

PUBLIC TRUST DOCTRINE: IMPLICATIONS FOR DEMOCRATISATION OF WATER GOVERNANCE

*Paromita Goswami**

A National Water Framework Law imbued with a thorough understanding of the Public Trust Doctrine has the potential to transform the existing state-centred water regime into a democratised space for people's participation. However, the existence of two contradictory drafts of the law, both claiming to incorporate the public trust perspective and yet with divergent implications for social equity and ecological sustainability has led to a need for further discussions in the public domain. This article argues that the details of legislation will determine the future trajectory of democratisation of water governance in the country rather than a mere invocation of the Public Trust Doctrine.

I. INTRODUCTION

India inherited and kept intact a plethora of colonial water laws, which underpin a centralised surface water governance system.¹ The colonial government had created a system to assert its 'sovereign' rights that were deemed to be at a higher level than mere proprietary rights of individual landholders or customary rights of local communities.² Colonial laws extended state ownership over all surface water resources³ – rivers and wetlands – and

* Activist with Shramik Elgar, a grassroots organisation working in Vidarbha, pursuing Ph.D. in the Centre for the Study of Law and Governance, Jawaharlal Nehru University, New Delhi.

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¹ A study of various colonial water laws beginning with the Northern India Drainage and Canal Act, 1873 shows that the colonial state progressively extended its command and control over natural water resources. These Acts allowed the state to notify natural water bodies for the purpose of diverting them through canal systems, engineered and managed by a hierarchy of 'canal officers'. By early 20th century the colonial state asserted total ownership rights over water e.g. under section 26 of the Central Provinces Berar Irrigation Act, 1931 which stated that 'all rights in the water of any river, natural stream or natural drainage channel, natural lake or other natural collection of water shall vest in the Government'.

² Secy. of State for India in Council v. P.S. Nageswara Iyer, 1936 SCC OnLine Mad 89 : AIR 1936 Mad 923.

³ Important colonial laws include irrigation acts specific to provinces such as the Northern India Canal and Drainage Act, 1873, Bengal Irrigation Act, 1876, Central Provinces and Berar Irrigation Act, 1931. Important provisions pertaining to riparian rights are included in the Indian Easements Act, 1882.

colonial courts, through their orders, ensured that the state retained paramount control over water.⁴ However, in the post-independence scenario, these laws created a dichotomy between the centralised model on the one hand and the demands of democratisation on the other. By the 1980s, with the clamour to expand the spaces for people's participation,⁵ questions regarding the state's dam-centric water management model loomed ahead.⁶

Democratisation of natural resource governance including water is seen as the antidote to over-centralisation of powers in the hands of an inefficient and corrupt bureaucracy. For example, Madhav Gadgil and Ramachandra Guha combine political economy and ecology to argue that the present system of water governance benefits a mere one-sixth of the population comprising of big farmers, urban professionals, industrial workers in the organised sector, bureaucrats and entrepreneurs.⁷ They categorise the rest into 'ecosystem people' – those who directly depend on their natural environment for survival – and the 'ecological refugees' – those who are deprived of their natural livelihoods, displaced from their homes and forced to seek refuge on the margins.⁸ According to them, the unequal distribution of benefits and burdens of the present development paradigm can only be overcome through genuine decentralisation to ensure economic growth, social equity and environmental sustainability:

“[T]he need [is] for a genuinely decentralized political system country-wide, where powers to use natural resources lie not with insensitive and corrupt bureaucracies but with the people who mostly depend on these resources...the self-interest of India's ecosystem people is congruent for the most part with the good husbanding of natural resources, at least in their own localities. The real solution for the long-term health of the environment thus lies in passing effective political power to the people...the record of state-guided development is abysmal, when reckoned by the criteria of economic growth, environmental stability or social equity.”⁹

The moot question that arises, hence, is this – what changes in existing water laws should be brought about to enable a decisive move away from the statist command-and-control model towards a decentralised one?

⁴ Robert Fischer v. Secy. of State for India in Council, (1908) 19 MLJ 131; Secy. of State for India in Council v. P.S. Nageswara Iyer, 1936 SCC OnLine Mad 89 : AIR 1936 Mad 923.

⁵ ANIL AGARWAL & SUNITA NARAIN, DYING WISDOM: THE RISE, FALL AND POTENTIAL OF INDIA'S TRADITIONAL WATER HARVESTING SYSTEMS (1997).

⁶ JEAN DRÉZE, MEERA SAMSON & SATYAJIT SINGH, THE DAM AND THE NATION: DISPLACEMENT AND RESETTLEMENT IN THE NARMADA VALLEY (1997).

⁷ MADHAV GADGIL & RAMACHANDRA GUHA, ECOLOGY AND EQUITY: THE USE AND ABUSE OF NATURE IN CONTEMPORARY INDIA 3-4 (1995).

⁸ *Id.*, 32-34.

⁹ *Id.*, 189-190.

Recent answers to this question revolve around the doctrine of public trust. For instance, M.S. Vani rues the fact that the space for community action and ‘citizen engagement in the governance of water’,¹⁰ has steadily declined from the colonial times to present day notwithstanding the introduction of the Panchayati Raj System and participatory irrigation management. She concludes in favour of the public trust doctrine that:

“Without a shift from ‘eminent domain’ to ‘public trust doctrine’, from ‘bureaucracy’ to ‘democracy’, from policy-based governance to governance by law, current paradigms of water resource use and management will continue to contribute substantially to the unsustainability of the resources of the earth.”¹¹

Similar sentiments are voiced by T.N. Narasimhan, who argues in favour of water legislation imbued with the public trust doctrine as a way to ensure the ‘sharing of power between state and the public at large in regard to water.’¹² Approaching the study of water laws from the perspective of federalism, Kamala Sankaran concludes that the constitutional allocation of legislative powers between Centre and State without providing a voice to the people through the Panchayati Raj Institutions has led to the concentration of decision-making ‘at the very top instead of, on principle, percolating downwards.’¹³ According to her, ‘the traditional Austinian notion of sovereignty had conceived of vesting limitless exclusive powers of legislation on the Supreme Sovereign ... one is struck by the extent to which such ideas in fact disempower people from participating in decision-making.’¹⁴

The Public Trust Doctrine (‘PTD’) is attractive to those seeking an alternative to the statist model because the PTD curtails the state’s unfettered control over natural resources and does not allow unlimited rights. At its core the PTD sees the state as a trustee holding the natural resource on behalf of the public at large including future generations and puts certain limits on state powers regarding what it may or may not do with the natural resource.¹⁵ According to Joseph Sax, state actions regarding transactions around natural resources may be restricted through judicial action on three grounds:

¹⁰ M.S. Vani, *Community Engagement in Water Governance* in WATER AND THE LAWS IN INDIA, 167, 188 (2009).

¹¹ *Id.*, 209.

¹² T.N. Narasimhan, *Water Law for India: Science and Philosophy Perspectives* in WATER AND THE LAWS IN INDIA 535, 555 (1st ed., 2009).

¹³ Kamala Sankaran, *Water in India: Constitutional Perspectives* in WATER AND THE LAWS IN INDIA, 17, 24.

¹⁴ *Id.*, 24.

¹⁵ David Takacs, *The Public Trust Doctrine, Environmental Human Rights and the Future of Private Property*, 717 NEW YORK UNIVERSITY ENVIRONMENTAL LAW JOURNAL (2008).

