

Political Assessment of Water Governance

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Abstract

This paper develops an approach to estimate the political risk associated with implementation of institutional reforms in the water governance, while providing insights into the interrelationship of institutional arrangements, power structure, and policy outcome. The approach endogenizes the actions taken by politicians, service providers, customers, and other power holders. The situation in India as regards availability of water is a paradox. The country accounts for 2.45 per cent of the total land area and 4 per cent of the water resources of the world. Nevertheless, water is a scarce national resource with demands on it increasing on account of a growing population of over one billion. Much of the available surface water and ground water, estimated at 1869 billion cubic metre is presently unable to be harnessed for use on account of topographical and other constraints. The World Water Development Report, 2003 indicates that in terms of availability of water, India is at the 133rd position among 180 countries and as regards the quality of the water available, it is 120th among 122 countries. Of the present water usage in India, 92 per cent is devoted to agriculture; around 3 per cent is used by industries and only 5 percent for domestic purposes like drinking water and sanitation. The picture gets complicated by the other constraints. 40 million hectare of land in the country is flood prone and an average, floods affect an area of around 7.5 million hectare per year. One-sixth area of the country is drought prone. Water pollution is a serious problem with 70 per cent of India's surface water resources and an increasing number of its ground water reserves standing contaminated by biological, toxic organic and inorganic pollutants. The National Water Policy advocates a participatory approach to management of water resources and non-conventional methods for utilization of water like artificial recharge of ground water and traditional water conservation practices like rain water harvesting.

With water being a scarce resource, its sharing and distribution requires a regulatory framework which is brought about through not only written laws but also traditional and customary practices. However, this paper is confined to giving a broad overview of the law relating to water and the right to water in India with reference to the constitutional and statutory provisions and the decisions of the courts. The piece begins with outlining the specific provisions of the Constitution of India and some of the significant statutes that help understand the position of the water governance. It proposes to discuss some of the decisions of the courts in cases involving interpretation of the statutory provisions. A brief analysis of the prominent issues that arise and the response to those issues is attempted. The concluding portion seeks to highlight issues that require immediate attention from the perspective of the Millennium Development Goals relevant to the water governance and the requirement of General Comment 15.

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A plethora of constitutional and legal provisions govern the availability and distribution and control of water. The Constitution of India recognizes the essential tenet of equal access to water. Article 15(2) of the Constitution explicitly states that no citizen shall 'on grounds only of religion, race, caste, sex, place of birth or any of them' be subject to any disability, liability, restriction or condition with regard to 'the use of wells, tanks, bathing ghats.' Article 21 which speaks of the right to life has been liberally interpreted by the Indian Supreme Court to include all facets of life. The directive principles of state policy (DPSP), which the Constitution in Article 37 declares to be non-justiciable, recognizes the principle of equal access to the material resources of the community. Article 39 (b) mandates that 'the State shall, in particular, direct its policy towards securing that the ownership and control of the material resources of the community are so distributed as best to subserve the common good.' Article 51-A(g) casts a fundamental duty on every citizen of India 'to protect and improve the natural environment including forests, lakes, rivers, wild life and to have compassion for living creatures.'

Introduction:

'Inconvenience would be caused if every person in lured by non-feasance on the part of a body or a person entrusted with a public duty were entitled to come into court with a demand for compensation for his own particular grievance (...) particularly (...) where the public duty is that of maintaining, a national system of irrigation over an area so extensive as British India.'

'[T]he government is not under an obligation with regard to each individual ryot to repair irrigation works whenever they require repair.'

'[I]t has never yet been held that an action will lie for mere failure to repair, when repair is required to enable the ryot to receive the usual supply.' [N]o (...) liability arises in cases of non-feasance merely because the statute imposes duty; the statute must impose the liability expressly or by clear implication.'²

Statute law and state control in the arena of water management have reinforced each in their development. The span of history of statutory water law in India is less than 130 years,³ but it has acquired an aura of the eternal which makes the questionings of its fundamentals difficult. The experience of the making of such law, its working and its effect does not lend itself to an endorsement of the now-presumed sanctity of statute law. The advent of statute law has provided fertile ground for the unreined growth of an intrusive state. Consequently, and relentlessly, it has attacked indigenous, and community-based, systems of control and management of water. Statute law has propounded its own set of values and priorities which have forcibly replaced those learned and cultivated through extended periods of a community's history. An exegesis

² Extracts from Secretary of State for India in council v. Muthu Veeran Reddi (1990-10) 21 Mad. L.J. 869 at 877, 874, 875. These are representative of the approach to state power, and duty without liability which dominated the colonial water regime.

³ Water Law in India (ed.) Chhatrapati Singh, ILI (1992). Annexure I of Siddiqui's 'History of Water Laws in India' places the earliest water law enactment at 1864.

of the statutory experience of water law has exposed its purpose, and effect to be less than noble. This paper is an exercise in explaining, both in its process and its substance, the true nature of statute and unwisdom of dependency on this capricious state device.

