Introduction
This chapter examines the status of human right to water and water rights in India today. After exploring the judicially evolved fundamental right to water, it discusses some key points on how water management and development is grounded under the Constitution of India. It goes on to identify areas to strengthen water rights in the country. It then reviews three broad areas within the ‘water sector’ where there has been maximum legislative activity across India since the dawn of the new century and makes some important inferences on the substance of these laws from a rights based perspective.

Right to Water and Water Rights Today
Legally, and conceptually, the human right to water to every person needs to be understood differently from the bundle of water rights available to water consumers and users in the country. Let us first examine the right to water. To the question as to whether there is a fundamental right to water for every person in India the short legal answer has to be yes. This is because such a right has been judicially evolved by the Supreme Court and various High Courts of the country over the years. The judicial creation of a fundamental right to water in India is briefly explored below.

Cases relating to Supply of Safe Drinking Water as Fundamental Right
The right to ‘pollution free water’ and the right of access to ‘safe drinking water’ has been read as a part of ‘Right to Life’ under Article 21 of the Constitution of India. This has been possible because of a liberal and activist interpretation of the fundamental right to life by the Supreme Court as well as the High Courts of the country in series of cases before them. After initially talking about the right to water in the context of pollution cases, courts have delivered a growing body of verdicts on the more fundamental concerns of access to drinking water and on the right to safe drinking water as a fundamental right.¹ One noticeable trend is that

this has happened mostly in cases where inadequate water supply to different cities was legally questioned and challenged. The context and evolution of the right in these cases are discussed below.

In a case relating to the scarcity and impurity of potable water in the city of Guwahati, it was contended that the municipal corporation is responsible for supplying sufficient drinking water. The municipal corporation in its counter affidavit said that while it is well aware about its duties with regard to supply of drinking water to the citizens, due to its financial constraints it could not augment its existing plant. The court made clear that "Water, and clean water, is so essential for life. Needless to observe that it attracts the provisions of Article 21 of the Constitution." Likewise, in a petition filed by an advocate for suitable directions to ensure regular supply of water to the citizens of Allahabad, the High Court reiterated the fundamental right to drinking water. The court cited with approval the Supreme Court's decision holding that the need for a decent and civilized life includes the right to food, water, and a decent environment. In another case, the Supreme Court had observed, "Drinking is the most beneficial use of water and this need is so paramount that it cannot be made subservient to any other use of water, like irrigation so that right to use of water for domestic purpose would prevail over other needs. In view of these decisions, the Allahabad High Court directed that a high powered committee be set up to look into the problem of access to water and decide on the ways and means to solve it on a war footing. The Andhra Pradesh High Court reiterated this position saying that while it is well aware about its duties with regard to supply of drinking water for domestic purpose it would prevail over other needs. In view of these decisions, the Allahabad High Court directed that a high powered committee be set up to look into the problem of access to water and decide on the ways and means to solve it on a war footing. In another case, the supreme court had observed, "Drinking is the most beneficial use of water and this need is so paramount that it cannot be made subservient to any other use of water, like irrigation so that right to use of water for domestic purpose would prevail over other needs." In view of these decisions, the Allahabad High Court directed that a high powered committee be set up to look into the problem of access to water and decide on the ways and means to solve it on a war footing. The Supreme Court held in 'Chameli Singh v. State of UP' (1996) 2 SCC 549: AIR 1996 SC 1051, 'That right to live guaranteed in Article 21 of the Constitution of India cannot be exercised without these basis human rights'. The closest that we came to directly incorporating this right was when the National Commission that reviewed the Constitution recommended in its report in 2002 that a new Article 30D be inserted in the Constitution thus: 'Eevery person shall have the right—(a) to safe drinking water... That recommendation of the National Commission reiterated what the higher courts have been holding in similar words in the past few years. In that sense one may argue that the National Commission was merely recognizing a right to safe drinking water even on the ground of paucity of funds'. In this line of cases in 2006 a Public Interest Litigation (PIL) was decided by the Kerala High Court ventilating the grievances of the people of West Kochi who had been clamouring for supply of potable drinking water, for more than three decades. Noting that the petitioners 'have approached this Court as a last resort' the Court held that:

We have no hesitation to hold that failure of the State to provide safe drinking water to the citizens in adequate quantities would amount to violation of the fundamental right to life enshrined in Article 21 of the Constitution of India and would be a violation of human rights. Therefore, every Government, which has its priorities right, should give foremost importance to providing safe drinking water even at the cost of other development programmes. Nothing shall stand in its way whether it is lack of funds or other infrastructure. Ways and means have to be found out at all costs with utmost expediency instead of restricting action in that regard to mere lip service.