“Three types of restrictions on governmental authority are often thought to be imposed by the public trust: first, the property subject to the trust must not only be used for a public purpose, but it must be held available for use by the general public; second, the property may not be sold, even for a fair cash equivalent; and third, the property must be maintained for particular types of uses. The last claim is expressed in two ways. Either it is urged that the resource must be held available for certain traditional uses, such as navigation, recreation, or fishery, or it is said that the uses which are made of the property must be in some sense related to the natural uses peculiar to that resource.”¹⁶

With specific reference to water laws, Sax states:

“[O]ne does not own a property right in water...but that he owns only a usufruct – an interest that incorporates the needs of others. It is thus thought to be incumbent upon the government to regulate water uses for the general benefit of the community and to take account thereby of the public nature and the interdependency which the physical quality of the resource implies.”¹⁷

The doctrine definitely places a challenge to the theory of paramount sovereign control, with potentially far reaching consequences for framing rules regarding access, allocations, conflict resolution and so on.

The PTD is the first definitive step towards democratisation. As long as the state claims sole and absolute ownership and control over all surface water, there cannot be any space for peoples’ voice and participation. PTD is the crucial step towards reclaiming that space by changing the state’s status from that of a sovereign owner with primary control over surface water resources, to that of a trustee on behalf of the people. While it is clear that PTD directs the state to act in certain ways, a question may be raised whether the doctrine also allows for the creation and expansion of space for community participation in water governance. One would argue that PTD is the *sine qua non* for people’s participation in water governance. However, since democratisation itself is a continuous project, PTD has to be accompanied by recognising other substantive and procedural rights which consolidates and expands the space for the articulation and balancing of competing interests in society.

¹⁶ Joseph L. Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICHIGAN LAW REV. 477 (1970).

¹⁷ *Id.*, 485.

II. THE PUBLIC TRUST DOCTRINE IN INDIA

The PTD has developed in India through several landmark cases in the Supreme Court. The Supreme Court has deduced this doctrine from various sources such as the Common Law and Article 21 of the Constitution, which guarantees the fundamental right to life, and Article 39 in Part IV of the Constitution which provides for equitable distribution of material resources.

The doctrine was first invoked in 1995 by the Supreme Court in the famous *M.C. Mehta v. Kamal Nath* ('Span Motels case').¹⁸ In this public interest litigation, the petitioner challenged a tourist resort namely Span Motels which proposed to change the course of the river Beas by dredging, blasting and reconstructing the riverbed.¹⁹ The construction of the resort was planned on protected forest land procured on a ninety-nine year lease from the government. The redirection of the course of the river had been approved by the Ministry of Environment and Forests as well as the local *Gram Panchayat*. The Supreme Court ruled that the lease of forest land for resort construction as well as the diversion of the river violated the PTD and therefore were not tenable.²⁰ Importantly, the court declared that the PTD, being part of the Common Law system, was 'law of the land'.²¹

Subsequently, in *M.I. Builders (P) Ltd. v. Radhey Shyam Sahu*, ('M.I. Builders')²² the Supreme Court ruled that the builder who had destroyed a public park during construction of a shopping complex should restore it as the park was protected under the PTD derived from the right to life under Article 21 of the Constitution. Later in the *Fomento Resorts & Hotels Ltd. v. Minguel Martins* ('Fomento Resorts Case')²³ the Supreme Court reiterated that natural resources are common properties held by the state as a trustee on behalf of the people, especially the future generations. Therefore, the state cannot transfer public trust properties to a private party, if such a transfer interferes with the access rights of the public. The public trust doctrine allows the judiciary to protect the rights of public at large to have access to light, air and water and also to protect rivers, seas, tanks, trees, forests and associated natural eco-systems.²⁴ In *Reliance Natural Resources Ltd. v. Reliance Industries Ltd.* ('Reliance Industries Limited'),²⁵ the Supreme Court interpreted Article 297 of the Indian Constitution,²⁶ to find that the people of India as a nation are the

¹⁸ *M.C. Mehta v. Kamal Nath*, (1997) 1 SCC 388.

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

²² *M.I. Builders (P) Ltd. v. Radhey Shyam Sahu*, (1999) 6 SCC 464.

²³ *Fomento Resorts & Hotels Ltd. v. Minguel Martins*, (2009) 3 SCC 571.

²⁴ *Id.*, ¶32.

²⁵ *Reliance Natural Resources Ltd. v. Reliance Industries Ltd.*, (2010) 7 SCC 1.

²⁶ The Constitution of India, Art. 297 ('Things of value within territorial waters or continental shelf and resources of the exclusive economic zone to vest in the Union'. In the given case Art.

true owners of the natural gas. The Court also relied on Article 39 included in Part IV of the Constitution which calls for an equitable distribution of India's material resources to best serve the common good which includes fairness to future generations.

While earlier interpretations of the doctrine saw the obligations imposed on the state as being negative in nature – a review of actions that the state may not perform- recent judgments have started to see such obligations as positive in nature. For instance, the Gujarat High Court has recently ruled that:

“The State as the trustee of all natural resources meant for public use, including lakes and ponds, in under a legal duty to protect them. This duty is of a positive nature requiring the State ...not only to protect the peoples' common heritage of lakes, ponds, reservoirs and streams but to prevent them from becoming extinct and to rejuvenate and preserve them quantitatively... and qualitatively...”²⁷

The very nature of a trust is that it imposes positive obligations on the trustee such that they are bound to use the property rights for the benefit of the *cestui que trust*.²⁸ The higher judiciary has extrapolated this understanding to the PTD, such that not only should the state abstain from certain actions, but the state is also expected to perform positive duties while using water resources to ensure the benefit of the public at large. Although, the higher courts have invoked the PTD to restrict government actions with an eye towards the common good - protection of the environment, a fair distribution of and equitable access to natural resources and concerns for intergenerational equity – in the absence of legislation, the interpretation and enforcement of the doctrine remains doubtful.

III. THE PTD AND NATIONAL WATER FRAMEWORK LAW

The PTD is poised to make an entry into water legislation through the National Water Framework Law. Such a law is being mooted to overcome some of the seemingly intractable problems plaguing water governance in the

297 (1) was interpreted which states that. “(1) All lands, minerals and other things of value underlying the ocean within the territorial waters, or the continental shelf, or the exclusive economic zone, of India shall vest in the Union and be held for the purposes of the Union.” Here ‘vest in the Union’ was interpreted to mean that the Central Government held the natural resources as a trustee on behalf of the people at large and the right and responsibilities of such trusteeship could not be abdicated in favour of private corporate interests).

²⁷ Shailesh R. Shah v. State of Gujarat, 2002 SCC OnLine Guj 164 : (2002) 43 (3) GLR 2295.

²⁸ B.M.GANDHI, EQUITY, TRUSTS AND SPECIFIC RELIEF13, 208-209 (2001).

country today.²⁹ The idea of such a law was powerfully asserted by Ramaswamy Iyer who also headed a sub-group set up by the Planning Commission for the formulation of such a law.³⁰ The sub-group submitted a 'Draft National Water Framework Law' in 2011³¹ ('Iyer Bill'). However, this draft was not accepted by the Ministry of Water Resources which set up a second committee for the same purpose under the chairmanship of Dr. Y.K. Alagh. This second committee too submitted its report including a 'Draft National Water Framework Bill, 2013' in May 2013³² ('Alagh Bill'). However, since then the matter is pending without either of the drafts having been inducted into the statute books.