I. INTRODUCTION: THE PRESUMPTIONS

In India, since 1950, a written Constitution binds the nation. There is a general acceptance of the supremacy of the Constitution.⁴ While providing the framework for governance, the Constitution details in three distinct lists⁵ the extent of legislative power of the States and the centre.⁶

Governance with the backing of statute law characterised the colonial period. Independence, the constitutional scheme, and the opportunity for self governance has altered the perception of state-enacted law.⁷ There are presumptions which have arisen from this perception which have influenced the growth of law-making and implementation in this country. It has also influenced the popular consciousness as to state power, as it has judicial understanding.⁸ Some of these presumptions have actively produced a degeneration, particularly, of state accountability, end of people's participation. Some of these atrophytic presumptions may be listed:

(1) All the legislative and executive⁹ power is clearly divided between the States and the Centre, including the unspecified residual power. The state has the power to make any law at all, the only possible conflict being between the Centre and the States on who has the power relating to the subject matter legislated upon.¹⁰ All powers of legislation that exist vest in the state and the state has the power to legislate on all matters.¹¹ The

4 For e.g. the recognition, even if hemmed in, of the right to livelihood as inherent in the right to life (Article 21 of the Constitution) has grown out of this argumentation. See *Olga Tellis v. Bombay Municipal Corporation* (1985) 3 SCC 545; *Sodan Singh v. NDMC* (1989) 4 SCC 155. See also *Delhi Transport Corporation v. DTC Mazdoor Congress* (1991) 1 SCC 600.

5 The Union list, the State list and the Concurrent list. Indian federalism has a clear bias towards centralization. This explains the residual entry in the Union list (entry 97, List I); and where both the Union and a state legislate on a matter in the Concurrent List the Central legislation has overriding effect.

6 The Executive power of the Centre and the States is expressly declared to be co-extensive with the legislative power (Article 53).

7 'States' in this paper refers to the territorial divisions of the country (not including the Union Territories, which are differently positioned in the Constitution); 'state' refers to the composite governing entity.

8 For example of the presumed constitutionality of a statute, see *Federation of Hotel and Restaurant Association of India v. Union of India* (1989) 3 SCC 634 (Legislative wisdom and 'constitutionality is presumed' 661). For example of the Court's deference to executive judgement, and lending it a finality, see *Dahanu Taluka Environment Protection Group v. BSES* (1991) 2 SCC 539 ('...it is primarily for the governments concerned to consider the importance of public projects' 541)

9 See supra note 5

10 See *Federation of Hotel and Restaurant Association of India*, supra note 7.

11 In *Union of India v. H.S. Dhillon* (1971) 2 SCC 779, the division of all legislative powers between the Centre and the States was categorically affirmed: '...we have the three Lists and a residuary power and therefore it seems to us in this context if a Central Act is challenged as being beyond the legislative act is challenged as being beyond the legislative competence of Parliament, it is enough to enquire if it is a law with respect to matters on taxes enumerated in List II (State list). If it is not, no further question arises.' 803

principle of representative democracy is recognised to the exclusion of a participative polity.¹²

(2) State-made law has a priori validity, even where it excites dissension and resentment.¹³ This has led to a position of the mind where all other forms of law or practice¹⁴ are tested against statute law; where it is not statute law which is tested against these other forms.

(3) The legislature makes the law, while the executive is the implementing agency. This presumption lends an aura of objectivity to the legislative process and product. This is a fallacy, most clearly demonstrable in a Cabinet form of government. Those who are instrumental in introducing legislation, and ensuring it is enacted, are also the heads of the executive in their Ministerial capacity. Empowerment of the executive by legislature, would, in effect, be empowerment by the Cabinet of itself in another capacity- as executive heads of the various arms of the state.

(4) It is only through legislation that the anomalies and inequities which abound can be dealt with. The presumption therefore also is that statute law does achieve this effect.

(5) To enforce its law, the state needs power. This essentially comprehends the power of sanction. A law and order machinery is presumed then to be an unavoidable necessity.¹⁵

(6) In the context of resources such as water and forests, there is the presumption of 'public policy' and 'public interest'. When the state undertakes activities which may deprive people of their rights to land, water, forests, (including the right to use and usufructuary rights) and declares that it is a policy conceived in public interest or a public policy envisaged for the greater public good, it is so presumed. It has, in fact, been accepted as being nonjusticiable even by courts themselves.¹⁶

12 'Representative democracy' recognizes the periodic determination of the people's representatives through elections. Once elected, the representative is answerable only to his party, till he has to approach the electorate again. An extreme assertion of this position is witnessed in the Anti-Defection Act (Tenth Schedule to the Constitution) which requires a Speaker to disqualify a legislator who may defy a party whip, even if it means voting against his conscience, or against the interests of his electorate. 'Participative democracy' would, by definition, mean a process by which there is continuous and effective participation in the decision-making process. Negatively stated, it would not permit uncontrolled delegation of the decision-making power.

13 E.g. the legal services Authorities Bill raked up a controversy because it envisaged an inter-relationship between the executive and the judiciary which would breach the cautious norms of the separation of powers doctrine. But once the Bill was enacted into law in 1987, the dissent died down to a whisper seeking amendment.

14 Eg. Customary law, common practice, historical and religious texts and prescriptions.

15 The increasing dependence on the law and order enforcement agencies – eg. the police- is noticeable in areas as wide-ranging as the Code of Criminal Procedure, 1973 and the Arms Act, to the Juvenile Justice Act, 1986 (including their role in identifying and apprehending 'neglected' juveniles) and the Immoral Traffic (Prevention) act, 1956: i.e., from the original law and order context to the 'social justice' context.

16 In *Central Inland Water Transport Corporation Ltd. V. Brojo Nath Ganguly* (1986) 3 SCC 156, the Supreme Court has held that 'there has been no well-recognised head of public policy, the courts have not shirked from extending it to new transactions and changed circumstances and have at times not even flinched from inventing a new head of public policy'.

These are merely some of the presumptions that have empowered law itself in popular perception. Water law is no exception to this. A representative study of the laws relating to water prompted serious doubts about these presumptions. What did emerge was disturbing in its intent, its effect and its magnitude.

