

Water as an ethic: three ways of talking about water, rights, and conflicts

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1. Introduction

We remember growing up in social milieus in which regular access to water was not guaranteed. Till, say, ten years back, growing up in small towns and villages in Karnataka and Odisha meant that even playing with water was a taboo. If a drop of water got split on the floor, or on the dining table, and a child started drawing something with it, immediately she would have been admonished by an elder, especially by the grandparents. This was because of a folk belief that playing with water resulted in droughts was still strong then. The need to conserve water was deeply embedded in the strictures and taboos that governed everyday life.

The links between water and what constitutes ethical social practice in India go very deep. In many of the purānas (histories that are hybrid narratives of genealogies, stories and historical events around people, places, deities and lineages) one of the ways in which the gods punish wayward kings who do not follow the dharma was by visiting droughts upon the kingdoms that they ruled. The corollary to such narratives was the fact that all rulers and kings could hope to increase their powers in the material world, and win merit for the other world by constructing water bodies.

In this context, David Mosse details out the ways in which the creation of water bodies in Ramnad district, exercises of political power, and notions of ethical practice all fed into each other for centuries all together. The creation of tanks was supposed to accrue merit for the rulers of the region. But the creation of such water bodies extended land under paddy cultivation in the area, and increased its human population, and thus, the number of subjects for the rulers as well (Mosse 2003).

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Even now when the rise of the developmental state has significantly eroded the autonomy of communities, it is not unusual to come across instances of people constructing and maintaining communal water bodies because of the merit that is supposed to accrue to one because of such charitable acts. Merit or dharma is supposed to accrue to people if they created public water bodies; but there were strictures against polluting water bodies as well. These were also a matter of taboos; urinating, defecating, or polluting rivers and tanks were taboos, and were seen as reprehensible acts.

But the past in India was not completely unproblematic. Water was also a site where caste differences and differentiation were built. The relationship between various *jāti* groups was mediated through the ritual and symbolic values of water. Generally speaking, in most regions of India, *jātis* have apparently been ranked according to a gradation imposed by water. Generally speaking (and this is a huge generalisation) a person belonging to a *jāti* that was less powerful and esteemed could and would accept water from the hands of someone belonging to a more powerful and esteemed *jāti* and not vice versa. Similarly food cooked in ghee or oil could be eaten by anyone, no matter what its source was. But the acceptance of food cooked in water was subject to strictures similar to the strictures governing that of acceptance of water. Thus, water played, and many would argue, continues to play, an important role in the reproduction of social roles and institutions in India; it might also be said that it is at the center of Indian conceptions of the good life.

But it can be argued that this way of acting upon the world is no longer available to us. Moreover, these ways of acting upon the world, specifically with respect to water, might even be in contradiction with the supreme morality – constitutional morality – that purports to govern our actions in post-independence, republican India. Increasingly access to key resources in India are framed through the discourse of rights; this is true for a resource like water as well. In this, the discussions in India also reflect the international narratives surrounding water rights.

Increasingly the international discourse surrounding water is framed through the trope of war and conflicts (Gleick 1994). The narrative of water conflicts can be seen as a narrative parallel

to that of water rights. Often conflicts are seen as either arising out of poorly defined rights or as a result of conflicting notions of rights – for example, as a result of conflicts between customary rights and property rights. Therefore, a discussion on water rights and water ethics might be relevant to any discussions on water conflicts.

2. Water rights

Increasingly discussions surrounding water and rights have three important strands; the first one has to do with that of property. This discussion, primarily of an economic and public policy persuasion, argues for the necessity of seeing water as an economic good, and sees property rights as one way of ensuring ‘proper’ transactions related to water. The second strand of discussions happens around rights of states over water, and the ‘water wars’ discourse dominated this for a while. The third strand of discussions occurs around the ‘human right’ to water, and the ways in which entitlements to minimum levels of water can be ensured to all, especially for the poor and the underprivileged. In some sense one can see at play the perceived dominance of three sets of socio-political actors in these three strands: the first strand privileges ‘the market’ and corporations; the second strand foregrounds statist concerns and tends to legitimise the state as the actor par excellence in the water sector; the third strand foregrounds ‘people’, and ‘society’.

Property rights over water

According to the UN agencies water gained recognition as an economic good after the declaration of the Dublin principles in 1992. A large part of the discussion surrounding water and property rights have been around seeing water as an economic good, getting the price right for promoting efficiency, and for ensuring the sustainability of water usage. The discussion surrounding property rights and water in India have been about pricing and cost recovery (Rogers *et al.* 2002). This discussion has had two foci; water for irrigation, and urban drinking water.

