as right to development, and right to a healthy environment. Note that collective rights are also problematic; for instance, when indigenous communities are given the right to govern their communities by communal consensus, dissenting individuals within these communities may be disadvantaged (Gledhill, 2003). In fact, both the extremes – the classical individualist notion of rights as claims of individual citizens sanctioned or recognized by the state, and the collectivist notion that gives priority to social claims over individual claims – are problematic (Mohanty, 1998). Further, the bearer of both individual and group rights are citizens, a category that

⁶ The Vienna declaration is the final document of the World Conference on Human Rights, the first post-Cold War international conference on human rights

is problematic because it disenfranchises large numbers of individuals and groups such as migrants; this is because 'human rights' in liberal theory flow from membership of a political community (that is, from citizenship) and not of a laboring community (that is, from residence) (Mamdani, 1998).

The second critique focuses on efforts to impose a universal moral framework via human rights. This involves two arguments. The cultural relativism argument is that the current form of human rights is based on a set of values that are important in one particular culture, and that these may not be important in other cultures. The Asian values version of this is exemplified in the 1993 Bangkok declaration that a collection of Asian states issued to the UN Conference on Human Rights held in Vienna. The declaration stated that westerners should not try to interfere in their internal political affairs since 'Asian values' provide a superior basis for social and political regulation. Another variant of the cultural relativism argument is that Asian societies base their social structures on duties and obligations rather than rights.

There are a number of counter-arguments to the cultural relativism critique of human rights. Firstly, the argument of relativism is often used by governments to legitimize their exploitative behavior (Wilson and Mitchell, 2003). Hence Freeman (2002) argues that this argument is biased against the poor; the apparent consent of those who lack the resources for dissent is false consent, and justice requires that the weak have a real capacity for choice. Secondly, Inoue (2004) argues that the attempt to oppose 'Asian values' to the 'Western' concept of human rights is untenable and dominated by the same West-centrism that those who make this attempt claim to overcome. More specifically, the Asian values discourse also ends up using the Western normative language of state sovereignty and socio-economic rights to subsistence in order to justify Asian values. Thus, for instance, the rejection of civil and political liberties as specifically Western values is premised on the West-originated concept of state sovereignty. Similarly, the anti-universalistic stand also relies on universal principles such as the value of cultural difference (Freeman, 2002). Thirdly, even if the language of human rights is basically related to European history, the ethical dimension underlying it is present in many cultures. Finally, even if one

accepts the fact that the social and cultural values of societies that are relatively affluent play a prominent role in defining the terrain of 'universal' rights discourse, Gledhill (2003) argues that this does not itself invalidate the discourse as a set of goals, although it does mean that there is a hegemonic thrust to the way western rights discourse operates.

The second argument involved in the critique of the universalistic nature of human rights deals not with the differences in the perception and importance of rights across cultures, but with the fact that the impact of differences in dimensions such as class and gender are ignored in efforts to judge behavior from the point of view of human rights. As Gledhill (2003) argues, appeals to an absolute, supposedly universal standard of rights assigned to each individual cannot be meaningful when the basic structures of socio-economic inequality (differences in access to material resources, and to social and economic power) deny some individuals the space to work with such standards. For instance, the universal application of the idea of child rights without considering the socio-economic constraints that force families to send their children to work is meaningless. Similarly, feminists have argued that human rights address violations by states, but do not address the violations that women suffer at the hands of men in the private sphere (Freeman, 2002). Another related point here is the politics of cultural representation involved in human rights debates. Often a mistaken respect for culture involves taking the interpretation of dominant elites or majorities as representing cultures, at the expense of the views of subordinate groups or minorities. Anderson and Guha (1998), for instance, shows how particular concepts of rights and justice have developed in official legal systems at the expense of others, even though they have also been questioned, appropriated, and challenged by groups in civil society.

Finally, there is also an anthropological critique of the definition and operation of rights. This critique accepts that there are differences between global rights language and the language of rights as used in local, every-day level situations, but moves beyond the idea of a 'clash of cultures' or the polarities of tradition versus modernity, and western versus non-western. For instance, Wilson and Mitchell (2003) look at rights at the level of social practice and examine how a rights regime

creates certain types of subjectivities (victims, perpetrators), while glossing over other identities that these individuals might wish to assert (survivors, freedom fighters), thereby resulting in a depoliticizing of ideological conflict.

As we will see in Chapter 3, all these debates find resonance in the discussion of the different dimensions of the right to water. The first critique that focuses on individuals as the bearers of human rights translates in the case of the right to water into the question of the unit to which water rights should be assigned (the individual, the household, or an association of water users). The second critique of a universalistic conception applies to questions of pricing (where ignoring willingness and ability to pay across different classes could have serious negative consequences on equity), and to how policies regarding different aspects of the right (the kinds of privatization that are encouraged, for instance) are shaped by a variety of factors including international trade and service negotiations. The third critique – about keeping in mind the working of rights in social practice – is important in order to appreciate the link between right to water and access to social power, as well as the linkages between right to water and other rights such as those to housing and health.

2.3 RIGHT TO WATER

Among the many economic, social, and cultural rights that have increasingly come into focus in recent times, an important one is the 'right to water'. The idea of an explicit right to water has come into focus particularly in the last quarter of the twentieth century. The various dimensions that such a right would involve are dealt with in detail in Chapter 3; the evolution of the right to water in the international human rights discourse is discussed in Chapter 4. In this section, I focus on the question of whether it is useful to institutionalize a 'right to water' in the human rights discourse.

Before turning to the question of institutionalization of a right to water, it is necessary to point out that the idea of 'right to water' mirrors the tensions between legal and non-legal usages of human rights. Thus many proponents emphasize the right to water as a basic right stemming from human dignity, while others emphasize the aspect of legal recognition in international and national law.

The question of institutionalization of the right is particularly relevant to the second usage. While institutionalization would have to take place at different levels, the focus here will be on international human rights law; the need for institutionalization at other levels and the forms it can take will be discussed briefly in Chapter 7.

One major justification for the institution of a universal human right on access to safe and adequate water is that it is one possible approach to legal protection (even if that is not the only avenue of legal protection, and other non-legal avenues might be needed in many contexts). However, there is also the question whether the enunciation of a human right to water (like all other human rights) renders any useful function, especially given that there is already a plethora of rights. The counter-critique to this is that there is only a plethora of 'soft' human rights laws (such as exhortative resolutions and declarations) and not enough 'hard law' which can be enforced, a point that Baxi (2002) makes in a more general context.

A more relevant argument against the institutionalization of one more right as a human right might be that such institutionalization leads, not to more secure protection, but to its protection in a form that is less threatening to the existing system of power. But here too the important point is not that human rights should never be institutionalized, but that institutionalization is a process involving power, and that this process itself needs to be analyzed and not assumed to be beneficial (Stammers, 1999 cited in Freeman, 2002).

Secondly, while the right to water begs a number of definitional questions and assumptions, having a formal human right to water is still useful because it could help shed focus on certain questions like government obligations, setting priorities for water policy, identifying minimum water requirements and allocation, and so on (Calaguas, 1999 cited in Ahmed, 2005).

Finally, the usefulness of international human rights law is also questioned on the grounds that there is no relation between it and domestic laws; however, as Pant (2003) argues, the problem is more that some international laws like trade agreements have gained supremacy over other international laws like

human rights agreements. Hence what might be called for is that trade agreements should be based on more humanitarian grounds and/or that human rights agreements should be treated on par with trade agreements. The caveat here is that human rights could end up being used for one-sided protectionist policies by developed countries (as when inadequate labor standards are used as an excuse by developed countries to prevent import of goods in which developing countries have a comparative advantage).

2.4 RIGHT TO DEVELOPMENT

Among the third generation of human rights, an important one is the right to development, i.e., the right to a particular process of development that ensures the realization of all human rights (civil, political, economic, social, and cultural). This was publicly proposed as a human right in the early 1970s and accepted by the UN General Assembly's 1986 Declaration on Right to Development (CDHR, 2004). Two reasons make it relevant to a discussion of a rights-based approach in water. Firstly, the right includes equality of opportunity for all in their access to basic resources, which would include water, and hence could provide the basis for a right to water (UN, 2004). Secondly, and perhaps more importantly, the differences between the right to development and the current rights-based approach to development, are useful to understand the potential that rights discourses have to bring about equity.

The 1986 UN Declaration was one part of a decade and a half of struggles by radical Third World states within the United Nations to pass a package of reforms that would result in a New International Economic Order that was fair to poor countries. Although the declaration that was finally passed was non-binding and a watered-down version of what was originally proposed, it did emphasize the global dimension of inequalities between North and South, as well the collective duty of all states to eliminate barriers such as unfair trade rules and the debt burden (Nyamu-Musembi and Cornwall, 2004). However, as we will see in the following section, these aspects of the right to development are missing in the rights-based approach to

development that emerged in the 1990s. Even later references to the right to development seem to have focused less on the political question of inequalities (whether at the global or other levels), or even of what exactly development entails, and more on the mechanisms by which the right can be widely achieved (see for instance, CDHR, 2004).

2.5 RIGHTS-BASED APPROACH TO DEVELOPMENT

The increasing adoption of rights language emerged in the post-Cold War period in the early 1990s, and gathered momentum in the build up to the Copenhagen Summit on Social Development in 1995; it was also aided by a number of factors such as NGO initiatives in integrating rights and development, and a growing emphasis on participation (Nyamu-Musembi and Cornwall, 2004). While a variety of actors – donors, governments, activists – have adopted the language, international development agencies probably represent the group that has taken on this language the most, resulting in what is now called the rights-based approach (RBA) to development.⁷

Rights language is used in diverse ways by different international agencies, and has resulted in a range of different methodologies and operational practices. For instance, a rights-based approach to development is often equated to a human rights approach to development (for instance, by the UN Office of the High Commissioner for Human Rights). Here a rights-based approach tries to integrate the norms, standards, and principles of the international human rights system into the plans, policies, and processes of development (OHCHR, n.d.). However, Eyben (2003) (cited in Nyamu-Musembi and Cornwall, 2004: 14) argues such a human-rights approach "signals an emphasis on legal codification and normative universality of rights", and must be distinguished from a rights-based approach that would include "a more all-encompassing reference to people's general sense of equity, justice, entitlement and/or fairness". This distinction is important because people often frame and make rights claims outside of formal legal instruments and institutions using a wide range of strategies, a

⁷ Although the current rights-based approach has a relatively recent history in the discourse of international development agencies, the principles articulated in it have been part of earlier struggles such as the nationalist and anti-colonial movements.

fact which is often not acknowledged by RBA (Nyamu-Musembi and Cornwall, 2004). Similarly, there is a difference of opinion about whether a human rights-based approach to development is part of the right to development (as put forward in CDHR, 2004), or whether the two are distinct (as Nyamu-Musembi and Cornwall, 2004 argue).

Nyamu-Musembi and Cornwall (2004) point out that there are different takes on the potential of RBA, with some seeing in it the promise of re-politicizing areas of development (e.g., participation) which have been 'sanitized' by institutions such as the World Bank, and others who point out that is just repackaging of 'old wine in new bottles'. The arguments regarding both the possibilities and pitfalls of RBA are briefly summarized here.

One major potential that RBA opens up is a greater focus on obligations. Since governments are primary duty-bearers in a rights-based approach (WHO, 2003), it could be used to pressurize states through accountability and transparency tools. In fact, RBA could also be used to address issues of accountability of non-state actors. The counter-argument to this is that even as funding countries and agencies see aid-recipients as rights-bearers, they usually do not see *themselves* as bearing any defined duties that contribute to the concrete realization of these rights (Nyamu-Musembi and Cornwall, 2004).

Secondly, the focus on rights could lead to development being viewed as expanding the choices of individuals (an approach which is related to Sen's concept of entitlements discussed in Section 2.7). In the case of poverty programs, for instance, this would mean shifting from a focus on increasing income through economic growth to expanding freedoms (UNDP documents summarized in Nyamu-Musembi and Cornwall, 2004). However, using the discourse of rights to enable people to empower themselves to overcome obstacles in the realization of social and economic rights may involve opting out of public services instead of making demands on the state. Hence a rights-based approach could also imply a reduced role for the state (e.g., in terms of provision of basic services such as water). This has led to fears that the rights-based approach is a donor-driven agenda with a deeper purpose

of reinforcing neo-liberal values and interests (such as a focus only on individual rights), or of imposing singular Western notions of what rights and development mean (for instance, a reduced role for the state) (Escobar, 1994).

Thirdly, RBA also has the potential to influence how donors regard (and administer) aid. One example of such a change is given by the experience of CARE staff involved in a refugee assistance project. Nyamu-Musembi and Cornwall (2004) discuss how CARE staff earlier used to feel that the situation of people receiving assistance was precarious, and that they would be expected to make do with whatever relief agencies were willing to offer. With a focus on rights, this changed to a recognition of refugees as human beings who are entitled to a minimum threshold of service provision necessary for a life of dignity. What followed then is not just a change in attitude, but also the freedom to take up particular issues. One example of this is when a CARE official used the justification of an RBA to successfully question the UN's implicit support of the policy of the Kenyan government to withhold basic services from Tanzanian refugees in Kenya in order to pressurize them to return to their country. Hence even though what is actually being promoted as rights-based is not in itself necessarily different from what development practitioners have been doing all along, there is a view that lending these practices the support of internationally agreed legislation does change the way in which they come to be viewed by development agencies and national governments.

Fourthly, rights language could be selectively appropriated and used. Thus, the World Bank claims that it is contributing to the realization of economic and social rights through its work of poverty reduction, but at the same time holds that civil and political rights (except insofar as they contribute to social and economic development) are outside its purview, ostensibly because its Articles of Agreement forbid involvement in political considerations. The Bank is also not willing to take measures to recognize and redress the negative human impact of its work in the realm of development (such as the lending to big dams). In the case of water, the World Bank justifies the privatization of water services in terms of rights, and more specifically the creation of a system of tradable water rights, which will allocate

water through market mechanisms. Although part of the rationale for such a system is to enable less powerful groups to also have secure water rights, in actual practice, the emphasis continues to be on profitable use of water; there is no reference to the need to first secure a minimum level of entitlement that should be available to all before the proposed market mechanisms are considered, if at all (Nyamu-Musembi and Cornwall, 2004).

At the same time, the potential of RBA can be appreciated by the fact that the same rights-based approach in the case of a United Nations Children's Fund (UNICEF) document related to water translates into an emphasis on securing basic levels of service for all, the need for regulation to ensure both efficiency and fairness, and skepticism about the effectiveness of market mechanisms to allocate water resources equitably across income groups and across competing uses (Nyamu-Musembi and Cornwall, 2004).

Finally, RBA could potentially serve as an opportunity to reflect more broadly on the power dynamics inherent in the practice of international development and on the question of ethics. However, it is important to note that this potential is limited by two factors. Firstly, for many development organizations, the process of integrating rights merely involves adding rights language and a legal or advocacy dimension to their work, instead of weaving together this dimension with development work in ways that could craft viable options to inequitable economic, social, political, and cultural structures (VeneKlasen *et al.*, 2004). Secondly, unlike the 'right to development' debates of the 1970s and 1980s, the rights-based approaches discourse has largely been articulated in ways that sidestep questions of donor country or multinational corporate duties with respect to the rights of poor people in the South; the emphasis is entirely on the citizen-state relationship at the country level (Pettit and Wheeler, 2005). In fact, Nyamu-Musembi and Cornwall (2004) argue that one reason for the acceptance of rights language by the governments of rich countries has been the perception that it does not bring with it the ideological baggage of the right to development (that is, references to global inequalities or duties beyond that of one's own state).

The foregoing discussion brings out that both the conceptualization and implementation of a rights-based approach can vary, depending on the particular actors involved and the social and political context in which they function.

2.6 WATER RIGHTS

The concept of water rights is often conflated with the right to water. However, water rights are best regarded as a sub-set of the right to water; while the concept of right to water includes a variety of dimensions such as access to water, affordability, ownership, delivery, and participation in decision-making processes (which will be discussed in Chapter 3), water rights refer specifically to the particular sub-set of these dimensions that are pertinent from the point of view of the right-holder.

For instance, when one considers the ownership dimension of right to water, there are a number of 'sticks' that constitute ownership. But of these, the most relevant sticks for the right-holder are operational rights (or rights of usage) and decision-making rights (especially about the working of institutions involved in the management of water), and water rights usually refer to these two sets of rights (Beccar *et al.*, 2002; Boelens and Zwarteveen, 2002). On the other hand, ownership of the resource itself (whether absolute or limited by doctrines such as that of public trusteeship), as well as the broad determination of the nature of water rights and their distribution, are sticks that are more relevant for the state, even though these do play an important role in influencing the nature of water rights held by particular individuals or groups.

I now turn to a number of features of water rights.

Firstly, the term 'water rights' is generally used in the context of water for non-basic needs i.e., not for water for drinking or household needs, but for irrigation and other livelihood needs.

Secondly, water rights have three dimensions – socio-legal, technical and organizational (Boelens and Zwarteveen, 2002). The socio-legal dimension ensures that the particular right is recognized as legitimate (by law or tradition or social relations of authority), both by users and non-users. Recognition must also be accompanied by a capacity to defend rights

against competing claimants, without which the right ceases to be meaningful. The technical dimension ensures that the means (infrastructure, technology, and technical skills) to take water from a source and convey it to fields is present, that is, the water right can actually be used. The organizational dimension refers to the mobilization of the means (labor and resources) for operation of the infrastructure, allocation of water, formulation and enforcement of collectively required rules and rights, and decision-making around these issues.

Thirdly, the institution of a system of transferable water rights (with a pricing system capable of capturing and reflecting the real value of water) is believed by many (see, for instance, Saleth, 1996) to be essential to an efficient functioning of water markets and water user groups. In fact, the neo-liberal version of water rights basically just refers to such tradable permits, and not necessarily to access to the decision-making process.

Fourthly, what rights include, as well as whether all users have different or equal rights, would vary across different irrigation systems, depending upon particular physical, agro-ecological, socio-cultural, and political conditions (Beccar *et al.*, 2002). The important point is that there must be space to allow for this kind of flexibility, while at the same time ensuring that some minimum standards, particularly in terms of equity, are met. However, space for such flexibility is often missing in practice. For instance, in recent times, the World Bank has promoted formalization of water (property) rights with the objective of providing security and certainty of legal title, so that right-holders may defend and assert their water rights vis-à-vis third parties, trade them, and use them as collateral for raising finance. But the process of formalization has been criticized as not being attuned to particularities of place and time (Spiertz, 2000). For instance, in the context of Andean water reforms, Boelens and Zwarteveen (2005) argue that the diverse property regions that have existed in the region show that the tenure of water was typically insecure for large sections of the population even in periods characterized by privatized regimes. Hence it is more useful to consider the question of how to create the infrastructure, laws, and institutions that allow

security of water tenure, rather than how and whether to privatize and trade water.

Finally, I turn to a point which was mentioned in the context of the socio-legal dimension of water rights, but which needs a little more discussion because it raises broader questions about the importance of law to both define and understand rights. This is the concept of legal pluralism – i.e., the co-existence of rules and principles of different origin and legitimization in the same domain. Rights can be recognized as legitimate by a variety of sources – formal law, customary law, tradition, and social authority. Further, plurality of law is not only seen in terms of different normative systems pertaining to one domain of social life, but also in the way in which one legal rule or one institution can manifest itself differently in different levels and contexts (Spiertz, 2000). In the context of water rights, the idea of legal pluralism is useful for a number of reasons. Firstly, it serves to emphasize that what a right is cannot simply be 'read' from legal texts and written laws, but obtains its meaning in the particular contexts in which it is discussed, used, and applied (Boelens and Zwarteveen, 2005). Secondly, there is a danger in over-emphasizing statutory rights too much, especially at the expense of other possible means of ensuring rights and bringing about change. Thirdly, without taking into account the role of local law and practices, it would be difficult to understand the possible consequences of any proposed intervention (Spiertz, 2000).

An example based on Vasavada (2005)'s discussion of Aga Khan Rural Support Programme's work in participatory irrigation management in South Gujarat will make this point clearer. It was found that once a Water Users' Association was formed and was governed by the byelaws of the state, male farmers also started seeing the working of the WUA from that point of view. For instance, they would hold that women could not become members of societies because they did not have land in their names, which is a requirement for membership as per the byelaws. This was a situation when a particular normative framework (the legal one) was employed by men to justify their preventing women from becoming members, even though the real cause for their behavior may be found more in a particular conception of gender roles in agriculture (Vasavada, 2005).

2.7 CAPABILITIES, ENTITLEMENTS AND RIGHTS

One major potential of rights-based approaches is their potential to link 'rights' and 'development'. However, as the section on rights-based approach shows, it is not obvious how this linkage is to be operationalized in practice. One possible way to do this (which has been attempted by UNDP) is to use Sen's concept of capabilities (CDHR, 2004). The concept of capabilities has also been put forward by Nussbaum (2000) as offering a better basis than rights to approach the idea of a basic social minimum to all. Another concept that is related to capabilities, and is often found in discussions of rights-based approaches in water as well as in discussions of equity, is the concept of entitlements. Hence it would be useful to review the concepts of entitlements and capabilities.

The concept of entitlements has a long history in moral philosophy, starting from Locke in the seventeenth century to Nozick in the twentieth century (Gasper, 1993). However, it was Sen who brought the concept into focus with his analysis of famines in West Bengal, where the failure of entitlements to cover subsistence needs was put forth as the key cause of starvation and death. This was against the conventional notion of a famine as arising because of inadequate supply of food. A number of inter-related concepts were put forward by Sen in his analysis.⁸ A person's set of resources, including their labor power, is his/her *endowment*. A person's effective legitimate command (i.e., the set of commodity bundles that can be legally attained by using one's endowments and opportunities) is his/her *entitlement*.⁹ *E-mapping* refers to the relation that specifies the set of possible commodity bundles that are legally attainable from any given endowment, through trade and/or production. Thus it reflects the rules, conditions, and processes which affect how one's entitlements are derived from one's endowments. Types of possession/acquisition/claims that are deemed legitimate in a given case are determined by *rules of entitlement*

such as legal rights concerning private ownership of goods and factors of production plus other social rights. A person's *capability* refers to the alternative combinations of functionings (things which a person may value doing or being) that are feasible for him or her to achieve. The relation between entitlements and capabilities is that entitlements enhance people's capabilities and consequently their well-being.

Following Sen's formulation of entitlements in the context of famines, there are now several extensions to entitlement analysis applied to issues ranging from privatization, households, and environment.¹⁰ There have also been a few attempts to apply Sen's entitlement approach to understand access to water supply (see, for instance, Anand, 2001). But the theoretical concepts and approach have generated a lot of debate. For instance, there is criticism about the fuzziness about the meaning of the term entitlement, both in the context of common property resources (Devereux, 2001) and in terms of whether it is a positive or a normative concept (Gore, 1993 cited in Gasper, 1993). For instance, although the central sense of 'entitlement' is 'what one has title to', there are many types of possible or proposed titles – moral, legal, de facto. Further, the term 'entitlement' already has a normative meaning in discussions in moral philosophy preceding Sen's analysis. Hence although Sen's own usage is descriptive, its normative associations inevitably influence the use of the term in practice; confusion also arises from its reference not to actual receipts of people but to what they could potentially acquire (Gasper, 1993). Sen's formulation is also believed to overlook the centrality of political processes as well as the fact that individuals are socially embedded members of households, communities, and states (Devereux, 2001). Similarly, even many later formulations of 'extended entitlements' (which go beyond legal rights as a means of acquiring entitlements) do not go far enough in terms of the range of possible mechanisms for resource access and control that they include (Leach *et al.*, 1999). These formulations also fail to acknowledge conflicts

⁸ The subsequent discussion draws heavily on Gasper (1993).

⁹ Gasper (1993) points out that 'entitlement' is an extension of the concept of purchasing power in micro-economics, to cover acquisition potential as a whole, not only via exchange.

¹⁰ For a brief summary of these, see Gasper (1993).

between legal and non-legal channels, and the fact that rules of entitlement are themselves subject to negotiation and struggle, and involve debates over meaning (Gore, 1993 cited in Leach *et al.*, 1999).

In spite of all these criticisms, two variants of Sen's approach are potentially useful in the context of the idea of 'right to water'. One is Nussbaum's capabilities approach, which looks at how people are actually enabled to live, using a given set of rights. Nussbaum (2000) argues that while the language of rights could be useful in the realm of public discourse (e.g., to remind that people have urgent and justified claims to certain kinds of treatment), the many philosophical disagreements with respect to the issue of rights (such as the basis of rights claims and whether rights are part of a social goal or side-constraints on goal-promoting action) mean that capabilities¹¹ provide a better philosophical basis for analyzing economic rights. Nussbaum argues that rights can be analyzed in a number of distinct ways – in terms of resources, utility, or capabilities. Giving resources to people does not always bring differently situated people up to the same level of capability. Similarly, in the case of utility-based analysis, the problem is that traditionally deprived people may be satisfied with a very low living standard, believing that this is all they have any hope of getting. According to Nussbaum, the advantage with a capabilities approach is that it looks at how people are actually enabled to live, and offers a clear rationale for spending unequal amounts of money on the disadvantaged, or creating special programs to assist their transition to full capability. Even though it is not clear that capabilities take clear positions on the debates arising in the context of rights (as Nussbaum, 2000 claims), the concept is still useful, especially as a standard against which to evaluate rights such as the right to water (the standard being that a certain minimum threshold is ensured to all), or to link rights and development. It would mean, for instance, that one is less concerned with coming up with a particular amount of water that all individuals should have and more with what people can

do or be with (potentially different amounts of) water.

The second variant of Sen's entitlement approach focuses on endowments, instead of on the failure of entitlements or on capabilities. While it is true that endowments are often not translated into rights, Leach *et al.* (1999)¹² and Menon (1999) point out that the prior concern must be endowments. Equity of resource endowments, where right to water would be one among many endowments, is one way to address concerns about social justice. In fact, Menon argues that as long as there is space for flexibility in defining the basket of endowments, concerns about cultural specificity can also be dealt with within this approach. The endowment approach put forward by Leach *et al.* has the additional merit that it emphasizes claims-making capacity as an endowment, which social actors combine with other endowments in their attempt to achieve effective command over environmental goods and services. This is important because entitlement failure "frequently results less from people's lack of institutionally grounded claims, but from their incapacity to make claims "stick" against those of more powerful actors in the context of resource struggles" (Leach *et al.*, 1999: 241).

2.8 CONCLUSION

This chapter reviews different rights-based concepts that are relevant to water. Among all the rights-based concepts, human rights have perhaps played the most significant role since the second half of the twentieth century. Even given the ideological baggage of the concept as well as its limitations, it is still useful to engage with it because it can force nation-states to address certain concerns as well as offer interesting lessons for the formulation and working of a right to water (such as allowing adequate space for differences across cultures and ecological systems). The concept of right to water is used most by organizations working in the realm of human rights and water, while the rights-based approach to development is mainly used by international development and donor agencies. Both mirror themes that are

¹¹ Note that Nussbaum's use of capabilities is slightly different from Sen's usage of the term.

¹² Leach *et al.* (1999) put forward the concept of environmental entitlements, which extends entitlement analysis to explain how access to and control over natural resources are also socially differentiated.

found in the discussion of human rights, particularly the tension about the basis of claims and the sources of legitimization (that is, the legal versus non-legal aspects of the rights) as well as the obligations of the state. The discussion of right to development and rights-based approaches also helps to bring in focus the fact that a rights-based discourse must be used very carefully if one is to avoid its co-option into agendas that work against the goal of social justice. The discussion of water rights helps to unpack the bundle of sticks that constitute ownership. Finally, the discussion of rights, entitlements, and endowments offers a theoretical foundation for linking a rights-based framework to equity.

In the rest of the report, the main focus will be on the concept of right to water. The sense in which I use right to water is not as 'human right to water', but more as a right arising from human dignity. Note that a right to water is only one sub-part of a rights-based approach to development (generally or in the specific context of water). A rights-based approach would be broader than a right to water in that it would also consider how water policies affect other economic, political, social, and cultural rights. While the inter-relation between these different kinds of rights will be briefly considered in this study, it is not the focal point. The main aim is to delineate the contours of a right to

water and the complexities involved both in its conceptualization (Chapter 3) as well as its working at different levels (Chapters 4, 5, and 6). However, this discussion does shed some light on how a rights-based approach is useful in the context of development.

Further, as Nyamu-Musembi and Cornwall (2004) point out, any version of the rights-based approach needs to be analyzed in terms of its normative content – that is, in terms of what ideals it invokes, what vision it represents, and how this vision is contrasted with existing practice and turned into a basis for reorienting development practice and practitioners. In Chapter 1, I have already discussed that the normative vision underlying this review of the right to water is that of social justice and equity, for which the two variants of Sen's entitlements approach – Nussbaum's approach focusing on capabilities, and the approach suggested by Leach *et al.* and Menon focusing on endowments – are useful. While the report itself basically deals with the rights discourse (and not on endowments or capabilities) for reasons outlined in Chapter 1, the idea of the right to water constituting an endowment, as well as the idea of rights helping to increase capabilities in order to ensure a certain minimum threshold to all (à la Nussbaum), if not full capability equality (à la Sen), will remain an underlying theme throughout.



CONTOURS OF A RIGHT TO WATER

3.1 INTRODUCTION

Having provided a brief background of different rights-based concepts in Chapter 2, I now turn to a discussion of the concept that is the main focus of this review viz., the right to water. Realizing the right to water, like all economic, social, and cultural rights, requires greater specificity in the content of the rights themselves, along with profound changes in the structures and budget priorities of governments as well as broader mobilization to claim them (Nyamu-Musembi and Cornwall, 2004). This chapter aims to clarify the content of the right to water i.e., the different dimensions involved in it. How these dimensions play themselves out in the Indian context as well as in the case of Maharashtra will form the subject of Chapters 4 and 5 respectively.

One can distinguish between seven broad dimensions that need to be discussed. The first dimension concerns the scope of the right to water. This includes questions such as what kind of needs should be considered within the ambit of the right to water (drinking, personal hygiene, household needs, livelihood requirements) and the quantity and quality requirements for each of these, as well as accessibility and affordability of water. The second dimension concerns the duties and responsibilities implied by the right. There are two aspects to this. One is the question of who the ultimate bearer of responsibility for the right is. A related point here is what implications the right to water has for the developmental functions of the state. The second question is whether the right to water entails any duties on the part of the right-holders.

The next three issues – ownership of water resources, the kind of system set in place for water delivery, and pricing of water – are related, among other things, to the question of whether water is to be treated as an economic good. An influential view in the realm of water has been that treating water as an

economic good would result in improved efficiency, equity, and sustainability. This has usually meant that market-based delivery systems are put in place, and that water is priced at its economic value; the question of ownership of water is a little more unclear in this view, although the establishment and enforcement of an effective (individual) property rights regime is usually considered critical (see, for instance, Saleth, 1996). Further, for some actors, market remedies and privatization solutions for growing water scarcity and quality problems are congruent with goals about social justice (including rights of the poor to water). For others, it is not clear that treating water as an economic good will lead to equitable access to water.