II. THE COLONIAL CONTEXT

Indian water law can be viewed generally in its three contexts—the colonial, the post-colonial and the constitutional. The colonial context is chronologically identifiable and ends somewhere between 1947, when India became independent, and 1950 when she became a Republic and gave unto herself a Constitution. The post-colonial period continues to this day in the form of unrepealed legislation of the colonial era. The constitutional era is of relatively recent origin, and is manifested both in statutes and in court decisions. Both post-colonial and constitutional law form the extant body of law on the subject.

The complexion of the law in these contexts is distinct. Colonial water legislation was characterised by its unmistakable intent to generate revenue. The control that the state sought to exercise through its officialdom was with the clear intention of maximising revenue. This accounts for the generous bestowal of powers upon officialdom including the power to delegate such powers ‘to any person acting under the general or Special order’ of such official.¹⁷ Post-1950 legislation on the other hand does not so expand its definitions of officialdom.

A. Empowerment

This empowerment of officialdom was enunciated along with a statement of the duties of the officials. The missing element was liability. The absence of this vital link between power and duty intentionally resulted in lack of accountability.

This empowerment took many forms other than the direct power of the official for instance to levy water rates¹⁸ act upon a decision of ‘expediency’ to construct a canal or embankment,¹⁹ permit third party user of private source.²⁰ It also permitted the official to compulsorily requisition labour upon the threat of sanction, in the event of what he considered an emergency,²¹ or even demand labour without wages.²² He could authorize

¹⁷ See ss. 8 and 9, Bombay Irrigation Act, 1879 (hereafter Bom IA)

¹⁸ s. 46 Ibid.

¹⁹ S. 7, Bengal Irrigation Act, 1876 (hereafter Beng IA)

²⁰ Ss. 66 and 67, Ibid.

²¹ S. 58, Bom IA. See also Orissa Compulsory Labour Act, 1948. The long title reads: ‘An Act to make compulsory labour lawful ... and to provide for the enforcement of customary labour on certain works of irrigation in the State of Orissa’. The Constitution proscribes forced labour (Article 23) but compulsory requisitioning of labour continues to be extant law.

others to act on his behalf.²³ The collection of rates could even be farmed out²⁴ to ensure that the maximum collection of revenue results.

B. Maximisation

The intent of the law was clearly revenue maximisation and efficiency.²⁵ A colonial state was hardly likely anyway to have a greater concern for equity than for revenue. A necessary incident of such value maximisation was ownership. All water sources then had to be the responsibility of some identifiable person.²⁶ Whatever was not demarcated as being 'owned' would thereafter residually vest in the state.²⁷ An 'owner' would, under the law, have to maintain his water source at an efficient level,²⁸ allow access to other persons for use,²⁹ and even for constructing schemes on his water source,³⁰ if it would enhance the user of water thereby enhancing the revenue to be collected. In the event that the water source could be better used by official calculation of expediency, the only remedy would be compensation payable as determined by officialdom.³¹ Colonial law makers also saw the commercial non-use of -all potentially usable water as 'wastage'.³² While the language employed read 'used', the import shifted then from 'use' to 'exploitation' of the resource. Needless to say, the purpose was greater revenue. To ensure optimum use of water, officials carrying out the work for the state were statutorily given a wide range of powers. The right to trespass with impunity was carefully engrafted on to every statute. Not only may he trespass where he found the need- a matter of subjective satisfaction- but he may also cause damage on the property of another in the process of the trespass.³³

C. Rights Depletion

The control that colonial laws gave the official, and through his person, the state, not only permitted unfettered right of entry to the official but also by permission of the official to

22 S. 26 Punjab Minor Canals Act, 1905. It provides that 'the State Government may ... direct that irrigators ... shall be bound to furnish labour free of cost to government for the purpose of effecting the annual silt clearance ...'

23 Supra note 16.

24 S. 82 Beng IA

25 An understanding of law which centre its vision on economics would find much to commend in this result. See Richard A. Posner, *Economic Analysis of Law*. Hereafter, read 'revenue maximization' and 'value maximization' interchangeably.

26 Or institution, body etc.

27 'Ownership' is relevant in outlining the duties of, the rates payable by, and the compensation which may accrue to the 'owner'. Where water sources cannot be related in these specific terms, the legislations presume that all the empowering incidents of ownership vest in the state.

28 Ss. 21 and 61 (10), Bom IA

29 Ss. 22 and 23, Ibid.

30 S. 17, Ibid

31 All Acts, generally provide for compensation in the event of a substantial diminution in the enjoyment of the incidents of ownership. The mode of quantifying compensation, and its determination was solely within the purview of the executive.

32 The 'wastage' of water occurs in, for eg., ss. 31 and 71 of the Punjab Minor Canals Act, 1905. It is not defined, but is to be interpreted in the midst of other terms carrying positive connotations, like 'authorized distribution of water' and 'efficient maintenance and working'. 'Unauthorised use' and 'wastage' of water are equated by the Act

33 Eg. S. 17 Andhra Pradesh Rivers Conservancy act, 1884.

any other person.³⁴ To take an instance, a canal officer may permit any person to use a water course or even to become a joint owner even where the owner may be an unwilling party.³⁵ This control over water sources was in fact extensive and included for instance the power of acquisition of private water sources;³⁶ the power to convert the use of water and to divert the flow;³⁷ the power to allow access to, and use of, water from privately owned sources even by an ex parte order.³⁸ This statutory whittling away of the rights of owners, users, and the generally unmentioned community converted ownership into a non-status, and made intrusive control by the state of the greatest significance.