Treating water as a public good and its management, especially that of irrigation water, by state agencies, is seen to lead to inefficient usage of water. Market-based mechanisms

are seen as alternatives. There are two broad sets of reasons that are given for preferring water markets over administered pricing. Treating water as a public good, and the consequent administrative delivery, is seen to be captured by interest groups. The governmental administrative bodies are also perceived to be inefficient. The critiques of free-market solutions argue that water markets need significant regulation. Moreover, private property rights over water need enforcement by the government; the need for such enforcement creates problems similar to those involved in treating water as a public good, and the consequent administered pricing and delivery. Moreover water markets fail regularly. The introduction of private property rights over water, and the consequent markets mechanisms, do not automatically guarantee efficiency. Market-based mechanisms also do not always take into account issues surrounding water equity (Routray 2010).

Recently, there have been a few cases in India where urban municipal bodies have tried to privatise water distribution in cities. The proposed changes to bring in market-based mechanisms in the water sector (in the case of both irrigation water and urban drinking water provisioning) are seen as part of a broader neoliberal trend in governance in India. As Priya Sangameswaran discusses in the case of Maharashtra, urban drinking water, rural drinking water, and irrigation water are increasingly subjected to a greater drive towards private sector participation that changes the discourse of water provisioning by depoliticising the imperatives and practices of governmental organisations. The neoliberal goal of self-sufficiency is propped up as a desirable goal; the questions of feasibility and desirability of this in a sector such as water (especially urban drinking water) is forgotten (Sangameswaran 2009).

We are not arguing that one need not 'get the price right' at every instance. In fact, in the way water usage is charged for urban drinking water and irrigation water, it is the rich farmers and urban middle class and upper-middle class citizens that get most of the benefit. The concerns of the poor and the vulnerable are rarely parts of the policy discourse. The water bills of the rich and the relatively better off need not be subsidised. But rationalisation of subsidies does not need to translate to either fixing property rights over water or to merely 'getting the price

right'. In times of growing agrarian distress and rapid expansion of urban population in India, using arguments of inefficiency of governmental provisioning of water to push for privatisation of water can only be termed as misguided.

States' rights over water

The international conventions, rules and declarations that frame discussions surrounding rights and water, not very unpredictably, foreground states as the legitimate social actors in the sector. These deal with rivers that flow through more than one country. The Helsinki Rules and the UN Convention of 1997 are important in this regard as these provide the principles of sharing transboundary river waters. The Helsinki Rules deal with issues surrounding pollution, navigation, and timber floating *etc.* But the UN Convention of 1997 does not deal with environmental and relevant human rights concerns in an integrated fashion. With respect to transboundary river waters, upper riparian states often claim absolute territorial sovereignty and control over the water within their borders with scant regard of effects on downstream states. Downstream states tend to make claims about the absolute integrity of the watercourses, and demand the non-disturbance of the quantity and quality of water flowing from the upstream states. The Helsinki Rules provide the principle of "equitable utilisation" that recognises the right of riparian states of usage of water from common sources if they do not interfere unreasonably with the usages of other riparian states. It must be evident that Helsinki Rules treat international transboundary rivers and their drainage basins as indivisible hydrologic units, and, these are expected to be managed as a single unit (Mohan 2010).

The Berlin Rules on Water Resources expand the scope of the Helsinki Rules and the UN Convention of 1997. The Berlin Rules enumerate five principles applying to the states related to participatory, conjunctive and integrated management, sustainability, and the minimisation of harm to the environment. The Berlin Rules also posit three additional rules relating to water sharing in an international transboundary context; these are cooperation, equitable utilisation, and the avoidance of harm. As it must be evident from this discussion, states do not have absolute rights over the waters of transboundary water bodies (*ibid*).

In the Indian context, water is listed under Entry 17 of the State List in the Constitution of India. This entry is subjected to the provisions of Entry 56 of the Union List. The latter Entry gives the Central Government powers to legislate on matters related to interstate rivers. But this Entry has not been used to the fullest possible extent. Further Article 262 of the Constitution provides adjudicatory function to the Centre in conflicts related to interstate rivers. The Inter-State Water Disputes Act (ISWD Act) 1956, that provides for the formation of tribunals for settling transboundary river disputes, was promulgated under this Article (Mohan and Routray 2011).