The sixth dimension concerns the relation of the right to water with other rights such as right to housing or right to development. This is important partly because all rights have complementarities and conflicts with each other, and partly because in the specific case of water, its use as an input in many production processes (be it in agriculture or industry) means that the relation between water and the development process becomes critical. The seventh dimension of a right to water deals with a number of changes in the international arena (both in the realm of water and otherwise) that will impact both the content and the working of the right.

Before moving on to a more detailed discussion of each of the seven dimensions in the rest of the chapter, a couple of points need to be noted. Firstly, these dimensions are not unique to the rights discourse, and have been discussed in a variety of contexts before. But bringing these different issues together helps to (a) bring out the inter-connections between them and (ii) re-enforce the fact that even defining what a right to water is complex (let alone realizing it). Secondly, there is no universally correct 'answer' to the questions raised by each of these dimensions; in fact, the provision of mechanisms that enable

context-specific discussion of these issues is as important a part of the right to water as the final resolution of the issues themselves. This is an important point to keep in mind when one turns to the practical implementation of the right to water.

3.2 SCOPE OF THE RIGHT TO WATER

Perhaps the most important question with regard to the scope of the right to water is what needs must be met under it. This, in turn, will determine the quantity of water that will be needed to satisfy the right.

In general, there is a fair amount of agreement that water for basic needs should be available to all. For instance, Gledhill (2003) argues that the right to water must be limited in quantity to basic needs for drinking, cooking, and fundamental domestic uses. However, there is no consensus on the exact amount of water that would satisfy basic needs,¹³ as well as whether one should have a universal standard or whether (and how) differences in requirement due to culture, climate, and technology should be taken into account. Basic water requirements suggested by various donor agencies such as the World Health Organization, US Agency for International Development, and the World Bank range from 20 to 50 liters per capita per day. However, greater amounts of water are also likely to significantly increase health and quality of life (CESR, 2003b). There is also the fear that suggesting a particular level of water provision can provide excuses for governments to 'lock' water provision at that level (UNESCO-WWAP, 2006).

Further, there are some who argue that the scope of a right to water should be widened to include water to meet livelihood requirements, especially in the case of those engaged in primary sector activities such as agriculture where water is an important input in the production process.¹⁴ This is a more controversial point, both whether the scope of the right should be extended in this manner, as well as whether water for livelihood requirements should be treated differently (in terms of pricing, for instance) than water for basic needs. One of the major hurdles in

extending the scope of the right to meet livelihood requirements is an economic one viz., the high financial, legal, institutional, and cultural costs for states in implementing a human right to water, leading to the suggestion that states could start with a basic needs right and then move onto a more holistic right (Bluemel, 2004).

Another related issue that the broader interpretation of right to water raises is the kind of development that water is used for. If the right to water is used to meet livelihood requirements by means of developmental processes that are problematic on grounds of equity or sustainability (for instance, cultivation of water-intensive crops in semi-arid regions), then the right becomes meaningless.

Apart from the question of the quantity of water needed to satisfy basic needs, any right to water would also have to set standards to deal with accessibility, affordability, and quality. The question of affordability of water will be further discussed in the context of pricing. But a useful conceptualization of 'affordability' is provided by WHO (2003). Firstly, affordability could be conceived in terms of a relation between income and expenditure on water; more specifically, no more than three to five percent of an individual's income is to be spent on water. While WHO does not discuss the possibility of this percentage differing across income groups, this might be a way to deal with inequities in income distribution. Secondly, WHO emphasizes the fact that what people can pay is not simply a matter of absolute income, but also of the expected income stream. Hence if people earn money on an irregular basis, this may deter them from entering into long-term arrangements which might be cheaper in the long run, but entail regular financial commitments.

Requirements of accessibility and quality have typically been less discussed than the question of quantity of water or pricing (Bluemel, 2004). This is in spite of the fact that the quality of water is related to questions of health. For instance, drinking water could be contaminated by a range of chemicals (lead, arsenic, benzene), microbes (bacteria, viruses, parasites), and physical hazards (glass chips,

¹³ In fact, apart from drinking, what constitutes basic domestic needs is not very clear.

¹⁴ The scope of the right to water may also include water for nature, or water to fulfill the basic ecosystem needs of water. This particular aspect is not considered in this study.

metal fragments) that could pose risks to health if they are present at high levels. In the light of increasing groundwater pollution as well as contamination of surface water bodies, which occurs due to chemical fertilizers and pesticides used in agriculture as well as dumping of household and industrial waste without treatment, the question of quality of water is slowly acquiring importance. Cases such as the arsenic contamination of groundwater in Bangladesh and West Bengal in the South Asian region have also helped to bring this issue into focus.¹⁵ It is also important to note that meeting adequate levels of sanitation is critical in order to ensure that water meets certain quality standards, because one of the primary causes of contamination of water is the inadequate or improper disposal of human (and animal) excreta.

In order for water to be secure and useable, everyone must also have safe and easy access to water facilities. For instance, in households using only a remote and unprotected source, health can be jeopardized by water contamination. Further, collecting water from distant sources could also mean that a lot of time is spent on the task, with the result that women and children (who are the ones who bear the burden of collecting water in many cultures) are unable to undertake other productive activities (like going to school in the case of children). In addition, there is also the risk of injury while carrying heavy loads.

It is important to note that questions of quality, access, and affordability differ for different uses of water, as well as across classes and gender. For instance, the quality of water would depend on the particular need in question: water for drinking would have to be of a higher quality than water for cleaning purposes, since health-related problems could arise not only due to insufficient water, but also due to problems in water quality such as fluoride contamination and arsenic poisoning. Similarly, Nanavathy (2000) (cited in Ahmed, 2005b) points out how

different 'types' of water are required by women for different purposes: for instance, women in coastal areas want brackish water to grow prawns and shrimps in, while textile workers want soft water to process their vegetable dyes for block printing. Questions of quantity, quality, access, and affordability are also inter-related. For instance, not being able to afford official sources of safe water might result in households having to use water from polluted streams and rivers (Mehta, 2004).

Hence one cannot just talk of water in a uniform manner. In fact, instead of posing the discussion of the scope of the right to water in terms of a fixed allocation of water (along with quality, accessibility, and affordability), it might be more useful, at least as a first step, to focus on the principle of equality and capability to do and to be (à la the capabilities approach of Sen and Nussbaum); that is, the idea that people all over the world should have access to safe, adequate, and affordable water in a manner that ensures a basic level of healthy functioning and well-being (Mehta, 2003b).¹⁶ But while this would automatically allow scope for inclusion of cultural and other kinds of differences in the right to water, it also means that more context-specific interventions become critical.

3.3 DUTIES/RESPONSIBILITIES IMPLIED BY THE RIGHT

For a right to water to be meaningful, there needs to be clarity on who bears ultimate responsibility for ensuring that water is provided to all as a basic human right. That is, who would be penalized and how in case of violations (a particular community, state or national governments, or the international world system), which body (such as an International Court of Justice for Water formed explicitly for this purpose or the International Water Tribunal)¹⁷ would be responsible for judging violations, as well as whether a system of compensation for those without water can/

¹⁵ Until the early 1970s, shallow hand-dug wells, rivers, and ponds were the main sources of drinking water for villagers in Bangladesh and West Bengal. But since surface water pollution was causing epidemics of cholera, aid agencies funded tubewells to tap groundwater, a practice that then became widespread. By the late 1990s, however, it was discovered that the arsenic level in many tubewells was way above safe limits, leading to a variety of health problems, including an increased incidence of cancers in the region (Anonymous, 1998).

¹⁶ Even if all people reach such a basic level of functioning and well-being, there would still be high levels of inequalities in society. Addressing these, by means of a right to water in conjunction with other rights, could be the next step.

¹⁷ The Tribunal is a nongovernmental organization seated in Amsterdam. It receives 'complaints' concerning water uses and establishes multidisciplinary 'juries' of independent experts to pass judgment on them and to make recommendations for their solutions (Alvarez, 2003).

should be put in place. While an international body could potentially judge violations, ultimate responsibility for implementing the right would have to rest within nation-states (though one could have variations in the level of state that bears this responsibility, depending on the degree of centralization or decentralization that one has in place). As Nyamu-Musembi and Cornwall (2004) emphasize, the only formal accountability that communities can expect is from their own government.

Apart from the question of who bears ultimate responsibility, the right to water would also impose obligations and responsibilities on the state to implement the right. Although this is fairly commonly accepted, there is disagreement on the precise nature of these obligations. For instance, Alvarez (2003) points out that state obligations with respect to a right to water as well as the methods used to enforce it are often construed as depending on whether it is understood as part of the right to life, or as part of the right to health, or the right to food, or as a proper right in itself. This is because right to life comes under the ICCPR, and the right to health and food under the ICESCR, and obligations under the two differ; the latter calls only for progressive realization whereas the former calls for immediate steps. At the same time, the dichotomy between the two sets of rights (civil and political on the one hand, and economic, social, and cultural on the other hand) has increasingly been questioned, especially in the case of basic needs such as food and water. In fact, many recent discussions of the right to water (such as UNESCO, 2002 and WHO, 2003) hold that the state should have obligations at the level decreed by the ICCPR.¹⁸

The responsibility of the state would also depend on whether we conceptualize the right as a positive right or a negative right; traditionally, a positive right (what is sometimes called an entitlement) is believed to increase the scope of the state's responsibilities far more

than a negative right (or a claim). Hence if a right to water implies a positive right, the state would have to play a proactive role in providing water. For instance, the state would have to actively protect existing water resources against polluting industries, and not merely react after such pollution has taken place. However, if it is interpreted as a negative claim right, the state would have to not interfere with existing rights to water, without necessarily having to take active measures to ensure water for all.

The perceived role of the state has also changed over time, particularly since the adoption of neo-liberal policies in the 1990s. During the water decade of 1981-90, governments were primarily seen as being the provider of basic services such as water and sanitation, although the participation of communities in decision-making was also encouraged. But by the time of the Dublin conference of 1992, and to date, the thinking is that the state should be the facilitator and the regulator rather than the sole provider (Hausermann, 1999). Even the introduction of a (human) rights approach need not necessarily put the onus on the government to be the sole provider, depending on the precise wording of the legislation. Thus in the South African constitution, the right to water (along with the rights to housing, health care, food, and social security) are subject to the limitation that "the state must take *reasonable* legislative and other measures, *within its available resources*, to achieve the *progressive* realization" of each of these rights.¹⁹ However, what 'reasonable' means and who decides it, as well as the question of how one judges specific instances of allocation of resources (that a government has at its disposal) between water and other competing claims, are unclear.

In general, the question of how to measure or evaluate state compliance and implementation of a right to water is a difficult one, although a number of possibilities have been laid down.

¹⁸ This would mean that the state has the obligation to respect the right, to protect it, and to fulfill it. The obligation to respect prohibits actions that undermine the right, including such activities as pollution from state-owned facilities. Obligations to protect the right to water require that states implement regulatory systems to control private-actor behavior that might interfere with the right to water. Obligations to fulfill the right to water include a responsibility to facilitate enjoyment of the right, promotion of the right through education measures, and provision of the right where individuals or groups cannot realize their right due to insufficient personal means (Bluemel, 2004).

¹⁹ Online version of Constitution of Republic of South Africa, 1996, Chapter 2, Sections 26 and 27; italics mine. Website: <http://ace.at.org/ero-en/topics/parties-and-candidates/constitution%20South%20Africa.pdf>, accessed on July 21, 2006.

These include measuring the general population's access to water, measuring the personal consequences of the lack of access to water, using the reporting systems of the ICESCR and of the ICCPR, and through the individual petition systems of complaints of the ICCPR and of the Inter-American Convention on Human Rights (Alvarez, 2003). But given that most governments, especially in developing countries, are already engaged in providing water directly or indirectly, it is not easy to judge what difference would be made in this process, and in general in the developmental obligations of the state, by having water as a human right (Mehta, 2003b). Nevertheless, the need for a right to water could still have other justifications – for instance, in terms of its use as a potential tool by actors in social movements (as will be evident in Chapter 6).

Finally, the question of duties and responsibilities is not just about who bears ultimate responsibility or what the obligations of the state should be, but could also include limits on the amount of water that one could consume, or restrictions on the manner in which it is used (Mehta and Madsen, 2003). While these aspects are particularly important from the point of view of equity and sustainability, they are also more controversial (for instance, the question of what specific measures – regulation, moral injunctions, and so on – that one would use to restrict consumption).

3.4 OWNERSHIP OF WATER

Not only are the questions of ownership, management, and pricing of water the most controversial ones in the context of any discussion of right to water, they are also probably the issues in which lack of conceptual clarity is the greatest. This is most evident in discussions of privatization, where the handing over of a particular aspect of water management (such as purification of water) to a private entity is often conflated with private ownership of the water resource itself (Paranjpye, 2005).

As the discussion in Chapter 2 brings out,

ownership is best seen as a bundle of sticks. From the point of view of the holder of the right to water, probably the most relevant stick is of usage (though other sticks such as transferability may be relevant in certain contexts). But when one considers the water resource as a whole, the sticks that become relevant are those of absolute ownership and of decision-making regarding the nature of rights and their distribution. It is these that will be discussed in this section. The particular institutional mechanisms that are actually involved in the working of water rights at different levels are discussed in the subsequent section on delivery of water services.

In terms of absolute control or ownership of water resources, the idea of private ownership has much less support than the ideas of market-based water delivery and water pricing (Bluemel, 2004). Even though water is not a public good in the strict economic sense of the term due to its divisibility (Langford, 2005), viewing water as 'belonging to the public' or as a public trust has considerable support under the Roman law or Common law doctrines (Solanes, 1999). Under this doctrine,²⁰ the state would be the trustee of the public. Although the public trust doctrine (or variants thereof) has been incorporated in the constitutions of a number of countries as well as in national legislation (such as the National Water Act of 1998 in South Africa), many still continue to vest the state with absolute control of water. This is particularly true in the case of surface water. Groundwater law in most cases is far less influenced by the public trust doctrine, and a common practice is that the owner of the surface land is also the owner of the water under the ground, though in some cases, often as a response to increasing groundwater pollution, groundwater is also controlled as public property or by invoking the police power of governments (Solanes, 1999).

The question of whether the state is merely a trustee or an absolute owner has important implications for the kind of policies that the state undertakes and the extent to which civil society initiatives can push for changes in the

²⁰ The public trust doctrine, developed in the ancient Roman empire, rests primarily on the principle that certain resources like air, sea, water, and forests have such a great importance to people as a whole, that it would not be justified to make them objects of private ownership. Being a gift of nature, they should be freely available to everyone irrespective of status. The doctrine enjoins upon governments to protect the resources for the enjoyment of the general public rather to permit their use for private ownership or commercial purposes.

water sector. This will become clearer in the discussion of state legislation and civil society initiatives with respect to water in Chapters 4 through 6.

Whether ownership of water is vested with the public or directly with the state, the other important question is who decides the allocation of rights over water, as well as delineates the exact nature and scope of these rights. Boelens and Zwarteveen (2005) argue that “the most important question in relation to water is not whether to price, privatize, sell or purchase, but rather who owns water access and control rights? What are the contents of these rights? Which acquisition mechanisms are deemed valid, and who has legitimate authority to defend, enforce, and sanction these water rights?”(p. 738).

Usually, it is the state that is the decision-making authority, although in principle, an independent statutory body could also undertake these functions. Even in the context of decentralization, where one may want to give greater powers to local bodies to take decisions about the use of water, the need for some kind of broad guidelines remains. What is crucial is that the process of decision-making by the state be democratic, in the sense of taking into account the opinions of different sections of society (and/or actively involving them in the process of decision-making), as well as transparent.

In terms of the nature of the rights, while there is a fair amount of consensus that the right to water is essentially a usufructuary right, there is controversy about whether or not these should be tradable. Advocates of water markets usually call for usage rights to take the form of individual-based tradable water rights. The justification for this is not just on the basis of improved efficiency, but also better equity and sustainability. Further, such a property rights system is deemed to be compatible with a public trust doctrine (Saleth, 1996). However, the individual basis of rights is often critiqued, as also the fact that very often, these rights have to be purchased and hence they are not affordable to all. Further, Bauer (1997) (cited in Boelens and Zwarteveen, 2005) point out

that most of the benefits attributed to water markets would be achieved through the provision of security alone, irrespective of whether water rights are tradable and transferable.

In deciding the nature and scope of the rights that different entities have over water, it is important to keep in mind that there are different kinds of rights already in place, i.e., one never starts from a *tabula rasa*. These differ in the sources from which they draw their legitimacy (such as custom and law), as well as their content. How best to reconcile these different kinds of rights, especially from the point of view of ensuring right to water to all, as well as the practical constraints in doing so, would have to be kept in mind. Note also that existing rights should not be frozen as they are, as this might just end up reproducing inequities (Spiertz, 2000).

Another important aspect to the nature of rights is the unit to which the right is to be assigned – the individual or the household.²¹ There are a number of inter-related points which are important to keep in mind while deciding the unit.

Firstly, there may be a difference between the unit to which a right is assigned and the unit of implementation, which in turn has implications for equity. In South Africa, for instance, as per its Basic Water Policy, each person is to receive, without cost, 25 liters of water per day free. However, in the process of implementation, the free amount of water is calculated on a household and not an individual basis (using a household size of eight), which tends to disadvantage larger and poorer black families (Langford, 2005). In general, whenever the unit of implementation is the household, the amount of water per household ends up being calculated on the basis of an average size, which in turn means that larger families are implicitly penalized.

Secondly, having the household as the unit to which water rights are assigned could result in (or further aggravate existing) intra-household disparities in the distribution of resources, especially along lines of gender. Since

²¹ These two units are the ones that are most relevant for drinking and irrigation water. Even in the case when irrigation water rights are assigned to a collective unit such as a Water Users' Association, in the process of actual implementation, it is on a household or on an individual-basis that water is finally allocated.

landowners are usually men (and even in cases where women are the nominal landowners, actual control often is vested with men), and heads of households too are usually men, rights over water end up being vested with male members of the household. Further, it is assumed that women's interests are congruent with those of the household, and that the men of the household will take care of both (Agarwal, 1992). Hence there is no perceived need for separate water rights for women. The only cases in which women sometimes get water rights are in the case of women-headed households (which usually consist of single women).

The question of formal vesting of rights over water for women is critical for a number of reasons. First of all, women and men within the same household may have different notions about what to do with the water,²² and women may not be able to carry out their desired option in the absence of rights being vested with them. Secondly, water rights can become an important means to improve the bargaining position of women both within and without the household, although Zwarteveen and Meinzen-Dick (2001) point out that for this to happen, water rights have to be accompanied by a greater voice or control in other realms too. Thirdly, water rights may be important in case women wish to break away from their natal or marital households. Finally, even when women have informal ways of obtaining access over water, these may not be secure, and water rights could help remedy this (Zwarteveen and Meinzen-Dick, 2001).

However, assigning water rights separately to women (along with rights to men, or instead of rights to men in the same household) is very difficult to undertake in practice due to social norms. Further, assigning water rights to women without rights over land and/or other inputs needed for production may not be meaningful. Another complicating factor is the inter-weaving of gender with other dimensions such as class and caste; that is, women do not constitute a single, unitary, and homogenous category. For instance, water rights are more important for women of lower economic classes, such as

landless or marginal households, because these classes have limited access to water and other resources, and women's control over water (e.g., to decide how it is to be used) becomes even more critical. But in such households, getting water rights for *anyone* is difficult. Hence in these cases, it might be pragmatic not to fight for water rights for women separately but instead for the entire household. In general, then, it is important to recognize that relations between men and women are characterized by *both* co-operation and conflict, so that instead of taking decisions about who to give water rights to on an a priori basis, one needs to consider how women themselves view water rights, as well as to what extent formalized water rights would benefit them in a given context (Boelens and Zwarteveen, 2005).

The third point that is important from the point of view of the unit to which water rights are assigned (especially in the case of irrigation) is the relation between access to land and access to water. In fact, the lack of water rights for women also results in part from their lack of control over land. The same issues that are raised in the context of gender – the feasibility of bringing about greater equity in the distribution of land-holdings, whether access to other resources is also needed in order to use land and water effectively – also apply in general. However, it is still important to keep this point in mind, especially in a rural context, where the sources for irrigation and drinking water are often the same (e.g., private wells, canals), so that special provision would have to be made to ensure water for landless households.

Finally, in most countries, a minimal criteria for any human right to be accorded (whether to an individual or to a household) seems to be citizenship. However, 'citizens' constitute a political community defined by the state, and at any given time, there may be groups of people (slum-dwellers, migrants) who are 'non-citizens' (Mamdani, 1998). How to ensure that even these non-citizens have access to basic rights such as the right to water then becomes an important question.

²² For instance, in case of irrigation water, women often want to grow at least a minimum amount of staples, in order to ensure food security for the household, whereas men often want to move entirely to cash crops, which are perceived as more lucrative (D'Souza, 1998). However, Zwarteveen and Meinzen-Dick (2001) argue that there is considerable complementarity and inter-connectedness between male and female uses of water.

3.5 DELIVERY OF WATER SERVICES

From the point of view of ensuring that the right to water is actualized, the institutional mechanisms put in place to undertake delivery²³ of various water services such as purification, distribution, sanitation, and sewerage are critical. This is particularly true in case of large sources of water where a suitable infrastructure needs to be built and managed for allocation of water, but is also now applicable to relatively smaller sources of water (such as borewells), where purification has become critical because of increasing contamination and pollution. Institutional mechanisms for delivery of water services are what come under the heading of governance; while governance includes a number of different dimensions, my focus here will be on privatization.

Traditionally, it has been the state (or state-owned enterprises) that has undertaken delivery of water services, both in the context of drinking water in urban areas and irrigation water from canals in rural areas.²⁴ This is because of the peculiar characteristics of water such as a high degree of natural monopoly, high capital intensity and the presence of sunk costs, the multipurpose and hydrologically interconnected nature of the water resource itself, as well as the perception that public provision is the best way to guarantee universal access (Mehta, 2003b). But the currently dominant view is that the private sector (including foreign private bodies such as MNCs) should be permitted to undertake this function, given the limited effectiveness of national or state governments in this respect (which in turn is due to a combination of reasons such as inadequate financial resources to undertake the investments needed, mismanagement, and poor institutional arrangements).²⁵ This trend towards privatization is most visible in the context of developing countries, with international financial institutions such as the World Bank and the IMF making privatization of water supply systems a prominent lending

condition as well a part of structural adjustment programs (Mehta, 2004). Another alternative that is recommended is partnerships of private firms and public bodies.

Bluemel (2004) distinguishes between two strands in the debate on privatization of water supplies – normative and applied. The normative strand posits any attempt at privatization as negative, using arguments such as water being a public resource and the symbolic significance of water in many cultures. The applied strand asks whether a particular privatization approach is appropriate under the circumstances or has been properly designed (see, for instance, Newborne and Slaymaker, 2005). Both strands are useful for different reasons. The normative strand helps to go beyond the focus on how best to create competitive conditions, and question the basic (neo-classical) economic notion of perfectly competitive markets leading to the best outcome (whether in terms of efficiency, equity, or sustainability). The applied strand helps to focus on the importance of regulation and the role of the state even in the context of privatization. The discussion in this section mainly deals with the applied strand.

Before turning to the arguments for and against privatization, it is first important to note that it could take a number of forms. Table 1 (on page 28) summarizes the major forms.

Of these, concession contracts have been the most common form (Mehta, 2004). Such contracts operate for instance in Buenos Aires, Argentina and in Nelspruit, South Africa, and enable governments to retain ownership of assets while passing the risk to the company (Holland, 2005). These are sometimes perceived to be superior to the other forms because (i) they introduce competitive incentives for efficiency since companies usually bid against each other to win the concession contracts and (ii) the contract itself can function as the chief regulatory mechanism. However, Rees (1998) argues that competition is often

²³ Delivery would broadly include building the necessary infrastructure as well as operations and management.

²⁴ Non-governmental providers of both drinking water and irrigation water (i.e., private agents) have also been in existence simultaneously (and in fact, are growing with increasing stress over the water situation).

In that sense, private delivery of water services is not a new phenomenon. But the current controversy over privatization arises essentially in the context of transfer of ownership of state-owned enterprises and it is on this that I will focus here.

²⁵ However, a strong meta narrative at the Fourth World Water Forum in Mexico in 2006 seems to have been that the government was 'back in', and should take primary responsibility through its legislating, regulating, policy development, planning, and finance-allocating roles (ODI, 2006).

Table 1: FORMS OF PRIVATIZATION

Contract type	Service contract	Management contract	Lease	BOT/BOO	Concession Contract	Divestiture
Asset ownership	Public	Public	Public	Public and private	Public	Private or public and private
Capital investment	Public	Public	Public	Private	Private	Private
Commercial risk	Public	Public	Shared	Private	Private	Private
Operations and maintenance	Public and private	Private	Private	Private	Private	Private
Tariff collection	Public	Public / private	Private	Public	Private	Private
Duration	1-2 years	3-5 years	8-15 years	20-30 years	25-30 years	Indefinite (may be limited by license)

Source: Bakker (2002) cited in Mehta (2004)

restricted by the dominance of a very small group of major companies in the international concessions market, and renegotiation of contracts – which is essential to deal with changing conditions – could impose high regulatory burdens on the government. There is also the dilemma that measures designed to reduce monopoly power reduce the potential profitability of private-sector companies, and therefore would be difficult to put in place (Rees, 1998).

Note that in none of these forms of privatization is the ownership of the water source itself privatized. How far the decision-making powers (about who gets access to water and the precise nature of these rights) remains with the state would depend upon the particular form of privatization, as well as the regulatory framework put into place by the state along with its ability and willingness to enforce it.

The usual argument in favor of privatization of water services (whatever be the precise form) is that it will result in improved efficiency (for instance, by reducing leakages and improving billing and collection). However, this is not an automatic or necessary consequence of privatization. Further, it is not obvious a priori

that any form of privatization will result in improved and more affordable access to water. The evidence of African and Latin American countries such as Guinea, Senegal, Bolivia, Argentina, and Peru indicates, on the contrary, that in many cases, even households that had some (even if limited) access to municipal water before privatization suffered disconnections because of lack of ability to pay (Mehta, 2004). Hence in some Latin American countries, privatization of water triggered social discontent of an order that resulted in the overthrowing of governments.

A number of other arguments have also been made against privatization. First of all, private parties are likely to be more interested in the lucrative parts of the water system (such as the wealthier parts of urban areas) (Mehta, 2003b). Rural areas, poorer urban areas, and the more unprofitable functions of sewerage and waste water management are not likely to be taken up. In fact, Barlow (2001) argues that since the provision of water services alone does not provide sufficient returns, water corporations are actively pursuing exclusive control over water service provision through acquisition of infrastructure and water licenses

(Holland, 2005). Also, privatization contracts often contain guarantees to compensate a company if it incurs losses. Secondly, privatization of the water sector appears to have worked best in those areas which had benefited from earlier state subsidies (Mehta, 2000). In fact, private partners are often less willing to undertake the setting up of new infrastructure, and would rather undertake operation and management of already existing systems. Thirdly, in the specific context of MNCs, exchange rate fluctuations can severely affect the financial models established for multinationals, as in the case of Manila and Argentina (Langford, 2005). There is also the issue of whether privatization will help in the long run if all the expertise is developed within multinational water firms and no local capacity is developed (Langford, 2005).

To deal with at least some of these criticisms, two conditions have been suggested as being critical to the success of privatization – a clear regulatory framework and a democratic, transparent decision-making process.

Mehta (2004) emphasizes the need to have a regulatory framework in place prior to privatization, so that commercial providers can be subject to tariff regulations, quality standards, and other performance requirements. However, the mere establishment of such a framework does not ensure accountability, and bodies that are responsible for the regulation may be subject to the same kind of pressures (for instance, from international bodies) as governments. The important question then is whether governments are any better at regulating private operators than they were as direct service providers. Further, as Mehta and Madsen (2003) argue, the ability of states to regulate private actors in the water sector and to explicitly support poor people's water consumption is likely to be circumscribed even more in cases where future water privatizations are undertaken under the General Agreement on Trade in Services (a point which I will discuss in greater detail in Section 3.9). Also, regulation that merely focuses on efficiency and growth may not necessarily be committed to ensuring access to basic services or protecting access of the poor to services (Mehta, 2004).

Ensuring that the equity impact of privatization is positive is complicated by an additional factor.

The poorest groups often do not rely on

multinationals or even governments for water delivery. Excluded or not reached by formal water systems, they usually buy water from informal vendors or landowners with water resources, often paying excessive prices and subject to uncertainties (Langford, 2005). How these transactions would be affected by the privatization of water delivery services is not obvious a priori. But the point is that reforms in the water sector tend to focus on the formal water sector, while ignoring the fact that regulation and monitoring is also needed in the informal water sector, in addition to the need for the poor to gain access to formal water supply systems.

The second condition that could help to mitigate the negative consequences of privatization deals with the process by which decisions are made about when privatization must be undertaken, the particular form that it should take in any given context, and the kind of rules that must be put in place to govern them. Ideally, this process should be democratic, which means that different sections of society must be involved in the process, and it should be a transparent one. In fact, participation is a crucial aspect of the right to water, not just in the context of privatization efforts, but also with respect to how water development is undertaken in general. While this condition is mentioned in a number of places, it has been absent in the privatization process of most countries. In fact, Langford (2005) argues that the World Bank appears willing to provide funding for promoting participation, but not in helping governments to conduct a proper public debate on solving water delivery problems.

In general, then, undertaking privatization in a manner that is consistent with goals of equity is not easy. Where does that leave us in terms of the 'best' kind of institutional structures to undertake delivery of water services? The range of options that have worked successfully across the world show that a priori stands of public only or private only are not always useful. Instead, focusing on context-specific case-studies could provide useful insights that aid in bringing about changes in the delivery of water services in desired directions, without necessarily trying to scale up or replicate key features of successful cases. For instance, an important example of a public model of service delivery which not only works efficiently and is

financially autonomous, but has also had a positive impact on poor people's lives and livelihoods is the Porto Alegre case in Brazil (Holland, 2005). The particular conditions present in this case (such as the strong associational culture present in Brazil) might not be replicable elsewhere. But the experience is useful in showing that opening up decision-making processes can lead to water governance structures that are pro-poor. There is also evidence of local management and financing that has been successful, both in rural areas as well as in metros. In Dhaka, Bangladesh, for instance, a workers' cooperative is now managing the city's formerly loss-making public water utility (Nadkarni, 2005). The potential for public-private partnerships is exemplified by the case of Cato-Crest in Durban, South Africa, where a successful partnership took place without the intervention of big water utilities (Mehta, 2004). In fact, although public-private partnerships are increasingly being advocated as an alternative to purely public or private provision of water, it is important to keep in mind that a partnership has to be between equals; hence the concept of a partnership between a municipality in a developing country and a multinational corporation is problematic (Holland, 2005).