D. In Good Faith

There were two other statutory devices in colonial legislation which bolstered these powers of the state: the 'good faith' clause, and the 'ouster' clause.³⁹ A good faith clause presumed every act of an official to be bona fide: he may make a mistake, but there is a possibility of error in all human activity. An officer of the state – euphemistically called a public servant-had to be permitted a wide margin to enable him to function effectively. This in any event was a cautious clause to extend and widen the area of protected errors, because the law itself of ten times provided permission for the official to trespass on another's land, to do any damage, to take away user rights, and even to take away all rights in a water source altogether.⁴⁰ This clause was therefore an expression of the sovereign immunity of the state and an iteration of the principle that a state can enact itself out of the reach of law. It must be said, even if with some chagrin, that this clause

34 Ss. 50 and 51, Beng. IA

35 Ss. 22 and 23, Bom IA.

36 S. 8 (2), Punjab Land Preservation Act 1900

37 S. 17, Punjab Minor Canals Act 1905.

38 S. 3, Uttar Pradesh Irrigation (Emergency Powers) Act 1950

39 38 A good faith clause would generally read thus:

(1) No suit, prosecution or legal proceeding shall be instituted against any person for anything done in pursuance of any order made or deemed to be made under this Act.

(2) No suit, or other legal proceeding shall be instituted against the state for any damage caused or likely to be caused by anything which is in good faith done or intended to be done in pursuance of any order made or deemed to be made under this Act. This has acquired a legislative shorthand as it has become a routine insertion in every statute (S.10 Uttar Pradesh Irrigation (Emergency Powers) Act, 1950)

The judicial attitude is summarized in these words: 'There is ... presumption that public officials will discharge their duties honestly and in accordance with the rules of law'. *Pannalal v. Union of India* 1957 SCR 233, 257. An ouster clause would read:

Jurisdiction of courts ousted in certain cases:

Any action taken or thing done under S.2, 3 or 4 shall, subject to the provisions of S.s (2) of S.7, be final, and shall not, save as otherwise provided in any rules made under this Act, be liable to be called in question in any court of law; nor shall any court of law issue an injunction in regard to any action or thing proposed to be taken or done under Section. 2, 3 or 4 (S. 8 A.P. Irrigation Works [Repairs, Improvement and construction] Act, 1943)

40 Supra.

along with the ouster clause has become a natural adjunct to most statute law now enacted.⁴¹

This clause particularly caused the death of 'accountability'. It also provided a fertile breeding-ground for corruption.⁴² The extent of reliance on subjective satisfaction of officials leaves a lot of discretionary powers in their hands. Situations requiring immediate decision-making or ground level handling may not be capable of specific legislative application and expression. Executive action, the reasoning goes, therefore demands executive discretion with a shelter from liability. This was the justification for the good faith clause. Not only was executive discretion unfettered, it was also vast. Even the best intentioned executive would be unable to comprehensively use the discretion given to, it. Thus protection was required not only for acts done but also for inaction. This has left a lot of scope not merely for discretionary, but arbitrary, action or inaction. There are two evident effects of this device, and its usefulness. Since the executive has the power to act, but no liability if they do not, they have the power of selected application of laws.⁴³ Its effectiveness has also led to increasing statutory appropriation of powers for the executive.

The sanctity attaching to statute law as the law of the 'state' lent an unquestioned validity to these provisions. It would have been utopian to expect that this phenomenon of vast powers without liability would be used only to the 'general good of the people'. This empowerment of state instrumentalities through statute law was therefore clearly intended to disempower a people, and the legitimacy that attached to enacted, codified law was used to achieve this.

E. Ouster

If the actions of the executive could not be challenged and no liability lay on account of a presumption of good faith, their decisions could not be questioned in courts of law either.⁴⁴ The classical theory of separation of powers requires a separation of powers among the three organs of state- the legislature, executive and judiciary. Water legislation however invested executive decision-making with finality. This was an exercise in pragmatism. If the decision regarding change of user, compensation for trespass and damage, and assessment of water rates were to be allowed to be agitated before the judiciary it may have detracted from the effectiveness of the value maximisation

41 S.48 Water (Prevention and Control of Pollution) Act, 1975 and S. 17 Environment (Protection) act, 1986 provide weak exceptions by introducing the notion of liability of a government department. See also 'Regime of Sanctions in Water Resources Management' P.K.Chaudhary in Water Law in India, supra note 2. 141.

42 'Public Servants' are also protected from prosecution by S. 21 of the Indian Penal Code, 1860 and the Prevention of Corruption Act, 1947 which require prior sanction for prosecution. This apparent attempt to shield them from frivolous or vexatious prosecution actually provides them a complete immunity which leaves them unfettered, almost, to act as they will. See also Liberty and Corruption: The Antulay Case and Beyond, Upendra Baxi (1989).

43 The passage of laws without considering their effectiveness in implementation is a matter of much concern. The extending tentacles of power in the hands of public officials provides them a complete immunity which leaves them unfettered, almost, to act as they will. See also Liberty and Corruption: The Antulay Case and Beyond, Upendra Baxi (1989).

44 Supra Note 38

procedures prescribed by colonial legislation. Executive expediency and executive norms would have had to meet the test of judicial considerations. Efficiency would have had to take a back bench to equity and common law norms of fair play and justice. 'Discretion' would have been replaced by 'judicial consideration'. This would have been counter-productive in a revenue generating statute. The delay occasioned by judicial proceedings- now proverbial- would have been another handicap to expeditious revenue generation, and the attention of the executive would have been constrained to be diverted, to whatever extent, to judicial proceedings.

The ouster clause was the remedy for this probable problematic, and provided an effective way out of executive answerability. It allowed the executive to start and complete proceedings in revenue matters in their own domain. The ouster clause has in general been in conjunction with the good faith clause and provided a shield to executive actions, inactions, and decision-making. The ouster clause too has survived the decades and like the good faith clause has wandered into a variety of territories that law encompasses.