Water as a human right

The discussion in the preceding sub-section showed that international principles, rules and frameworks for water governance as well as the Indian constitution frame issues surrounding water through a statist optic. This neglect of the social aspects of water usage is definitely not unique to these. Academic work on social issues related to water has generally dealt with issues of efficiency and sustainability. Comparatively speaking, less attention has been given to issues surrounding equity (Routray 2010).

In this regard there is an increasing move to argue for a human right to water that tries to take into account these concerns of equity. Scholars argue that from an individual's perspective there are clear advantages to having human rights over water. The social benefits of recognising such a right are perceived to be significant. The question is whether such a human right to water should be a right subordinate to other human rights such as right to health and right to life (as recognised by the international bill on human rights) or should it have an independent recognition. In either case, institution of a human right to water will have far reaching consequences. There are difficulties associated with the fragmentation of the right to water. Thus, the Committee on Economic, Cultural and Social Rights of the United Nations Economic and Social Council (ECOSOC) has taken a non-fragmented and holistic approach in order to ensure the required water supplies to realise the rights under The International Covenant on Economic, Social and Cultural Rights (ICESCR). This can be seen from the ECOSOC's General Comment 15 in

November 2002; this note recognised the right to water as an independent human right. This Comment is non-binding, and does not spell out the obligations of the States to ensure the human right to water. But it is significant as it provides the basis for an independent human right to water (Blumel 2005).

A human right to water would entail obligations to respect, protect and fulfill. This will involve ensuring access to water with a specified quantity and quality in a non-discriminatory fashion. Ensuring water rights might be difficult because attempts at ensuring one community's rights might violate another's; big dams are a good example of this. There are further choices to be made between the right to water, and the right to development. This is an important set of choices to be made, since industry is amongst the biggest polluters of fresh water sources, and cleaning up pollution by shutting down, relocating or adapting to cleaner technologies will have developmental costs. From the perspective of the states, such an approach is seen to put constraints over adequate cost recovery. These costs are perceived not as merely financial, but as legal, cultural and institutional ones as well. These costs will vary according to socio-economic, cultural, and political contexts of specific countries. South Africa has already enshrined the human right to water as a part of the country's constitution, and has started taking steps to ensure the enjoyment of such a right by the country's citizens. Argentina also has an explicitly stated right to water in its constitution, and has taken steps within its court system to protect this right (*ibid*).

Ensuring the human right to water: the Indian case

In India a quantum of 150 lpcd and 200 lpcd of water has been put forth by the NCIWRDP in the rural and urban areas respectively; a common norm of 100lpcd is seen as sufficient for both (Iyer 2007). In India's constitution, the right to water is not stated explicitly; but this right is implicit in the constitutional right to life that has been interpreted by Indian courts to include a right to clean and sufficient water. The right to water has been derived by the courts in India from Article 21 of the Constitution that provides for the right to life. The right to water in India has evolved through judicial interpretation, and not through legislative action. This is evident in the judgments being passed by the judiciary in cases such as *Narmada Bachao Andolan v. Union*

of India, M.C. Mehta v. Union of India and A.P. Pollution Control Board v. Prof. M.V. Nayadu. In these cases the Supreme Court has passed injunctions upholding the state's duty not to pollute water resources, to prevent potential pollution of drinking water during industrial development, to improve the sewage system, and, to provide clean drinking water to all its citizens. The Supreme Court of India has also declared groundwater to be a public asset (Narain 2010)

Questions surrounding water rights in India are also issues about access. In large parts of rural India caste-based barriers to accessing water, especially drinking water, are still prevalent. There are laws that try to deal with this situation; for example, s.3 (xiii) of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 deals with problems of scheduled caste and scheduled tribe communities with respect to access to water, and makes it a punishable offence for persons belonging to non-ST/SC communities to either obstruct usage of sources of water by SCs and STs, or to spoil such sources of water. It must be mentioned in this regard, that traditional managers of water bodies in the commons (such as tanks), especially in peninsular India, often belonged to the SC communities. But irrigation laws in Andhra Pradesh and Tamil Nadu do not acknowledge the roles of such traditional water managers and their rights. With regard to other uses of water such as those by traditional fisher folk, the changed polices of the state often affect them adversely. As this shows, governmental policies are often inconsistent with the constitutionally given and judicially interpreted right to water. The need to adequately operationalise such a right stems not merely from constitutional and juridical imperatives, but also from such international imperatives as the Millennium Development Goals, and the obligations under General Comment No. 15 (Muralidhar 2006).