Apart from the trend towards privatization in the post-1990s era,²⁶ the other important change in the realm of delivery of water services is the trend towards decentralization (Mehta, 2004). In the realm of water, for instance, management of canal irrigation is increasingly being handed over to user groups. Some regard the management of water by user groups also as an instance of privatization. Others emphasize the need to distinguish between management by collective user groups and management by corporate entities or private operators (whether formal or informal, including NGOs) who are not themselves the recipients (or direct users) of water. Be that as it may, decentralization could potentially result in more efficient and equitable water provision at the local level if local authorities were given the financial and institutional capacity to fulfill new responsibilities, and equity requirements are put

in place a priori. However, decentralization is less likely to resolve the problem of regional disparities.

3.6 PRICING OF WATER

The question of pricing of water is perhaps the one that gets the most attention in any water reform strategy. It is also one that is viewed most often as conflicting with a right to water (see, for instance, Barlow, 2001). It would really not be possible to review here the vast amount of theoretical as well as applied literature generated on the subject. What I propose to do in this section, instead, is to lay out the main issues involved in the question from the point of view of ensuring a right to water to all.

There are three major arguments made in favor of pricing of water – recovering costs, capturing the 'true' value of water as a resource that has multiple uses, and providing an incentive for judicious use of water, although it is the goal of cost-recovery that has received the most attention (TAC, 2000). In theory, all three goals are important from the point of view of efficiency, equity, and sustainability, and therefore pricing of water need not be seen as conflicting with a right to water. For instance, the low price that many consumers of water pay is believed to be one cause of its unsustainable use, and this lack of sustainability in turn has implications for equity. Hence, some argue that the right to water should be interpreted not to mean the provision of 'free' water, but water that is affordable to all, including socially disadvantaged groups (Iyer, 2003), though others continue to argue in favor of providing at least a certain minimum amount of water free of charge to all, and charging only for water supplied beyond this minimum (as in the case of the South African water policy).

Similarly, without cost-recovery, states will not have adequate funds to provide for the construction of new water supply and wastewater disposal facilities, as well as for management of existing facilities, especially in the face of declining funds from international institutions (Biswas, 2005). Even if water as a resource is free, the services involved in its

²⁶ It is also important to note that many multinational private water companies have now started to retreat from water services contracts and investments in developing countries in the face of high political and economics risks, shrinking profit margins (in part due to currency instability), and increasing criticism affecting firms' business image (UNESCO-WWAP, 2006).

delivery entail costs, at least in urban areas (Mehta, 2003b). Thus there is a cost in impounding the water, bringing it from the reservoir to the purification plant, transporting it through distribution pipes, then collecting the drainage, purifying it to some standard, and releasing it again (Paranjapye, 2005). In fact, even in rural areas, treatment needed to make water potable may involve costs.

But while the goals of pricing themselves cannot be faulted, it is not obvious that increasing the price of water will necessarily meet these goals; further, there are also alternative instruments that could either meet these goals without the negative equity consequences of increased pricing, or that could help to mitigate the negative equity impact.

For instance, the argument (made most often by environmentalists) that water as a resource has been taken for granted and overused, and that only pricing will help to understand its real value and to start conserving it (TAC, 2000) is problematic because for affluent customers, higher rates do not necessarily translate into lower demand or more careful use of water. In the case of irrigation water in canal systems in Western India, for instance, Ray (2005) argues that the function of ensuring efficient irrigation or water conservation may be more achievable through enforceable allocation rules (such as a per-hectare ration) that would make the scarcity value of water immediately obvious and change in the price policy of agricultural output (e.g., reducing government support prices for water-intensive crops such as sugarcane) rather than through higher price of irrigation water. Further, most of the discussion about water pricing centers on individual use, even though a large percentage of water consumption in urban centers is due to industrial and institutional use (Barlow and Clarke, 2002).

With respect to the goal of cost recovery, though pricing is more likely to lead to improved returns, such returns often come at the expense of poor consumers, who are likely to end up curtailing their usage because they cannot afford it. One counter-argument made to this is that the poor already pay high costs for water to informal providers, and hence would be willing to pay for formal access to water. But Mehta (2004) argues that the willingness-to-pay proponents treat households as black

boxes, ignoring the power dynamics within them, the naturalization of women's water-related tasks, and the low opportunity costs attached to women's time. For instance, Reddy (1999) shows how a house connection has seemingly little appeal for many households in Rajasthan; this is not just because of the expensive installation charges, but also because women and children, who face the drudgery of fetching household water, have low opportunity costs and do not control either their labor or household income, whereas the men do not face the drudgery but would have to pay for installation charges. Hence any attempt to price water would have to take into account a number of factors, including variations in agro-climatic zones, income levels of households, valuation of women's work, and access to public goods. This in turn means that blanket assumptions such as the one that rural households are willing to pay five percent of their income/expenditure for water (made while formulating pricing policies for water) are uncalled for.

Acknowledging differences in willingness-to-pay is also important because it opens up the possibility of discriminatory pricing or cross-subsidization (Reddy, 1999). In fact, this is the usual instrument recommended to deal with the question of affordability to the poor (see, for instance, Biswas, 2005). But cross-subsidies (whether across households or across different uses of water such as drinking, irrigation, and industrial uses) are not easy to implement. As the experience of public water provision (especially in urban areas) testifies, subsidies often end up benefiting higher income groups rather than lower income groups, and so the question of targeting of subsidies is critical. Further, in the case of privatization of water services, firms may not be willing to use cross-subsidies because it would compromise on their goal of profit maximization. For instance Llorente and Zerah (2003) point out that higher prices for industry (in order to subsidize drinking water for households in urban areas) may lead to industrial users moving away from municipal water to private sources of water.

Thus the problem of pricing water in a manner that it remains affordable, as well as enables costs to be met, is a tricky one. When one extends the question of pricing to social

services beyond water such as schooling, combining cost recovery with equity becomes an even more difficult tightrope to walk on (Hoering and Schneider, n.d.).

3.7 PARTICIPATION

The concept of a right to water, as well as a rights-based approach, is relevant not only to particular outcomes, but also to processes – both of policy-making and of implementation of policies and projects in the realm of water. This process dimension is what I refer to as participation. Ideally, this is something that should be woven into all the other dimensions; it has been included here separately only to emphasize its importance.

To give an example of the limited manner in which participation usually works, consider the case of the demand-responsive approach in the water sector in India,²⁷ which is the new bottom-up approach put forward in the World Bank's current water policy. Firstly, there has been no involvement of civil society groups in the framing of the policy itself. As Hoering and Schneider (n.d.) point out, this is problematic because the fleshing out of rights and responsibilities, as well as of framework conditions by the government, has a considerable influence on the prospects of success for the approach. Secondly, no instruments are explicitly included to enable marginalized sections of the population to be a part of decision-making processes about water at the micro-level. Hence the possibility that the approach would help in overcoming existing inequities is very remote. In general, unless there is engagement with the micro discourses of power, participation is hardly likely to be synonymous with empowerment (Ahmed, 2005a). Further, it is important to note that the particular manner in which decision-making is democratized could also have important implications for equity. Boelens and Zwartveen (2005) point out that most communal water systems in Peru, Bolivia, and Ecuador have a one-person, one-vote rule, but World Bank proposals for new water legislation stipulate that voting rights should be made proportional to the quantity of water-use rights that each user holds, which means that it becomes

difficult for smallholders to bring about desired changes. Thirdly, although participation in implementation is called for in theory, it has been insufficient in both quantitative and qualitative terms. The main motivation behind involving people in implementation seems to be cost recovery, and not understanding what their priorities are at any given time. Ideally, as per the logic of demand-based projects, if people are uninterested in house connections or modern systems of supply, there should be openness to providing low cost water through stand post supplies and/or improving the water sources within the village (Reddy, 1999), but in practice this is often not the case.

The above examples are typical of how most water projects work. Hence a right to water should explicitly engage with the question of how to make provision for participation in decision-making at all levels, particularly by marginalized groups.

3.8 RELATION OF RIGHT TO WATER TO OTHER RIGHTS AND VISION OF DEVELOPMENT

Defining the right to water in any given context would not only involve understanding the different elements that constitute it, but also how the relation between right to water and other rights works out. In fact, water conflicts that arise because of competing claims of different water users or competing claims between different uses often have to do with conflicts between right to water and other rights. However, as we will see below, both complementarities and conflicts are possible between different kinds of rights.

In the discussion of the status of the right to water at the international level in Chapter 4, it will become evident that the right to water can be derived from rights such as those to health or food; that is, there are complementarities between them. However, the precise manner in which the right to water is derived from these could also limit this complementarity. For instance, the provision of adequate food does not require local provision of water (since food can be produced in distant locations and moved to the point of

²⁷ In this approach, costs of water supply are to be borne by the users, decision-making powers are transferred to consumers, and investments are initiated by consumers according to their self-determined requirements.

demand) (Gleick, 1999), but local provision might still be important from the point of view of food and water security (Bluemel, 2004). Similarly, rights to livelihood and housing could have mixed impacts on the right to water. On the one hand, if one sees the provision of water for economic needs as an integral part of the right to water, the relation between right to water and right to livelihood could be complementary. On the other hand, a livelihood-enhancing activity could also impinge on someone else's right to water. Examples of this include an industry that generates employment but over-extracts water beyond sustainable limits or pollutes an existing source of water. While this could seem like a classic 'development-environment' conflict, in any particular case (such as the case of Plachimada discussed in Chapter 6), a variety of factors are at play, making the decision about how best to resolve the conflict or which rights to legitimize a difficult one. Similarly, in the case of informal settlements in rural areas, the right to connect to public (or private) water systems is often denied because local authorities are concerned that providing water would legitimize the informal occupation of the land. In fact, the link between housing and access to water in urban areas parallels the link between land rights and water rights in rural areas (except that land in rural areas is needed not just for access to water or housing, but very often for meeting livelihood requirements also).

Both in the context of the conflict between right to water and other rights, as well as in the context of some of the elements of right to water (such as how much water is needed to satisfy people's economic needs), the question of what kind of development process one has in mind becomes important. This is true not just in the obvious sense of whether one adopts a water-intensive cropping pattern or encourages water-guzzling industries or consumption patterns, but also in the more indirect connections between water and other realms. The discussion of the right to development in Chapter 2 already points out that although such a right can be the basis of a right to water, it also raises questions about various dimensions of development such as the perpetuation of power inequities at different

levels. This in turn means that any discourse of right to water would need to engage not just with water per se, but also other aspects that indirectly affect it. Thus the question of participation of different sections of society in water policy would need engagement with questions of democratization and transparency (e.g., a focus on institutional structures and legislative measures such as an effective Right to Information Act) (Pant, 2003).

3.9 GLOBALIZATION AND RIGHT TO WATER

Globalization impacts the question of right to water via two routes. One route is when the water policies of governments are affected by the policies of international institutions by way of conditionalities for lending and structural programs, as well as potentially by liberalization of trade in goods and services. The second (less studied) route is the impact of global forces that are external to the water sector, even though these are likely to shape water use, availability, and management practices of the future in significant ways; these would include major developments in areas such as biotechnology, desalinization, information, and communication (Biswas, 2005). The focus of this section will be on the first route.

In order to understand how water policies of governments have been influenced by changes at the global level, it is useful to consider how views regarding water have evolved in the last three decades. Mehta (2004) distinguishes between three phases with respect to the process of convergence of views on water. The first phase (between 1977 and 1992) saw the consolidation of the water decade²⁸ and the declaration of water as an economic good at the International Conference on Water and the Environment held in Dublin in 1992. The second phase (between the Dublin Declaration and the Hague Conference in 2000) witnessed the rise of the neo-liberal agenda both globally and in water management, and the rolling back of the state through conditionalities of the IMF and World Bank, as well as regional development banks such as the Inter-American Development Bank and the Asian

²⁸ 1981-90 was the WHO's International Drinking Water Supply and Sanitation Decade.

Development Bank. The third phase refers to efforts in the twenty-first century on the part of supra-national bodies such as the World Water Council and the Global Water Partnership, which are viewed by many as giving a new impetus to private sector involvement. The particular kind of water discourse that emerged in each of these phases is discussed further in Chapter 4. But these are not the only views that have emerged; for instance, the idea of water as a human right has also been receiving increasing attention. However, the hegemony of particular institutions and ideologies at the international level has meant that the idea of rights has received far less attention; on the contrary, there is increasing convergence among international and national players about the changing role of the state (as being more responsible for regulation rather than for providing water), the need for cost recovery, an enhanced role for the private sector, and the need to draw in non-state actors in the realm of water (Mehta, 2004).

Perhaps the best example of how particular international institutions/discourses can shape water policies of national governments is given by the role of the World Bank in the water sector. Hoering and Schneider (n.d.) analyze how the World Bank shapes national and international water policy by linking the award of loans to strict conditionalities and by influencing the formation of opinion in water debates. Until the early 1990s, the World Bank's water policy was mainly geared towards providing financial support for infrastructure provided by the state. However, since the 1990s, the central aspect of the World Bank's water policy has been the notion of water as an economic good, resulting in its supporting water privatization in developing countries. This position is evident in its 1994 'World Development Report', and has been restated in its controversial 2003 'Water Resources Sector Strategy'. Similarly, the World Bank's recent report on the water economy of India also favors privatization. The demand-responsive approach advocated by the World Bank (and applied, among others, in India and Sri Lanka) has also resulted in accelerating the state's withdrawal from rural supply. Further, while the influence of the World Bank (along with the IMF and other bilateral funders) has been

key in driving policy and reform processes in Ghana, India, and Niger, public consultation has been rare. The reason for this is not hard to guess: where public consultation took place (as in Brazil and the USA), privatization tended to be resisted and public utilities were reformed significantly (Mehta, 2004). Recent World Bank efforts to increase private ownership of land are also a cause for some concern, since access to land usually determines access to water (Langford, 2005).

Even when the idea of water as a human right has some influence on particular national governments, the fact that these co-exist with other, more dominant views on water results in interesting contradictions, as the case of South Africa shows. South Africa has an explicit right to water in its constitution as well as a Free Basic Water policy adopted in 2001, which aims to provide a basic supply of 6000 liters of safe water per month to all households free of charge. Both of these fit into the discourse of water as a human right. But South Africa also adopted a fiscally conservative Growth, Employment and Redistribution macro-economic policy in 1996, and cost recovery is an official policy of the government. Fiscal conservation has meant that grants and subsidies to local municipalities and city councils have decreased; the result has been partnerships between public bodies and the private sector in the realm of water, which have had a mixed impact, especially in terms of equity. Further, disconnections to non-paying consumers (especially in urban areas) are not uncommon, and have been linked by some to outbreaks of cholera and other gastrointestinal infections (Holland, 2005).

The role of international finance in the water sector is not just restricted to the conditional funding provided by international and regional lending institutions. Institutions such as the World Bank have also financed and promoted large hydroelectric projects in spite of concerns about their equity and sustainability impact; further, in many of the recent privatization projects (such as in Brazil and Bolivia), the International Finance Corporation division of the World Bank provides capital financing directly to major water corporations (Barlow and Clarke, 2002).

Water policies of governments are also likely

to be affected by the efforts of the World Trade Organization (WTO) to progressively eliminate tariff and non-tariff barriers to trade in order to ensure the free flow of capital, goods, and services across national borders.²⁹ There are two international trade agreements which can affect water – the General Agreement on Trade and Tariffs (GATT) and the General Agreement on Trade in Services (GATS). Under GATT rules, water is a tradable commodity, so that restrictions on imports and export of water are prohibited. Cross-border trade in water is already acquiring importance, as in the case of the export of fresh water from Canada to the USA. Even though there is some provision for restrictions that are necessary in order to protect the environment (for instance, not importing water that has been extracted in a way that is destructive to watersheds), in practice, its use is often overruled by using the clause that the restriction is a disguised barrier to trade. This in turn means that the interests of corporate players promoting water exports receive precedence. Further, while trade in water between water-rich countries and water-poor countries is sometimes put forth as a solution to problems of water scarcity, Barlow and Clarke (2002) point out a number of problems with this measure. Firstly, since the motive of any commercial exchange would primarily be profit, it is very unlikely to reach those who need water the most, but are not able to pay for it. Secondly, external dependence for a crucial resource such as water is not desirable. Thirdly, commercial water exports would perpetuate the assumption that the problems in the water sector can be resolved by furnishing an increasing supply of water.

The second trade agreement under which water is likely to be affected is the GATS. Most water-related services are currently not included in the GATS' services sectoral classification list (exceptions are sewage services and wastewater). However, attempts are ongoing (particularly in the European Commission) to include water collection, purification and distribution services also under environmental services. Trade liberalization under the GATS essentially refers

to (i) the equal market access principle which prohibits limitations in the participation of foreign service providers (and foreign direct investment) unless specifically listed in a country's 'schedule of specific commitments' and (ii) the national treatment principle whereby governments can elect either to treat foreign services and service suppliers in the same way as domestic services and service suppliers, or include limitations in their commitments to favor the latter (Newborne and Slaymaker, 2005). While in principle, countries are free to decide whether and how far to open sectors to foreign competition, there is indirect pressure on developing countries. For instance, members try to promote their foreign investment interests by exerting influence through their aid programs to facilitate commercial presence of a foreign company in a country. The December 2005 Hong Kong negotiations (which was part of the Doha round) imparted a new momentum to the negotiations on services (including environmental services), with a decision made to achieve a progressively higher level of liberalization in services and intensify the negotiations to that end (Dubey, 2006).³⁰ How far these attempts are a result of the belief that liberalization of water services can be a solution to the financial difficulties of developing countries and improve efficiency of water services, and how far they are a result of successful lobbying by European water giants such as Vivendi and Suez Lyonnaise des Eaux, is debatable. Further, even if liberalization can result in gains as long as certain regulatory mechanisms (such as legislative measures) are in place to safeguard the interests of the poor, Mehta and Madsen (2003) argue that extending the coverage of the GATS to water-related services would undermine the ability of member-states to introduce such measures. Interestingly, even though the United Nations High Commissioner for Human Rights notes several potential conflicts between service liberalization and the realization of human rights, it also contends that the progressive liberalization of trade in services can go hand in hand with the progressive realization of

²⁹ The discussion in this section draws heavily on Barlow and Clarke (2002).

³⁰ However, in July 2006, the Doha round of the negotiations of the WTO collapsed.

human rights under certain conditions.

3.10 CONCLUSION

The discussion of different dimensions of right to water in this chapter helps to bring out the complexities involved in even conceptualizing the right. It also lays the ground for the analysis in the subsequent chapters, of how right to

water works out in the international arena (especially in the context of the human rights regime), in the legislation of India and Maharashtra, as well as in civil society initiatives. In each case, I consider how the different dimensions discussed in this chapter are dealt with (or not), and how this in turn influences the working of the right in actual practice.



CHAPTER 4

RIGHT TO WATER AT THE INTERNATIONAL LEVEL AND IN INDIA

4.1 INTRODUCTION

Having laid out the background for this study with the discussion of rights-based concepts and of different dimensions of a right to water in Chapters 2 and 3 respectively, Chapters 4 through 6 actually analyze how the right to water plays itself out at different levels. The focus of this chapter is the evolution of the right to water in the human rights regime at the international level, the legal status of right to water in India, and the shaping of different dimensions of the right by India-level laws and policies.

At the international level, discussions of water have been shaped by a number of discourses, of which the idea of water as a human right is only one. I start by briefly summarizing these different discourses, before moving on to the evolution of the right to water in the human rights discourse. Even within this discourse, there are differences of opinion about the various elements that comprise a right to water. My focus will be on the view taken by the most recent (and most explicit) formulation of water as a human right viz., General Comment 15 of the United Nations Committee on Economic, Social and Cultural Rights adopted in 2002, and the guidelines for the realization of the right put forth in the 2005 Report of the Special Rapporteur of the United Nations Commission on Human Rights.

At the India-level, I set the background for the discussion of right to water by briefly discussing the human rights situation as well as the general water situation in the country. The legal status of 'right to water' is then discussed by focusing on constitutional support for the right to water, followed by an analysis of how the contours of such a right are actually shaped by water-related policies, legislation, and judicial judgments at the India-level.

4.2 WATER DISCOURSES AT THE INTERNATIONAL LEVEL

In Chapter 1, I discussed how rights discourses have acquired growing importance in the last

two decades in a variety of realms, and how the concept of right to water is one of the important articulations of rights in the context of water. However, this discourse is neither the only one, nor the most dominant. There are three other formulations of water in the international arena: the Dublin-Rio principles, the advocacy of water markets and privatization of water services by the World Bank and the Asian Development Bank, and the approach of 'Integrated Water Resources Management' propagated by the Global Water Partnership and the World Water Council (Iyer, 2005a).

Perhaps the discourse which has almost acquired hegemonic status (in terms of its influence on the thinking and practice of a wide variety of actors including governments) is the formulation in the Dublin-Rio principles. The Dublin principles were endorsed at the International Conference on Water and Environment held in Dublin in the run-up to the Rio Earth Summit in 1992. The Dublin Declaration highlighted four key principles – the importance of freshwater as well as its finiteness and vulnerability, increased participation of users, planners and policy-makers at all levels of water development and management, the central role of women in the provision, management, and safeguarding of water, and the recognition of water as an economic good, with an economic value in all its competing uses (Gleick, 1998). These principles significantly contributed to the Agenda 21 recommendations adopted at the UN Conference on Environment and Development in 1992, although unlike the Dublin principles, Agenda 21 emphasized that water is an economic *and* social good (TAC, 2000).

The advocacy of water markets and the privatization of water services by the World Bank and the Asian Development Bank is based partly on the Dublin-Rio characterization of water as an economic good, but is also related to the rise of neo-liberalism and the consequent reduction sought in the role of the government

in the provision of basic services (Mehta, 2004). Although market remedies and privatization solutions for water problems are believed by some (especially donor countries) to be congruous with rights of the poor to water (Mehta and Madsen, 2003), on the whole, the idea of water as an economic good and of water markets has generated considerable controversy, particularly in its implications for pricing (Mehta, 2003b).

The third discourse which is becoming important in recent times is the idea of integrated water resource management (IWRM). The concept has been introduced (to varying degrees) in the water policies of a number of countries such as South Africa, Uganda, and Brazil. But while the concept of IWRM is an advance over earlier sectoral and fragmented approaches of water management in some respects, it has also been critiqued on a variety of grounds (in terms of both conceptualization and implementation). For instance, Iyer (2005a) argues that IWRM continues to be influenced by old-style engineering-based thinking, and has a built-in bias towards centralism and gigantism due to its emphasis on integration of multiple processes. There is also a lack of clarity about who is in charge of integration, the roles and responsibilities of governments, the private sector, civil society, and the international community, how to ensure that different interests are reflected in IWRM plans, and how to resolve conflicting interests and disputes (UNESCO-WWAP, 2006). The questions of integration of land and water governance, as also whether all water issues need integration, have also not received adequate attention.

It is important to note that the two organizations that have most actively propagated IWRM – the Global Water Partnership (GWP) and the World Water Council (WWC) – have also been subject to criticism. The GWP is an action-oriented network of organizations interested in water issues, with a mission to transform the Dublin principles into practical tools for solving water problems at the local and regional level. It was formed in 1996 by the World Bank, the UNDP, and the Swedish International Development Cooperation Agency. Its principal operating arm is the Technical Advisory Committee (TAC). The WWC is an international think-tank founded in 1996 to promote awareness on critical global water issues. The members of the WWC include representatives

of business, government ministries, academic centers, multilateral financial institutions, UN agencies, and local governments. Its major activity has been the organization of the triennial World Water Forums, which have become an important platform for the global debate on water resources. However, these Forums have been criticized as representing mainly the interests of transnational corporations and industrialized countries, especially because the founders of WWC include executives from multinational water companies (Gleick, 1998).

The emergence of the rights discourse (and more particularly the idea of right to water) at the international level is discussed in the subsequent section. However, two points need to be noted here. Firstly, a variety of concurrent factors have led to a growing focus on the idea of right to water. These include the growing importance of the rights approach in general, the continuing lack of access of many parts of humankind to water even for basic needs in spite of a variety of development interventions in water, problems of sustainability of water as development processes all over the world result in over-extraction and/or pollution, and the emergence of water (and other natural resources) as new arenas of conquest and control at all levels. Secondly, the rights discourse has engaged (or has had to engage) with the discourse of water as an economic good and the advocacy of water markets and privatization; for instance, in analyzing the implications of pricing of water on equity of access to water. However, the reverse has not been true. That is to say, the actors most involved in propagating the dominant discourse exemplified in the Dublin-Rio principles (institutions such as the World Bank) have not engaged with the discourse on right to water in any meaningful fashion (Hoering and Schneider, n.d.).

4.3 RIGHT TO WATER AT THE INTERNATIONAL LEVEL

At the international level, the idea of a right to water has been most discussed in the human rights context. Right to water is not fully defined by existing international law or practice; however, it is implicitly and explicitly supported by many human rights instruments (Gleick, 1999). Implicit support for the right to water is provided by other human rights such as those

to food, health, adequate housing, well being, and life, since water is necessary to secure these rights. The so-called third generation human rights – the right to development, the right to environment, and the right to peace – also provide a basis for the right to water (Sadeq, 2005). For instance, the 1986 Declaration on the Right to Development has the provision that states should ensure equality of opportunity for all in their access to *basic resources*, education, health services, food, housing, employment, and the fair distribution of income (UN, 1986, Article 8(1); italics mine).

Further, as evident in the discussion in Chapter 3, which right the right to water is derived from has an impact on how the various dimensions of a right to water work out. For instance, the amount of water supported by the right to life is the bare minimum necessary to support life, and does not ensure water sufficient for personal consumption or even for all forms of hygiene, whereas the right to health would ensure not only access to clean and safe water to drink, but also water to assist in the disposal and cleanup of waste, and the protection of existing bodies of water from contamination (Bluemel, 2004). The two rights which have been interpreted most often (for instance, in Alvarez, 2003 and Bluemel, 2004) to encompass a right to water, and which figure prominently in all basic international human rights instruments, are right to life and right to health. Two human rights instruments also explicitly mention the right to water: the 1979 Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), where it is mentioned as a part of a right to adequate living, and the 1989 Convention on the Rights of the Child (CRC), where provision of clean drinking water is mentioned as a means to combat disease and malnutrition. The right to water is also enshrined in one regional treaty – the African Charter on the Rights and Welfare of the Child.

However, the most explicit formal adoption of the right to water as an independent human right is in the General Comment³¹ 15 adopted in November 2002 by the United Nations Committee on Economic, Social and Cultural Rights. The document provides guidelines for

state parties on the interpretation of right to water under two articles of the ICESCR – Article 11 (the right to an adequate standard of living) and Article 12 (the right to health). While the General Comment is not legally binding on the 146 states that have ratified the International Covenant, it aims to assist and promote the implementation of the Covenant and does carry the weight and influence of 'soft law'(UN, 2004). The 2002 General Comment has also been supplemented more recently by the 2005 draft guidelines for the realization of the right put forth in the Report of the Special Rapporteur of the United Nations Commission on Human Rights. These guidelines highlight the main and most urgent components of the right to water, without attempting to provide an exhaustive legal definition of the right. They emphasize the right to water for personal and domestic uses, in order to realize the right to adequate nutrition and the right to earn a living through work (UNESCO, 2005). Since these two documents together constitute the most complete articulation to date of the idea of a right to water in the human rights discourse, it is useful to briefly consider how they engage with the different dimensions discussed in Chapter 3. But before turning to this, I would like to briefly mention the support that the idea of right to water has outside the domain of human rights viz., in other international law and declarations.

Outside the domain of human rights, support for the right to water is offered by international humanitarian law applicable in armed conflicts (e.g., in the 1977 Protocols to the Geneva Conventions) and by international environmental law instruments (Bluemel, 2004). For instance, the UN General Assembly's 1997 Convention on the Law of the Non-navigational Uses of International Watercourses holds that in the case of a conflict between uses of an international watercourse, special regard should be given to the requirements of vital human needs (UN, 1997, Article 10(2)). Further, a series of international environment or water conferences (beginning in the 1970s) also took up the issue of access to basic resources and right to water. For instance, the United Nations Water Conference held in Mar del Plata,

³¹ General Comments issued by ECOSOC are non-binding interpretations of ICESCR rights and obligations, but may be relied upon by various international bodies when deciding whether a state has met its obligations under ICESCR (Bluemel, 2004).

Argentina in 1977 agreed that all peoples have the right to have access to drinking water to meet their basic needs. The concept of meeting basic water needs was also emphasized during the 1992 Earth Summit in Rio de Janeiro, Brazil and expanded to include ecological water needs (Gleick, 1999). The 2002 Johannesburg Declaration on Sustainable Development called for speedily increasing access to basic requirements such as clean water. However, while the importance of water to satisfy basic human needs and the idea of water as a right has been present in many water conferences, consensus on an explicit right to water by governments has been difficult to come by. This is most evident in the ministerial statements at the World Water Forums, which recognize only the idea of water as a basic need and not the idea of water as a right, even when the latter has been debated in the Forum (as in the case of the declaration at The Hague in the Second World Water Forum in 2000). This, in turn, is a possible reflection of the lack of hegemony of rights-based discourses in water (discussed in the previous section). In fact, the dynamics in the most recent Forum (the Fourth World Water Forum at Mexico held in March 2006) are particularly interesting in this regard. The Forum had a number of sessions on the question of right to water, and the rights narrative was linked to questions of local empowerment and local knowledge (ODI, 2006). The Ministerial statement (which is a non-binding document signed by government representatives attending the Forum) also reaffirmed that governments had a primary role in improved access to safe drinking water, basic sanitation, and sustainable and secure tenure through improved governance at all levels as well as an appropriate enabling environment and regulatory frameworks; further, they should adopt a pro-poor approach and have active involvement of all stakeholders. While this could potentially be construed as the beginning of a reference to a right (ODI, 2006), the lack of an explicit reference to water as a human right has also been critiqued by many activists (Cevallos, 2006). Although many delegates said that they agreed with the principle, some argued that it was not feasible to include it in the final

declaration, because it could generate legal problems at the national and international level. The 'compromise' reached was the inclusion of an annex in the Ministerial Statement that expresses a dissenting view held by the governments of Bolivia, Cuba, and Venezuela as well as by activists taking part in a parallel civil society forum, stating unequivocally that access to water is a fundamental human right. This stand was endorsed by the United Nations Educational, Scientific and Cultural Organization, which said that nations that are signatories to UN treaties have a 'moral obligation' to consider water as a human right (Cevallos, 2006).