F. Forced Labour

Every effort was made to ensure that the revenue generating nature of land and water resources was safeguarded. This necessitated the absolute control- to be exercised when, and only when, the officials may choose to exercise such control- of the resources. The human resource was also statutorily requisitioned in times of emergency. The Compulsory Labour Acts⁴⁵ provided the authority for requisitioning every able-bodied person from the labouring classes, and every able-bodied male from the other classes, to provide labour in times of emergency- for instance, where there was a breach of an embankment or a fear of one which was expected to flood the village. It is interesting that these Acts prescribed liability for a person refusing to contribute labour to work which by local custom was usually executed by 'the joint labour of a village community'. The possibility that the intrusive nature of state legislation may provoke resistance from a village community was sought to be overridden by the threat of sanction.

The bias of colonial legislation towards revenue garnering is unmistakable when one considers the areas in which law was enacted. The laws related to irrigation works navigation channels and drainage works.⁴⁶ In fact a large number of these legislations related directly only to cess. The objective of efficiency for revenue maximisation left little scope for recognising basic needs. These legislations, while they could be extended to all available sources of water, saw no need to make even a residual provision for basic needs, like drinking water. However, in the rare instance that drinking water has been mentioned, it must be said to the credit of the colonial law makers that they recognised the non-compensatable nature of drinking water. If any supply of drinking water was 'substantially deteriorated or diminished' by any works undertaken, the remedy was not

⁴⁵ For eg. see Orissa Compulsory Labour Act, 1948 supra note. 20.

⁴⁶ For a partial compilation of water law statutes, see Siddiqui, supra note 2.

compensation, but' an adequate supply of good drinking water' 'within convenient distance'. Even a revenue-oriented legislation could recognise certain basic needs!

G. Statutory Sanctions

A feature of colonial legislation that deserves some concern is the threat of sanction that attends the actions, or failure to act of the individual. When this is juxtaposed with the invulnerability of state action, its purport becomes clearer. Every individual, or a community of individuals with rights over a water source has the power to use it any manner they deem best. The decision or action of the individual would depend upon his judgment of what he deems proper, and the extent to which he is willing to act. He may therefore permit only partial utilisation of his water source, may not be willing to allow a third party on his land or to use his water source or may not use his water source, or may not convert the user of his water source. He may not deem it right to build an embankment or construct a dam across the water source over which he exercises ownership rights. By legislative provision, his decision however was liable to be overridden by an official of the state, whose judgment would prevail. If he did not maintain his water source in a manner which met with the approval of the official, the latter may trespass on his lands, carry out any repairs he may consider necessary and recover the costs from the individual. The official may cause any damage to the individual's property- he would merely have to compensate the individual as executive judgment deemed fit. If an individual did not provide labour under the provisions of the Compulsory Labour Acts, he could be penalised. Where water was allowed to 'run to waste', the person through whose act or neglect such water ran to waste would be penalised. But where the person was unidentified, all the persons chargeable in respect of water supply from such water course would be liable for the water so wasted. In short then, the legislations provided a framework to insure against any revenue loss. The only remedy for any person whose water source was taken over by these powers vested in state instrumentalities, or whose property had been damaged in the process of official, or official-permitted, action was compensation. This too was not an unqualified remedy. For instance, an Act may prescribe that only 'substantial damage' may be compensated. Or that any damage caused may be compensated at Public Works Department rates.⁴⁷ There *is* an interesting anomaly in the law-making vision: in one Act it enhances the revenue payable where a scheme implemented on a water source results in increased percolation leading to improved crops. In another Act, it refused compensation for damage to crops caused by increased percolation. That is, where the effect is revenue generating, the law demands recognition of the benefit; but where damage results, the state disclaims responsibility.

III. POST-COLONIAL: OF CONTINUITY AND SUCH

This understanding of the import and effect of colonial legislation is imperative to understand its influence on post-colonial legislation. There are significant similarities and explainable difference between the colonial and post-colonial law-making approach. A

⁴⁷ S. 10. Orissa Compulsory Labour Act, 1948

striking feature of the post-colonial laws is continuity. Many of the laws enacted to further colonial interest have simply been continued. The revenue exacting irrigation, drainage, embankment and water-based resources laws have not changed complexion at all. Some verbal changes have been effected after the Constitution took effect. For example, the term 'labourers' in the Compulsory Labour Acts has been replaced by 'persons', but the substantive provisions remain virtually unchanged. Two explanatory notes appended to the Bengal Irrigation Act 1876, illustrate this vividly. They read:

The words 'Provincial Government' were first substituted for the words 'Lt. Governor' by para 4(1) of the Government of India (Adaptation of Indian Laws) Order, 1937. Thereafter the word 'State' was substituted for the word 'Provincial' by para 4(1) of the Adaptation of Laws Order, 1950. The words 'Servants of the Crown' were first substituted for the words 'Officers of Government' by para 3 and Schedule IV of the Government of India (Adaptation of Indian Laws) Order, 1937. Thereafter the word 'Government' was substituted for the word 'Crown' by para 4(1) of the Adaptation of Laws Order, 1950.⁴⁸

Whether this retention of colonial laws can be interpreted as an expression of positive intent to continue colonial policy may be moot. The factum of ultimate and absolute control over water sources (as over land, in fact more so) is, however, categorically retained. Deliberations between 1946 and 1949 of the Constituent Assembly resulted in the Constitution which came into force on January 26, 1950. Members of the Constituent Assembly, particularly those on the drafting committee, were representative of the participants in the freedom struggle. The landed interest and Princely States were also generously represented. The country was being torn apart by the partition into India and Pakistan and the optimistic pangs of birth of a newly independent state were not free of the pangs and fears that beset partition. It would have been a defiance of history, and ahistorical, to have sculpted any but a centralised Constitution. Yet the plurality of interests and the extent of territorial reach could not have witnessed a non-federal structure. Hence, the division of powers between the Centre and the States in the Constitution. While the legislative and executive power had been apportioned between the Centre and the States, pragmatism demanded that extant laws, should not be jettisoned because of their colonial bias as it would leave a vacuum.