One of the fundamental challenges faced in framing a national water law is the fact that water is a State subject under the Constitution,³³ although the Centre may legislate for the development and regulation of inter-state rivers and river valleys.³⁴ Both the Alagh and Iyer Bills have worked around this problem to propose that a national framework water law can be passed under Article 252 of the Constitution, *i.e.*, it shall apply to States which adopt it through a resolution passed in that behalf under Clause (1) of Article 252.³⁵ In identically worded provisions, both the Bills state that the Act will apply 'in the first instance to the whole of the States [whose legislative assemblies pass the resolution adopting the Act] and the Union territories; and it shall apply to such other States as they adopt the Act by resolution passed in that behalf under clause (1) of Article 252 of the Constitution'.³⁶

Both the drafts have mentioned the PTD, and yet they have very different emphases with potentially divergent outcomes with regard to democratisation. I shall compare the two drafts with a specific focus on the provisions

²⁹ Ramaswamy R. Iyer, *Why a National Water Framework Law*, THE HINDU (Chennai) January 7, 2013.

³⁰ *Id.*

³¹ Planning Commission, *The Draft National Water Framework Act*, available at http://www.planningcommission.nic.in/aboutus/committee/wrkgrp12/wr/wg_wtr_frame.pdf (Last visited on August 15, 2015).

³² Ministry of Water Resources, Government of India, *Report of the Committee for the Drafting of National Water Framework Law*, 2013, available at <http://www.indiaenvironmentportal.org.in/files/file/national%20water%20framework%20law.pdf> (Last visited on August 15, 2015).

³³ The Constitution of India, Schedule VII, List II, Entry 17.

³⁴ The Constitution of India, Schedule VII, List I, Entry 5.

³⁵ The Constitution of India, Art. 252(1) ('Power of Parliament to legislate for two or more States by consent and adoption of such legislation by any other State' states that '(1) If it appears to the Legislatures of two or more States to be desirable that any of the matters with respect to which Parliament has no power to make laws or the States except as provided in Articles 249 and 250 should be regulated in such States by Parliament by law, and if resolutions to that effect are passed by all the House of the Legislatures of those States, it shall be lawful for Parliament to pass an Act for regulating that matter accordingly, and any Act so passed shall apply to such States and to any other State by which it is adopted afterwards by resolution passed in that behalf by the House or, where there are two Houses by each of the Houses of the Legislature of that State).

³⁶ The Alagh Bill, 2016, §1(2); The Iyer Bill, 2013, Part 2.

that have implications for restricting the state-centred model and allowing space for wider community access, peoples' participation, and local management of water resources.

A. *THE QUESTION OF OWNERSHIP*

One of the core questions with a direct bearing on democratisation pertains to ownership claims over water resources. According to David Takacs the state or a private party cannot claim full ownership rights over natural resources because certain rights inherently accrue to the public at large:

“The Public Trust Doctrine stands for the procedural and substantive rights that the citizens may have in the name of certain environmental resources that are widely understood to belong to them inherently, and to the corresponding duties that sovereigns have in protecting and advancing those rights.”³⁷

The property rights of a trustee are distinct from that of the owner. Ownership is a bundle of rights which includes the rights of access, withdrawal, management, exclusion and alienation.³⁸ First, the PTD does not allow alienation of the property even for fair price and second the rights of management are restricted such that the state as a trustee cannot take any action which will jeopardise the rights of the public.

Both the Iyer and the Alagh Bills invoke the PTD to indicate that the state is not the owner of the resource, and it is saddled with positive and negative obligations as the management decisions that it might take. Particularly the Iyer Bill clearly asserts that water is a “common property resource” and therefore neither the state nor private parties can exert ownership claims thereon.³⁹ The Alagh Bill and the Iyer Bill define PTD in identical terms as “the doctrine that the state holds natural resources in trust for the community.”⁴⁰ The Iyer Bill goes further to specifically deny state ownership by introducing the concept of common pool resource using a non-obstante clause:

“Notwithstanding anything contained in any other law, water in its natural form, such as river, stream, spring, natural surface-water body, aquifer and wetland, is neither state

³⁷ Takacs, *supra* note 15.

³⁸ Edella Schlager & Ostrom, *Property Rights Regimes and Natural Resources – A Conceptual Analysis* in *LAND ECONOMICS* 252 (1992).

³⁹ The Iyer Bill, 2013, Part 2 (“Common property resource” means a resource owned in common by a village or group or community, as distinguished from private ownership or ownership by the state).

⁴⁰ The Alagh Bill, 2016, §2(xxiv); The Iyer Bill, 2013, Part 2.

property nor private property but is a common pool resource of the community to be managed by the community or by the state for the community.⁷⁴¹

The state has created its claims of ownership over water through a plethora of legislations, such as the Irrigation Acts and Revenue Codes. For instance, §20(1) of the Maharashtra Land Revenue Code, 1966 declares that all ditches, dykes, the bed of the sea and of harbours and creeks, rivers, streams, *nallas*, lakes and tanks and all canals and watercourses, as well as all standing and flowing water, which are not the property of persons legally capable of holding property, are the property of the State government.⁴² Similarly, Section 26 of the Madhya Pradesh Irrigation Act, 1931, disallows the use of water resources without the explicit permission of the state authorities based on the state's claims of control over water resources. The 'notwithstanding' or non-obstante clause dismantles all such ownership claims by giving the national framework law the power to override all such provisions.

B. THE RIGHT TO WATER

The right to access, use and manage water has been a bone of contention leading to confrontations between the state and community in the Indian framework. According to Wagle et al., the pre-1990s conflicts revolved around displacements and environmental destruction caused by big dams and other state projects, whereas in the post-1990 scenario, water conflicts arise from diversion of water from irrigation projects for industrial use.⁴³ Controversies have intensified around the question of inter-sectoral allocations and brought into question the state's prerogative of making allocations within and across categories of users. For instance, there was a long drawn struggle by farmers in Amravati against the diversion of water from the Upper Wardha dam for Indiabulls Power Company.⁴⁴ Bhiksham Gujja et al. note that conflicts over inter-sectoral water allocations (as also other types of hydro-conflicts) may increase in the near future.⁴⁵ Against this background, the right to water and the issues of allocation has become increasingly important.

While dealing with the issues of prioritisation and allocation, the Alagh Bill introduces the concept of 'pre-emptive needs' which includes water

⁴¹ The Iyer Bill, 2013, Part 5.

⁴² The Maharashtra Land Revenue Code, 1966, §20(1).

⁴³ S. Wagle, S. Warghade & M. Sathe, *Exploiting Policy Obscurity for Legalising Water Grabbing in the Era of Economic Reform: The Case of Maharashtra, India* in WATER ALTERNATIVES 412-413 (2012).

⁴⁴ Society for Backlog Removal & Development v. State of Maharashtra, 2013 SCC OnLine Bom 366 (The petition challenges allocation of water from Upper Wardha Irrigation Project to Indiabulls Company for power generation).