3. Water as an ethic

In contrast to seeing water as a right we posit that there is a need to frame discussions surrounding water and equity in terms of an ethic. This is important in the context of India where rights, especially property rights, add to the potential for conflicts embedded in situations of water sharing. Water as a resource itself comprises of an ethic. Unlike other 'static' resources such

as land and minerals, water is dynamic. It is also renewable, and this characteristic of water makes physical exercise of a 'right' – in the sense of excluding other potential users - difficult. Because as a resource water can be used multiple times for multiple usages, it can lend itself as much a site for conflict as for cooperation.

In this regard, instead of figuring out details of what will be the legal, economic and institutional repercussions of constituting water as an ethic, we here list out a few principles that may help in taking the discussion on water, equity and rights forward. These are based on the understanding that duties and rights are intertwined; every right, as we learnt as students in school, has a corresponding duty. The peculiar nature of water makes the fulfillment of these duties an imperative. Water is essential for life, and is the basis for obtaining other capabilities such as food and health that are necessary for human wellbeing. Hence, discussions surrounding water and equity have to go beyond the narrow and legalistic calculation of rights and duties; a discussion of water as an ethic has to frame these debates.

The first principle that has to be kept in mind while discussing about water and equity, and, therefore, about water as an ethic is that of ideological pragmatism. As seen in the earlier sections of this essay, discussions surrounding water and rights are often framed around ideological positions that seem to foreground states, or markets, or communities as custodians par excellence of water as a resource. One needs to get away from this kind of ideological polarisation with respect to water. In some instances, for example, in densely populated urban areas, provisioning by governmental organisation might make sense, whereas facilitation of community provisioning of drinking water supplies might be more relevant in thinly populated rural areas. Major subsidisation of domestic water usage of poor urban citizens might be necessary whereas rich rural farmers undertaking cash crop cultivation might deserve minor or no subsidy support.

The second principle to be kept in mind is that of subsidiarity. If water can be provisioned at a lower scale of administration or community, then that should be encouraged. This also means that the responsibility is on organisations on a higher level to follow rules such as no-harm to the resource.

The third principle that has to frame discussions surrounding water as an ethic is a Gandhian one – it is the principle of *antyodaya* (roughly translated it means putting the last, or the weakest, at the first). With respect to water, in practice, it will mean that in the event of any conflict with respect to claims or access to water as a resource, the claims and concerns of the weaker party in a dispute should be foregrounded.

The fourth principle that has to frame discussions surrounding water is the indivisibility of water as a resource and the way it can work as an integrative device in thinking about issues surrounding development and equity. Current processes of development violate the ‘bodies’ of sources of freshwater such as rivers, tanks and lakes with impunity. Socio-economic planning and its implementation takes place in India as if water and water bodies are incidental to such a process. Especially with respect to urban water resources, city planning has to take place as if water mattered. It will help us think and act about issues of inequity in other resources such as land and forests in a much more integrated fashion.

4. Steps to be taken

If we see water as an ethic, then one cannot merely hand out a set of prescriptions that are context-independent. But certain broad directions in which things need to start moving soon can be indicated. One needs to identify a minimum quantum of water (for drinking, cooking, sanitation, and health) that is an entitlement of every person on account of being a citizen of India. Because of obvious reasons, this will need to be minimally defined, and governmental agencies responsible for ensuring supply and access of this water will need to be identified. Instead of targeting the vulnerable, the attempt should be to ensure universal access to this quantum of water. A code will also be needed to be developed for governmental organisations for dealing with pollution of fresh water sources. Similarly, corporate liability will need to be defined banning usages of certain types of common resources of surface and groundwater for commercial purposes. A place has to be created for civil society organisations so that they can act as catalysts for desirable change for ensuring the right to water, for watching over the activities of government

organisations and corporations, and for playing a pedagogic role with respect to the wider public (Muralidhar 2006).

5. Conclusion

There was an older ethic of water that governed the usage of the resource in India informed by a certain understanding of Dharma. Under the constitutional morality that is supposed to guide resource use in postcolonial India that ethic is not available to us any longer. The discourse that is available to us is one of rights. As we saw in this essay, there are three important ways of thinking about water and rights in the world as well as in India. These three are – private property rights over water and issues surrounding cost-recovery; rights of states over water according international laws and conventions and the possibilities of cooperation and conflict between states based on these rights; and the third being around the human right to water. This essay is most comfortable with the third way of talking about rights. While recognising a human right to water it is necessary to start thinking about water in new ways. Thinking about water as an ethic, and the principles that can govern such an ethic, might be one such way in which we can perhaps start thinking about water, equity, and rights productively. This will also help us to prevent water conflicts, and to be able to deal with them in more effective ways.

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