An expression of this continuity of colonial law is witnessed in express terms in the Constitution. It provides for the 'continuance' in force of the existing laws and their adaptation.⁴⁹ This article of the Constitution does not presume the repeal of existing law, and their re-enactment by the Constitution. It presumes that the pre-existing laws shall be continued in their operation, unless expressly repealed.⁵⁰ A challenge to the validity of pre-existing law would require testing it against other constitutional provisions: if the law is in dissonance with any constitutional provisions, the law would fail. There is also a

48 The Government of India Act, 1935 was a prelude to the 1950 Constitution. That explains the dates of the two Adaptation of Laws Orders.

49 Article 372 of the Constitution of India (COI)

50 Constitution of India, D.D. Basu under Article 372.

specific prescription for constitutionally negative any pre-existing law that overrides the fundamental rights, a set of 'negative' rights recognized as fundamental in the Constitution. These would be the matter of debate in the judicial arena and the subject of judicial interpretation. A conservative judiciary might well believe that the inconsistency between the pre-existing law and the constitutional provision must be spelled out from the express provisions of the Constitution and 'not from any supposed political philosophy underlying the Constitution'. The extent to which this continuity has influenced the law is such in evidence not only in the actual continuance of colonial law but the terms in which new law is enacted. There is a distinct bias towards bureaucratic control over water resources, expressed in terms practically identical to colonial legislation. The intrusive decision-making powers vested in officialdom are patent. The only remedy remains compensation. Ownership and statutory denial of the right to decide about the use of one's water resource is evident. The notions of wastage, official access to one's property including the right to cause damage, and compulsory labour find prominent places in post-colonial legislations. The good faith and finality clauses are even more liberally used in post-colonial legislation.

IV. CHANGING JUSTIFICATIONS

The explanation for this extensive vesting of powers is however not couched in colonial terms. The inequities in the Indian polity demand positive state action. Logically, then, for the state to act it needs the power to act. Being a pluralistic nation, with a diversity of problems, national planning requires planned use of resources.⁵¹ The population problem adds to the anxiety of the state. Control over resources, therefore, becomes of the utmost significance. This control is exercised in the declared interests of 'public policy' or 'public interest'.⁵² The right to property was a fundamental right when the Constitution came into force, but soon lost its primary position to the transformative impulses of the state.⁵³ Public policy explained this phenomenon. Under the Land Acquisition Act, 1894, (with some major changes brought in it in 1984) any land can be acquired by the state for a 'public purpose'. Courts have accepted that 'public policy' and 'public interest' are not susceptible of judicial interpretation but are exclusively within the executive domain. The control that colonial law-making built into Indian law was legitimated by this reference to the interests of the 'public'.

While colonial law makers were prolific in irrigation-related laws, post-colonial legislators have moved into regulating water supply, sewerage, and preventing water pollution.⁵⁴ These have been responses to urbanization and industrialisation. A common feature of these laws is the centralising tendency they display. A power given to a municipal council for example, to prepare a scheme for the supply of water to the

51 The First Five Year Plan conceived of the utilisation of water resources being planned on a national basis.

52 To illustrate, Article 19 COI, which provides for the protection of certain freedoms (including for example the freedom to practise any profession) permits reasonable restrictions being imposed on their exercise. A recurrent permissible reason for imposing such restrictions is 'in the interests of the general public'.

53 It was omitted by the Constitution (Forty-fourth Amendment) Act, 1978

54 Supra note 46.

population in the area is withdrawn to the State Government if the power is not exercised. There is little anyone can do if the State Government is recalcitrant and, for reasons good or bad, does not act.

The politicisation of the polity and the regular return of the law makers to the populace has not, however, prevented extreme and absolute acquisition of power through statutes. A state enactment 'abolishes' the 'right of user of water'. By categorical statement 'all the existing rights (whether customary or otherwise and whether vested in any individual or in village communities) of use of water, if any, in the areas to which this Act extends, shall stand abolished'.⁵⁵

The territorial division of India into States and the constitutional division of authority among States has left a grey area in the sharing, use and development of river waters. The Cauvery water dispute between the States of Karnataka and Tamil Nadu- the upper and lower riparian users- is a case in point. The agitation of the respective claims of the two States meanders in and out of the realm of water to wander into wholly unrelated, and often irrelevant areas like the political point each Chief Minister may seek to score in their attempts to strengthen their positions. The planned execution of large projects over large rivers is often accompanied by legislations creating Boards invested with powers to help them in the completion of their tasks.⁵⁶ These are instances of bureaucratization through law. Post-colonial legislation is therefore characterised largely by the continuity of colonial laws. It also shows striking evidence of bureaucratisation and a clear tendency to centralise. In the wake of global environment consciousness, the movement for not tampering with nature's resources has received a fillip in India, and the questions regarding the meaning, and model of development have become more strident. While statute law carefully provided only the procedural right to be heard, substantial changes could be effected without answerability. People's movements have demanded a voice in policy making. The question of depletion of one natural resource (for example, forests), in the converted use of another (river water) are being asked demanding a response. The large scale displacement of people in the construction of major projects have been justified in the name of development.⁵⁷ It has meant calculating the economic benefit against social cost – an attitude rightly rejected. But these movements have had to brave the powers that statutes have given state instrumentalities. The Official Secrets Act, 1923 was invoked to contain the protest movement against the construction of the Sardar Sarovar project on the river Narmada. Activists of the Narmada Bachao Andolan (Save Narmada Campaign) have been repeatedly subjected to arrest and police harassment. A book on the Narmada project was banned and seized under the Customs Act and the