⁴⁵ Biksham Gujja, K.J. Joy, Suhas Paranjpe, Vinod Goud & Shruti Vispute, 'Million Revolts' in the Making, ECONOMIC AND POLITICAL WEEKLY 570, 572 (February 18-24, 2006).

for drinking, sanitation and ‘other needs as may be prescribed’ which have a higher priority over other uses.⁴⁶ ‘Pre-emptive need’ is not well defined because a list of just two uses- ‘drinking water, sanitation’- is hardly a comprehensive assessment of uses. The most glaring omissions are water for cooking and livestock. There is also no mention of the special water requirements of women. A more exhaustive list would have ensured that water for several other needs would have been prioritised. Rather than providing a clear guideline for government action, this rather restricted list remains open for amendments and additions by state agencies.

Further, the Alagh Bill is quite anthropocentric and to that extent flies in the face of concerns for wildlife conservation and livestock improvements. It states that ‘water ... as a sustainer of human life shall take precedence over other uses such as agricultural, industrial, commercial, and other uses’ (emphasis added).⁴⁷ This limited conceptualisation of ‘pre-emptive need’ and the emphasis on human life has severe implications- for instance, in the case of rural households a quantum of water for livestock is considered to be a high priority.

The Iyer Bill prefers to use the phrase ‘water for life’ rather than ‘pre-emptive’ use thereby making it comprehensive enough to include the water needs of humans as well as non-humans such as - livestock, other animals, birds and even wildlife.⁴⁸ Part 4 of the Bill specifically deals with ‘water as sustainer of life’ and provides that:

- (1) “Water in its primary aspect as a sustainer of life shall take precedence over water in any other aspect.”⁴⁹
- (2) Other uses of water, such as agricultural, industrial, commercial, and others, though important, shall not be such as to jeopardise or diminish the role of water as sustainer of life.”⁵⁰

This provision is linked to Parts 10 and 11 of the Bill. Part 10 deals with right to water in which the Bill states:

- (1) “Every human being and livestock or other domestic animal or bird, shall have the right to sufficient and safe water to meet the requirement of water for life ...

⁴⁶ The Alagh Bill, 2016, §2(xviii).

⁴⁷ The Alagh Bill, 2016., §3(6).

⁴⁸ The Iyer Bill, 2013, Part 2.

⁴⁹ Other aspects include water as an economic good, or commodity.

⁵⁰ The Iyer Bill, 2013, Part 4.

- (2) The right to water for life shall take precedence over water rights, if any, for other uses including agricultural, industrial, commercial, municipal and recreational uses.
- (3) In the case of tribal and other communities dependent on traditional natural water sources including rivers, streams, lakes, springs, and others the right to water for life shall include their right of access to those sources.
- (4) The state at all levels shall ensure the realisation of the right to water for life, and monitor and review it periodically, through a participatory and transparent process.
- (5) In the case of wildlife, their access to their natural water sources and the natural availability of water to them shall not be adversely affected by human actions, plans or projects.⁵¹

The Iyer Bill thus correlates closely not only with the constitutional provisions around right to life (Article 21) but also the state's obligations towards protecting the economic rights of tribals and vulnerable communities (as provided in Article 46). In that respect the Iyer Bill has a strong equity content, which is conspicuously missing in the Alagh Bill. By stating that the state shall ensure the access rights of tribal communities and others who are dependent on water sources for livelihood, this provision substantively widens the scope of PTD. This has huge implications for communities who are today struggling to access water resources. For instance the tribal fishermen living on Madhya Pradesh – Maharashtra borders have been in conflict with the forest department regarding access to the Pench reservoir for fishing, to the extent that they have been shot dead for entering the reservoir.⁵² Thus, Part 10(3) of the Iyer Bill, if enacted, would place such tribal fishermen's claims on a surer footing in law than they have today. The access to the water resource would be part of their fundamental right to life.

Part 11 of the Bill deals with priorities in water allocation, wherein water for life has over-riding precedence followed by other uses. According to this Part:

- (1) "In all allocations of water by governments at any level, or by any other duly authorised body or agency or institution, public or private, the first and over-riding priority shall be for water for life, followed by water

⁵¹ The Iyer Bill, 2013, Part 10.

⁵² Aparna Pallavi, *Tribal Fishers to Move Court after One of Them is Killed by Forest Staff in Pench National Park*, available at <http://www.downtoearth.org.in/news/tribal-fishers-to-move-court-after-one-of-them-is-killed-by-forest-staff-in-pench-national-park-38623> (Last visited on July 6, 2016).

required for all other uses, viz, water for livelihoods for vulnerable sections, water as a social good, and water for agricultural, industrial, commercial, recreational and other uses.

- (2) The *inter se* priorities in allocation for different water uses other than water for life shall be determined by the appropriate authorities or agencies with reference to local circumstances such as local climate, land soil characteristics, water availability, prevalent activities and livelihoods and the land-uses indicated by those circumstances.⁵³

These are important provisions where the Iyer Bill is unclear about prioritisation beyond water for life. Such clarity was necessary in the context of the water sector reforms being ushered in by states such as Maharashtra, Madhya Pradesh, Karnataka, Uttar Pradesh, Rajasthan etc. Maharashtra was the first state to initiate water sector reforms and evoked great criticism when its state water policy 2003, prioritised industrial use over agricultural use such that the government was forced to amend the policy in 2011 and place industry below agriculture.⁵⁴ Against this background an unambiguous guideline was expected from the national framework law.

The issue of right to water is closely associated with affordability,⁵⁵ and therefore, with water pricing.⁵⁶ Recent emphasis by the state on full cost recovery has become controversial because of the fear that the poor may be priced out and their right to water may remain just words on paper.⁵⁷ Given that both the Alagh Bill and the Iyer Bill recognise certain “rights to water” to be ensured by the state, this state obligation should not be defeated through pricing. If the state holds water on behalf of people as a whole, then PTD makes it incumbent upon the state to ensure a minimum quantum of water to the entire population without regard to the ability to pay. Indeed, if the state fails to meet this obligation one could say that the state has failed to meet its public trust. Water as a public trust then agitates against the neoliberal vision of water as a commodity with its emphasis on full cost recovery, water markets and privatisation. Barton Thompson who studies the tensions between the PTD and commodification of water states:

⁵³ The Iyer Bill, 2013, Part 11.

⁵⁴ Paromita Goswami, *Maharashtra's Water Politics: Fate of the Regulatory Authority*, 10-13 ECONOMIC AND POLITICAL WEEKLY (January 2, 2016).

⁵⁵ FORUM FOR POLICY DIALOGUE ON WATER CONFLICTS IN INDIA, LIFE, LIVELIHOODS, ECOSYSTEMS, CULTURE: ENTITLEMENT AND ALLOCATIONS OF WATER FOR COMPETING USES, 20 (2011), available at <http://conflicts.indiawaterportal.org/sites/conflicts.indiawaterportal.org/files/Minimum%20Entitlements%20Report%20with%20cover.pdf> (Last visited on July 6, 2016) ('Policy Dialogue on Water Conflicts').

⁵⁶ *Id.*, 23.

⁵⁷ *Id.*, 27.

“...the public trust vision of water, seems inconsistent with the commoditization of water. Efforts to price water at its full price, promote water markets and privatize the public supply of water often seems to clash with ethical precepts underlying the public trust doctrine.”⁵⁸

The Cochabamba Declaration which followed the successful struggle against Bechtel’s takeover of the water supply system in Cochabamba states:

“Water is a fundamental human right and a public trust to be guarded by all levels of government, therefore, it should not be commodified, privatized, or traded for commercial purposes. These rights must be enshrined at all levels of government. In particular, an international treaty must ensure these principles are incontrovertible.”⁵⁹

The Cochabamba Declaration is the most unambiguous enunciation of the contradiction between PTD and commodification. Against this background it is interesting to see the differences between the Alagh and Iyer Bills.