I now turn to the different dimensions of the right to water as articulated in the 2002 General Comment and additions by the 2005 draft guidelines.

Normatively, the right consists of both freedoms and entitlements.³² Freedoms include the right to maintain access to existing water supplies necessary for the right to water, and the right to be free from interference (e.g., the right to be free from arbitrary disconnections and contamination of water supplies). Entitlements include the right to a system of water supply and management that provides equality of opportunity for people to enjoy the right to water (UNESCO, 2002: Clause 10).

In discussing the scope of the right to water as well as the duties and obligations imposed by it, the Comment and the guidelines are fairly comprehensive. They discuss the factors involved with respect to the questions of availability, quality, and accessibility of water. In terms of availability, although the need for water for farming and other productive uses is referred to, the focus of the Comment is on extending individual access to water for personal and domestic uses. In fact, the 2005 draft guidelines focus exclusively on the right to *drinking water and sanitation*. In terms of accessibility, the Comment discusses not only physical accessibility and economic accessibility, but also non-discrimination against marginalized areas or groups, and access to information on water issues (UNESCO, 2002: Clause 12). In fact, the emphasis on non-discrimination (including

³² 'Freedoms' and 'entitlements' are the terms used by the General Comment. This is equivalent, in legal terminology, to negative and positive rights (for a brief distinction between the two, see Footnote 4 in Chapter 2).

on the basis of housing and land status) and equality (including equity across generations) is found throughout the Comment as well as in the draft guidelines. Further, the Comment and the guidelines also emphasize sustainability of water and efficiency in water use, and suggest measures to attain these. An important feature of the discussion of availability, quality, and accessibility is that there is space for variations in these. For instance, the guidelines point out that water-quality standards should give priority to the elimination of pollutants with the most significant impact on health in a particular country or context, rather than to the setting of high thresholds that cannot be attained immediately within the available resources (UNESCO, 2005: Clause 7.2).

The Comment provides for a major role for the state; it also emphasizes that non-state actors should take necessary steps to realize the right to water (or at least not to thwart it). For instance, while it has refrained from declaring that private sector participation in water provision is contrary to the right to water, so that states have flexibility in choosing their economic system, it does emphasize the need for democratic private sector participation, as well as for regulation by the state (Langford, 2005).

The Comment also explicitly calls for international organizations (including those concerned with trade and finance such as the WTO and the World Bank) to take the right to water into account in their programs (UNESCO, 2002: Clause 60), thereby implicitly conceding the impact that the working of these organizations has on different dimensions of water.

However, the main drawback of the Comment and the guidelines is that there is not enough discussion of the controversial aspects of ownership, delivery, and pricing of water. Thus while the Comment emphasizes that water should be treated as a social and cultural good, and not primarily as an economic commodity (UNESCO, 2002: Clause 11), the implications of this for reduction in subsidies in the water sector and the role of the private sector are not fully considered. There is also some discussion in the Comment of the dimension of affordability of water, and that investments in water should not disproportionately favor expensive water supply services and facilities that are often

accessible only to a small, privileged fraction of the population. In fact, the 2005 guidelines lay out specific measures to ensure affordability such as flexible payment schemes, cross-subsidies from high-income users to low-income users, as well as taking into account a person's ability to pay before reducing a person's access to water (UNESCO, 2005: Clauses 6.1 – 6.4). But the tension between meeting costs and financing a right to water, on the one hand, and affordability to all groups, on the other hand, is not considered.

Further, when one considers the questions of conflicts between different uses and users of water, and the kind of vision of development (including the meaning of participation) that should underlie water policies, the lacuna in the Comment and the guidelines is particularly glaring.

These drawbacks mean that the UN's concept of a right to water as articulated in the General Comment and guidelines is not comprehensive and decisive, although, as Langford (2005) argues, it is still useful to have such a right put out in the public domain. Ultimately, though, it is at the level of the nation-state that many of the questions raised above would have to be addressed. Hence I now turn to the particular context of India.

4.4 RIGHT TO WATER IN THE INDIAN CONTEXT: AN INTRODUCTION

The right to water is treated diversely in national laws. While many countries do not have this right in their laws, there are also examples in which the right is placed in the constitution (such as South Africa and Uganda), others that have included provisions in their national constitutions defining water as a public good and legislating for fair and equitable access (such as Ethiopia, Guatemala, Gambia, and Panama), and also those where specific laws have been enacted on the subject (such as the Safe Drinking Water Act of 1974 in the United States which directs the Human Health Sub-Committee of the United States Environmental Protection Agency to ensure that both public and non-community water systems meet minimum standards for protecting public health) (Alvarez, 2003; CESR, 2003). But South Africa is probably the only case where an explicit right to water in the constitution is matched with an explicit right in implementing legislation.

In India, the right to water is not explicitly stated in the constitution, although a large number of enactments regarding water and water-based resources have been passed (for instance, on the issues of water supply for drinking purposes and irrigation). However, the right is implicit, in that Indian courts have interpreted the constitutional right to life as including the right to clean and sufficient water.

However, the constitutional status of a right is one thing, and incorporation of the right in policies, laws, and programs quite another. In the case of water, there is the added complication that water is basically a state subject, so that the working of the right to water would depend to a large extent on the manner in which individual states incorporate different dimensions in their respective legislations. At the same time, central-level laws and policies do influence how states actually do this. While the precise nature of this influence is discussed later in this chapter, it is useful to lay out at this point how the division of labor between the centre and the states works.

In the constitution, the primary entry relating to water is Entry 17 of List II in Schedule 7 i.e., the state list category. This means that states have control over water supplies, irrigation and canals, drainage and embankment, water storage, and hydro-electric power. The power of states is limited only by Entry 56 of List 1 (the union list), which gives the central government powers to regulate and deal with inter-state rivers and river valleys to the extent declared by the Parliament by law to be expedient in the public interest, and by entry 57 of the same list, which gives the centre the sole power to regulate fishing and fisheries beyond territorial waters (Singh, 1992). However, the centre-state relationship is far more complex than the constitutional arrangement may make it seem (Singh, 1992; Iyer, 2003). One reason for this is that although water resources are at the disposal of the states, it is the centre which allocates the revenues for development purposes. For instance, while state governments are responsible for implementing drinking water schemes, these often get financial and technical support from the central government. Secondly, major and medium irrigation, hydropower, flood control, and

multipurpose projects have been subjected to the requirement of environmental clearance (as well as forest clearance, if forest land is involved in the project) for inclusion in the national plan since 1978 (when the Ministry of Environment and Forests was created); prior to that, central clearance was needed only in terms of technical feasibility and economic viability (Upadhyay and Upadhyay, 2002). This requirement has been strengthened with the passage of the Forest Conservation Act of 1980, the Environmental Protection Act of 1986, and the Environmental Impact Notification, 1994. For instance, under the EIA, environmental clearances are mandatory for all new projects and expansion/modernization of existing projects in thirty-two sectors that are considered highly polluting or with high impact on the environment and people. Thus while how a right to water works out in any given state is certainly affected by the policies and legislation regarding water and related subjects of that particular state, it is also affected by national-level policies and legislation.

But before considering either the constitutional status of right to water or how central level policies and legislation shape different dimensions of right to water in the states, it will be useful to briefly consider the rights situation as well as the water situation in India.

4.4.1 Human rights in India

The only form of rights with which the Indian state has explicitly engaged is human rights; other formulations of rights such as rights-based approaches or the Sen-Nussbaum concept of entitlements have been taken up only insofar as they form the mandate of funding agencies. Hence the discussion here focuses on the status of human rights legislation in India.

In the Indian context, human rights “means the rights relating to life, liberty, equality and dignity of the individual generated by the constitution or embodied in the International Covenant and enforceable by courts of India” (Section 2(1)(d) of The Protection of Human Rights Act, 1993, cited in Chakraborty, 1999: 251). Thus in theory, both international law and constitutional law form the basis of human rights in India.

India has ratified five of the six international

covenants (ICCPR, ICESCR, CRC, CEDAW, and CERD)³³ and the conventions that constitute the legally binding international human rights treaties. India has also established the National Human Rights Commission (linked to the United Nations Commissioner on Human Rights) as well as State Human Rights Commissions under the Protection of Human Rights Act of 1993. But implementation remains poor, despite the new policy papers and the documents of the Planning Commission of India increasingly using (human) rights language.³⁴ In fact, India has opted out from the jurisdiction of all UN Treaty Bodies, thereby ruling out the possibility for Indian citizens to approach and make use of these mechanisms by making individual complaints (Kumar, 2006). It has also not maintained a good record of reporting to the Human Rights treaty bodies (Marks, 2004). Hence in practice, more than the international treaties, it is the constitution of India that has formed an important basis of human rights discourse in the country.

It has also been aided in this by the view that the constitution is not just an instrument of governance, but also an agenda for social transformation (Sethi, 1998). Further, both class-based social movements as well as the so-called New Social Movements, irrespective of whether they explicitly articulate their struggles in the language of human rights or not, have played an important role in enlarging the content of rights, creating greater awareness of rights and at times procuring rights to those excluded from them (Mohanty, 1998). The role of social movements/civil society initiatives in the context of human rights in general, and right to water in particular, will be discussed further in Chapter 6. Here I will focus on the role of the constitution in the context of human rights.

Human rights are found in two parts of the constitution. Civil and political rights are incorporated under the category of Fundamental Rights in Part III of the constitution (articles 12 to 35), while economic, social, and cultural rights

are incorporated under the Directive Principles of State Policy in Part IV (articles 36 to 51). While the fundamental rights are justiciable, the directive principles are not; the state is only supposed to strive to achieve the latter through appropriate legislative and administrative measures (Singh, 1999). However, various courts have held that the recommendatory nature of directive principles cannot be a reason for not holding the state responsible for the achievement of those principles. The significance of the directives is evident from the constitutional clause which says that "the State shall, in particular, strive to minimize the inequalities in income, and endeavor to eliminate inequalities in status, facilities and opportunities, not only amongst individuals, but also amongst groups of people residing in different areas or engaged in different vocations" (Article 38, Clause 2, inserted by the Constitution's 44th Amendment Act 1978).³⁵

The scope of human rights provided in the constitution has also expanded considerably in the last two decades (i.e., since the 1980s) due to judicial activism of the Supreme Court initiated by Justice V R Krishna Iyer and Justice P N Bhagwati. A number of changes have been brought about in conventional litigation.

Firstly, fundamental rights have been liberally interpreted in various cases, expanding their scope and content. The interpretation of the constitution has followed what Singh (1999) calls the "social justice approach", where the text is provided with a contextualist reference to the basic philosophy of the constitution. This has resulted in a number of important verdicts on prisoners' rights, rights of landless laborers and release of bonded laborers, as well as a creative expansion of the scope of Article 21 of the constitution. Article 21, which is a fundamental right, says that "no person shall be deprived of his life or personal liberty except according to procedure established by law". This negative right to life has been interpreted in a number of court judgments to mean the

³³ CAT has been signed by India, but not yet ratified.

³⁴ In part, this is because of a weak enforcement mechanism; for instance, the National Human Rights Commission (NHRC) is required to intimate the state government concerned before it makes its monitoring visit and can only recommend payment of compensation to victims of violations of human rights *after* the completion of inquiry. Amendments were proposed to the 1993 Act (by NHRC in 1994, and by the Ahmadi Committee in 1999) in order to increase the autonomy and competence of NHRC, but it is only now (in the monsoon session of 2006) that they are going to be tabled in Parliament (Sripati, 2006).

³⁵ Citation from online version of Constitution of India, Website of Government of India, Ministry of Law and Justice, Legislative Department (<http://indiacode.nic.in/coiweb/welcome.html>).

right to live with dignity, which in turn includes the right to livelihood, right to education, right to health, and right to water. Thus a fundamental right (which in the Indian context, includes only civil and political rights) has been expanded to make economic and social rights (such as health care, food security, elementary education, and water) also justiciable.

Secondly, judges now often go beyond the giving of judgments and issue specific directions for executive action (and sometimes even monitor the progress of action) (Iyer, 2006). Thirdly, the concept of Public Interest Litigation (PIL) was articulated in the late 1970s by the Supreme Court. Individuals or organizations were permitted to approach the courts 'in the public interest' on behalf of those unable to do so themselves. While the initial phase of PILs (late 1970s and early 1980s), focused on civil and political rights, the second phase (from the mid-1980s to date) has seen a greater inclusion of economic and social rights too (Marks, 2004).

The growth of judicial activism in the country can be attributed to a number of factors – progressive legislation, a sensitive judiciary, and active social action groups and movements that sought the intervention of the judiciary to pressurize the government to fulfill the rights of the marginalized (Marks, 2004). However, there are also limits to judicial activism. For instance, the judiciary has not been able to adequately address situations of conflict of rights (e.g., in cases relating to environmental protection) or deal with the question of overuse and misuse of resources. The ubiquitous problem of implementation and a piecemeal approach (viz., the absence of a comprehensive systematic reform) also limits the effectiveness of judicial decisions (Marks, 2004). In fact, the extent to which the judiciary can (and should) expand constitutional law and enter the realms of policy-making and executive action has been a matter of some controversy, as also has the sometimes indiscriminate use of PILs (Iyer, 2006). For instance, the Supreme Court's support of a particular technical solution (the use of Compressed Natural Gas or CNG) in response to a PIL filed by the Centre for Science and

Environment on the problem of air pollution in Delhi, is questionable (Iyer, 2006).

The result is that even today, economic, social, and cultural rights are not necessarily reflected in policies, programs, and budgetary allocations, in spite of government claims to protect at least some of them. This is true in the case of the right to water too, as will be evident in the subsequent sections.

4.4.2 General water situation in India

I now turn to the current water situation in India.³⁶ The discussion will bring out the fact that the right to water, even when interpreted in the narrow sense of just access to drinking water and water for basic household needs (i.e., without bringing in the question of water for livelihood requirements or for the environment, and other dimensions of right to water), has not been met in the Indian context. While this is often attributed to lacuna in 'implementation', the problem is more deep-rooted in that the manner in which existing policies, legislation, and programs have been formulated is itself incommensurate with a right to water.

Before turning to the actual discussion, it is important to note that there is a paucity of reliable data for most aspects of water. In the case of drinking water, for instance, WaterAid (2005) points out that there is a lack of a common definition of coverage, as well as a lack of inclusion of functionality, usage, quality, and sustainability aspects in the data. If one brings in more complex dimensions of a 'right to water' such as water for livelihoods and conflicts between different livelihood possibilities, or the issue of pricing, the lacunae in data become even more stark.

4.4.2.1 Drinking water situation

Let me start with the drinking water situation.³⁷ As per the Department of Drinking Water Supply (DDWS), rural water coverage stood at 94 percent of rural habitations³⁸ in early 2004. However, there is a difference between the number of habitations considered 'fully covered' and the number with coverage plus use plus sustainability. That is, this number does not

³⁶ The major uses of water in India are agriculture, domestic use, industry, and power generation. My focus in this section will be on drinking water (which is often a subset of, though used synonymously with, domestic use) and irrigation.

³⁷ This discussion of the drinking water situation at the India level draws heavily on WaterAid (2005).

³⁸ Habitations are defined by DDWS to include hamlets, settlements, and other habitations as per the revenue classification of a village (WaterAid, 2005: 19).

take into account non-functional or unusable water sources, increasing problems of water quality or poor maintenance leading to defunct infrastructure, and seasonality.³⁹ In fact, studies which have taken into account issues of sustainability, water quality, and seasonality have arrived at much lower coverage levels (WaterAid, 2005).

In urban areas, the coverage of drinking water was reported to be 91 percent in the 55th round of the National Sample Survey in 1998-99. Data showing urban water coverage is even more problematic as urban slum population is severely underreported, and calculations often just divide total water available in an area by total population, without taking into account inequity in water distribution. Among the major problems in the urban drinking water sector are poor quality, regular shortages in supply (which in turn leads to contamination), weak infrastructure, high leakages (as high as 25-50 percent), and inequity in distribution (WaterAid, 2005). Further, although water tariff is low due to cross-subsidization, subsidies directed to the poor often do not reach them because the poor may not be linked to public supply lines. Sustainability is also becoming an important issue, with groundwater resources in and around urban centers being tapped not only by public water authorities, but also by private water suppliers. In fact, there are numerous instances of metros, state capitals, and large cities securing heavily subsidized water from rural areas, creating scarcity in the rural areas from where the water is taken (WaterAid, 2005).

Apart from the problems in public provision for water, it is also important to note the problems with private operators in the water sector. While private water suppliers have always existed in both rural and urban areas, in recent times, their number has increased dramatically, particularly in urban areas. In the case of Chennai, for instance, there is a 600-crore tanker industry supplying about seven percent of the city's water (Srinivasan, 2005). In Delhi, a 400-crore water tanker industry exists which mines groundwater free of cost and sells it at Rs.1000-Rs.2500 per tanker. In addition, Delhi

Water Board water is also re-packaged and sold privately (Singh, 2005). However, this private water supply industry has a number of problems. Llorente and Zerah (2003), in their study of informal water operators in Delhi, point out that no external control exists on the burgeoning water tankers and bottled water suppliers, and that the poorest households pay more in proportion to their income for water than well-off households from these informal water sellers.

In recent times, a number of changes have taken place in the drinking water sector, of which perhaps the most important one in rural areas is the shift (at least on paper) from supply-side projects, based on centralized modes of funding and management, to projects based on the principles of demand responsiveness, cost recovery, and decentralized mode of management (GoI, 2003-04). In the case of urban drinking water, the most important change being attempted is the privatization of water delivery services; while the idea of raising water prices has also been put forward, it has been politically the most difficult to implement.

4.4.2.2 Irrigation

In terms of water allocation priorities, the 2002 National Water Policy accords the second priority to irrigation (GoI, 2002). Currently, the ultimate irrigation potential of the country is said to be 139.89 million hectares (58.50 from major and medium irrigation projects and 81.43 from minor irrigation schemes), of which the irrigation potential created up to end of 1999-2000 is 94.73 million hectares (35.35 from major and medium, and 59.37 from minor irrigation) (GoI, 2000-01).

Irrigation policy in post-Independence India generally has taken the form of either government-managed dams and canals or subsidized credit for private means to exploit groundwater sources such as tubewells. In terms of absolute scale, large-scale surface irrigation projects account for the bulk of irrigation, but its relative importance has declined in recent times as a consequence of

³⁹ The central government does have a category of 'slippage' to deal with habitations that go from fully covered to partially covered, and partially covered to not covered, due to problems of source functionality, water quality, and the emergence of new habitations. While the Working Group on the Tenth Five-Year Plan said that slippage affected around 15 percent of habitations in rural India, the lack of details about slippage means that it is difficult to ascertain whether 'slippage' is a serious or a relatively minor problem (WaterAid, 2005).

the even more rapid expansion of groundwater development. The share of minor surface irrigation (such as tanks) has been relatively stagnant or declining (Vaidyanathan, 1999). Of India's total net irrigated area of 54,563 thousand hectares in 1997-98, only 31.3 percent was irrigated by canals (both government and private) and 5.7 percent by tanks, while 33.8 percent was irrigated by tubewells and 22.8 percent by other wells (CMIE, 2001).

Both surface (major and medium) irrigation works as well as groundwater irrigation in India suffer from a number of drawbacks. In the case of medium and major works, these include, among others, inequitable distribution of irrigation facilities across different classes of people and different regions, neglect of environmental factors, lack of utilization of potential created, inefficiency in water use, and lack of participation. In the case of groundwater, problems include falling groundwater tables, which in turn results in salinization of aquifers and pollution, as well as adverse effects on the poor (Gadgil and Guha, 1995; Ramamurthy, 1995; Vaidyanathan, 1999).

Partly in an attempt to redress these drawbacks, and partly in response to the pressures of liberalization, a number of changes have been initiated in the irrigation sector in the last decade. For instance, in the case of both surface water and groundwater irrigation, the government has been emphasizing, at least on paper, the need for decentralized, people-oriented, and demand-driven water management as opposed to a centralized, government-oriented, and supply-driven regime (Upadhyay, 2002). One example of this is the introduction of Participatory Irrigation Management, where the management of irrigation systems is handed over to Water Users' Associations (or WUAs). In the context of groundwater, attempts have also been made to introduce some form of regulation and set up water markets. Similarly, as in the drinking water arena, privatization has been introduced in irrigation too; for instance, the corporate private sector is allowed to build and operate dams across rivers for hydro-electric power or irrigation. These changes will be discussed in greater detail in the discussion of different dimensions of the right to water.

4.5 CONSTITUTIONAL STATUS OF RIGHT TO WATER IN INDIA

With this brief discussion of the rights situation and water situation in India, I now turn to a discussion of the constitutional status of the right to water in India. As in the case of the international right to water, the right to water is not explicitly mentioned in the Indian constitution, but has implicitly been derived under the right to life by various judicial judgments.

A clear recognition of the right of people to clean water was first put forward by the Kerala High Court in 1990, as part of the right to life (Article 21). This was in the context of a case where it was questioned whether a scheme for pumping up groundwater to supply potable water to Lakshadweep Islands in the Arabian sea would not bring more long-term harm than short-term benefits, because of water intrusion into the aquifers (Pant, 2003). In the next year (1991), the Supreme Court enlarged the scope of the right to life to include the right to enjoyment of pollution-free water and air. This decision has now been re-enforced in a number of cases (most of which were filed in the form of Public Interest Litigations). For instance, in December 2000, in the context of a case involving the Government of Andhra Pradesh giving permission to an oil company to set up a potentially polluting industry in the catchment area of two rivers, which are the main sources of drinking water to Hyderabad and Secunderabad, the Supreme Court ruled that access to clean water is a fundamental human right of all citizens under Article 21 of the constitution, and that the state is duty bound to provide it (Ramachandraiah, 2001).

However, while there is no doubt that there is judicial support for the right to water, the implications of judicial judgments for different dimensions of the right to water are not clear. For instance, the precise nature of the right granted by the judiciary (whether it is negative or positive) and consequently the role of the state is debatable. Much of the public interest litigation concerning water issues has centered on the question of the state not destroying natural water resources, and not of the state providing water to people i.e., the right to water is interpreted more as

a negative right. However, the water supply acts of various states are enacted with the supposition that it is their duty to ensure availability of water to people i.e., a positive right (Singh, 1992). Further, some judicial judgments (such as the 1980 Municipal Council Ratlam v Vardhichand and others) hold that the state cannot claim insufficient funds as a reason to not carry out its duties (Upadhyay and Upadhyay, 2002). But even if one accepts the basic point about the state's responsibility to ensure provision of adequate water, what exactly such responsibility entails is not clear. Does it imply, for instance, that none of the specific tasks involved in providing water to people can be delegated to any private body (which is the stand taken by some campaigns against water privatization), or only that such private bodies should be subject to regulation by the state with a view to ensuring access to water to all? Which kinds of water needs are considered to be the state's responsibility is also not clear. While the discussion of the right to water and of the responsibility of the state is often framed in terms of drinking water and water for domestic use, in recent times, there has also been some focus on the state's duty with respect to water for irrigation. A landmark judgment in this context was a court ruling in Karnataka in January 2006 which made state dam authorities liable to pay compensation for deficiency of service to farmers (Anonymous, 2006d).

Apart from the question of interpretation of judgments, there is also the question of how the judicial stand is reflected in national-level policies. Even the idea of water as a right (which has a constitutional basis) is not reflected in current policies. For instance, the 2002 National Water Policy continues to call water a 'basic human need' as against a 'basic human right', in spite of many attempts by civil society agents (at the time that the draft was being circulated in the public domain) to change the nomenclature from need to right (Anonymous, 2002a). In a sense, this (the NWP's stand) reflects tensions at the international level (discussed in Section 4.3) about whether water should be called a need or a right. This in turn calls into question the role of the judiciary and of case law, a point that was also raised in the context of human

rights in general in India. In the context of the river-linking project, for instance, Iyer (2003) points out how the Supreme Court has overstepped its domain by decreeing, in response to a PIL, that the rivers of India should be linked within ten years. While the Court can hold that the right to drinking water is a part of the right to life, and also direct the state to ensure the right, the particular manner in which it is to be ensured is not within the domain of the judiciary. Further, even if the giving of such a direction is justified, it is premature in the sense that the proposal has not even been adequately examined. There is also the important question of whether the citizen has the right to move the court with a writ petition against an executive action which has been taken in pursuance of a judicial direction.

4.6 CONTOURS OF A RIGHT TO WATER

Although there are judicial judgments deriving a constitutional basis for a right to water in India, there is no legislation in place promising this right. However, existing policies, laws, and programs do deal with different dimensions of a right to water and in turn, influence how states articulate these different dimensions. There are two broad ways in which the centre influences state policy. Firstly, the centre plays an indicative role; that is, it indicates the direction in which states must move (e.g., putting in place groundwater legislation), but may not necessarily apply 'pressure' for the policy to be actually taken up or even discuss the direction in any great detail. The second way in which the centre influences state policies with regard to water is via legislation that is binding (e.g., laws related to the environment).

A number of points need to be noted here. Firstly, there are varying degrees of implementation across the states, and the specific way in which the same set of central-level factors would shape the right to water differs from state to state. Thus the central model groundwater bill has been languishing for a long time in the states, but Participatory Irrigation Management has been taken up by many states following encouragement from the centre, although in varying forms. Similarly, following the adoption of a National Water

Policy⁴⁰ at the central level (first in 1987, and then a revised version in 2002), each state was supposed to draft its own policy in two years. But some of the states who have adopted state water policies have ended up using identical ones; while this ensures some uniformity between states, it has also meant that the uniqueness and the distinct agro-ecological zones of their own states have not been taken into consideration, thereby undoing an important rationale for undertaking such a policy in the first place.

Secondly, the centre could also bypass the states and directly influence how the right works out on the ground (by the use of programs such as *Swajaldhara*). Thirdly, policies at all levels are shaped by a variety of factors. At the central level, these include international bodies (lending institutions, the World Trade Organization, MNCs) and interest groups within the country. For instance, donor agencies are pressing for cost recovery in water, while socio-political obligations are instrumental in slowing down the process of pricing. The same point applies at the state level too. In fact, funding institutions, which in the pre-liberalization era used to work primarily via the centre, now often fund state programs, thereby influencing state policies directly. A study of laws and policies as well as the factors influencing them also helps to understand how the international level water discourses shape national and sub-national level discourses.

It is beyond the scope of this study to trace out the specific ways in which different states have reacted to various aspects of policy and legislation at the centre which are relevant to a right to water; all I do here is briefly review the central-level aspects themselves and then indicate the direction that they have taken in the states (at least in some of the cases).

4.6.1 Ownership of water

The question of ownership of water – both of absolute ownership and of decision-making regarding the nature and distribution of rights – is usually the subject of state legislation (though in none of the states are there explicit

statements or acts that clearly recognize and define property rights in either surface water or groundwater). But a number of aspects of central-level policy and legislations are relevant to the issue.

Perhaps the most important aspect of ownership is the doctrine of public trust explicitly adopted by a 1997 Supreme Court judgment; the judgment argued that our legal system – based on English common law – includes the public trust doctrine as part of its jurisprudence, which in turn implies that the state is a trustee of all natural resources, and has a legal duty to protect them (Iyer, 2005b). The distinction between the state as absolute owner and the state as public trustee is an important one, because as Upadhyay (2005) points out, if the state is an absolute owner, one would have to concede that it is free to regulate the resource in any manner it chooses, and one cannot question the current regime of rights. However, the spirit of the public trust doctrine is not evident in any of the state legislations.

Consider first the case of surface water. Three kinds of rights are broadly recognized in the case of surface water by most states. Public ownership of surface water is implied in government appropriation and regulation of surface water through irrigation projects (although there is some controversy about whether the state has ownership rights, or just control and user rights) (Upadhyay, 2002). This started with the Easement Act of 1882, when the colonial state was vested with absolute rights over all rivers and lakes, and further consolidated in both colonial as well as post-colonial legislation in individual states (such as the Madhya Pradesh Irrigation Act of 1931). Where surface water is not appropriated/used by the state, riparian rights prevail; that is, farmers owning land contiguous to the source of water – stream, pond, or lake – have the first right to water, as long as their use does not interfere either with the flow of the water itself or with the use of downstream riparians (Singh, 1992). In addition, particular groups may have customary rights over water.

⁴⁰ The National Water Policy does not have statutory status, but is formulated and approved by the National Water Resources Council, an institution established by a resolution of the Government of India, and comprising of the prime minister as chairman, the union minister of water resources as vice-chairman and all state chief ministers and several central ministers as members. The National Water Policy is supposed to guide the formulation of policies on water at the state level.

But there has been no attempt to incorporate the public trust doctrine either in the manner in which each of these rights regimes work out, or in the relation between different rights regimes. For instance Irrigation Acts in India place rights to watercourses in the hands of the state, often superceding pre-existing rights of communities to manage their water resources. This in turn means that the state can divert water resources, obstruct traditional water sources and collection methods, or act as barriers to new local efforts in water management (Pant, 2003). For example, when water harvesting efforts in Rajasthan resulted in water reappearing in rivers and streams that had been dry for years, the state ended up claiming the right of control over those waters for the purposes of allocation of licensing fisheries (Iyer, 2001).

The absence of a public trust doctrine is even more evident in the case of groundwater legislation. Groundwater has never been declared to be publicly owned, nor is public ownership implied through the operation of state/public tubewells acts. The actual use of groundwater, however, is governed by a de facto rights system determined by factors such as ownership of the overlying land, economic power, historical precedence, and so on. In effect, then, groundwater is an open-access resource, at least until it is captured and privatized by whoever taps it first (Saleth, 1996). This feature of groundwater, combined with the fact that there are no restrictions on its use (as we will see in a subsequent section), has been an important factor contributing to its over-exploitation.

Another important aspect of ownership that is present at the centre, and finds replication in the states, is the lack of definition of a clear relation between different rights regimes such as formal rights and customary rights. In fact, a Supreme Court verdict emphasized the point that customs are only a source of law (and not laws themselves) and that even their becoming a source is contingent on them being recorded in statutes or recognized by courts. Hence customary rights also need to be

recorded as state-sanctioned formal rights to be relevant (Upadhyay, 2003). However, there is no mention of the relation between formal law and customary law in the 2002 National Water Policy.

The third way in which access to water is influenced is by the policy with regard to citizenship, which is determined by the centre. Like in many other parts of the world, citizenship is usually a criterion for the enjoyment of human rights in India too. As discussed in Chapter 3, migrants are the most important group of people who are excluded from the enjoyment of rights as a result of this focus on citizenship. The striking down of the Illegal Migrants (determination by tribunals) Act of 1983 by the Supreme Court in 2005 has meant that the onus of proving citizenship is once again on the person suspected to be a foreigner, thus making it easier for government authorities to categorize those without adequate documentation as 'migrants'.⁴¹ Further, slum-dwellers are also increasingly being denied the rights of citizens, as a result of judicial judgments such as the one in the 2000 Almitra Patel versus Union of India case, which treat the urban poor as encroachers and equate the provision of resettlement as tantamount to rewarding pickpockets (Ramanathan, 2006).