55 S.3. Kumaun and Garhwal Water (Collection, Retention and Distribution) Act, 1975.

56 For eg., Betwa River Boards Act, 1956, Brahmaputra Boards Act, 1980.

57 There are only three States that have enacted legislation to deal with the problem of displacement caused by large projects: Maharashtra, Orissa and Madhya Pradesh. These, generally, provide for rehabilitative measures or for monetary compensation. These legislations do not however dilute the power of the executive nor do they allow the displaced persons any say in the decision making process.

powers under the Code of Criminal Procedure are repeatedly invoked to prevent protest demonstrations and meetings.

At least a part of the reason for these ‘anti-’ movements has been the complete absence of people’s participation in the decision-making process, even when their interests and their very lives are vitally affected. The parrot-like repetition of state-empowering and accountability-negating clauses in legislations has only served to presume a power on the part of state instrumentalities while alienating people further. A disrespect for the law and the ‘versus’ vision of the state has naturally followed. In this midst, the Environment Protection Act and the amendment to the Factories Act, 1948,⁵⁸ have provided feeble attempts at permitting popular participation and in allowing people to initiate action to preserve the environment, and human life. The accretion of powers in the hands of the state does not seem to have provided any answers. The problems are of excessive bureaucratization which results in a gradual but sure depletion of the autonomy of the people. The lack of accountability coupled with excessive empowerment has resulted in selective application of the law. In fact, not only in matters relating to water but generally the loudest and least countered complaints are about tardy, or non-implementation of laws. The undisturbed trend of empowerment through statutes has acquainted the instrumentalities with power, to be used, or not used, as they deem fit. This familiarity with power and unfamiliarity with accountability for long decades now is reason enough for resistance to shed any of these powers. The process of decision-making and acting has excluded the people, including the affected people, from its purview for so long now that it has almost acquired a ‘right by tradition’. It is in this context that we have to view right to water as a basic right.

V. THE NATURE OF THE STATUTE

One could well start this exercise with the understanding of what the nature of statute law is, particularly in the context of water rights. This would explain how much of the realisation of the right to water should be effected through statutes, and how to view the presumptions that have underlain laws relating to water for over a century. Colonial codes acquired their sanctity from the worthy promise of the ‘rule of law’. Time-tested usages, customs and practices of long standing which had acquired community acceptance, and established modes of thought and deed, and decision-making and participation would be enacted out of existence to establish the ‘rule of law’.

This acceptance of statute law as overriding has to be subjected to an understanding of the nature of legislation. To begin with, legislation can only be made by the state. Binding duties and sanctions can be detailed only by the state. Naturally it does not impose then on itself, or on its instrumentalities. From this should stem a realisation that there never can be a positive empowerment of a people. It is the prerogative of the law maker to decide on patterns of empowerment, and to expect a product of the lawmaking process which would invite an attack on the law maker’s own functioning would be unrealistic. There is no counterforce that can match enacted law - unless it is revolution.

⁵⁸ S. 41 B of the Factories Act, 1948 after its amendment in 1987. This and related amendments are causally connected to the Bhopal Gas leak disaster.

Statute law is a tool by which a state consolidates its own position. It provides a chain of empowerment, and enables this consolidation. Statute law is by nature intrusive. It could provide for policing, for instance, in its liability connotations. By nature it appropriates (for instance water, land, power). There is no requirement of morality or humaneness to give statute law legitimacy. When statute law provides for a duty without sanctions, for non-performance, that which is in the nature of a duty becomes a power. Statute law has a destructive power in that it can destroy long patterns of usage. The sketch of the growth of statute law, and its traits provides the background against which can be viewed the right to water.

VI. THE BASIC RIGHT TO WATER

The incontrovertible fact is that water is basic to humanity. The right to water ought therefore to be an immutable aspect of human life. Water being basic to human existence, it is not a right that can be waived, less so can it be appropriated. The presumed legitimacy of statute law has pervasively influenced the nature of the right to water. It would bear repetition that among the most prominent effects of legislating for water has been extensive bureaucratisation. This has been accompanied by a lack of accountability which has made absolute the powers given to officialdom by statute. With the revenue-generating and water resource-control impulses of the statutes, it has been only a stray reference to the basic right to water that is witnessed. The purpose of the statutes then seems to be acquisition of control over the resource by the state, and not the realisation of the basic right in water. This perception is important in the light of the presumption that it is only through legislation that anomalies and inequities can be dealt with. And that statute law actually achieves this. The tale of legislation, however, unfolds a different narrative.

Statute law in fact punishes poverty. It has been a process of illegitimising poverty; to be poor is to be illegal. This it achieves by an inordinate importance placed on 'ownership' and purchaseability. This aspect of purchaseability is well understood by reverting to the recognition that the state, through statute law, treated water as a commodity with a tremendous economic significance. The colonial state, and the post-colonial state in unchanging fashion, saw water as a generator of revenue, and used the power of legislation and the magic wand of the rule of law to maximise revenue. That focussed the attention on the irrigation potential of water. Consideration of access to water was integrally linked with the ownership/possession of land, for water purchased for its irrigation potential presumed land to be irrigated. Except very occasionally, there is hardly any reference to the basic nature of the right to water. This treatment of water as an irrigation resource also meant that the right to water got intertwined with the right to land. Also, the intrusive state mechanism could take away a right from the owner of a water source where he owned no land on the revenue maximisation argument of 'wastage'. That water to the extent that it is a basic right should be purchaseable denies the right to any person without purchasing power. This is a direct denial of the basic right to water effected by statute. This perspective of the effect of statute law denies credibility to the inequity-removing presumption that one encounters in the popular perception.