The Alagh Bill does not interrogate the complexities of pricing or its relationship with the PTD. Rather it accepts water pricing as one of the basic principles of efficient water management:

“Water shall increasingly be subjected to allocation and pricing on economic principles to ensure its development costs, efficient use and reward conservation.

Provided that the principle of differential pricing of water may be retained for the pre-emptive uses of water for drinking and sanitation; and high priority allocation for ensuring food security and supporting livelihood for the poor.

Provided that equitable access to water for all and its pricing, for drinking and other uses such as sanitation, agricultural and industrial, shall be arrived at after wide ranging consultation with all stakeholders through independent statutory Water Regulatory Authority, set up by each State.”⁶⁰

The Bill further provides that:

⁵⁸ Barton H.Thompson, Jr., *Water as a Public Commodity*, 95 MARQ. L. REV. 17 (2011).

⁵⁹ *Id.*

⁶⁰ The Alagh Bill, 2016, §3(18).

“[T]he appropriate Government may provide a minimum quantity of water for drinking and sanitation free of cost to eligible households, being part of pre-emptive need.”⁶¹

‘Pre-emptive need’, according to the Bill, was supposed to be made available to every individual at a higher priority over other uses, yet here it is made amply clear that even this quantum of water shall not be free for everyone. It shall be free only for certain ‘eligible’ households whose eligibility shall be determined by state agencies. The Alagh Bill has little to say about the establishment and functioning of the statutory water regulatory authority beyond the stipulation that every State shall have one for allocation and pricing of water on volumetric basis.⁶²

The simplification of the pricing issue in the Alagh Bill is a direct contrast to its complication in the Iyer Bill. Water pricing is a difficult task because it is determined on the basis of opportunity costs and alternative uses of water. In the Iyer Bill differential pricing is not related to the category of use, rather it is expected to take into account the ‘multiple roles of water as a fundamental right, social good, economic good and a part of history, culture and religion’.

“The price of water shall be based on a differential pricing system in recognition of the multiple roles of water as fundamental right, social good⁶³, economic good⁶⁴, and part of history, culture and religion.”⁶⁵

This sort of wide scope may in fact make the provision most difficult to enforce considering that arriving at a consensus regarding the price of historical, cultural and religious roles of water may be quite difficult. The price of water, according to Rogers, Bhatia and Huber, is arrived at by adding together three types of costs – full supply cost, full economic cost and full cost. Full supply cost comprises of the operation and maintenance charges plus the capital charges. The full economic cost is arrived at by adding the opportunity costs and cost of economic externalities with the full supply cost. Finally, the full cost is arrived at by adding the cost environmental externalities to the full economic cost. Here environmental externalities pertain to the costs borne by

⁶¹ The Alagh Bill, 2016, §6(4).

⁶² The Alagh Bill, 2016, §6.

⁶³ The Iyer Bill, 2013, Part 2 (“[W]ater used for certain common or social or general purposes and not for the benefit of particular individuals or groups, or instance water for use in public hospitals, or public educational institutions or public parks and gardens, or for municipal purposes such as firefighting or street washing”).

⁶⁴ The Iyer Bill, 2013, Part 2 (“[W]ater considered as a good that is scarce in relation to wants and needs, can be put to alternative uses, and has an opportunity cost or exchange or marketable value in some uses”).

⁶⁵ The Iyer Bill, 2013, Part 20 §1.

public health and ecological system.⁶⁶ This type of cost calculation arrives at the economic value of water. Using such calculations one can arrive at costs associated with providing water for drinking, sanitation, municipal use, agriculture, industry etc. However, the Iyer Bill, by including history, culture and religion, forces the issue into non-economic directions. Here, of course, the method of calculation of the value of historical, cultural or religious use of water becomes contentious. This is the weakest provision in the Iyer Bill partly because of the impossibility of assigning fixed values to historical, cultural or religious use and partly because it is unclear how contradictions between the various uses are to be settled. For instance, in a recent case in Mumbai High Court the contradiction between water for religious use and water as fundamental right was brought to the fore when petitioners pleaded that the state should stop providing water for *Kumbh Mela* without first meeting the requirements of drinking water.⁶⁷

While the Iyer Bill is quite clear that commercial agriculture and industry ought to be priced on the basis of full cost recovery or full economic pricing, or even higher,⁶⁸ it is less sanguine about how water for subsistence of vulnerable livelihoods is to be priced,⁶⁹ leaving the task to the state agencies.⁷⁰ Here the Iyer Bill could have ensured some protection for livelihood needs either by way of saying that water for livelihoods would be accorded a high priority (as is stated in the Alagh Bill) or that it would be given water at subsidised rates. Also, this provision seems to step down from the previous provision ensuring tribals and other traditional communities the right to access water sources.

While the Alagh Bill does not consider how water would be priced for social uses such as in public hospitals, firefighting, public gardens etc., the Iyer Bill leaves this for determination by the state agencies.⁷¹ Here too, the Bills could have placed a high priority to social uses as these are common to all people and are crucial for public welfare. This would have been truly in consonance with the spirit of the PTD.

⁶⁶ See Peter Rogers, Ramesh Bhatia and Annette Huber, *Water as a Social and Economic Good: How to Put the Principle into Practice*, available at [http://www.gwp.org/Global/ToolBox/Publications/Background%20papers/02%20Water%20as%20a%20Social%20and%20Economic%20Good.%20How%20to%20put%20the%20principle%20into%20practice%20\(1998\)%20English.pdf](http://www.gwp.org/Global/ToolBox/Publications/Background%20papers/02%20Water%20as%20a%20Social%20and%20Economic%20Good.%20How%20to%20put%20the%20principle%20into%20practice%20(1998)%20English.pdf) (Last visited on May 20, 2016).

⁶⁷ *KumbhMela must be Last Priority in Water Allocation: H.C.*, THE STATESMAN, September 23, 2016, available at <http://www.thestatesman.com/news/india/kumbh-mela-must-be-last-priority-in-water-allocation-hc/166852.html> (Last visited on October 18, 2016).

⁶⁸ The Iyer Bill, 2013, Part 20, § 2(a).

⁶⁹ The Iyer Bill, 2013, Part 2 (“[A]n activity or occupation or employment including self-employment that provides sustenance to an individual or family”).

⁷⁰ The Iyer Bill, 2013, Part 20, §2(b).

⁷¹ The Iyer Bill, 2013, Part 20, §2 and §3.

Although the Iyer Bill has left much discretion in the hands of state agencies where pricing is concerned, it has certain important provisions which have implications for ensuring water for the weakest sections of society:

“Water as a fundamental right and a part of the right to life, shall not be denied to anyone on the ground of inability to pay.

For domestic water supply, a graded pricing system may be adopted, with ‘full cost recovery’ pricing for the middle-income and high-income groups, affordable pricing for those below that level, and a modicum of free supply to the very poor, or alternatively, a minimal quantum of water may be supplied free to all.”⁷²

Through this provision the Iyer Bill is unequivocal in its commitment to water as a fundamental right derived from the constitutional guarantee of the right to life. The ability to pay is not the criteria for accessing the right to water for life. Beyond that the Bill provides two alternatives for domestic water. Both these alternatives include a free supply of water at the very minimum for the poor.