4.6.2 Scope of right to water

Two important aspects of the scope of the right to water are affected by the centre viz., quality and quantity. Firstly, at least some forms of water come under the purview of central legislation dealing with the quality of water and water pollution (Pant, 2003). For instance, packaged water was included in 2000 in the Prevention of Food Adulteration Act (1954). Similarly, the Water (Prevention and Control of Pollution) Act, 1974 (amended in 1988) provides for a comprehensive scheme of administrative regulation through a permit system. The provisions of the Environmental (Protection) Act, 1986, also relate to water quality and access to water through its notifications on permissible quality standards, environmental impact assessments, and public hearings. Its most relevant provision (from the point of view

⁴¹ Prior to 1983, the detection and eviction of foreigners was done under the Foreigners Act 1940, where the burden of proving citizenship was on the person alleged to be a foreigner. The IMDT Act provided for judicial tribunals to determine disputes about citizenship which might arise under the Foreigners Act. Though the Act was for the entire country, it was initially made applicable only to Assam and was to be eventually notified to other parts of the country (Bhushan, 2005).

of water) is probably the Coastal Regulation Zone (CRZ) Notification, which prohibits certain activities such as the discharge of untreated wastes and effluents in coastal areas declared as CRZ. However, the quality norms are far from adequate. For instance, the bottled water and soft drink industry which depends on extracting groundwater, and has a huge impact on the surrounding groundwater (in terms of both quality and quantity), is outside the purview of the 1994 Environmental Impact Assessment (Anonymous, 2005b).

Secondly, the drinking water programs of the central government have standardized quantity norms (for meeting basic water needs) which influence the way in which these programs work on the field. According to official guidelines issued by the central government, rural water requirements in India are set at 40 liters per capita per day (lpcd)⁴² and urban water requirements at 140 lpcd for sewered areas, and 100 lpcd for unsewered areas. There are a number of problems with the quantity norms. The rural water requirement does not take into account the needs of livestock (except in desert areas where another 10-15 liters is allocated on that count). Further, the norms do not consider intra-household dynamics over water allocation (Ahmed, 2005c). There is also little space for flexibility in the norms to deal with differences in requirements (say, across different agro-climatic zones). Usually, in designing rural water systems, total demand is determined by fixing the norm of 40 liters per capita per day as a minimum requirement for all rural areas, and then multiplying this by the population. One result of this lack of flexibility in quantity norms is that in regions where per capita use is lower, population coverage is reduced (Reddy, 1999).

4.6.3 Duties/Responsibilities implied by the right

The discussion in Section 4.5 indicates that there is at least some judicial basis for a right to water in India. There is still, however, no clear basis for accountability, and the duties

of the government and enforceability mechanisms are not defined at the central level.

In terms of duties of the right-holder, the only aspect where the central government has tried to suggest legislation – groundwater use – has not succeeded. The Groundwater (Control and Regulation) Bill was mooted by the Government of India way back in 1970. The draft was then circulated to all the states, with an advice to enact it into an Act, with modification if necessary. The bill has since been amended thrice, in 1992, 1996, and 2005. However, very few of the states have enacted legislations, and even these attempts have been limited. Gujarat was the first state to introduce a groundwater act in 1976, which dealt with the regulation and licensing of tubewell construction and control of groundwater use.⁴³ But apart from the fact that this act was applicable only to nine out of Gujarat's nineteen districts and did not address any fundamental questions of property rights over water, the legal status of this act is not clear and hence implementation has been difficult (Dubash, 2002; Mehta, 2003a). The scope of the Maharashtra groundwater legislation is restricted to underground drinking water sources (GoM, 1993); the same is the case with the Madhya Pradesh act too. In the case of Andhra Pradesh, while all new wells require registration and permission for wells is supposed to be granted only after taking the prevailing groundwater situation into consideration, there is no scope for regulating existing wells (Soussan and Reddy, 2003). Tamil Nadu has an act applicable only to the Madras Metropolitan area, and a bill has been introduced for the rest of the state.

4.6.4 Delivery of water

With regard to delivery of water, the centre has encouraged two kinds of policies, both of which have been taken up to varying extents by different states – sectoral decentralization (such as Participatory Irrigation Management) and privatization.

In the case of irrigation, sectoral decentralization has taken the form of

⁴² The Government of India is in the process of relaxing these norms. The relaxed norms stipulate that once every habitation in the state has a safe drinking water source providing 40 lpcd, state governments may provide (if demanded by the beneficiaries) up to 55 lpcd of safe drinking water, with the conditionality that beneficiaries of the relaxed norms must be willing to share no less than 20 percent of the capital, and 100 percent of operations and management costs of the higher service (WaterAid, 2005: 17).

⁴³ More specifically, the Act introduced a system of licenses for any new wells deeper than 45 meters and proscribed uses other than agriculture and drinking (Bhatia, 1992).

Participatory Irrigation Management (or PIM). Although this idea has been supported by the Government of India since the mid-1980s (for instance, in GoI, 1987), it is only recently that states have started taking measures to facilitate it.

The precise nature and extent of powers and functions of WUAs varies from state to state, and is usually determined by a variety of factors internal to the state. For instance, in some states, the fixing of water charges has been kept outside the purview of the WUAs, but in other states (like Gujarat), the WUAs are free to decide the water rates to be charged from the beneficiary farmers (Upadhyay, 2002). But one feature seems to be common to all WUAs viz., the limited nature of the powers devolved to them. This, in turn, is very much in tune with the stand that central policies take with regard to water. For instance, while the 2002 National Water Policy emphasizes a participatory approach to water resources management, the aim of involving water users' associations and local bodies is said to be "to eventually transfer the *management of such facilities* to the user groups/local bodies" (GoI, 2002: Section 12; italics mine); there is no mention of *ownership* of the water facilities by local groups. Similarly, while participation at the level of the WUA might be encouraged, the question of participation in the process of irrigation policy-making at higher levels is not even mentioned.

In the case of drinking water too, the process of sector reform (particularly in the rural sector) was started by the centre. Initially, reforms were introduced in 1999 in 67 pilot districts covering 26 states, and were scaled up in 2002 in the form of *Swajaldhara*. The *Swajaldhara* program aims to provide direct access to central resources to communities and community institutions (*panchayats* and district water and sanitation committees), which want to develop and manage local water resources to meet their drinking water needs. However, while the sector reform scheme of *Swajaldhara* is expected to replace the existing scheme of the Accelerated Rural Water Supply Program (ARWSP)⁴⁴ by 2007, adoption of *Swajaldhara* has been slow and the role of different agents such as government technical support agencies and NGOs remains weakly defined (WaterAid, 2005).

The emphasis on this scheme is in line with global trends discussed earlier – focus on cost recovery, limited role for the state, emphasis on water as an economic good, and so on. In fact, while the centre does concede that water is an economic and social good, it also holds that some of the problems in the drinking sector (such as lack of sustainability) are due to the perception of people that "water is a social right to be provided by the government, free of cost" (GoI, 2003-04: 136). As the discussion in Chapter 3 points out, the idea of water as a right need not necessarily imply free water in all cases, and conversely, the agenda of cost-recovery could be undertaken in conjunction with the idea of water as a right. Hence not explicitly engaging with the idea of a right to water, even though it has a constitutional basis, means that the particular manner in which the centre ends up shaping reforms in the delivery of water services is limited from the point of view of equity.

Another kind of change in delivery of water that has been encouraged by central policies is privatization, in the context of canal irrigation, minor surface irrigation, and drinking water systems (particularly in urban areas). For instance, the 2002 National Water Policy points out that corporate sector participation in canal irrigation will help in "introducing innovative ideas, generating financial resources and improving service efficiency and accountability to users" (GoI, 2002: 6). Further, it could include one or all of various aspects such as building, owning, operating, leasing, and transferring of water resource facilities.

In the arena of drinking water, the Chennai Metropolitan Water Supply and Sanitation Board, popularly known as Metrowater, was an early reformer in India, and negotiated its first big loan from the World Bank in the early 1980s i.e., even before the central-level policy changes. But since the late 1990s, reform of the water sector has become an important part of the policy discourse in several cities such as Bangalore and Delhi. At the present juncture, however, there is little analysis of the precise forms that privatization is taking and its implications, although concerns about equity (particularly as a result of the increase in prices that privatization is likely to result in) has led

⁴⁴ ARWSP is a supply-driven scheme introduced in 1972-73.

to protests by civil society groups in many parts of the country.

Central-level policies with respect to both sectoral decentralization and privatization have two important lacunae. The first is that the implications of the 73rd and the 74th constitutional amendments for these policies have not been dealt with, resulting in an unclear division of labor. Thus the 2002 NWP calls for participation by both WUAs and *gram panchayats*, but does not deal with the problem of co-ordination between them. Even when there is clarity about which body has primacy (like Panchayati Raj Institutions or PRIs in the case of rural drinking water schemes), there may not be supporting legislation from the states. For instance, decentralization is often only administrative, without sufficient powers and financial autonomy being given to the PRIs (NIRD, 2001). Further, the PRI Acts of different states which give power to local communities over many aspects of water do not supersede irrigation acts wherein control is more centralized.

A related point is that there is a conflation in central-level policy of the private sector with 'community' and 'civil society', all of which are shown in opposition to 'the state', which implicitly assumes that all non-state actors have a level playing field (Coelho, 2005). There is also no clear discussion of the role of NGOs or civil society. Similarly, while government documents constantly refer to the 'community' in the context of water management, this community is taken as equivalent to the village in drinking water programs, users of a particular water source in the case of surface irrigation (as in lift irrigation schemes or command areas of irrigation projects), and the watershed or the river basin in other contexts such as the integrated planning, development, and management of water resources. There has been no attempt made to link these different kinds of 'communities'.

A second important lacuna in central-level policies is the near total absence of any discussion of the impact of GATS negotiations on water delivery. This is crucial because the December 2005 Hong Kong negotiations give some indication that India may (have to) accept commitments to liberalize services under Mode 3 (relating to right to establish-

ment) in return for the ability to supply services under Mode 1 (i.e., cross-border movement), which includes service outsourcing in which India has proved its competitiveness (Dubey, 2006).

4.6.5 Pricing

Since the Eighth Five Year Plan (1992-97), there has been emphasis on management of water as a commodity. The NWP 2002 also points out that water charges for various uses should be fixed in such a way that they cover at least the operation and maintenance charges of providing the service initially and a part of the capital costs subsequently (GoI, 2002: Clause 11). This has already been operationalized in central-level schemes such as *Swajaldhara* where villagers are required to contribute ten percent of capital costs of a water scheme; after completion, the entire operations and management cost is the responsibility of the community (GoI, 2003-04).

However, states have been slow to take up the central injunction to price water like an economic good. The arena in which this has been undertaken the most is canal irrigation (where increased water charges form a part of PIM). Raising the price of urban drinking water has been proposed, but undertaken in very few areas. Rural drinking water schemes which emphasize cost recovery have also been slow to spread.

An important lacuna in the central level policies is the absence of any analysis of the equity impact of pricing, and of possible mechanisms to deal with these. This, in turn, could adversely affect the working of a right to water. For instance, under *Swajaldhara*, only those villages that are willing to adopt the demand-responsive approach are entitled to public funding for new water systems. This could result in poorer villages and sections of the population that cannot pay their share of costs not receiving government funds.

Interestingly, at least in the context of irrigation water, the 1987 NWP specifically mentions that water rates for surface water and groundwater should be rationalized with due regard to the interests of small and marginal farmers. This point is missing in the 2002 NWP, which just makes a general statement that subsidy on

water rates to the disadvantaged and poorer sections of the society should be well targeted and transparent. Without knowing the exact rationale of the process behind the change in wording, one may not be able to read much into it, but it is, nevertheless, worth noting.

4.6.6 Relation of Right to Water to Other Rights and Vision of Development

The discussion in Chapter 3 (in particular, Section 3.8) indicated the importance of recognizing the possible conflicts and complementarities between different uses and users of water, as well as between different kinds of rights, and of engaging with a vision of development. The first element is almost absent in central-level water policies, and the second is present only in a very limited sense; these lacunae are also found in the state-level policies.

Let me start with the first point, about conflicts between different uses and users, and therefore potentially between different kinds of rights. The basic principles governing the basis, nature and content of legal rights of different claimants over water (between different riparians in a particular river basin or between different uses and users) are not clearly codified. Similarly, water allocation priorities are either undefined or not clear. For instance, the National Water Policy accords top priority to drinking water (GoI, 2002: Clause 5) and holds that drinking water needs of human beings and animals should be the first charge on any available water (GoI, 2002: Clause 8). However, there is no discussion of how this is to be operationalized, either at the central level, or at the state level. That is, there is no clear discussion of conflicts between drinking water and other uses of water and how these are to be resolved, or of the relation between right to water and other rights. The result is that cases where water for industry or agriculture gets priority over water for drinking are not uncommon.

One example of this is the Tamil Nadu government's bid to accommodate industry (by way of lax environmental regulation and by ensuring that industries have secure access to treated water), which has resulted in textile units flourishing in Tirupur, even though unregulated mining of groundwater by these units has led to a drastic fall in water levels

and a shortage of drinking water in the region (Jayaraman, 2005).

Perhaps nothing exemplifies the complexities involved in ensuring a right to water more than the relation between right to water and right to livelihood. Srinivasan (2005) gives the example of private tankers in Chennai which are mining the borewells in the surrounding farmlands for water. The water that is sold commercially is pumped out using subsidized power that is provided by the Tamil Nadu government for agricultural purposes, which means reduced water for agriculture as well as for drinking water supplies. While some of the farmers protest against this, for others, selling water to these private operators is often a more viable option than living off agriculture. Srinivasan points out a number of interesting questions that this example raises. Firstly, while cases involving MNCs like Coke and Pepsi have received a lot of attention because their bottling plants over-extract groundwater, relatively less attention has been focused on Indian private operators. Secondly, there are potentially alternative ways of fulfilling Chennai's water needs (such as recharging ponds and protecting swamps). Thirdly, while the need to fulfill the water rights of Chennai cannot be taken away, these cannot be fulfilled at the expense of the right to water and the right to livelihood of rural people. Fourthly, the fact that there are willing sellers of water (even though it might not be a viable strategy in the long term because extracting groundwater would become impossible or too costly at some point) means that serious thought needs to be given to the nature of agriculture and rural development.

This last point about the nature of the development process is perhaps the one with which water policies and legislation need to engage with most critically. Note that there is a particular view of development already underlying most water policy; the problem is that it often follows a conventional view of development without any questioning. Consider, for instance, irrigation policy in post-independence India. One of its major goals has been maximizing production per unit of area (GoI, 1972). The importance of this goal has to be understood in the context of the broader economic goal of industrialization, where

agriculture was seen mainly as a source of cheap labor and food. State-funded, large-scale canal irrigation was seen as the best means for bringing more and more areas of the country under cultivation, thereby increasing agricultural production. This, in turn is one of the factors that resulted in excessive concentration on large dams in India (Ramamurthy, 1995).

Similarly, the broad agricultural policy of the state – in particular, the pricing of agricultural produce (minimum support prices and procurement prices) as well as pricing of and access to agricultural inputs – affects how water (both surface water and groundwater) is exploited and used.

Note that sometimes even attempts to move away from conventional development without thinking through the alternative carefully could have negative consequences. Baviskar (2006) gives the example of the Master Plan for Delhi 2021, which envisages an economic growth model that discourages polluting manufacturing industries and encourages 'clean' service sector industries like international tourism, without taking into account the resource requirements of these forms of development (in terms of water and power, for instance).

4.6.7 Participation

The discussion of participation in Chapter 3 already indicates that the usual manner in which it is conceptualized and implemented is problematic, both in terms of involvement of different sections of society in decision-making at supra-local levels, and its working at the local level. The central policies on water replicate these problems, and there is usually no more than a cursory mention of participation.

For instance, the 2002 NWP mentions that the involvement and participation of beneficiaries and other stakeholders should be encouraged right from the project planning stage itself, but the nature of this participation, as well as how and by whom beneficiaries and stakeholders are to be defined is unclear. Similarly, while PIM encourages participation at the level of WUAs, any participation in the process of irrigation policy-making at higher levels is not encouraged. Even in drinking water schemes such as *Swajaldhara*, which purportedly rest on principles of social inclusion

and governance, there are no mechanisms to actually ensure that the schemes are designed by including all sections of society (Ahmed, 2005c). In part, this could stem from eulogistic notions of 'community' (particularly of village communities) so that power politics within the community are not taken into account. It could also be due to the fact that the goal of participation in these projects is itself very limited viz., to get local people to contribute (labor, for instance).

In spite of the positive role that judicial activism has often played in recent times, it has also served to limit participation in some cases. Iyer (2003) points out how in the context of the Inter-State Water Disputes Act of 1956, 'inter-state' really means intergovernmental, and that when two governments agree on a project on an inter-state river or a tribunal lays down the details of such a project in its award, the right of the affected people to be consulted about or to question the project get extinguished. One instance of this is the Supreme Court judgment affirming the rights of the government in the case of the Narmada (Sardar Sarovar) case.

4.6.8 Non-water legislation

The right to water is not only affected by laws relating to water (whether ownership and use or quality and pollution), but also by other central legislation; these do not deal with water per se, but rather with the ability of states to pursue particular kinds of water policies, and that of communities to access clean water and influence water policy (Pant, 2003). While it is not possible to analyze all of these here, it is useful to keep them in mind. The list of such legislations includes (i) the 73rd and 74th amendments to the Constitution under which drinking water, water management, watershed development, and sanitation are to be devolved to the *panchayats* and *nagarpalikas* (ii) the Right to Information Act and (iii) the Land Acquisition Act 1894.

Recent policy changes, for instance in urban infrastructure, could also potentially impact the way in which various dimensions of right to water work in the case of specific states. One example of this is the Jawaharlal Nehru National Urban Renewal Mission (under the Union Ministry of Urban Development), under which a total of 63 cities and towns across the country have

been identified for fast-track development (Anonymous, 2006b).⁴⁵

4.7 CONCLUSION

This chapter shows that there is support for a right to water in the international human rights regime, although the most important statement to date – the General Comment 15 of the United Nations, leaves a lot of issues undefined. At the India level, a basis for a right to water has been found in the Indian constitution; however, neither the judiciary, nor the government has engaged with the General Comment in particular, or the human rights discourse in general (at least in the context of a right to water), which, in turn, is an indication of the hegemony of other water discourses.

The specific discussion of different dimensions of water shows, on the whole, that from the point of view of a meaningful right to water, there are several lacunae in central-level policies and legislation, particularly in the form that current changes in the irrigation and drinking water sector have taken. This results in limitations in the working of the right to water at the state level. Further, the division of labor between the centre and the state means that some of the recommendations made by the centre are non-statutory in nature, and not necessarily followed by the state governments.

In the next chapter, I will turn to the articulation of the right to water in the legislation of one particular state viz., Maharashtra.



⁴⁵ It is too early to say what precise impact this mission would have on water. But two examples indicate the kind of impacts that are possible. Firstly, the development plans prepared by at least some of the cities and towns already indicate an importance given to flyovers and gardens instead of to basic services like water supply and drainage. Secondly, refusal to comply with urban reform policies of the centre could result in reduced central funding for basic services such as water. The states of Maharashtra and West Bengal, which refused to repeal laws restricting land ownership (originally a mandatory 'reform' condition, and now made optional) are likely to get reduced central assistance under JNNURM towards water and sanitation projects meant for the urban poor (Anonymous, 2006b; Dave, 2006).

RIGHT TO WATER IN MAHARASHTRA

5.1 INTRODUCTION

Having traced how the right to water works in the domains of human rights law and legislation at the India-level, I now move on to the case of Maharashtra. I start by giving a justification for the choice of this state. I then provide a background of the general water situation in the state. The rest of the chapter focuses on how Maharashtra-level legislation affects different dimensions of a right to water.

5.2 WHY MAHARASHTRA?

Maharashtra offers an interesting case study of the question of right to water for a number of reasons.

As in the rest of India, water-based interventions have always been important in Maharashtra, mainly due to the predominance of agriculture in the state, in which water is a critical input. Combined with the growing household needs of rural and urban populations, as well as the water needs of industry, the result is a high demand for water. The importance of water in the state is evident from the number of statutory bodies appointed to study issues of water. For instance, two Irrigation Commissions have been appointed - the first in 1962 (under the chairmanship of SG Barve) and the second in 1995 (under the chairmanship of MP Chithale). Apart from these, the state has also had a Fact-Finding Committee for Survey of Scarcity Areas in Maharashtra State in 1973, a Review Committee on Drought-Prone Areas in 1984, a Fact-Finding Committee on Regional Imbalance in Maharashtra State to study the problem of regional inequity in the state (including inequity in regional distribution of water), and the Sukhathankar Committee in 2000 to evaluate different rural-urban water supply schemes.

However, the access of many groups of people

to water continues to be limited, as will be evident in the discussion in the next section. Various factors are responsible for this: geographical characteristics, faulty water (and water-related) policies of the colonial and post-colonial state, and unequal distribution of power. For instance, the choice of a wrong cropping pattern viz., extensive cultivation of a water-intensive crop in a semi-arid region, has led to an artificial creation of 'scarcity' of water. The diverse range of factors affecting the water situation in the state will help to bring out the complexities involved in ensuring the right to water to all as well as the importance of context-specific discussions of the right.

Maharashtra is also a good example of the different kinds of changes that are occurring in the water sector, not just in India, but the world over. These include a greater emphasis on Water Users' Associations (WUAs) for management of water resources at various levels, revision of water rates, corporate involvement in medium and major irrigation projects, demand-driven rural drinking water projects, and a focus on watershed projects as well as on river basin management in water policy. One realm in which change is evident is legislation; since 1990, a number of legislations - the Groundwater (Restrictions for Drinking Water Purpose) Act in 1993, the Maharashtra State Water Policy in 2002 (MSWP),⁴⁶ the Maharashtra Management of Irrigation Systems by Farmers Act (MMISFA), and the Maharashtra Water Resources Regulatory Authority Act in 2005 (MWRRA) - have been passed.

Lastly, Maharashtra has a rich history of social movements of various kinds (see, for instance, Shah, 1990; Rodrigues, 1998), including a wide range of civil society interventions with respect to natural resources and economic development in general, and water in particular. For instance, a number of experiments in equitable distribution

⁴⁶ The MSWP is not strictly a legislation, but a policy that is supposed to influence legislation.

of water and its sustainable use have been undertaken in Western and Southern Maharashtra. This factor is important in the choice of Maharashtra because this study is also interested in the question of how civil society initiatives engage with the idea of right to water, a question that will be taken up in Chapter 6.

5.3 GENERAL WATER SITUATION

In this section, I will describe the general water situation with respect to drinking water and irrigation in Maharashtra, and then summarize the broad reasons for the prevailing situation.

The state of Maharashtra has two kinds of river systems – those flowing eastward and those flowing westward. Of the five major river basins in the state – Krishna, Bhima, Godavari, Vainganga and Tapi – , the Krishna, Vainganga and Godavari river basins supply the maximum amount of water to the state (Deshpande and Narayanamoorthy, 2001).⁴⁷ Estimated average annual availability of water resources in the state is 164 cubic kilometers of surface water and 20.5 cubic kilometers of groundwater.⁴⁸

According to the 2001 census, 79.8 percent of the households in the state have access to safe drinking water. This includes 68.4 percent of households in rural areas and 95.4 percent in urban areas. In terms of irrigation, although the percentage of gross irrigated area to gross cropped area has increased steadily since the time of formation of the state (from 6.5 percent in 1960-61 to 16.6 percent in 2000-01), it is still low as compared to the ultimate potential as well as to the all-India average of 38.7 percent (GoM, 2000-01).

As in the rest of the country, there are problems with respect to efficiency, equity, and sustainability in the case of both drinking water and irrigation. The lack of efficiency is evident, for instance, in the fact that actual utilization of the irrigation capacity created up to June

1999 was only 38 percent for major and medium irrigation projects (GoM, 2000-01). Similarly, there is also inequity in the distribution of water, both between districts and within the same district. For instance, sugarcane-growing areas get water even during droughts, while other areas lack water for subsistence crops or even drinking water. The result is that eight out of the ten leading sugarcane-growing districts – Ahmadnagar, Solapur, Sangli, Satara, Pune, Nashik, Beed, and Latur – have large drought-prone areas in them.

Sugarcane cultivation is problematic not only in terms of equity, but also in terms of environmental sustainability. Increased cultivation of sugarcane usually has gone hand-in-hand with lavish use of water for irrigation⁴⁹ and use of fertilizers in excessive amounts (which further increases the need for water). This has worsened waterlogging and salinity along the Deccan canals, and in some cases has led to complete loss of formerly fertile land (Attwood, 1992; Attwood, 2001). Sustainability is also a problem in case of groundwater use. While there are currently no over-exploited watersheds in Maharashtra (i.e., watersheds where groundwater exploitation is over 100 percent of recharge capacity),⁵⁰ there are 34 dark watersheds (i.e., where groundwater exploitation is between 85 percent and 100 percent). These represent 2.26 percent of total watersheds in Maharashtra (GoI, 2000-01). Further, there is evidence that the groundwater situation is fast deteriorating. A Central Groundwater survey to ascertain the status of groundwater in the state showed that from May 2003 to January 2004, water levels in 35 percent of the wells in central Maharashtra fell by two meters, and that in the northern, southwestern and western areas of the state, the fall was as steep as four meters (Bavadam, 2004).

It is important to note that the problems of efficiency, equity, and sustainability of water

⁴⁷ Bhima is a tributary of Krishna and Vainganga is a tributary of Godavari; however, in Maharashtra, the two tributaries are counted as separate rivers.

⁴⁸ Measurement of groundwater availability is based on the component of annual recharge that can be subjected to development by means of suitable groundwater structures.

⁴⁹ Until recently, irrigation water was not charged per unit volume, and farmers had no cost incentive to economize. Canal water was also often used to flush salts out of the surface soil. Further, uncertainty of supply led to excessive use of canal water when available (Attwood, 2001).

⁵⁰ The annual recharge rates are average estimates, so that individual aquifers could have different recharge rates. Further, estimates of extraction are usually made from a very limited sample. Hence there are doubts about the accuracy of the classification (Vaidyanathan, 1999).

are inter-related. For instance, the growing problem of groundwater depletion means that the newer technology needed for pumping water is less and less accessible to poor farmers, resulting in inequity in the way different classes of people can cope with the groundwater shortage.

There are a number of reasons for the problems in the water situation in the state. One is to do with nature's endowment in terms of topography and rainfall. 91 percent of the geographical area of Maharashtra is occupied by hard rock and the topography is undulating, as a result of which groundwater percolation and storage is comparatively poor. This, in turn, means that irrigation capacity of the state is limited. The 2nd Irrigation Commission of India pointed out that even after using surface and groundwater fully, only 30 percent of the land in Maharashtra could be brought under irrigation, and 70 percent would be rainfed (GoI, 1972). To date, even this potential has not been fully reached.

The effect of the topography is aggravated by the fact that even though the average rainfall in Maharashtra is quite high, there is wide variation in rainfall across different parts of the state. There are three broad zones in the state in terms of natural rainfall. One is the coastal strip of Konkan (in the western part of the state), which receives an average of 2,500 mm rainwater every year. But a large part of this water drains out into the Arabian sea since the rocky terrain prevents percolation of rainwater into the soil. The second zone is the rain-shadow region of the Western Ghats, mostly in Western Maharashtra and Marathwada, which gets scanty and erratic rainfall – this constitutes 40 percent of the land territory of Maharashtra. The third zone, consisting of Vidarbha and some parts in the other areas, receives adequate rains, barring certain pockets. As a result, large parts of the state are semi-arid and nearly 50 percent of the state's net area is consistently subject to droughts.⁵¹

More than geographical factors, however, many of the problems in the water situation can be attributed to deficiencies in state policy with regard to water. In the case of irrigation, this is primarily reflected in the undue focus on large surface irrigation projects, and in the case of drinking water, in the piecemeal and target-oriented approach followed.

I first consider the case of irrigation. As in irrigation policy at the central level, successive state governments in Maharashtra have emphasized major and medium surface irrigation projects, so that the state now has the 'distinction' of having the largest number of on-going major and medium irrigation projects and extension/renovation/modernization schemes in India (108 out of a total of 476 in the country) (GoI, 2000-01).

The emphasis on large-scale dams and canals stems in part from the goal of increasing agricultural production in India (discussed in Chapter 5), but in the specific case of Maharashtra, there is also a particular historical context which gave rise to this. It is important to take this into account, because it presents a good example of how a particular constellation of factors could give rise to a policy, and how the policy has unintended consequences even as the factors themselves change. The emphasis on large dams began in the second half of the 19th century, following major famines and crop failures, and was spurred in part by the Deccan Riots of 1875.⁵² The first irrigation dam and canal – the Kutha – was constructed in 1874. The early canals were initially conceived as protective works, i.e., they were intended to provide water for food crop production over wide areas. But faced with low demand for irrigation water and high costs of canal irrigation in the Deccan, the government switched to a system of using water to service compact areas for water-intensive crops such as sugarcane. In this system, the government guaranteed to supply water to a certain area (designated a

⁵¹ In the post-independence period, Maharashtra experienced severe droughts in 1965-66, 1970-73, 1984-87, 1992, and 2001-03 (Krishnaraj *et al.*, 2004).

⁵² In 1875, riots took place in Western Maharashtra, with peasants seizing and burning mortgage deeds and other records that moneylenders had in their possession. The Deccan Riots Commission, appointed by the British government to enquire into the causes of the riots, found evidence of increasing agricultural indebtedness and consequent land 'transfers' from cultivators to moneylenders. Further, the riot villages were found to be characterized by poor soil and precarious climate, and were in the heart of the famine zone. In 1879, the government attempted to promote a greater balance in credit relations by passing the Deccan Agriculturalists' Relief Act, which inhibited transfer of land from peasant debtors to their 'non-agricultural' creditors. Though it was not the riots *per se* that led to the taking up of large-scale surface works, they did influence the forms that agricultural policy (and more specifically irrigation policy) took (Attwood, 1992).

block) for six years, and the cultivators, in turn, guaranteed that they would take canal water for the same period. Following the success of the block system, more canal systems developed between 1900 and 1938. By the end of the 1930s, there was a seven-fold increase in canal irrigated area since the turn of the century and sugarcane became the basis of increasing prosperity in the canal villages (Attwood, 1992). In the post-independence period, canal irrigation has spread even further.