One of the most poignant effects of legislation is the systematic depletion of the avenues of participation of persons, even those vitally affected by the statutory scheme. The development of statute law has generated and perpetuated the disempowerment of the people. The accretion of power without accountability; the absence of people's participation; the ultimate control of the state over all water sources; and the threat of sanctions explicit in statute law have rendered comatose the autonomy of the people. The effect of this lack of autonomy has necessarily been an increasing reliance on the state to perform functions which were earlier within the realm of the community. For instance, dispute resolution would have to await state intervention where it would have earlier been dealt within the community.

It is further to be considered that the plethora of powers and the absence of liability for non-performance of laws, leads to a selective application of laws. Law therefore becomes a weapon in the hands of persons who can wield it. This perhaps explains at least partially the non-transformative nature of water law. The mega-use of water sources (for instance, dams, reservoirs) have been undertaken by the state in keeping with its avowed model of development. This model has both its protagonists and antagonists. A significant factor that has permitted the state to undertake these projects has been the presumption of control over all water sources. The damming of the Narmada was preceded by extensive dialogue, debate and compromises among four States and the Centre, The large number of people who were to be displaced by this conversion of user of water were not even consulted. Protests which followed were quelled forcibly. The Save Narmada Campaign continues to demand the right of the people to be involved in decisions concerning their lives, but law and order statutes are used to quiet the dissent.

The absolutism displayed by the state is bolstered by the law and order power it holds. This power is presumed to be legitimate. But when one considers that a state may by its action deprive the people of rights basic to their existence, without hearing and answering them, the justification for this power is called into question.

The need for state control over water resources has been reiterated in the Five Year Plans which have been the policy statements in a planned economy. The First Plan conceived planning for the utilisation of water resources on a national basis. National plans, centralised Boards and centrally sponsored programmes have been the progression of state action in the harnessing and use of water resources. Statute law is an enabling mechanism in this state planning. Statute law has, on this analysis:

- Engendered and perpetuated inequity, by punishing poverty, by its emphasis on purchaseability, and by its planning on the basis of a definition of the cost:benefit ratio which compares social cost with economic benefit.
- Denied participation to the people in the decision-making process, even where the decisions made vitally affect their lives.
- Disempowered people, and denied them autonomy. It has empowered the state in absolute terms, and has accustomed state instrumentalities to power without

accountability. Given the decades long acquaintance with this power, it would be unrealistic now to expect a voluntary process of disempowerment of the state itself.

- Bureaucratized the use, management, sharing of water and the dispute resolution and compensatory mechanisms in the water regime.
- Permitted the use of water and water sources and their conversion as the state may deem to be in the 'public interest' or in the interests of 'public policy'. The re-ordering of the entire universe of water is therefore left in the hands of the state. There is no direct answerability either, except through the institutions of a representative democracy, for a where political interests prevail.
- Made water and water rights entirely compensatable (except for occasional statutory deference to the basic need for water).

Statute law, as this study demonstrates, has clearly acquisitive tendencies. It bolsters the position of 'ownership' and state power, and consolidates the control of the state over water. Its utilitarian and economic position denies the consideration of the basic need of every person to water. Water being basic to humanity, the processes which apply in the management of water and water sources have to be in consonance with one fundamental norm: that the least common denominator in relation to water cannot be less than an irreducible minimum.⁵⁹

The right to water is an inalienable right, that is, to the extent of the irreducible minimum it cannot be sold or bartered away.⁶⁰

Incapacity to purchase cannot be made a criterion in the enjoyment of this basic right. Conversion of user of water cannot lead to a negation of the right to water of any persons even where such conversion may create other substantial beneficiaries. The notions of ownership and control being capable of denying a person this basic right, have to be replaced by more equitable norms. The individual-consciousness of the norm of the irreducible minimum finds no champion in the centralizing statute.

That the overriding nature of statute law has invariably caused the decline and destruction of community values, customs, usages, and practices has to be recognised by the state, and to enter popular consciousness. The motive for this destruction is suspect: revenue maximisation as the goal of the colonial state and its continuance with an emphasis on the control over all water resources, in the post-colonial state. The method is the statute: intrusive, a creation of the state, overriding in its nature even while it destroys all existing forms of law or social control. The effect has been excessive an absolute control in the hands of the state; non-consideration and therefore denial of the norm of the irreducible minimum and a compelled voicelessness of the people. This however is not an analysis that goes so far as to ask for the cessation of the enactment of legislation altogether. It

⁵⁹ The Maharashtra Municipalities Act, 1965 conceives of 70 litres of water per person as a statutorily prescribed quantity.

⁶⁰ This has been recognized in relation to Tribals land at least on the statute books eg. the Chota Nagpur Tenancy Act which applies in the predominantly tribal areas of Bihar. This recognition is reflected hardly at all in the law relating to water. In fact, the Kumaun Act expressly abolishes the right to water (supra note 67), while the Punjab Minor Canals Act, 1905 explicitly denies the acquisition of a prescriptive right to water [S. 10 (3)].

only seeks to demonstrate that some of the prevailing perceptions of legislations are based on an inadequate understanding of what legislation is capable of doing, and what it has in fact done. If the state is to legislate in the realm of water, there will have to be a renewed understanding of what statute law should do, and how it will be kept within these bounds.