There is a plethora of research on the political economy of water that documents the flow of water from the poor and powerless to the rich and powerful.⁷³ As a response to this the Iyer Bill attempts at redistributing water by penalising ‘profligate use’.⁷⁴ Although ‘profligate’ is not defined, given that this is a framework law, the fact that such a guideline is included itself gives scope for implementing States to decide on the level beyond which they would start penalising users within their jurisdiction. This provision is buttressed by the following provision, which stipulates denial of water beyond a limit.⁷⁵ Once again, the Iyer Bill does not define ‘certain limit’, but if this provision is legislated every State will have to decide the limit beyond which they would not provide water even after payment. These are extremely stringent provisions and ones that could drastically change the patterns of high-end water usage.

⁷² The Iyer Bill, 2013, Part 20, § 4, 5.

⁷³ See AMITA BAVISKAR, *IN THE BELLY OF THE RIVER: TRIBAL CONFLICTS OVER DEVELOPMENT IN THE NARMADA VALLEY* (2nd ed., 2005); Erik Swyngedouw, *The Political Economy and Political Ecology of Hydro-Social Cycle*, 142 *JOURNAL OF CONTEMPORARY WATER RESEARCH AND EDUCATION* (2009); Jasveen Jairath, *Misgovernance of Droughts in India* in *GOVERNANCE OF WATER: INSTITUTIONAL ALTERNATIVES AND POLITICAL ECONOMY* 36, 37 (1st ed., 2008); MAUDE BARLOW & TONY CLARKE, *BLUE GOLD: THE FIGHT TO STOP THE CORPORATE THEFT OF THE WORLD'S WATER* (2011).

⁷⁴ The Iyer Bill, 2013, Part 20, § 6(‘There should be prohibitive penalties to discourage profligate use, and the service should be denied beyond a certain limit’).

⁷⁵ The Iyer Bill, 2013, Part 20, § 6.

C. RIVER BASINS

River basin development centred around the construction of big dams has been critiqued on several counts. The first pertains to ecological destruction due to over-exploitation of river basins. For instance, Brij Gopal compares a river to a living organism and notes, “any human intervention that causes a decline in the flow or obstructs the flow impacts upon the river’s health.”⁷⁶ Similarly, Parineeta Dandekar studies the rivers of the Western Ghats to argue that the over-development of rivers has fragmented the flow of these rivers, leading to basin closures, environmental destruction and human misery.⁷⁷ The human costs due to population displacement and loss of livelihood is another point of critical concern regarding big dams.⁷⁸ While river basins have emerged as the desirable unit for water governance, this is not enough. Without a sensitive understanding of what rivers are and the role they play in the economy as well as ecology, simply using the river basin as the unit of governance will not substantially change the manner in which rivers are governed.⁷⁹ It was expected that the two Bills would reflect these crucial concerns. It would be quite accurate to say that while the Alagh Bill remains statist and reiterates *status quo* in this regard, the Iyer Bill moves several steps forward.

The Alagh Bill devotes an entire chapter (Chapter IV) to ‘Water Resources Projects: Planning and Management.’⁸⁰ Broadly, the Chapter provides that specific legislations should be enacted for the purpose of development, management and regulation of river basins; balanced development of the catchment as well as the command areas should be ensured through integrated water resources management and optimal utilisation is to be ensured ‘with due regard to the reasonable present and future needs for life and livelihoods, appropriate economic activity, social justice and equity and ecological sustainability.’⁸¹ In addition to the above general regulations, the Alagh Bill has an entire section on ‘Project Planning and Management’ which deals with various aspects of infrastructure construction and management.⁸² While it asserts that the “planning and execution of all components of water resources projects shall be carried out in a *pari-passu* manner with concurrent monitoring at project and State

⁷⁶ Brij Gopal, *The Yamuna: Living or Dying* in LIVING RIVERS, DYING RIVERS 20(2015).

⁷⁷ Parineeta Dandekar, *Endangering a Heritage: Rivers of Maharashtra* in LIVING RIVERS, DYING RIVERS 328, 329 (2015).

⁷⁸ Dinah L. Shelton & Donald K. Anton, *Problems in Human Rights and Large Dams*, 27-28 GW LAW FACULTY PUBLICATIONS & OTHER WORKS (2011).

⁷⁹ François Molle, *Water, Politics and River Basin Governance: Repoliticizing Approaches to River Basin Management*, 34(1) WATER INTERNATIONAL, 62-70 (2009).

⁸⁰ David Gilmartin, *Water and Waste: Nature, Productivity and Colonialism in the Indus Basin*, 5057-58 ECONOMIC AND POLITICAL WEEKLY, (November 29, 2003) (David Gilmartin explains how the term ‘development’ when associated with water means the removing water from its natural state through the construction of dams, canals, reservoirs and other infrastructure).

⁸¹ The Alagh Bill, 2016, §7(1) - (4) & (8).

⁸² The Alagh Bill, 2016, §10(1) to (6).

levels with a view to prevent time and cost over-runs”,⁸³ the Bill fails to even cursorily mention displacement, land acquisition, rehabilitation and resettlement. It also fails to incorporate the need for people’s participation in the formulation of the River Basin Plans. In a sense, the Alagh Bill totally neglects to address the crucial concerns raised by academics and activists over the past quarter of a century. By such omission it indulges in a self-defeating exercise as it only serves to strengthen the existing statist water regime.

In the Iyer Bill, the discussion on rivers and other water bodies is initiated in the part titled ‘Water: Heritage, Ecology, Equity’ which is in contrast with the Alagh Bill’s project oriented approach. The Iyer Bill introduces the concept of minimum interference as the desired policy in dealing with rivers and other water bodies:

“There shall be minimum interference in existing natural river flows; in the natural state of water bodies and wetlands; and in flood-plains and river-beds which shall be recognised as integral parts of the river themselves.”⁸⁴

The emphasis is on the preservation and protection of water ecology, social justice and equity as the prime principles that ought to govern water policy, plans and management.⁸⁵ The minimalist approach coupled with the precautionary principle underpins the approach of the Iyer Bill towards rivers. It strongly advocates that the natural flows will be interfered only as an exception and therefore all ‘projects’ such as dams, barrages and storages would need ‘strong and exceptional justification’.⁸⁶

The Iyer Bill deals with river basins not as an object to be developed for optimal extraction, but as a spatial framework for understanding the mutual relationship between land-use and water-use. The Iyer Bill’s stipulation that land-based activities such as mining and industrialisation in water-stressed areas should be curtailed, could have far-reaching implications for water intensive agriculture or industries in areas facing scarcity in quantitative or qualitative terms. It emphasises that river flows adequate to preserve and protect a river basin as a hydrological and ecological system should be maintained at all times.⁸⁷ This is indeed in direct opposition to the present dam-centric approach. Further, the Iyer Bill provides the critical criteria for selection of projects, and an approach towards project-induced displacements which are in total contrast to the Alagh Bill. It clearly states that ‘least environmental impact and no or minimum displacement of people shall be an important selection criteria in

⁸³ The Alagh Bill, 2016, §10(5).

⁸⁴ The Iyer Bill, 2013, Part 3, §2(b).

⁸⁵ The Iyer Bill, 2013, Part 3, §1-5.