Since the 1970s, groundwater development has also been emphasized, and tubewells have received considerable institutional credit. But on the whole, the attention directed towards minor irrigation has not been adequate, especially when one considers the fact that minor irrigation accounts for a large portion of the state's ultimate irrigation potential and much of this still has not been attained (Deshpande and Narayanamoorthy, 2001). For instance, lift irrigation schemes, which are critical in a state with undulating terrain, have been recommended by various committees, but except in the case of sugar co-operatives, they have not been very successful. At present, lift irrigation schemes constitute a very small percentage (0.36 percent) of the total irrigation capacity created up to June 1999. The actual utilization of the minor irrigation capacity created up to June 1999 was only 29.7 percent (GoM, 2000-01).

The bias of state policy in favor of major and medium surface works was exacerbated in the late 1990s when the government of Maharashtra started trying to impound as much as possible of the water awarded to it by the Bacchawat interstate water dispute tribunal.⁵³ This resulted in a rapid process of dam construction with considerable social costs (in that rehabilitation concerns in these dams were not met at all). Ironically, much of the water impounded in the dams remains unutilized to date because of incomplete canal work (Deshpande and Narayanamoorthy, 2001; Phadke, 2004).

In the case of drinking water in rural areas, as in the rest of the country, provision of water

supply has been supply-driven, with emphasis on norms and targets and on construction and creation of assets, rather than on management and maintenance of the facilities built or of the sustainability of the source itself; this in turn has led to a large gap between coverage on the books and actual coverage on the ground (WSP, 2004). For instance, the most common form that drinking water schemes have taken is digging of borewells, neglecting other sources of drinking water like tanks. Further, during times of severe water shortages such as droughts, ad hoc measures (e.g., supply of water via tankers) are offered instead of seeking long-term solutions. Until recently, there has also been no systematic, comprehensive policy on recharging strategies such as water harvesting and watershed development, though soil and water conservation measures have been undertaken on a sporadic basis. Even in the limited cases where such practices have been adopted, emphasis is often more on irrigation for agriculture rather than on drinking water.

With this brief discussion of the water situation in Maharashtra, I now turn to the different dimensions of the right to water in Maharashtra.

5.4 DIMENSIONS OF RIGHT TO WATER IN MAHARASHTRA

As the discussion in Chapters 3 and 4 shows, right to water is not a simple matter involving just access to water, but involves a number of distinct, though inter-related dimensions. In this section, I will discuss how each of these dimensions works out at the level of government policies and laws in Maharashtra.

As mentioned earlier, there have been a number of changes in the realm of water policy in the state since the 1990s, of which the most important are the passage of the MSWP, the MMISFA and the MWRRA. Hence for each aspect, I will first discuss the experience until the 1980s and then the changes in the last decade and a half.⁵⁴ But before turning to a detailed discussion of the different dimensions, let me just briefly mention the (official) rationale

⁵³ This tribunal was set up to resolve the dispute on the sharing of the water of the Krishna river between the states of Andhra Pradesh, Karnataka and Maharashtra. The state of Maharashtra was given an award of 560 TMC of water in May 1976, which was to be used by May 2000 (Deshpande and Narayanamoorthy, 2001).

⁵⁴ It is important to note that the rules to implement MMISFA and MWRRA have not yet been fully framed, although in the case of MMISFA, official guidelines for the working of WUAs have been in existence since 1994.

behind each of the three recent pieces of legislation/policy change.

The MSWP of 2002 is the first water policy document of Maharashtra, and as such, an important landmark. Even though state water policies do not have legal status, and there are usually gaps between the policies, passage of enabling laws, and implementation by the bureaucracy, they are still important because they provide overall guidelines; individuals or NGOs cannot fight for suitable changes in rules if the policy documents do not even mention them. The MMISFA was passed in order to provide a statutory basis for management of irrigation systems by farmers, which in turn is in tune with recommendations made at the central and state levels. The Act aims to increase efficiency in utilization of irrigation capacity, as well as in distribution, delivery, application, and drainage of irrigation systems (GoM, 2005a). The MWRRRA aims at establishing a Maharashtra Water Resources Regulatory Authority to regulate water resources within the state, as well as facilitate judicious, equitable, and sustainable management of water resources (GoM, 2005b).

From the point of view of a rights discourse, perhaps the most important feature of the state policy and the two legislations is the introduction of the concept of 'entitlements' to water. For instance, the MSWP mentions entitlements to water for the first time, and grants water users' organizations and entities stable and predictable entitlements to water, so that they can decide on the best use of water without bureaucratic interference (GoM, 2002: Section 1.3). Further, it claims that a well-defined, transparent system for water entitlements will be established, so that these cannot be changed unilaterally by any state agency or authority (GoM, 2002: Section 4.1). Both MWRRB and MMISFA, legislations that were put in place three years after MSWP, discuss entitlements in greater detail. The nature of these entitlements, and their implications on different dimensions of a right to water, will become evident in the ensuing discussion.

5.4.1 Ownership of water

As at the India level, the state continues to play a dominant role, both in its control over water resources, as well as in defining the nature and distribution of rights over water. Since this has been done most explicitly in the

case of surface irrigation, it is this that I will focus on. But it is also important to note that in the case of groundwater, the de facto open access status of water has not been questioned. In fact, a distinguishing feature of all recent legislation is the lack of any serious consideration of groundwater, a lacuna which is especially problematic in the light of the fact that groundwater has become the more important source in recent times as well as the focus of a large number of water programs (such as watershed development). Further, the idea of water being a public trust finds no mention in any Maharashtra-level legislation.

In the case of surface water, ownership is vested in the state. In fact, even the recent changes calling for participatory management of canal systems by NGOs and for the establishment of entitlements specifically emphasize this. For instance, the MSWP refers to water entitlements as "entitlements to use the water resources of the state" (GoM, 2002: Section 4.1), thereby reinforcing the idea of the state as the owner of the resource. Similarly, the MMISFA emphasizes that unless otherwise decided by the government, the ownership and the control of reservoirs and head works of any irrigation project, and of main rivers and their tributaries, shall be vested in the government (GoM, 2005: VIII(66)).

In terms of defining the nature and distribution of rights over surface water also, the state has always played an important role, although the strong tradition of farmer-managed irrigation systems (even prior to the official move towards such systems) has meant that there has been an inter-play between the working of rights on the ground and the conception by the state. The precise nature of these rights is discussed in the following section, on the scope of the rights.

The question of ownership also includes defining who the beneficiaries of water are. For both drinking water and irrigation water, the household is the unit usually used for assigning water rights (even if water requirements are conceptualized per capita); further, one individual (the head of the family, again usually male) is taken to be the representative of the family. The implications of this have been discussed in Chapter 3. In the specific case of Maharashtra, the question of distinct water rights for women has not been considered at

all in state legislation, although, as we will see in Chapter 6, civil society groups have engaged with this question. Similarly, the dimension of access to water being linked to citizenship or proof of residence has also not been questioned.

In the context of rights over irrigation water, the link between access to land and access to water continues to date, so that the landless have no rights to irrigation water. The new legislation has one feature which could potentially help to break this link. Unlike WUAs in many states where membership is restricted to registered landowners, permanent or protected tenants in the area of operation of the society are also allowed to be members of WUAs in Maharashtra. That is, there is potential for non-landed groups to acquire water. But given that leasing in land on a secure or permanent basis and more importantly, proving this, is difficult, this provision generally cannot be used. Further, the policy guidelines for WUAs emphasize the importance of homogeneity of interests within the WUA, and therefore of inclusion of farmers only (GoM, 1994). Thus even though there is no explicit exclusion of the landless, their inclusion is difficult.

Finally, in granting explicit water entitlements, the new legislation makes no distinction between individuals, local associations, and corporations. Sainath (2005a) points out that this puts corporations on the same footing as citizens and farmers.

5.4.2 Scope of right to water

At the level of state legislation, there is no guaranteed promise of water for all (for drinking or for the fulfillment of basic needs), whether in terms of quality, quantity, affordability, or accessibility. This is true even with the new legislation which explicitly talks about entitlements for the first time at least in the case of irrigation; no entitlements are granted for drinking water. While systems of rights over water (both drinking and irrigation) that are based on state legislation, customs, or local institutions do exist (such as the *shejpali* and block systems described below), the kind of access to water that particular individuals and groups actually have is determined by a

combination of economic, social, and political factors.

I now turn to a brief discussion of the system of rights present in surface irrigation systems. In Maharashtra, the area officially designated as the irrigable command area by the Irrigation Department defines who is entitled to irrigation (Rajagopal *et al.*, 2002). The entitlement is not fixed and is not formally tied rigidly to season, nor is it binding on the irrigator to take any one designated crop, although there is an approved cropping pattern for each project.

The most common approach followed for distribution of water in canal systems is *shejpali*, although other approaches also exist. Under *shejpali*, every farmer is required to apply for irrigation each season, indicating the crops to be irrigated and the area for each crop. Depending on the water availability that year, canal authorities then issue water passes after scrutinizing the applications. In this system, water is supplied to particular crops, rather than to land, with the quantity of water per acre varying among crops.⁵⁵ The duration of irrigation commitments varies from a single season to six years, and priority ranking varies directly with duration (Naik and Kalro, 1998).

Under the block system (which is different from *shejpali*), longer-term commitments (six years or more) are made for a variety of crops. Such blocks are most common in the Deccan canals in western Maharashtra, with the important types currently being cane blocks, fruit blocks, garden blocks, garden and seasonal blocks, two seasonal blocks, and three seasonal blocks (Rath and Mitra, 1989).

In the case of both *shejpali* and block systems, water was always supplied on an area (as against a volumetric) basis. This led to wastage of water because for an individual farmer, there was no incentive to conserve water; on the contrary, it was rational to use more water, as well as grow water-intensive crops, even though the social cost of this was high. The result has been distorted cropping patterns and cropping practices.

Under the new system of farmer managed systems in surface irrigation, the most important changes in terms of the nature of rights is that

⁵⁵ Hence farmers' crop choices are implicitly constrained by irrigation authorities.

WUAs now have the freedom to decide the cropping pattern. Bulk entitlement of water to the WUA would then be decided by the Maharashtra Water Resources Regulatory Authority (Regulatory Authority henceforth), on the basis of the cropping pattern designed and the designated command area. However, the right to distribute water to individual farmers would rest with the WUA. Further, the WUAs would pay for the water received on a volumetric basis, although individual farmers may continue to pay the WUA on an area basis.⁵⁶

Since the concept of entitlements put forth in the MMISFA and the MWRRA is the nearest version of right present in the state's discourse, it is useful to consider its nature in a little more detail. Firstly, entitlements in the legislation refer to authorization granted to use water i.e., a usufructuary right. But this is not linked to any notion of *inherent* rights of farmers over water (Upadhyay, 2005a); it is also far from any notion of entitlements to satisfy capabilities (in the Sen-Nussbaum framework discussed in Chapter 2). Secondly, the MSWP permits transfer of all or a portion of water entitlement between entitlement holders in any category of water use, and priority on both annual and seasonal basis based upon fair compensation of the entitlement. However, it is not clear whether only the quota for a particular season or year is transferable, or whether a permanent transfer of the entitlement is also feasible. Further, there is no provision for transfer of entitlements to non-entitlement holders (such as the landless).⁵⁷

5.4.3 Duties/Responsibilities implied by the right

As mentioned in the previous section, there is no guarantee offered by the state for access to either drinking or irrigation water. Even in the case of surface irrigation, where there is some degree of 'commitment' by the irrigation authority of the state, this commitment is not an enforceable guarantee i.e., there is no option for redress if the right is denied. However, the Memorandum of Understanding signed between the Irrigation Department and the Water Users Association would usually specify how much

water the WUA would be allocated, along with details of proportionate reduction in case of reduced storage or reservation of part of the water. This, in turn, created at least some basis for negotiation. But in the new regulations, there is, on the one hand, still no provision for enforcement of the water entitlements; on the other hand, it is also not clear what space there will be for the kind of negotiations that used to take place in the past.⁵⁸

With respect to the duties of the right-holder, the two major questions are whether there are any restrictions on the manner in which water can be used or limits to water consumption, both of which are important from the point of view of equity and sustainability. With two exceptions, both inadequate, this is an area in which there is a big lacuna in state policy, even though on paper, the state does emphasize the importance of water conservation (GoM, 2002).

The first exception is a set of restrictions relevant to irrigation. Under the 1976 Irrigation Act, canal and well water could not be used for the same area, and there had to be a distance of three meters between channels that supply irrigation water through canal systems and channels conveying water from wells. The rationale for the restrictions on conjunctive use of surface and groundwater was to prevent misuse of public water (Pant, 1999). Implementation of this provision was never very effective, and with the passage of the MMISFA, these restrictions are no longer in force since the act has explicit provision for use of groundwater within the command. The same act also includes provisions to regulate sowing, planting, or growing of crops, and to regulate areas of cash crops during specified periods in the command areas of canals in order to ensure proper utilization of water resources (GoM, 1997: I-47 (1) and I-48). But such direct restrictions are difficult to implement, and the above provision has never been used. Again, with the passage of the MMISFA, which explicitly guarantees to WUAs the freedom to grow different crops within their water entitlement, these restrictions are not relevant.

⁵⁶ The discussion in this paragraph draws on a personal communication with K. J. Joy (December 12, 2005).

⁵⁷ This point was raised by K. J. Joy, personal communication (December 12, 2005).

⁵⁸ Thanks to Suhas Paranjape (personal communication) for drawing my attention to this point.

Currently, the only provision to regulate water use or consumption in the case of irrigation is the provision in the MWRRA that in some regions, water will not be made available from the canal unless the cultivator adopts drip irrigation or sprinkler irrigation. However, the introduction of this condition without taking into account the financial burden that such techniques could impose is detrimental from the point of view of equity; further, the possibility of using alternative water-saving technology has also not been considered (Sainath, 2005b).

The second exception is in the case of drinking water. Maharashtra has a legal measure to deal at least partly with groundwater exploitation for drinking water, viz., the Groundwater (Restrictions for Drinking Water Purpose) Act of 1993. As protection for public drinking water sources, it is prohibited to sink wells for any purpose within a distance of five hundred meters⁵⁹ of a public drinking water source, if both are in the area of the same watershed (GoM, 1993: II-3 (1)). In areas declared to be 'water scarce', the extraction of water from wells within one kilometer from a public drinking source can be regulated (GoM, 1993: II-5). Digging of new wells in over-exploited watersheds⁶⁰ is also prohibited (GoM, 1993: II-7 (1)); even in cases of existing wells in over-exploited watersheds, extraction of water can be prohibited during scarce months if it is found to adversely affect any public drinking water source (GoM, 1993: II-8). Apart from the fact that the provisions of this act have rarely been used, the effectiveness of this act is limited by the fact that it does not provide for restrictions on groundwater exploitation in the case of irrigation.

5.4.4 Delivery of water

In line with central guidelines, changes in delivery of water have taken two forms in

Maharashtra – sectoral decentralization and privatization.

In the case of drinking water, sectoral decentralization has basically been confined to rural areas. Traditionally, government-owned agencies have been responsible for construction and management of rural water supply systems. Although this approach has led to the creation of assets on a massive scale, the assets have often been of poor quality and service delivery not adequate. The Sector Reform Program pioneered by the Government of India, and state-level projects directly funded by donors such as the World Bank have increasingly encouraged demand-driven projects in lieu of the older supply-driven projects.⁶¹ The key feature of this is that management (and in some cases construction also) is undertaken via a representative committee called the Village Water and Sanitation Committee, which may or may not be formally part of the *panchayat* system. Currently, such demand-driven projects have been introduced in a few selected districts – Amravati, Dhule, Nanded, and Raigad. The main funders for these are the World Bank, the Government of Germany, and the Government of India (via its *Swajaldhara* program); the Government of Maharashtra also funds some demand-driven projects, though it also continues to fund some older, supply-driven schemes.

In the case of irrigation, sectoral reform has taken the form of PIM in canal irrigation, and a move towards greater community participation in watershed development programs. The focus of the discussion here will be on PIM.

While associations for managing water systems have existed for a long time in Maharashtra (such as the *phad* system⁶² in North-west Maharashtra), the recent genesis of the participatory irrigation management program or PIM can be traced to the formation of co-

⁵⁹ The purpose of keeping a safe distance of 500 meters is to protect minimum one meter saturation of aquifers in the month of May extending from the center of source well up to 500 meters radial or elliptical distance, depending upon the occurrence of rock type, geomorphological conditions, and location of source well with respect to drainage pattern and density of wells (GoM, 1993, Technical Guidelines, Section 3).

⁶⁰ In the context of the Maharashtra Groundwater Regulation Act, an over-exploited watershed means a watershed where the estimated annual groundwater extraction is more than 85 percent of the estimated average annual groundwater recharge (GoM, 1993: I (5)).

⁶¹ Note that apart from the two extremes of supply-driven and demand-driven projects put in place by the government, other options for management of assets and service provision (such as service provision by formal or informal private water providers) are already in place in the state, which have varying degrees of success in terms of cost recovery and equity.

⁶² The *phad* system consists of a series of weirs where the canal system is managed, operated, and maintained by beneficiary groups. The entire command is divided into a number of *phads* (groups of contiguous farms where, in a season, only one crop is grown under irrigation) ranging from a few hectares to 50 hectares.

operatives in the late 1980s by NGOs such as the Pune-based Society for Promoting Participative Ecosystem Management (SOPPECOM), the Nasik-based Samaj Parivartan Kendra, and the Bhusaval-based Sane Guruji Shram Seva Kendra (Das, 2001). Partly in reaction to the pressure exerted by these and other NGOs, and partly in response to the widespread trend of decentralization (including the central government's own encouragement of PIM), the Government of Maharashtra took a decision to encourage formation of co-operative WUAs for irrigation management in 1988.⁶³ The rationale was to improve water use efficiency, increase agricultural productivity, and reduce work for the Irrigation Department (as a result of elimination of *shejpalis*). The policy of participatory management was also expressed in the 1994 *Cooperative Water Users' Association Guidelines* of the Government of Maharashtra. But bureaucratic hurdles to the setting up of WUAs continued to exist. A 2001 government notification made WUAs compulsory, and the MMISFA was finally passed in 2005.

Since the 2001 government notification, water for irrigation is supposed to be supplied to farmers only through WUAs, and not to individual beneficiaries. Even lift irrigation schemes are to be undertaken only by WUAs, and eventually sanctions to individual schemes of lift irrigation are to be cancelled (GoM, 2005a). The nature of the rights given to the WUAs has already been discussed in the section on the scope of the water rights. Here I will just briefly discuss the overall working of WUAs.

The process of formation of WUAs and actual handing over of control of irrigation facilities will take a long time, partly because the legislation enabling farmers' participation in irrigation was put in place only after a lag,⁶⁴ and all relevant administrative rules have still

not been changed, and partly because at many levels of the state bureaucratic apparatus, devolution of powers to farmers continues to be met with resistance (either because it means a loss of 'under-the-table' income for bureaucrats, or because of continuing skepticism about the ability of farmers to manage irrigation systems on their own).

As a result, as of August 2003, only 426 WUAs were functioning in major and medium irrigation projects, covering a cultivated command area of 1,32,766 hectares (which constitutes 4.5 percent of the net area irrigated in 2002-03).⁶⁵ Of these, 335 WUAs were under Command Area Development (CAD) projects. There were also another 1068 WUAs in various stages of formation, of which 573 are for CAD projects.⁶⁶ In the case of minor irrigation projects, 31 WUAs were functioning with a cultivable command area of 9579 hectares (which constitutes 0.3 percent of the net area irrigated in 2002-03), and another 322 were in various stages of formation.⁶⁷

There is some evidence that wherever WUAs have been formed and are functional, there is increased availability of water, improved reliability of supply, flexibility in cropping pattern, less time and fewer bureaucratic hurdles in getting water, better maintenance and therefore less seepage losses, improved recovery of water charges, and greater equity in distribution of water within the WUA (Naik and Kalro, 1998). In general, however, studies of the impact of the formation of WUAs have typically concentrated more on the effect on efficiency of water use and agricultural productivity, and less on considerations of equity and sustainability. In fact, the official parameters of the Irrigation Department for monitoring and evaluation of WUAs do not even mention equity.⁶⁸

Further, Pant (1999) points out that the eligibility

⁶³ Note that there was already provision for supply of canal water to associations and volumetric pricing in the Maharashtra Irrigation Act of 1976 (GoM, 1997).

⁶⁴ The passage of the legislation means that WUAs can be registered with the Irrigation Department (as against the Co-operative Department as was the case earlier), which is expected to considerably speed up and simplify the process.

⁶⁵ The provisional figure for net area irrigated in 2002-03 is 2,971 thousand hectares (GoM, 2003-04).

⁶⁶ The fact that WUAs dominate in CAD projects, as compared to non-CAD projects, could be at least in part due to the fact that the former get half their management subsidy from the central government, while the latter get it entirely from the state government, whose financial position limits the number of projects that can be provided assistance.

⁶⁷ Data from website of Department of Irrigation Research and Development, Government of Maharashtra: www.dird-pune.org.

⁶⁸ This is in spite of the fact that both equity in water distribution and economical use of water are mentioned in the objectives of Participatory Irrigation Management (GoM, 1994: I (2.1)).

criterion for WUAs itself is problematic. At present, the criterion is that *at least 51 percent of the beneficiaries or the owners of 51 percent of the land in the Cultivable Command Area of a minor* can come together to constitute a WUA. This means that a small proportion of beneficiaries with large landholdings can establish a Water Users' Association, excluding the majority of marginal, poor farmers. Hence Pant argues that both the conditions together should be made compulsory criteria.

Apart from sectoral decentralization, the other form that changes in delivery of water have taken is privatization. So far, this trend has been the strongest in the irrigation sector. For instance, in order to accelerate the completion of irrigation projects, the Government of Maharashtra has established five Irrigation Development Corporations. These corporations are allowed to raise funds through the open market for funding their construction activities. Although the irrigation corporations were set up with considerable fanfare, their working has not borne out initial expectations. They also constitute an added financial burden for the state, since these corporations sometimes receive budgetary support from the Maharashtra government (such as in the case of the Maharashtra Krishna Valley Development Corporation); further, if the promised rate of return on the corporation's fixed investment (17.5 percent – a rate that is very high for irrigation projects) is not met, the state government has undertaken to meet the difference out of its own resources⁶⁹ (Deshpande and Narayanamoorthy, 2001).

There are also plans to give the management of minor irrigation tanks on a BOT basis to private parties, as well as to establish water companies in Solapur and Sangli cities (in the southern part of Maharashtra) for distributing drinking water. Attempts to bring about participation by the private sector in water distribution is also under way in parts of Mumbai and the suburbs. However, at this point, the precise form that these would take is not very clear. In general, while privatization in minor irrigation and in drinking water (especially in urban areas) has not been taken up as seriously as in the case of major and medium irrigation,

a critical issue is the lack of transparency about these efforts, or of any attempt to put regulatory mechanisms in place (both essential conditions for privatization to work effectively, as was discussed in Chapter 3).

Understanding the equity impact of changes in the delivery of water in the case of major and medium irrigation is further complicated by the fact that a number of different trends co-exist in the arena – privatization in the form of the irrigation development corporations, decentralization (via the formation and devolution of powers to WUAs) and centralization (via the provision to set up a Regulatory Body which has no room for PRIs). In fact, the powers given to the Regulatory Body are extensive (including, among other things, distribution of water entitlements for different categories of use, determination of priorities in distribution of water at different levels – basin, sub-basin, project, and establishment of water tariffs). As a result, there is the danger that entitlements would be frozen at their current level, which would sanction current modes of unsustainable use of water and inequitable distribution, as well as preclude the possibility of periodic review of entitlements. It is also interesting to note that the MWRRA was modeled on the Maharashtra electricity bill, although electricity as a resource is very different from water.⁷⁰

Finally, as in the central-level policies and legislation, the implications of the 73rd and the 74th amendments have not been clearly considered for delivery of water services, and the devolution of relevant powers and functions to PRIs is still not complete. The result is that the division of labor between PRIs and different local bodies (set up in the case of PIM, as well as in drinking water schemes and watershed development) is not clear; further, in the absence of adequate powers and capacity-building, neither the PRIs nor the user groups can necessarily carry out their functions (WSP, 2004).

5.4.5 Pricing

As in the rest of the country, both drinking and irrigation water have traditionally been cross-

⁶⁹ This in turn brings into question even the extent to which the irrigation corporations represent a trend towards privatization.

⁷⁰ The last two points were made by Suhas Paranjape (personal communication).

subsidized by industry. While this has not resulted in universal access to water, it has been a contributing factor in costs not being met, which, as discussed in Chapter 3, adversely impacts how much operation and maintenance can be undertaken in the case of existing works, and how much new investment can be undertaken. One major thrust of current reforms in the state therefore has been to increase the price of water as well as to ensure user contribution towards capital costs, and operation and maintenance expenses. While the need for recovery of costs cannot be denied, the particular manner in which the pricing reforms have been structured has serious implications for equity.

The case of drinking water, and in particular of demand-driven drinking water projects, has already been discussed in Chapters 3 and 4. Traditionally, in rural areas, in cases where public sources of drinking water (such as handpumps) are used, water is supplied free of charge and the costs of the infrastructure are also met by the government. The flip side of this is the dependence on government funds which may not always be forthcoming; further, issues of quality and accessibility are usually not taken into account (WSP, 2004). The emphasis on demand-driven projects since the 1990s (discussed earlier) has meant that people are not only expected to pay for the water, but also to bear 10 percent of the capital cost and all operation and management expenses. As discussed in the previous two chapters, this clause could have negative equity consequences in that people who cannot afford to pay this price would be unable to have access to funds in these projects, and may have to turn to more expensive private sources. Further, asking only rural communities to bear the costs of drinking water schemes, while continuing to subsidize more heavily the distribution of drinking water to urban consumers (given that even operational costs of the huge projects set up in cities are not recovered) is unfair.

In Maharashtra, urban drinking water rates have not increased. However, it is important to note that people's expenses on water may still have increased because of the increasing pressure on water resources, resulting in the use of

alternative sources of water such as private tankers.

In the case of irrigation, the prime source for the recovery of capital costs as well as operation and maintenance costs of irrigation works was the per-hectare water charge, with different rates being charged for each crop, and also varying by season.⁷¹ As in the rest of the country, these charges were not sufficient to meet the costs of the irrigation works. For instance, the percentage of recovery of working expenses through gross receipts in large-scale irrigation and multipurpose projects in Maharashtra was only about 4 percent in the early 1990s (Deshpande and Narayanamoorthy, 2001). Further, supplying water on an area basis also limited the revenue of the irrigation department (apart from leading to wastage of water).

After the introduction of volumetric pricing in 2001, recovery has improved. Further, charges for surface water (primarily canal water) have also been revised a number of times in the last few years. The proposed hikes under the MWRRA have particularly come in for a lot of criticism, as they are likely to result in agriculture becoming unviable for a large number of farmers. Although there is the claim that cross-subsidies could be allowed to alleviate the impact of such charges on the poor, the exact mechanisms for this have not been stated. Further, the MWRRA has also made water into a tool for an authoritarian population policy (via the clause that farmers with more than two children would have to pay one and half times the actual rates); since low income households tend to have more children, the move is likely to have the effect of punishing people for the offence of being poor (Sainath, 2005b).

Further, the emphasis on water rates, i.e., on the revenue side, has not been accompanied by equal emphasis on the expenditure side, i.e., attempts to cut down unwarranted expenditure (such as increasing administrative costs) (Deshpande and Narayanamoorthy, 2001). There is also no charge for groundwater; nor have there been substantial changes in rates for other uses of water and for electricity.

⁷¹ These water charges were assessed by the Irrigation Department and recovered by the Revenue Department.

5.4.6 Right to water and vision of development

In line with the National Water Policy, the Maharashtra State Water Policy also lays down some broad guidelines for dealing with potential conflicts in the allocation of water. For instance, it allocates first priority to water for domestic use, by saying that drinking water needs of human beings and animals shall be the first priority on any available water. Further, multipurpose projects are required to include a domestic water component wherever there is no alternative and adequate source of drinking water. However, as at the central level, the operational implications of this drinking water priority are not evident in actual legislation. Similarly, in the case of agriculture (which, along with hydropower, has been given third priority), there is no attempt to have sub-priorities of water for one crop, two crops, and perennial irrigation.

In general, links between water and other sectors, as well as the kind of development goals that one wants to achieve with water, are not clearly articulated even in the MSWP. While the MSWP does mention as its aims the promotion of growth, reduction in poverty, and minimization of regional imbalance, it leaves out water and food security; further, no attempt is made to link water clearly to any of the broader development goals.⁷² Similarly, while the importance of cost recovery has been mentioned and enabling legislation (such as the MMISFA) has also been put into place for this, what impact an increased cost of water will have on food prices has not even been considered (Sainath, 2005a).

Another example of the lack of consideration of the linkage of water with other sectors is that the question of how water use would be affected by power charges or the agricultural price support system, and therefore the need to bring about changes in these realms, is missing. The importance of doing this is evident from the case of sugarcane cultivation in Maharashtra. Unlike the common perception

that the excessive cultivation of sugarcane is only because of the low (at least until recently) price of water, studies have shown that sugarcane's importance also arises from a biased agricultural policy and from the link between co-operative sugar factories and political parties.⁷³ For instance, the central government declares a statutory minimum price (SMP)⁷⁴ for sugarcane, as against the Minimum Support Price (MSP) for all other crops (including food crops). While there is often no purchasing agency available at the primary market level to purchase at the announced support price for many crops, in the case of sugarcane, sugar mills are statutorily obliged to pay at least the SMP to the cane farmers (Rath and Mitra, 1989). Further, following the declaration of the SMP by the central government each year, state governments declare a State Advised Price (SAP) which has usually been 20-30 percent higher than the SMP (except in recent years); many sugar mills pay the SAP rather than the SMP to cane farmers. The SMP and the SAP are not related to the market price of sugar; for example, since 2000, high sugar production and surplus stocks led to a fall in the price of sugar, but the central government continued to declare a higher SMP each year.⁷⁵ The result is a continuing incentive to farmers to grow sugarcane, while at the same time increasing the fiscal burden on governments (which usually end up subsidizing the mills in a variety of ways) (GAIN, 2004).

The excessive share of water cornered by sugarcane growers is also made possible by the pre-eminence of the sugar industry, inclusive of sugarcane farming, in Maharashtra's political economy (Dhanagare, 1992). 'Granting' canal water to sugarcane cultivators has been an important tactic used by politicians to build their vote banks.

Finally, the problem of ensuring any degree of coordination between policies in different aspects of water and between water and other sectors is compounded by the complex administrative division of labor with respect to water. For instance, the Irrigation Department,

⁷² These points were raised in a presentation by A.Kotasthane of Gomukh at a seminar on 'Water and Sustainable Development' at the Tata Institute of Social Sciences on August 19, 2003.