⁸⁶ The Iyer Bill, 2013, Part 15, §(1) and (2).

⁸⁷ The Iyer Bill, 2013, Part 8.

the decision-making on projects.⁸⁸ Further, the projects will not be decided by state agencies but shall be ‘based on the free, informed and prior consent of the people likely to be affected by it’ and they would have the first claim over the benefits generated by the project. Finally, the Iyer Bill protects the project-affected people by providing that the state’s resettlement and rehabilitation efforts should ensure that the standard of living and quality of life is at least maintained if not enhanced.⁸⁹

The development versus minimalist approach embodies very different ideological positions on how rivers are viewed. The former approach arises from the faulty and dangerous view that all water that flows to the sea is wasted and that water should be harnessed and put to use. The latter takes a holistic view of water and the wisdom of allowing it to flow unhindered. While the former promotes the existing project-oriented development ideology without much concern for environment or human displacement, the latter takes the view that no such projects should be undertaken without first ensuring minimum environmental destruction as also the free and informed consent of those adversely affected. In effect, the Iyer Bill completely dismantles the project-centric development narrative by prioritising human rights and environmental conservation over infrastructure development. If legislated such provisions will have a vital impact on water governance in the country. First, every individual project would have to be vetted to eliminate alternatives that would be more destructive towards the environment and/or cause more displacement. Second, on a national level, development models such as river linking would have to be re-visited on the fundamental issue of whether such massive diversions in the natural flows of all major rivers in the country is commensurate with the guidelines at all. From the viewpoint of PTD, certainly the Iyer Bill saddles the state with far greater responsibilities regarding sustainable use and conservation of the ecology. It also protects the rights of the project-affected to be consulted, informed, allowed to voice consent (or dissent) before the project is initiated, in addition to their right to proper resettlement and rehabilitation. These are also aspects that directly support democratisation through empowering people in making decisions that impact their lives.

D. SUBSIDIARITY AND INSTITUTIONAL ARRANGEMENTS

Under the PTD the state is no longer the sovereign owner of water resources and therefore it cannot be the sole or even the primary rule-maker regarding the use of the resource. This understanding widens the scope for people’s participation in framing rules about resource access and use. Rule-making itself has two aspects – first, the subject (about what the rule is being made) and

⁸⁸ The Iyer Bill, 2013, Part 15.

⁸⁹ The Iyer Bill, 2013, Part 15.

second the procedural aspects (the forum or space for framing rules). Schlager and Ostrom,⁹⁰ have associated rules with ‘levels of actions’⁹¹ as under:

“As individuals conduct day-to-day activities and as they organize these activities they engage in both operational and collective-choice levels of action ... [O]perational activities are constrained and made predictable by operational level rules ... generally agreed-upon and enforced prescriptions that require, forbid or permit specific actions for more than a single individual ... Operational rules are changed by collective-choice actions. Such actions are undertaken within a set of collective-choice rules that specify who may participate in changing operational rules and the level of agreement required for their change ... Constitutional-choice actions entail devising collective-choice rules. In establishing an organization or changing the process by which the operational rules are devised within an existing organization, individuals engage in constitutional-choice actions.”⁹²

Based on the above categorisations, Lele and Menon have argued that democratisation would mean that a wider range of actors are involved in not just operational actions and rule-making but also in collective-choice and constitutional levels. They have given an example from forestry. In the case of water governance, an example of democratisation would mean that farmers’ groups not only make rules about distribution of water and collection of charges from members which are operational issues, but they are also allowed a say in what the floor rate should be which would be a collective-choice level issue.⁹³

The Alagh and the Iyer Bills deal with participation in very different ways. In a section titled ‘participatory water management’, the Alagh Bill puts the onus on the government to “recognise, undertake and encourage a participatory approach to water management through laws, regulations and administrative measures.”⁹⁴ The Bill makes a special mention of Water Users Associations which would be “accorded statutory powers to collect and retain a portion of water charges after paying for the water charges as may be fixed by the Water Regulatory Authority, manage the volumetric quantum of water allotted to them and maintain the distribution system in their jurisdiction”.⁹⁵ Although named ‘Water Users Associations’, it is clear that these are farmer groups who do not include other water users such as the fishing community. Be that as it

⁹⁰ SCHLAGER&OSTROM, *supra* note 38.

⁹¹ *Id.*, 249.

⁹² *Id.*, 249-250.

⁹³ SHARACHCHANDRALELE&AJIT MENON (EDS.), *DEMOCRATIZING FOREST GOVERNANCE IN INDIA* 19-20 (2014).

⁹⁴ The Alagh Bill, 2016, §15(1).

⁹⁵ The Alagh Bill, 2016, §15(2).

may, the charges and the quantum of water are collective action decisions that are made by the regulatory authority or state agencies, and the farmers are left with the day-to-day maintenance of the infrastructure and collection of dues.

This is a restrictive provision compared to the Iyer Bill which envisages institutional mechanisms to deal with several key aspects of water governance including “basin-level, aquifer-level and basin-aquifer coordination and harmonisation, ensuring the right to water for life, obviating and resolving inter-state river water disputes and obviating and resolving other kinds of water-related disputes and conflicts”.⁹⁶ The Iyer Bill further stipulates that the institutional mechanisms dealing with the abovementioned subjects are built from the village or micro-watershed level and such local level institutions should federate at a higher level in a “nested series”.⁹⁷ In other words, instead of neat categories of largely operational tasks performed by local level institutions and collective choice activities such as basin level coordination and dispute resolution performed by distant authorities, the Iyer Bill allows the local level institutions to participate in the latter decisions as well. Thus, decision-making on a range of issues is decentralised giving communities who are the actual users of water a potential voice in the decisions.⁹⁸ When decisions are made by a distant authority only those stakeholders who have the resources can engage with decision-makers and even influence the outcomes. However, in a nested series of institutions people may engage at different levels. This allows for greater participation and also for the representation of a variety of interests.

The Iyer Bill further provides that the decisions taken in the water institutions should be taken at the “lowest appropriate level”, described as the principle of subsidiarity.⁹⁹ This would mean that maximum decisions could be taken at the local level. Moving decisively away from existing centralised model, the Iyer Bill provides that at each level, the institutions shall include representatives of ‘all categories of water-users, government administrators and technical personnel, and academics and experts outside the Government, and shall be fully participatory’.¹⁰⁰ It is important to note that the Iyer Bill does not see the Water Resources Regulatory Authority as a stand-apart institution with

⁹⁶ The Iyer Bill, 2013, Part 14, §1.

⁹⁷ Nesting refers to the institutional characteristic of local bodies and user groups by which they are linked structurally and functionally with other similarly situated groups in a horizontal manner, as also with administrative and policy-making bodies in a vertical hierarchy. For instance, all the village level bodies such as village watershed committees, *pani* panchayats, water-user associations, etc. can federate at the block level, representatives from several blocks may federate at the district level, from several districts at the region or State level. There could be inter-State coordination mechanisms in case of basins spread over more than one state. For analysis of Indian water institutions see R. MARIA SALETH, *Strategic Analysis of Water Institutions in India: Application of a New Research Paradigm. Research Report* 79(2004).

⁹⁸ The Iyer Bill, 2013, Part 14, §2(a).

⁹⁹ The Iyer Bill, 2013, Part 14, §7.

¹⁰⁰ The Iyer Bill, 2013, Part 14, §3.

the primary mandate of fixing water prices. Rather, it insists that very need for a Water Resources Regulatory Authority should be reviewed on the following grounds:

“That it is truly autonomous, professional inter-disciplinary body, with managerial, professional, mediatory and adjudicatory capabilities built in;

That it is truly consultative and participatory in its composition and functioning and that representatives of civil society are associated with it at all levels and at every stage

That it is decentralised in its own functioning and is also consistent with the constitutional scheme of democratic decentralisation...”

Overall, the Iyer Bill shows a greater commitment towards building decentralised yet nested institutions and ensuring subsidiarity through people’s participation in decision-making over a wider range of issues than the Alagh Bill.

Rainwater harvesting is another arena where community initiatives and participation is considered crucial. In this regard the Alagh Bill mentions one of the basic principles of water management:

“Decentralised local rainwater harvesting and micro-watershed development shall be adopted for water management along with recognizing, empowering and encouraging local initiatives.”¹⁰¹

This provision is *prima facie* adequate in ensuring decentralised rainwater conservation efforts and can be a clear operative guideline for state agencies.

The Iyer Bill too gives strong emphasis on rainwater harvesting to the extent of terming it the “preferred route for water augmentation and management”.¹⁰² However, it advances important conditions in this regard:

“In undertaking the activities ... due regard shall be had to the suitability of the location chosen for structures, possible downstream impacts, and harmony with basin hydrology and ecology.

¹⁰¹ The Alagh Bill, 2016, §3(16).

¹⁰² The Iyer Bill, 2013, Part 17, §1.

Such efforts shall be based on local community knowledge and traditional wisdom as well as modern science.

Customary laws which form part of such traditional wisdom and practices shall be given due recognition by the state, provided they are non-discriminatory.”

Thus, the Iyer Bill keeps the focus on appropriate technology and equity. It shows an awareness of intra-community dynamics by reiterating the non-discriminatory aspect of water sharing.

“Institutional arrangements shall be made ... to protect the harvested water from appropriation by some to the detriment by others.

Such local efforts and initiatives shall be inclusive, equitable and non-discriminatory.”¹⁰³

Although, the Iyer Bill attempts to tilt the scales in favour of decentralisation, it cautions that traditional and informal decision making should not lead to the perpetuation of any form of discrimination. This equity caveat is extremely important since often the discomfort with excessive state control is accompanied with an awareness that community control might prove to be as problematic. Even the smallest community is not a homogenous entity but divided along gender, class and caste lines and therefore power to the community can very well translate into power and resource-cornering by the elite sections of the community.¹⁰⁴ ‘Local’ and ‘traditional’ modes of decision making are increasingly being questioned, for instance because of their dependence on the unpaid physical labour of women and lower castes.¹⁰⁵

E. UNADDRESSED ISSUES

While the Alagh and Iyer Bills have covered an entire gamut of issues related to water governance, there still remain a few concerns which neither addresses. Firstly, while dealing with local water management, the law has to take into account the fluid nature of water, which makes it overflow boundaries. Unlike fixed natural resources such as land and forests, watershed boundaries may or may not neatly coincide with village or ‘community’ boundaries however defined. This complication was pointed out by Amita Baviskar in her

¹⁰³ The Iyer Bill, 2013, Part 17, §5 & 6.

¹⁰⁴ Prakash Kashwan, *Traditional Water Harvesting Structure: Community behind ‘Community’*, 47(7) ECONOMIC AND POLITICAL WEEKLY, 596-598 (2006).

¹⁰⁵ Esha Shah, *Telling it Otherwise: A Historical Anthropology of Tank Irrigation in South India*, 49(3) TECHNOLOGY AND CULTURE, 652 (2008).

study of the watershed development programme in Madhya Pradesh.¹⁰⁶ A watershed can be 'shared' by several villages and also, a watershed development programme may benefit a downstream community more than the community that 'developed' it in the first place.¹⁰⁷ This aspect goes to the core of issues such as ownership, community participation and benefit-sharing. Secondly, there always remains the question of the non-local user. Under what circumstances should users located at a distance be allowed to access and use water resources? This issue needs careful consideration especially in cases where non-local users require access to water that has been augmented by local people. This matter is further complicated when the non-local users are more powerful in terms of resources and have greater ability to influence policies in comparison to village communities. These issues are intrinsically connected with water disputes and have been carefully documented in recent studies.¹⁰⁸ These are situations that primarily deal with the concern that both water and 'community' are sometimes not amenable to neat boundaries. To resolve these, the legislature would have to create mechanisms for negotiations and deliberations, and certainly avoid the short cut of rule by fiat.

IV. CONCLUSION

For the last three and a half decades, India has been searching for an alternative to the colonial legacy of a centralised, dam-centric water governance model that is responsible for demolishing community level institutions of water management, causing environmental destruction, and unleashing human tragedy through displacement of people, especially tribals. The present governance system is underpinned by water laws that uphold the doctrine of sovereign paramourty over water resources. The PTD challenges the premise of the state being the sole owner, controller, allocator and rule maker and offers scope for expanding the space for people's voice and participation.

Our comparison of the Alagh and Iyer Bills shows that mere formal declarations about the adoption of the PTD cannot ensure that the relationships between people, state and water *inter se* will automatically restructure themselves in any particular manner. In spite of invoking the PTD the two Bills embody entirely contrasting ideologies about water, and power-sharing around resource governance. Hence the trajectory of democratisation and the resolution of the state/society conundrum will ultimately be determined through the details of legislation. Against this background, the implications of the PTD in general and the two drafts of the National Water Framework Law

¹⁰⁶ A. Baviskar, *The Dream Machine: The Model Development Project and the Remaking of the State* in WATERSCAPES: THE CULTURAL POLITICS OF A NATURAL RESOURCE, 281,289(2007).

¹⁰⁷ Suhas Paranjape & K.J. Joy, *Understanding Water Conflicts* in INDIA INFRASTRUCTURE REPORT – 2011: WATER, POLICY AND PERFORMANCE FOR SUSTAINABLE DEVELOPMENT, 44-45 (2011).

¹⁰⁸ Policy Dialogue on Water Conflicts, *supra* note 57.

in particular ought to be further debated threadbare in the public domain – and in the legislature.

Undeniably the PTD has important repercussions for democratisation of water governance in the country because it curtails state control and actions on various grounds. However, as the indicative comparison between the Alagh and Iyer Bills shows, there can be two contrasting perspectives about how water ought to be governed even though both claim to be imbued with the PTD. Therefore, the future direction of water governance rests on which of these two drafts is finally enacted, or even the possibility that an entirely new draft enters the statute books. If the Alagh Bill is enacted it will lead to creation of an institutional structure with a strong emphasis on economic efficiency, development of river basins through project construction, an emphasis on participatory irrigation management, creation of State-level water regulatory authorities, etc. On the other hand, the enactment of the Iyer Bill would mean a clear-cut focus on social justice, communitarian and ecological concerns, minimum interference with river flows and wetlands, an impetus to traditional methods of water augmentation, recognition of customary laws and knowledge systems, etc. In many important ways the Alagh draft is geared to maintaining the status quo while the Iyer draft provides an entirely new model of managing water. Therefore, only if the Iyer Bill, or something on similar lines, is enacted into a law will it lead to a decisive paradigm shift with regard to water governance in India.