⁷³ See, for example, Rath and Mitra (1983) on the Pravara Left Bank Canal in Ahmadnagar District of Maharashtra.

⁷⁴ The SMP is usually announced in rupees per quintal for a basic recovery of 8.5 percent, with a premium for every 0.1 percent increase in recovery.

⁷⁵ Between 1999-00 to 2003-04, SMP rose from Rs.56.10 per quintal to Rs.73 per quintal.

the Rural Development and Water Conservation Department, the Zilla Parishad, Water Supply and Sanitation Department, and the Agriculture Department deal with different aspects of drinking water and irrigation functions of water at the state level.⁷⁶

5.4.7 Participation

As discussed in Chapters 3 and 4, participation would ideally include involvement in both policy-making and actual implementation on the ground. The presence of strong civil society groups in the state (both historically and in current times) has meant that there has been greater participation in Maharashtra than in many other states. But provision for participation or facilitating mechanisms in state policy and legislation continues to be limited. For instance, although the idea of farmers' participation has influenced (at least in part) the formation of WUAs, specific provisions to ensure equity in participation do not exist in the government guidelines; only procedural aspects of internal functioning are mentioned (GoM, 1994). Similarly, in the case of the MSWP, there is precisely one reference to gender, and that too a nominal one: "The women's participation in the irrigation management should also be considered" (GoM, 1994: Section 2.2.2).

But if participation at the micro-level (such as in WUAs) is merely mentioned and not facilitated, the question of participation in the process of irrigation policy-making at higher levels is not even mentioned in any of the state policies or legislation. As a result, even though policy-making continues to be subject to pressures and lobbying from different groups, there are no formal mechanisms to ensure that

all sections of society have a chance to participate in the process of policy-making, or that these inputs are actually taken into account.

The experience of the recent water legislation is interesting in this regard. For instance, in the case of the Maharashtra State Water Policy (MSWP), not only was the adoption of the policy itself a result of considerable lobbying and pressure applied by individuals and organizations working in the field of water, but also three drafts of the policy were open to public suggestion before the finalization of the document, a practice that is highly unusual. The process was, of course, subject to a number of limitations: for instance, the state was not duty-bound to actually take into account these suggestions. As a result, the final version of the MSWP was retrogressive compared to the earlier drafts.⁷⁷ The two legislations which were passed three years later to actually operationalize some aspects of the MSWP – the MMISFA and the MWRRA – had two different kinds of experiences in this regard. In the case of the MMISFA, at least some process of public consultation was undertaken. A draft version of the Act was circulated for obtaining the opinion of various NGOs, even though, as in the case of the MSWP, these were not necessarily accepted.⁷⁸

However, the MWRRA was not discussed with anyone initially, though some NGOs like SOPPECOM tried to push for changes in it even before it was tabled in the legislature in 2004. Sainath (2005c) also points out that the process of passage of the bill offers an interesting lesson on the workings of parliamentary democracy. When the bill was

⁷⁶ The Irrigation Department is in charge of medium and major irrigation projects (that is, those having a cultivable command area (CCA) of 2001 to 10,000 hectares and above 10,000 hectares respectively) as well as certain minor irrigation projects (those with a cultivable command area between 251 and 2000 hectares). Minor Irrigation Projects having a CCA between 101 to 250 hectares are under the control of the Rural Development and Water Conservation Departments, while projects with a CCA below 100 hectares are under the administrative control of the District Council, i.e., the Zilla Parishad. Supply of drinking water (both rural and urban) as well as quality control of water is the domain of the Water Supply and Sanitation Department, which works with the aid of two technical wings – the Groundwater Supply and Development Agency (GSDA) and the Maharashtra Jeevan Pradhikaran (MJP). This department was created in 1996 to concentrate exclusively on poor coverage of drinking water and access to essential services in rural and urban areas. Rural Water Supply and Sanitation programs are implemented through the Reform Support and Management Unit (RSMU) in this department. Water-conserving forms of irrigation (such as drip and sprinkler) come under the purview of the Agriculture Department. Watershed development programs come under the Water Conservation Department.

⁷⁷ Interview with Seema Kulkarni on June 11, 2004.

⁷⁸ For instance, SOPPECOM suggested modifications with respect to four areas in the MMISFA (i) equity in membership to the WUA for women, landless, and representatives of the *Gram Panchayat* (ii) Representation to all the above groups in decision-making bodies (iii) Water entitlements to women, landless and other deprived sections (iv) Linkage of the WUA to the elected body of the *panchayats* in the redefined area of operation (SOPPECOM, 2003). None of these recommendations were accepted.

first introduced in the Nagpur session of the State Legislative Assembly in 2004, it was subject to criticism by a CPI-M legislator. It was then referred to a joint committee of both houses, though not all party members (including the one that originally critiqued it) were included on the committee. The joint committee not only approved the bill, but also made some additional changes (like the introduction of the retrogressive two-child norm). The revised bill was re-introduced in the Mumbai session in 2005 on the last day and passed by voice vote at the last minute, so that there was not enough time to read, let alone discuss, the bill (Sainath, 2005c).

5.5 CONCLUSION

The recent reforms undertaken in the realm of Maharashtra indicate the influence that central-level policies and legislation have on the states, even though water is technically a state subject. Further, while the changes in Maharashtra have potential in increasing the rights of some groups (like WUAs), the nature of these rights are limited; in fact, they are more in line with a narrow, tradable permits version of water rights.

The Maharashtra case also raises a number of important questions about the working of rights in water. Firstly, in many cases, the granting of rights to WUAs (however limited) is a formalization of rights that groups of farmers already had (especially given that the existence of farmer-managed irrigation systems predates the process of PIM in the state). It would be interesting, therefore, to see what difference the process of formalization has made (or will make) to the rights of farmers. Secondly, given that one important dimension of the right to water is participation, not just at the local level, but also at supra-local levels (particularly, in policy-making), and that this in turn calls for democratization at *all* levels, what are the implications of simultaneously putting in place a highly centralized body with far-reaching powers (like the Regulatory Authority)?

Having considered the conceptualization of various dimensions of the right to water in legislation at three different levels – international human rights, India, and Maharashtra, I now turn to the conceptualization of the right in another domain viz., civil society initiatives.



CHAPTER 6

CIVIL SOCIETY INITIATIVES AND RIGHT TO WATER

6.1 INTRODUCTION

The domain of water has seen a wide variety of civil society initiatives and struggles. While the nature of water (its unbounded nature, its linkages with social and political power, its different possible uses) has meant that conflicts and struggles over water have always existed, the trajectory of 'development'⁷⁹ undertaken since independence has led to these taking particular forms in the post-independence period (agitations against big dams, struggles for rehabilitation, movements for access to irrigation water). Liberalization policies undertaken since the 1990s have also resulted in new kinds of initiatives such as those protesting the entry of MNCs that over-extract groundwater, or the handing over of surface water bodies or urban delivery systems to private operators (whether Indian or foreign). While all struggles have not explicitly used the language of right to water, the idea of individuals or groups having claims or entitlements over water (whether for life, health, or livelihood requirements) does form the basis of many of them.

A comprehensive review of all water initiatives is beyond the scope of this study. Instead, this chapter aims at providing a flavor of the kind of initiatives being undertaken in water, including differences in the actors involved, the particular dimensions of water that they deal with, and the strategies that they adopt. Since the discourse of rights forms an important part of this study, I will briefly consider the form that movements dealing with rights (or rather with one particular form of rights viz., human rights) have taken in India. I then discuss civil society initiatives in water in India, focusing on two cases in particular – the anti-Coke struggles at Plachimada in Kerala and the agitations against the privatization of the Sheonath river in Chhattisgarh. Finally, I

turn to civil society initiatives in water in Maharashtra.

6.2 HUMAN RIGHTS MOVEMENTS IN INDIA

India has seen an active civil society and a wide number of social movements. However, the range of issues taken up, the actors involved, and the tools used have varied across regions as well as changed over time. For instance, since the 1980s, social movements have increasingly begun to focus their struggles not only around issues of class and nationhood, but also around issues of gender, ethnicity, caste, and regional identity (Parajuli, 1991). Further, at least some of these new social movements (as they have come to be called) have engaged with alternative visions of development, unlike the old or classic social movements which took as their model of development the industrial society of the West (Omvedt, 1994).

In the specific context of human rights, NCAS (2004) identifies four trajectories of movements in the country – civil and political rights, social, economic and cultural rights, rights of the marginalized (such as women, Dalits, and Adivasis), and the right to transparent and accountable governance. Although these trajectories are interconnected, they were promoted by different sets of actors (often with varying ideological affiliation) at different points in time. Particularly interesting is the fact that the same tension between civil and political rights, on the one hand, and social, economic, and cultural rights, on the other hand, which is found in the human rights discourse at the international level (discussed in Chapter 2) was also found for a long time in the human rights movements in India (and is still present to some extent). For instance, liberal advocates who promoted civil liberties saw the struggles of left-oriented groups for workers' and peasants' rights

⁷⁹ Here I use the term 'development' in a very broad sense, as including not only a particular vision of economic development, but also a specific set of values and norms.

as a 'political' activity of radicals external to their movement, while the left groups perceived human rights as a Western idea used to gloss over socio-economic inequalities and to legitimize the capitalistic and imperialistic project of the West (Mohanty, 1998). It was in the emergency period, when there was widespread violation of many civil and political rights, that the importance of such rights first began to be appreciated across the political spectrum.

The post-emergency period has also seen an increasing focus on social and economic rights of the poor, of ethnic and religious minorities, of women and children, as well as on newer rights such as environmental rights and the right to development (Dutta, 1998). A wide range of reasons contributed to this widening focus, such as a greater interaction of Indian activists with international human rights organizations, and an increasing realization about the limitations of a welfarist approach that did not question the socio-political conditions and structural inequalities that perpetuate deprivation (Dutta, 1998).

The result is that today, the dichotomy between the two sets of rights is increasingly being questioned, resulting in greater alliances across movements (Mohanty, 1998). Thus linkages between different groups have been made in movements such as the National Alliance for People's Movements (a broad-based alliance of a number of social movements and organizations active at different levels and in different parts of the country) (Sheth, 2004). In fact, the post-1990s period has particularly seen an increased number of such alliances, because groups working separately on different issues such as gender, ecology, human rights, or education are now conceiving their activities as a form of social and political action aimed at countering hegemonic power structures at all levels, and are therefore coming together on common platforms on the issue of liberalization and globalization (Sheth 2004).

Linkages across different movements has led, among other things, to new tools and strategies for change such as judicial activism (discussed in Chapter 4), or of the application of old tools to new issues. Thus groups working on social, economic, and cultural issues have also begun to draw on the fundamental rights and directive principles of the Indian constitution to pressurize the state for change (NCAS, 2004). For instance,

the campaign for right to education resulted in the 86th amendment to the Indian constitution that guarantees the right to education as a fundamental right under the right to life and personal liberty (Article 21); attempts have also been made to put in place a legislation to implement the right, and a Right to Education bill is currently pending in Parliament. This example is particularly important in the context of water, because, as the discussion in Chapter 4 shows, the right to water has also been derived by the Indian judiciary under the same fundamental right i.e., right to life.

But alliances across movements (both across different kinds of human rights movements, and between human rights movements and those working on other issues) are still insufficient. In part, this is because a lot of mobilization in India is identity-based, and people's awareness is limited to their own specific economic and political conditions (Baxi, 1998). Further, just as the link between right to water and the vision of development is not sufficiently made in the human rights discourse and in state legislation, the human rights movement in India also does not sufficiently engage with the discourse of development. This is in spite of the fact that at least some of the movements are a reaction to the ill-effects of development projects (such as big dams, forestry projects, and mining companies) (Baxi, 1998). Civil society initiatives in water, on the other hand, have engaged to a far greater extent with the question of development, albeit not always as critically as they should. It is to a discussion of these that I now turn.

6.3 CIVIL SOCIETY INITIATIVES IN WATER IN INDIA

There have been a variety of civil society initiatives dealing with the problems of access to, use of, and pollution of water. These struggles vary with respect to the issues considered, ideology, number and kinds of actors involved, and the tools used.

Perhaps the greatest variation is found in the range of issues considered in water initiatives. They could deal with basic water needs (drinking and household needs) or with water for livelihoods (agriculture, fishing, and so on). They could be an immediate response to developmental activities that are insensitive to the natural environment or problematic in other

respects like the mode of water development (a polluting industry, a big dam), linked to question of identities (along linguistic, caste, religious, or ethnic lines) and/or stem from particular notions of social justice and equity.

Among all these categories, the largest number of initiatives (and also the most visible) have been the struggles against multipurpose river valley projects that emerged in the 1970s – for instance, against Tehri on the river Bhageerathi in the Himalayas, Silent Valley in Kerala, Koel Karo in Bihar, and Sardar Sarovar in the west – on a variety of economic, ecological, and environmental considerations (Gadgil and Guha, 1994). The other set of struggles that has been reasonably prominent is that of farmers for irrigation water, such as in the South Maharashtra case. Struggles dealing with the question of identities and social justice (such as the Mahad movement linking access to water to caste status or the Pani Panchayat initiative in Western Maharashtra aiming to de-link land and water rights) have been far more localized. The question of drinking water (especially when its scarcity is a regular feature) is the one that has drawn the least attention, except when there is some other trigger factor. This is true especially in rural areas, where struggles for drinking water have often been small-scale and episodic, and very rarely have people in different areas joined hands and formed a movement. There could be a number of reasons for this. One is that those who do not have even drinking water are often the very poor who are not able to participate in movements. In the context of rural Maharashtra, Rao (1996) points out how it was difficult for her to find struggles of rural women for drinking water mainly because it is more difficult for women to rally against a landlord or a village-head. They either just devise coping strategies; or even when they do protest via non-typical methods (à la Scott, 1985), these are both less visible and do not inscribe themselves in communal memory in the same

manner as more vocal, explicit forms of protest would. The second reason could have to do with the way the media works; just as death due to famines finds greater coverage than death due to malnutrition, droughts find more coverage than regular scarcity of water (Sainath, 1996).

The post-liberalized era has also given rise to a different set of issues around which water struggles are based. One example is the struggles for water in urban areas, which are mainly reactions to attempts by the government to 'privatize' water and which focus on issues of ownership, delivery, and pricing (albeit often without adequate conceptual clarity on these issues). In Delhi, for instance, resident welfare associations of different housing colonies and NGOs such as Parivartan joined hands to protest against perceived attempts at water privatization, forcing the government to withdraw the request for a World Bank loan. Note that at stake here was not just the handing over of particular water delivery services to private firms, but also a lack of transparency in the whole process, favoritism for specific private sector firms, and an anticipated rise in tariffs without guarantee of improvement in services (Jain, 2005).

Water struggles also differ in their ideological positions and the strategies that they use. Like other environmental struggles in India, water initiatives employ a combination of strategies that span the ideological spectrum of environmentalism.⁸⁰ In the realm of water, for instance, critics of big dams employ arguments challenging the wisdom of large, capital-intensive projects and calling for the use of appropriate technology. At the same time, they raise the issue of population displacement and questions about the social distribution of costs and benefits, implicitly drawing upon an ecological Marxist understanding of the nature of development. The use of decentralized and non-violent collective action stems from a Gandhian tradition. The specific tools used draw

⁸⁰ A useful classification of the ideological streams in environmental movements in India is given by Gadgil and Guha (1994). They discuss three ideological streams: Crusading Gandhian, Appropriate Technology, and Ecological Marxism. The 'Crusading Gandhian' stream upholds the pre-capitalist and pre-colonial village community as an ideal of social and ecological harmony. It emphasizes the moral imperative of checking overuse of resources, moving away from a materialist, consumerist lifestyle, and doing justice to the poor. The 'Ecological Marxism' stream holds that it is unequal access to resources that is responsible for environmental degradation. To remedy this, political change must come first, for which collective action aimed at transformation of unequal relations is critical. The 'Appropriate Technology' stream falls between the two, with a practical emphasis on constructive work, i.e., actually demonstrating socio-technical alternatives to environmentally degrading technologies. This strand is also influenced by socialist principles – for instance, in its ambivalence about religion, and in its criticism of traditional social hierarchies.

from three broad sets of strategies used in the environmental movement in India – resistance to the state, consciousness building, and reconstruction⁸¹ (Gadgil and Guha, 1994). Of these, the most controversial is the first, with differences of opinion around whether there should be engagement with the state at all, and the form that this should take. While tools of advocacy and lobbying are being increasingly used in the realm of water to influence state law and policy, the results of this are not always positive, as the discussion in this chapter will show. Strategic alliances have also sometimes been made between different groups (as in the case of the movement for rehabilitation of dam oustees and the movement for equitable distribution of water in existing dams in South Maharashtra).

In terms of the actors involved in these struggles, the anti-dam movements have been mass-based (and therefore presumably involving a wide range of classes), while irrigation struggles have often involved big and medium farmers (unless there is a strong equity component to it, as in the case of the South Maharashtra movement). Those dealing with questions of identity or social justice, by their very nature, involve groups that are the traditionally marginalized in society. An important feature of the new, post-liberalization struggles in urban areas is the involvement of the middle class, a class that is usually apathetic in terms of undertaking any political action; however, what effect their participation will have on questions of equity (for instance, access to water for slum-dwellers) is not clear at this point.

It is also important to note that all the four features of initiatives in water – their ideology, issues, actors, and strategies – could change over time (both within a particular struggle as well as across all struggles), either in response to the changes in the water sector and to broader developmental changes, or for strategic reasons. For instance, over time, the focus of the Narmada Bachao Andolan has changed from critiquing big dams and the current development

paradigm to pushing for adequate rehabilitation (Menon, 2006).

Finally, civil society initiatives in water (with a few exceptions) are reactive rather than proactive, a critique that has been leveled against the environmental movement in general in India and the world.⁸² On the whole, though, these initiatives do raise a wider range of concerns (both related to water and otherwise) than the human rights discourse or state policies and legislation. In particular, questions about the kind of development process that should be set in motion and the obligations of the state as well as non-state actors are brought more explicitly to the forefront. This will be more evident in the discussion of the two specific cases below.

6.3.1 Anti-Coke struggles at Plachimada in Kerala

The anti-Coke struggles at Plachimada in Kerala exemplify the complexities involved in the issue of 'right to water' in recent times – the jurisprudence of groundwater, the role of the judiciary in deriving a right to water in existing constitutional law, the real and perceived conflicts between objectives of growth, equity, and sustainability, the question of how much power PRIs really have even in a decentralized set-up, and how civil society initiatives should engage with the state.

Let me first start with a brief summary of the case.⁸³ In March 2000, a bottling unit of Hindustan Coca-Cola Beverages Ltd. (an Indian arm of Coca-Cola) started operations in Plachimada village in Palakkad district in the northern part of Kerala. It was originally welcomed as it provided some employment as well as income to the Panchayat by way of taxes. But this changed with increasing water shortages in the region. In April 2003, the Perumatty Gram Panchayat (which has jurisdiction over Plachimada village) did not renew the license of the bottling unit of HCBL because it felt that the company was causing a shortage of drinking water and irrigation water in the area, as well as contamination of well

⁸¹ The strategy of reconstruction basically refers to restoration of degraded ecosystems (afforestation programs, soil and water conservation programs, and so on).

⁸² For instance, Krishna (1996) argues that the success of the environmental movement continues to be limited to stopping particular projects and refining environmental regulations.

⁸³ The summary is based on discussion in a number of sources (Anonymous, 2004; Anonymous, 2005a; ENS, 2005; Iyer, 2005b; Krishna Kumar, 2004a; b; Krishna Kumar, 2005; Lakshmikutty, 2005; Narain, 2004).

water, through over-exploitation of groundwater sources. Further, the sludge that the company was 'gifting' the villages as good fertilizer turned out to be toxic. The Panchayat's decision was initially stayed by the government, following which the Panchayat filed a writ petition in the High Court. In response to this writ petition, the Kerala High Court passed a landmark judgment in December 2003.

The court held that the state is the trustee of groundwater and that it is duty-bound to prevent its overuse; its inaction in this regard would be tantamount to infringement of the right to life guaranteed under Article 21 of the Constitution of India. The High Court also recommended that the company did not have unrestrained rights over groundwater; instead, it could only draw groundwater equivalent to the quantity normally used for irrigating crops in a land area the size of the company's plot, an amount to be determined by the Panchayat and the Groundwater Department. The response of the court to the writ petition was challenged by the company. Subsequently, a division bench of the High Court appointed a multi-agency expert committee to ascertain whether the current level of exploitation of groundwater by the company was indeed the reason for the scarcity of water experienced in the region. Following a preliminary report in the court in February 2004, the state cabinet served a four month ban on the drawing of groundwater to HCBL (i.e., until the onset of the south-west monsoon in June). Both the High Court decision and the ban on HCBL were seen as major victories for the anti-Coke movement at Plachimada.

However, both positions were reversed when the final report was submitted in March 2005. In April 2005, HCBL was permitted by a Division Bench of the Kerala High Court to resume production at Plachimada, drawing groundwater up to five lakh liters per day⁸⁴ during 2005-06 (without any right of accumulation in case of non-use any day) from the 34 acres premises of its bottling plant. The only caveat was that the company should actively involve itself in community development programs of the Panchayat, especially in the matter of health

and water supply, and hence a reasonable amount of water drawn should be utilized for the benefit of the public. The justification offered by the court was that the drying up of ordinary wells was not a phenomenon specific to Plachimada, and that shortage of rainfall was a contributory factor. The report on which the High Court judgment is based has been critiqued on a number of grounds such as incomplete estimation of water usage/demand, faulty calculation of rainfall trends and consequent water availability, and lack of attention to the question of groundwater quality (Venugopal and Suchitra, 2005). However, these issues were not raised by any of the parties concerned in the case.

But even more important than the reversal of the ban were the rulings made by the April order about the role of *panchayats* and rights over groundwater. With regard to the former, the court held that the Permumatty Gram Panchayat was not justified in rejecting the application for renewal of the license before a scientific assessment of the groundwater potential had been made, nor could it enquire about the details of the machinery installed, borewells, and so on, as such matters fall within the jurisdiction of the enforcement officer under the Factories Act. The April order also pointed out problems with the December order giving the Panchayat the right to fix the quantity of water that the company may be permitted to draw. This was on the grounds that no reason was provided for giving agriculture more priority than an industrial activity, and the fact that differences in agricultural needs from crop to crop was not taken into account. In fact, the April order also mentioned the need to fully utilize developmental opportunities that only industrial establishments could create in an area that is otherwise predominantly agrarian.

In the context of groundwater, the April order ruled that any person could extract groundwater from his property, unless it is prohibited by a statute, and that if restrictions on extraction of groundwater are to apply to legal persons (companies), they may also have to apply to natural persons (individuals). Further, even the mandatory function of a *panchayat*

⁸⁴ The figure of five lakh liters was arrived at by a team of experts of the Central Water Resources Development and Management (CWRDM) by taking into account the average rainfall in the locality. This is supposed to be the amount that could be withdrawn without affecting both domestic and irrigation water requirements under normal rainfall conditions.

under the PRI Act viz., maintaining traditional drinking water sources, could not prevent a well owner from extracting water from his well as he wished i.e., could not deny the proprietary rights of the occupier of land.

The Perumatty Gram Panchayat has since appealed to the Supreme Court for revocation of the High Court order, calling into question the rights of a *gram panchayat* to drinking water and for agricultural purposes in contrast to the right of a multinational company to extract water. The case is still pending. In the meanwhile, the Kerala government has notified the land on which the bottling plant is located under the Kerala Groundwater (Control and Regulation) Act, 2002 to regulate the use of groundwater in times of scarcity. This meant that the area and its water resources were declared as 'over-exploited', and that the company would have to get further clearances in order to continue to draw groundwater. The most recent development is that the Perumatty Gram Panchayat has issued a fresh license to HCBL for three months, imposing 17 conditions, in order to comply with a High Court order (Anonymous, 2006b). Coca-Cola has accepted the license under protest.

With this brief summary, I now turn to the implications of the case for the concept of right to water.⁸⁵

Firstly, the idea of 'right to water' is explicitly used in the agitation. The focus is to a large extent on drinking water rights of the poor (including questions of quality of water), but the idea of water for livelihoods (in particular, for agriculture) has also been brought up. However, while drinking water and agriculture needs are posited against the needs of industry, the relation between drinking water needs and agriculture needs (including for different kinds of crops) could also be conflictual, a point which has received less attention.

Secondly, an important part of the strategy involved in the agitation is positing the 'community' against the 'multinational'. Such a dichotomy is clearly useful for strategic purposes; for instance, the struggle at Plachimada can be a part of anti-globalization

struggles at the national and international level. In fact, the movement has already drawn considerable international support, with many communities in the US, the UK, and other countries refusing to do business with Coca-Cola until it meets the demands of the protesters in India. However, this strategy also raises a number of questions. Firstly, class and power differences within the community are not very clearly articulated. Secondly, while the Plachimada case has received considerable attention because it involves over-extraction of water by an MNC, over-extraction of groundwater by Indian private operators (operators of tankers in urban areas for instance), has received far lesser attention.

Thirdly, at stake in the Plachimada struggle is also the question of what development entails, especially in the context of a state like Kerala where recent years have seen attempts to promote economic growth and higher employment opportunities. In this context, it is interesting to see the view that the High Court takes in the April 2005 judgment, where it implicitly supports a path of development that necessarily entails the establishment of industries, even if the environmental costs of these industries are high (and distributed inequitably across different groups).

Fourthly, the two contrary judgments of the Kerala High Court once again bring out the lacunae in laws pertaining to ownership of groundwater. The first judgment was a landmark because it brought up the idea of the state as a public trustee of groundwater. While the second judgment was problematic in that it just re-enforced the de facto link between land and water, it also raised important concerns such as the lack of effective legislation and the need to impose restrictions on groundwater extraction by companies *as well as* individuals (Upadhyay, 2005b), with the caveat that one would need to recognize the differential economic status and power positions of the two entities. Another related point is the lack of any discussion of pricing of groundwater.

Fifthly, the second court order brings into question the whole process of decentralization and democratization. There are a number of

⁸⁵ Note that the following discussion is not meant to detract from the contributions of the Plachimada struggle; the idea is to bring out the different dimensions and varying motivations involved.

inter-related points here. One is the question of who should be deciding what is 'reasonable' extraction, and how to balance ecological questions with what different groups of people want, a role which the high court seems to have taken onto itself, but which could also be the mandate of PRIs or other democratically elected bodies (Upadhyay, 2005b). The second is the power of higher courts to overrule the decision of an elected Panchayat, especially when there is some legal basis (via the 73rd and 74th amendments) for it to take decisions about a drinking water resource.

Sixthly, Upadhyay (2005b) also argues that the Plachimada case raises questions about bringing battles into the legal arena indiscriminately, as judicial decisions could supplant those taken by elected bodies. He contrasts the Kerala case with the case of Kaladera in Rajasthan, where the resolution of a Panchayat in June 2005 against another Coca-Cola bottling plant was approved by a specially convened *Jan Adalat* (People's Court) also comprising senior lawyers and a retired justice.⁸⁶

6.3.2 Agitations against the privatization of the river Sheonath

One of the lacunae in legislation with regard to ownership of surface water is lack of clarity about whether the state owns surface water or merely has user/control rights over it. This question becomes important in the light of recent efforts by the state to lease out surface bodies to private entities. The case which has drawn the most attention in this context is the privatization of the river Sheonath in Chhattisgarh.⁸⁷

In 1998, an Indian company, Radius Water Ltd., entered into a BOOT (Build-Operate-Own-Transfer) agreement with the Madhya Pradesh government in 1998, whereby it would lease in a part of the River Sheonath for a period of 22 years. This was the first case of river privatization in India. When the state of Chhattisgarh (consisting of some areas in the eastern part of Madhya Pradesh) was

constituted in November 2000, the river Sheonath became a part of the newly formed state. According to the contract inherited by the Chhattisgarh government from the Madhya Pradesh government, Radius was allowed to develop water sources (through construction of up to three barrages) over about 23 kilometers of the Sheonath river for supply of water – between 4 million liters per day to a maximum of 30 million liters per day – to existing and expected industries in the Borai Industrial Growth Centre in Durg District. With a requirement of 3.6 mld, Hindustan Electro Graphites was, and is, the only major consumer of water in Borai. Further, a take-or-pay clause in the contract stipulates that the Chhattisgarh State Industrial Development Corporation (CSIDS) would have to pay Radius for a minimum of 120 million liters per month regardless of whether or not the water was consumed. Under this clause, CSIDC had to pay Rs.290.81 lakh to Radius between December 2000 and June 2002.

Further, the company did not allow villagers to use water from the river for irrigation, or even for their own personal needs. Downstream communities were particularly affected. Fishing activities were also adversely impacted because the company had blocked all access to fishing grounds over a half-kilometer stretch of the river.

The Forum for Fact-Finding Documentation and Advocacy, a civil society organization based in the Chhattisgarh capital Raipur, filed a PIL in the state's high court, challenging the privatization of the river on the grounds that it had adversely affected the livelihoods of local fishermen, and irrigation and drinking water supplies in the area. The agreement was deemed to violate the fundamental right to life and livelihood guaranteed under Article 21 of the Constitution of India, as well as Article 47 (right to proper nutrition) and 48A (protection and improvement of environment and safeguarding of forests and wildlife), which are Directive Principles of State Policy.

⁸⁶ In Kaladera and adjoining villages near Jaipur in Rajasthan, farmers hold the Coca-Cola bottling plant (established in 1999) primarily responsible for declining ground water levels in the region, and the resultant harm to local agriculture as well as reduced water for personal consumption. Coca-Cola gets the water free except for a small cess that it pays to the government. While there are other factors that have also led to the decline in groundwater in the area (more water-intensive agriculture, water-guzzling industries like beer units), the situation is believed to have worsened since the Coca-Cola plant was set up (Adve, 2004).

⁸⁷ The discussion of this case is based on Jayaraman (2005).

Finally, in response to protests by villagers and civil society agents, the Borai scheme was cancelled by the Chhattisgarh government. However, there have since been other instances in the state where parts of rivers were leased out or handed over to industries for their private use. These include the Kharn river (Nico Jaiswal group), the Sagari river (S R Group), Indravati river (Tata group) and Kelu river (Jindal Group) (Mumtaz *et al.*, 2005).

Two broad sets of issues are raised by the Chhattisgarh case. The first is whether the state has the right to enter into an agreement of this kind, especially without including any provisions to safeguard the interests of existing users. If one considers the state as a public trustee, the answer to this question is clearly no. The second issue is once again about the path of development that one wants to undertake, and whether industries should be encouraged when their establishment is on terms that primarily benefit the industrial concern itself.

6.4 CIVIL SOCIETY INITIATIVES IN WATER IN MAHARASHTRA

Civil society initiatives in Maharashtra consider a wide range of issues relating to different dimensions of a right to water. On the basis of the issues that they deal with, these initiatives can be classified into five broad categories of water: those dealing with the mode of development, those concerned with questions of equity in distribution of water, those concerned with sustainable use of water, initiatives trying to link the dimensions of gender and access to water, and initiatives that are primarily a response to the changes introduced in the water sector by the state in the post-liberalization era. These initiatives have had varying degrees of success: some of them (like the South Maharashtra movement) have become mass movements, others (like the Pani Panchayat experiments and the experiments in sustainable farming) have not spread beyond few locales. Nevertheless, at least the fact that such attempts have been made is important.

The initiatives have also used a wide variety of strategies. The movement for equity in water

(especially in the context of dams) has placed considerable emphasis on mass mobilization and consciousness-raising in various forums. For instance, the struggles about the Bali Raja Memorial Dam have involved demonstrations to raise public consciousness, campaigns with various left organizations in the district, and university seminars to discuss the principles of the movement and the course of action to be followed (Omvedt, 2000). At the same time, there have also been *dharnas*⁸⁸ and fasts to protest state inaction or wrong action, as well as reconstruction work. In the case of the village-level water projects emphasized as alternatives to dams (be they the watershed program of Ralegan Siddhi or the lift irrigation schemes of Pani Panchayat), reconstruction was the dominant strategy, although there was some engagement with the state, as well as mobilization (at least at the level of the village). In general, both reconstruction and consciousness building are accepted as important by all. The more controversial strategy is engagement with the state, there being considerable differences of opinion about the ideal mode and extent of such engagement. Some put all responsibility on local groups and consequently see no role for the state, while others seek to lobby extensively with the state.

I now trace out the trajectory of the various initiatives in water in Maharashtra, and briefly describe the issues that they have focused on.

As in the rest of the country, the most important form of irrigation development in Maharashtra until the 1970s was large and medium dams. The rehabilitation of people displaced by the dams was inadequate and raised questions about the social distribution of costs and benefits of such projects. This provided the plank for the first set of struggles in the realm of water. A major impact of these struggles was the passage of the Maharashtra Rehabilitation of the Project Affected Act of 1978; among other things, the Act provides for more land in the command area for marginal farmers, and for thirteen civic amenities – ranging from water supply to schools and cremation grounds – for resettled villagers (Phadke, 2004).

⁸⁸ A dharna is a form of protest to obtain redress for a wrong, usually by stopping work at a particular site.

Along with the problem of rehabilitation of dam oustees, large-scale surface irrigation works also came in for criticism on other grounds such as the inappropriate technology (for instance, use of capital-intensive technology in a labor-intensive society) used and the lack of attention paid to local ecological factors. While some of the people involved in the struggles against big dams were against *all* dams, others held that it was possible to construct dams with more appropriate technology that would not have the same negative impacts in terms of displacement or adverse effects on the environment. For instance, the Mukti Sangharsh movement in Southern Maharashtra, a broad platform of left-wing activists founded after the 1982-83 textile strike in Bombay, spearheaded the construction of the Bali Raja Memorial Dam in the villages of Balawadi and Tandulwadi in Sangli district. The dam is a small, peasant-built one, constructed using local resources, and it did not lead to any problems of displacement (Thukral and Sakate, 1992).

An important feature of the struggles of Mukti Sangharsh and others working with them has been the rejection of one of the most common dichotomies in water discourse today – that between ‘big dam’ developmentalism and anti-dam eco-romanticism (Omvedt, 2000; SOPPECOM, 2002). Their argument is that while the planning and performance of the former leaves much to be desired, the latter aims to preserve ‘the environment’ at the expense of the livelihood needs of farmers. Further, small dams are not enough to satisfy all livelihood needs in a reliable fashion (even if supplemented by local watershed development), and hence large dams cannot be totally rejected.⁸⁹ This argument is particularly true in drought-prone areas which get less than 500 mm of rainfall a year.

In contrast to those advocating a pragmatic approach to large dams (and all large-scale water development), others have been more concerned with alternative modes of water development, such as water harvesting,

especially at the village level. Perhaps the best-known example in this regard is Anna Hazare’s Ralegan Siddhi, where watershed development led to a variety of socio-economic changes.

If debates about the mode of water development form the focus of one set of struggles in water in Maharashtra, a second set of struggles relates to distribution of irrigation water (including questioning of the link between access to water and access to land).

The movement for equitable distribution of water is mainly concentrated in southern and western Maharashtra. Its genesis can be traced to the Pani Panchayat experiments of Vilasrao Salunkhe. Following the 1971-72 drought in Maharashtra and the ineffectiveness of the ad hoc relief measures undertaken, Salunkhe started his experiments in Purandhar taluka of Pune district in Maharashtra. These experiments, which primarily involved lift irrigation schemes, aimed to de-link rights over water from rights over land and to restrict the amount of water per beneficiary in order to ensure that all members of the community in question (including the landless) would benefit. The idea was to reduce intra-community inequalities by promoting a more equitable distribution of water resources.⁹⁰

Pani Panchayat provided inspiration for principles of equity to be applied in other contexts, such as the Bali Raja dam in Balawadi and Tandulwadi, the watershed program in Ralegan Siddhi, and the Water Users’ Association at Khudawadi. However, the main attempts at replication as well as engagement with the state to provide legal backing for equitable water distribution have taken place in the context of dam water. For over a decade now, drought-affected peasants (organized under an umbrella of left organizations such as the Shetmajoor Kashtakari Shetkari Sanghatana, the Shramik Mukti Dal and Mukti Sangharsh Chalwal) in thirteen *talukas* of four districts in Maharashtra have been demanding the right to equitable distribution of water from the dams in the region

⁸⁹ This view has led them to take a more pragmatic approach, even in the case of the construction of the Narmada dam (especially in recent years, when the construction of the dam has become a *fait accompli*), and to focus on lobbying for changes in technical design that will ensure greater equity (Interview with K. J. Joy, a member of SOPPECOM, on July 25, 2001).

⁹⁰ Interview with Vilasrao Salunkhe, the founder of Pani Panchayat, on July 24, 2001.

for every agricultural family, including the landless (Phadke, 2004).⁹¹

Of all the struggles in Maharashtra, it is this one that has used the language of rights (and right to water) most explicitly. Hence it is useful to briefly consider what this right encompasses (with the caveat that it is put forth in the context of canal water in rural areas).⁹² Firstly, there is a clear distinction between basic needs and economic needs, with water for basic needs being free, but water for economic needs being charged. Water for satisfying basic needs (drinking, domestic needs, cattle, and agriculture) is seen as a right; following the Pani Panchayat principles, this includes water for three acres per household, which is considered the minimum necessary to satisfy basic needs. Thus the conceptualization of right to water includes water for at least minimal livelihood requirements. Secondly, there has been a fair amount of engagement with the question of the unit to which water rights should be assigned (for instance, the idea that landless households should also be included). Thirdly, the responsibility of granting the right is clearly put on the state, even though there is an important role for civil society groups and local people both in lobbying for changes in state policy and in ensuring effective implementation. Fourthly, there is questioning of at least some aspects of the mainstream development paradigm (for instance, the idea of drought as a natural phenomenon and the excessive use of inputs – including water – in agricultural cultivation).

Equity in a different context, that of conjunctive use of water, was addressed in the case of Ozher village of Nashik district in Western Maharashtra. Farmers there were already getting water from a nearby canal when an NGO called *Samaj Parivartan Kendra* set up a WUA and also got the Maharashtra Soil and Water Conservation Department to construct

a series of check dams on the *nallahs* in the command area of the canal. These check dams stored both the rain water as well as the canal seepage water (or the water remaining in the canals after usage in each round). As a result, water level in the wells in the vicinity increased. Since the increase was due to a public investment (in canals and check dams), the well owners agreed to share part of the increased water with neighboring farmers who had no wells, as well as to pay the WUA a fixed charge for using water from the wells that had benefited from the recharge (Paranjape *et al.*, 1998).⁹³ This case raised the important question of payment for conjunctive use of water.

A third set of struggles in Maharashtra has focused on the question of sustainable use of water. In the case of surface water, for instance, experiments were conducted in two villages of South Maharashtra (Balawadi and Benapur) in 1986-91 to show how organic inputs and mixed cropping patterns can improve productivity of land even with limited water application (Paranjape *et al.*, 1998). These experiments were fairly successful, but widespread replication remains to be undertaken. A few attempts have also been made to undertake sustainable practices with regard to the use of groundwater, including in Ralegan Siddhi, Pani Panchayat, and Hivre Bazar (where a watershed development scheme was implemented in the mid-1990s). These have tried to limit withdrawals by restricting either the kind of crops that can be grown or the kind of technology that can be used (no borewells, greater use of drip and sprinkler irrigation). Since groundwater development and use take place privately, the adoption of such measures is mainly dependent on local initiative, and there have been no widespread attempts at changes in this regard. However, they do serve to bring out the importance of raising the question of use of

⁹¹ The most recent manifestation of this struggle (called the Thiyya Andolan) was a sit-in by about 7,000 peasants from the drought- and dam-affected areas of Sangli, Satara, Solapur, and Kolhapur districts in Pune in January 2004, following the severe droughts in 2002 and 2003. The main demands of the Thiyya Andolan were: (i) allocation of funds to the tune of Rs.30 billion for eradication of drought; (ii) change in the priority allocation of water from industry to agriculture; (iii) equitable distribution of water in proportion to the population; and (iv) allocation of funds to the tune of Rs.5 billion for rehabilitation of the dam-affected. These demands were partially conceded on the second day, after which the sit-in was withdrawn (Phadke, 2004). As of June 2004, however, most of these demands had not been actually met (Interview with Seema Kulkarni, one of the co-ordinators of the sit-in, on June 11, 2004).

⁹² The discussion of the features of the right is based on an interview with K. J. Joy, a member of SOPPECOM, on July 25, 2001.

⁹³ Farmers in Ozher also use drip irrigation for cultivation of grapes, the major crop taken up for cultivation after the increased availability of water.

water in conjunction with demands for better access to water.

The fourth set of initiatives in Maharashtra tries to link the question of gender and access to water. In the mid-1990s, in a village called Khudawadi in Osmanabad district in Southern Maharashtra, the Pune-based SOPPECOM was involved in setting up a Water Users' Association, in the course of which they entered into a bargain with water users to give a part of their water entitlement from the canal to landless women. The women would use the water on fallow lands belonging to private owners, and a scheme was then worked out to share the produce of these lands between the landless women and the landowners. The experiment itself did not succeed, except for meeting the fuel and fodder needs of the women for a few years (SOPPECOM, n.d.). However, it raises a number of important points for such struggles. Firstly, it shows that at least in the context of satisfying livelihood needs, right to water alone is not sufficient, and needs to be accompanied by access to land and credit. Secondly, it helps to re-enforce the idea of right to water as a basic right (independent of land ownership). Currently, SOPPECOM is also working to improve the access of 'deserted women' to resources such as water.

A fifth set of struggles focuses on the changes in the water sector introduced by the government in recent years. These struggles

are conducted at two levels. One is lobbying the state for changes in policies and legislation. For instance, in the context of attempts to give small tanks on a BOT basis to private parties (by passing a Government Resolution to this effect), Mukti Sangharsh is fighting to ensure that these tanks are given to co-operatives or village communities instead, with the government contributing money for building. Further, as discussed in Chapter 5, civil society groups have also played an important role in getting the draft bills of the MMISFA and the MSWP into the public domain. The second level at which struggles are conducted is in actually disseminating information and raising consciousness⁹⁴ about the implications of the new policies.

6.5 CONCLUSION

The discussion of civil society initiatives in water provide a glimpse of the complexities involved in struggles dealing with any aspect of 'right to water'. These initiatives have engaged with more dimensions of the right than the human rights discourse and state legislation. For instance, the idea of water for livelihoods and the relation between water and development has been an important part of at least some of these struggles. But more importantly, the use of rights language and efforts to engage with the state indicate the potential for synergies between different domains.



⁹⁴ Interview with Seema Kulkarni, a member of SOPPECOM, on June 11, 2004.

CHAPTER 7

CONCLUSION

7.1 INTRODUCTION

The preceding chapters have traced the journey of a right to water across a number of discourses. From the human rights discourse at the international level to legislation at the level of India and Maharashtra, and then onto civil society initiatives in India and Maharashtra again, the right to water either deals with different dimensions, or with the same dimension in a different manner. For instance, the human rights discourse often focuses on legal aspects, without taking into account the social and cultural context of the practice of the right at local levels, or of power relations in other realms at the international level which could impact the right (such as in GATS negotiations). Similarly, the human rights discourse and state legislation do not really engage with issues of development, thereby implicitly subscribing to the standard paradigm of development, while many civil society initiatives critically question at least some aspects of mainstream development. In this concluding chapter, it would be useful to go back to the four aims put forth in the first chapter (bringing about greater conceptual clarity in the way the term 'rights' is used, laying out the contours of a right to water, showing how state policy in India and Maharashtra supports these different aspects of the right to water, and discussing how civil society initiatives engage with these dimensions), to see what insights emerge with respect to each of them, and indicate possible ways ahead.

7.2 MEANING OF RIGHTS

The theoretical discussion of rights in general and the right to water in particular in Chapters 2 and 3 respectively, and the working of rights in the domains of human rights, state legislation, and civil society initiatives in Chapters 4 through 6, indicates that engaging with the concept is useful for a number of reasons, although one also needs to exercise some caution in doing so.

What does engagement with the concept of rights have to offer? Firstly, the link between particular versions of rights and the idea of capabilities means that rights can help bring questions of equity and social justice to the forefront. This is true even though a lot more work needs to be done to understand the operational implications of a rights-based approach (whether it is having fulfillment of capabilities as a standard or the idea of right as an endowment), particularly in the context of a complex resource like water. Secondly, the debates that are found in different versions of rights, be it human rights or rights-based approaches or the right to development (the relative importance of legal versus non-legal aspects, the role of the state, the implications of power inequalities at various levels) are relevant to issues of water too. For instance, the human rights discourse raises the question of how one could make the concept of right to water meet certain minimum standards (which would call for a certain degree of universality), while at the same time allowing for contextual specificity. Similarly, the tensions between civil and political rights on the one hand, and economic, social, and cultural rights on the other hand, which is found not only in the human rights discourse at the international level, but also in the human rights movement in India (although less pronounced in recent times), has implications for how one should view a right to water (as derived from the right to life or right to health, or as an independent right). Thirdly, rights could be a useful strategic instrument, especially in negotiations with governments and donors. The fact that the World Bank discourse on water rights influenced state legislation in Maharashtra on Participatory Irrigation Management (PIM), can be viewed as a matter of both concern (in the power that one international lending institution has) and hope (that other international discourses, like the one on rights, could also potentially be made as powerful).

However, one must also bear in mind the pitfalls

of using over-simplified versions of rights. In this regard, the experience of community-based natural resource management, which gained prominence in part because of strategic uses of the idea of an idealistic version of 'community', but is since struggling to make the concept more nuanced (Agrawal and Gibson, 2001), should serve as a caution. Another example is the concept of right to development, which was prominent in the 1980s, but which is now near absent or present only in a highly sanitized, non-political version. There is thus the danger that like other concepts in the development discourse (empowerment, basic needs, social capital, and so on), rights also run the risk of being co-opted into a neo-liberal agenda, or in agendas that do not explicitly focus on equity.

One way of increasing the likelihood that the concept of rights plays a useful role in the context of water is perhaps to ensure greater clarity in what having a rights-based approach in water would entail. This brings me to the second aim of this review – to bring about greater conceptual clarity in at least one sub-part of an RBA in water viz., the concept of a 'right to water'.

7.3 DIMENSIONS OF A RIGHT TO WATER

One of the lessons that emerges from the discussion of rights is that one needs to guard against universalistic notions of a right to water, and instead try to situate it in a particular context. At the same time, it is important to delineate the contours of such a right i.e., the different dimensions that it would have to deal with. The discussion in Chapter 3, where the issues at stake in each of these dimensions are laid out, as well as the discussion in Chapters 4 to 6, where how these different dimensions work in the realms of human rights, state legislation, and civil society initiatives is brought out, show that the right to water is far more complex than just simply access to adequate and safe water.

For instance, one important issue in the context of a right to water is the gender dimension of the unit to which water rights are assigned. However, in any given context, the decision of whether to try and push for water rights for women would depend not just on practical feasibility and what needs to be done to deal

with the existing water problem, but also on whether access to water would be the best means of empowering women in a meaningful sense, and what women themselves want at that point. The important point is that there should be awareness of different possible options and their implications, as well as flexibility (both in legislation as well as in civil society initiatives) to pursue whatever is deemed best under the circumstances. The question of whether particular entities (landless households, slum-dwellers) have access to water also involves fulfillment of (and ability to prove) particular eligibility criteria (whether it is tenancy status in rural areas or domicile status in urban areas). While such inter-connections increase the complexities involved in extending the class of right-holders, they also open up possibilities for linking up struggles. Thus struggles to formally recognize slums can link with struggles to provide basic amenities (including water) to all.

But perhaps the most important outcome of discussing different dimensions of a right to water is that it could result in greater conceptual clarity in the goal that one is striving for. For instance, polarities between market remedies, pricing of water, and privatization on the one hand and goals about social justice on the other hand might be useful strategically (for instance, for mobilization in a movement such as the one in Plachimada). But they also lead to confusion, as when any attempt at privatization (including of a very specific water delivery service) is seen as privatization of the resource itself and therefore calling for resistance, instead of trying to understand the precise terms of the privatization contract and then deciding if that is the best way to undertake reforms in the delivery of water in that particular context.

Engaging with different dimensions of a right to water also highlights the fact that the link between the right to water and development is critical. This is particularly true given that water not only has multiplier effects in any economy, but is also tied in with social and political power. Hence recognizing the conflicts between different uses and users of water, as also of the vision of development underlying water policies, is important because without this, existing power inequities are likely to be re-enforced or further aggravated.

Finally, it is important to note that each of the

dimensions of water has implications for efficiency, equity, and sustainability. While it has not been possible in this study to consider the implications of different dimensions for all three goals, it is important to keep in mind that the three goals, as also the different dimensions, are inter-connected, which in turn opens up the space for linking different, apparently unconnected, struggles.

Another dimension of a right to water that has not been discussed in this study, but is important, is the relation between technology and right to water. There are two inter-related points here. The first point is that the choice of technology is likely to make a big difference to how the goals of efficiency, equity, and sustainability are attained, and therefore how the right to water works out in any given case. Hence explicitly engaging with the kind of technology being used is important. But this rarely happens. For instance, in the context of Environmental Impact Assessment (EIA), the type of technology being installed is never considered an important parameter. The result is that clearances are given even to industries where water consumption is far above the global best practices (Anonymous, 2005b). The second reason why the link between technology and right to water is important is because embedded in technology itself are assumptions about development.

7.4 STATE LEGISLATION AND RIGHT TO WATER

While there is some recognition of right to water in international human rights as well as in the Indian constitution, at the level of state legislation and policies in India, different dimensions of right to water do not get much support. This is true even in cases like Maharashtra, where a particular version of rights (viz., entitlements to water) has been put forward in the context of PIM, but is limited on a variety of fronts. What is a matter of concern is that even an active civil society has not always succeeded in shaping legislation in desired directions, even though it has succeeded in bringing about micro-level changes.

However, not engaging with legislation is also not an option. As the discussion in the preceding chapters indicates, along with constitutional rights, rights granted via policies and legislation could be one, if not the only,

instrument that could be used by different agents in their struggles around water. Further, the law also performs the function of regulating people's attitudes, because over time, people internalize it. Hence there is definitely a need for further changes in legislation. A number of points are important in this regard.

Firstly, the discussion in Chapter 5 shows how the right to water in India has been interpreted by the judiciary under the right to life in the constitution. However, the nature of the right – whether it is a negative right or a positive right, what it implies about the relationship between development and the environment – is not clear. One form that legal reform would have to take is (a) to decide whether the right to water needs to be formalized as an independent right, or whether the current interpretation under the right to life is sufficient and (b) clarify what the right implies for the different dimensions reviewed in this study. Note that having a clear constitutional provision is important even if the right to water is incorporated in 'ordinary' legislation or found in judicial applications; as Gavison (2004) argues, a constitutional right to water would constitute "entrenched legislation", which has a special status and is less subject to change. Singh (1992) also argues in favor of expanding constitutional law (as against rectifying existing statutory law) because it gives more lasting solutions.

The second point that is important from the point of view of legal changes is one that Singh (1991) (cited in Saleth, 1996) makes with regard to water law reform in general, but which would apply to the idea of right to water too. Singh argues that just passing an act to be superimposed on the existing legal domain governing water resources is not sufficient; reform would be needed in central and state laws, rules, orders, ordinances, customary laws, and court decisions pertaining to water, i.e., a combination of constitutional, criminal, civil, and customary law. Thus changes would be needed in the Easement Act, Irrigation laws, Panchayat and Municipal Corporation laws (Singh 1992); they would also have to cover domains such as flood-plain zoning, pollution control, water quality, and groundwater regulation. Further, changes are not just required with respect to the legal regime in water, but also with respect to other related aspects. For instance, laws regarding land use and ownership are important,

because they are closely linked with water, sometimes formally through riparian rights, and land owners can affect water through land use changes such as reforestation (TAC, 2000). Similarly, an effective Right to Information Act is important to get information (like the precise nature of privatization contracts) that would otherwise be inaccessible to the vast majority of people.

While the task of legal reform might seem daunting, a potential starting point is a suggestion that Bluemel (2004) makes in the specific context of a riparian regime, but which is more broadly applicable – to explicitly incorporate the public trust doctrine in the existing systems of rights. This would be especially useful in the short run, while the impact of a right on everything ranging from water user charges, irrigation acts to environmental and agricultural regulations is being worked upon. As discussed in Chapter 3, the idea behind a public trust framework is that the state, as a trustee, would have regulatory control over water while people, as members of the trust, would have usufructuary rights over its use. Saleth (1996) and UNESCO-WWAP (2006) argue that such a system could fit the requirements of efficiency, equity, and sustainability; state trusteeship would allow social control over the amount of and the manner in which water is to be distributed and utilized (leading to ecological security and social equity in water use) and private user rights would allow transferability (leading to economic efficiency and resource conservation). While the idea of private, transferable user rights is problematic on a number of grounds (as the discussion in Chapter 3 indicates), the idea of a certain degree of state control (albeit constrained by the condition of functioning for the public interest) could be a useful one.

Along with legal reform, it is also necessary to put in place institutional mechanisms that can effectively decide how various dimensions of the right to water are to work in different contexts as well as give these institutions the necessary backing. Institutional issues are what broadly comes under the heading of governance,⁹⁵ on which there has been a lot of emphasis in recent times (see, for instance,

Mehta, 2004; Ahmed, 2005a). This question of institutional issues was discussed explicitly or implicitly as part of the different dimensions of the right to water. But two points are worth emphasizing. Firstly, just as legal reform needs to encompass a whole range of water and water-related legislation, institutional reform also includes a wide range of issues which includes machinery for resolution of inter-state disputes, grievance redress mechanisms in the context of large projects, creating institutional mechanisms to reduce non-revenue water and wastage, facilitating conservation, tackling corruption, and building the capacity of local government and local municipalities (both in terms of knowledge and finance) (Mehta, 2004). Secondly, as discussed in Chapter 4, particularly in the Indian context, clarifying relations between institutions is critical.

7.5 CIVIL SOCIETY INITIATIVES AND RIGHT TO WATER

The discussion of civil society initiatives in water in Chapter 6 indicates that these initiatives emphasize a different set of dimensions than state legislation or the human rights discourse. For instance, the anti-Coke struggles at Plachimada in Kerala raise important questions about the ownership of groundwater, the use of judicial activism, the limits of political devolution, the (perceived) conflicts between development and environmental protection, and conflicts between different uses of water. The initiatives also bring forth the inter-connectedness of different dimensions of the right to water, and therefore the possibility (and need) for networks and alliances across different groups. One example of this is the alliance between the dam-rehabilitation struggles in Maharashtra (which deal with the socio-economic impact of a particular mode of water development) and the equity in water struggles (which are concerned with the question of who has access to canal water, and how much, and the price to be paid for this).

The manner in which at least some civil society initiatives use the language of rights also offers proof of both the potential and problems of the rights discourse. The fact that it has been used in mobilizing people as well for engagement with

⁹⁵ GWP defines governance as a "...range of political, social, economic and administrative systems that are in place to develop and manage water resources, and the delivery of water services, at different levels of society (TAC, 2000).

the state is one indication of the potential for synergies across different domains. But the limitations of such use are evident by the fact that there is often lack of clarity about what the right exactly entails, and actual impact on state and global institutions continues to be limited.

The discussion in the preceding chapters also indicates two possible routes that future civil society initiatives can take. One is that there should be more attempts to influence the international discourses on water, not just the rights discourse (or the right to water), but also the other three discourses (the Dublin-Rio principles, the World Bank-ADB discourse on water markets, and the idea of Integrated Water Resources Management). This could seem like an esoteric concern, but the importance of doing this is exemplified by the South African case. Although South Africa has a right to water explicitly mentioned in the constitution as well as legislation that actually enables such a right to be implemented, there are still problems in the working of the right to water. But this is not so much due of lack of effective implementation, as due to other international discourses around water playing a more influential role and adversely affecting the working of the right on the ground.

Such an attempt could take a number of different forms. For instance, it could involve pressurizing international donors into NOT imposing private participation as a condition for aid (Mehta, 2004). It could also involve constant monitoring of GATS and bilateral investment treaties which seek to open water markets (particularly in urban areas) to foreign investment and competition.

Secondly, even as critically questioning existing discourses around water and development is important, it is crucial to simultaneously engage in "critical reconstruction", especially at the micro-level (Langford, 2005). For instance, one needs to develop alternative public and community models to manage water delivery, like the examples mentioned in Chapter 3.

Finally, it is useful to add a cautionary note on the role of civil society agents. As Mohanty (1998) argues, civil society could not only be a liberating idea, but also act as a "legitimizing

ideology of a coercive state" (p. 16). Hence just as an active civil society could act as a check on the state, checks are needed among different kinds of civil society actors too. Even in the case of those interventions whose ideology is more in tune with a liberating idea, it would be useful to keep in mind Sethi (1998)'s warning against the tendency "to load ex-ante macro expectations" on phenomena (actors/activities/organizations) that cannot bear the burden.

7.6 CONCLUSION

This study started with the aim of reviewing rights discourses in the context of water (and more specifically, the concept of a right to water), drawing on discussions in the domains of human rights, state legislation, and civil society initiatives. Given the constraints of the methodology used, the scope of the study is necessarily limited. In this concluding section, I would like to indicate four broad areas of study which one would need to engage with in order to take the work done in this review further.⁹⁶

Inextricably bound with the concept of rights is the concept of law. Hence engaging with the question of law as a conceptual category becomes critical. A number of different views of law have been put forth. For instance, Dhawan (1989) discusses (i) the 'black letter law' tradition, which interprets law as a relatively autonomous reality which is distinct from questions of morality (ii) an instrumental view of law (where law either fulfills the interests of the more powerful groups in society or is used to meet goals of redistributive justice) and (iii) law as an integral part of capitalism (either as an instrument to promote capitalist development or a natural spin-off resultant from it). Embedded in these different concepts are also particular views of development. Further, how law is used as well as how one interprets deviations from law is related to the particular view of law that one holds. For instance, social movements could use law as a resource in their struggle for social change, or they could focus on changing law as an outcome of their struggle. Law could be used to generate consent as well as to structure modes of resistance. These questions in turn have implications for the

⁹⁶ The following discussion draws on comments made by Ajit Menon on an earlier draft of this report.

potential of a right to water and of rights-based approaches. The concept of legal pluralism (briefly discussed in Chapter 2) also has implications for whether law is considered as an institution central to social order, or it is only one among multiple institutional arrangements and normative repertoires in society (Spiertz, 2000).

The second area in which more work is needed is the concept of citizenship and its linkage with water (as well as other social, economic, and cultural rights). This review indicates how on the one hand, the idea of citizenship as a condition for enjoyment of rights has been problematized and on the other hand, the modes of citizenship are also being increasingly narrowed down. Delving deeper into these aspects in the specific context of water is essential because, as Menon (1998) argues, citizenship is inextricably bound with the concepts of rights and justice, particularly in modern democracies, since justice is often ensured by the winning, granting, and protection of rights that are held by citizens.

The third area is the conceptualization of the state by different actors and of one particular arm of the state viz., the judiciary. Judicial judgments in cases such as the Plachimada case discussed in this review as well as others like Narmada and the inter-linking of rivers not only bring into question the use of PILs and judicial activism, but also broader questions of the role of the judiciary in general. For instance, Dhawan (1989) points out that the work of the judiciary is both constitutive of ideology and conceptive, in that it determines the manner and framework within which value preferences and public policy are discussed.

The fourth area of possible study is the actual working of rights discourses on the ground. This would imply drawing from actor-oriented approaches and legal anthropology; this, in turn, would ensure that agency and people's daily experience regarding the normative environment with all its ambiguity, variation, and contradiction becomes the arena in which one studies rights (Spiertz, 2000). This is important for a number of reasons. Firstly, the discourse of rights is related to wider questions of development. For instance, the concept of right to water has become a crucial symbolic issue

in the protest against globalization as a whole. Understanding how rights are constructed and used in any given context would need more case studies of rights and water. Secondly, water management practices and rules are also embedded in and constituted by existing social and political relations and hierarchies, cultural values, patterns and criteria of legitimacy, and locally specific ecological conditions (Boelens and Zwarteveen, 2005). Thus the rights that an individual claims would depend on the particular institutions they have access to, that is, the political context determines how competing rights claims are arbitrated at a local level. At the same time, the focus on agency should not detract from the fact that the discourse of rights is socially constructed, so that questions of structure and agency also become important. As Pettit and Wheeler (2005:1) argue, "the process of making rights is a political one, rather than a technical or procedural one, because it entails confronting the structural inequalities that underlie the negation of rights. Understanding how rights can shift power relations is essential to realizing the potential of rights to contribute to change."

The above four areas indicate not only suggestions for future work, but also the shortcomings of this one. However, the hope is that by reviewing three discourses – human rights, state legislation, and civil society initiatives – in one place, this study helps at least partially in indicating how bridges could be built between different actors and in opening up new spaces for intervention. Rights in general, and human rights in particular, may seem too abstract on the surface; further, what happens at the local level is determined by such a wide variety of factors that having an international or even national human right to water may seem to be of little consequence. But the study brings out the fact that international/national discourses do influence what happens at the local level. However, perhaps the most important thing that a rights-based approach (and a right to water) has to offer is the immediacy of social justice or equity concerns. Equity is not something that should (or can) be brought about at some later stage (after growth, after development), but is something that needs to be undertaken ex-ante.



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**REVIEW OF RIGHT TO WATER:
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