Incorporating Right to Safe Drinking Water directly under the Constitution

Even while the cases above make it clear that there is a judicially evolved fundamental right to water, such a right is not explicitly incorporated under the Constitution of India. The closest that we came to directly incorporating this right was when the National Commission reviewed the Constitution recommended in its report in 2002 that a new Article 30D be inserted in the Constitution thus: 'Every person shall have the right—(a) to safe drinking water... That recommendation of the National Commission reiterated what the higher courts have been holding in similar words in the past few years. In that sense one may argue that the National Commission was merely recognizing a

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3 Para 6 of the affidavit—opposition filed by Gauhati Municipal Corporation and quoted in 1999 (3) GLT 110.
4 At p. 112, para 10.
6 The Supreme Court held in 'Chameli Singh v. State of UP' (1996) 2 SCC 549: AIR 1996 SC 1051, 'That right to live guaranteed in any civilised society implies the right to food, water, decent environment, education, medical care and shelter. These are basic human rights known to any civilised society. All civil, political, social and cultural rights enshrined in the Universal Declaration on Human Rights and Convention or under the Constitution of India cannot be exercised without these basis human rights'.
8 Further, the Court said that since the matter involved technical expertise, the committee should consult experts also in this regards. If any complaints were made by the citizens of any locality that they were not getting water, the committee would look into it and do the needful. See para 9 in S.K. Garg v. State of UP 1999 ALL. L.J. 332.
pre-existing right, not creating a new one! Somehow, the said recommendation of the National Commission that reviewed the Constitution, much like the Report of the Commission itself containing the recommendation, is gathering dust in New Delhi. The fact that it was the National Democratic Alliance (NDA) Government at the centre which had constituted the National Commission—and which soon went out of the government following the submission of the Report—has not helped. Even while recognizing that water is a state subject, and capable of evoking intensely political and emotive reactions, a national consensus in explicitly incorporating a fundamental right to water may not be elusive. Right to education of a child from 6–14 years age is a judicially evolved right which has been explicitly incorporated as a fundamental right under new Article 21A of the Constitution of India. There is no reason why drinking water being more fundamental than even elementary education—and similarly judicially circumstanced as education—should not follow the same route.11

There is another good reason as to why an explicitly recognized and well-defined right to water needs to find a direct entry into the Constitution of India. Chapter 10 of this Report points out, various cases before the courts confirm that the fundamental human right to water is well established. Yet, the actual content of the right has not been elaborated upon in judicial decisions. This has also meant that the judicial response to specific cases on violation of right to water can be adhoc. Even in the cases discussed above, a closer look at the verdicts can reveal fault-lines. Take, for example, the 2002 case in the High Court of Andhra Pradesh. The High Court said that the right to safe drinking water is a fundamental right and ‘cannot be denied to citizens even on the ground of paucity of funds’. Then it contradicted itself. The judgement also says that though the state is under an obligation to provide at least drinking water to all its citizens, ‘the limited availability of water resources as well as financial resources cannot be ignored’. The Court could have categorically declared that the state’s failure to provide safe drinking water was unconstitutional. However, the judge felt that to issue such a direction would be only ‘utopian’.

This judicial ambivalence explains why the rights regime in the country tends to be a right without remedies regime. In the above case while the court desisted from making a categorical declaration, it could say clean water is a fundamental right only because of the soft nature of the operative directions it ultimately made.

Need for a ‘Good Quality’ Right to Water
On a related note, the mere incorporation of a right need not necessarily be seen as remedy or result inducing in itself. There are three conditions for a ‘good quality’ human right to be effective: the right needs to be fundamental, universal, and clearly specifiable. Can the right to water in India meet the said three conditions? While the basic need for, and hence right to, water is universally accepted as a fundamental right, it has struggled to meet the test of specificity in the Indian context. This is simply because it has not been possible to specify a level below which the right to water can be said to be denied. It is for this reason that the literature on social and economic rights produced by the United Nations (UN) over the years emphasizes that all socio-economic rights subject to a regime of ‘progressive realisation’ can only be effective if ‘minimum core obligations’ are built in to them. The minimum core obligation of the state flowing from the right to water of every person has not yet been defined and specified in India either by the legislature or by the courts. Perhaps it is time to clearly recognize that a certain quantity of water (litres per capita per day or lpcd) is a most basic human need and should be seen as an inviolable part of the fundamental right to water.12

Explicit incorporation of a right that is fundamental and universal and, more importantly in the Indian context, clearly specifiable in terms as laid out above has the potential to catalysing changes in law and policy in the

11 There are other countries in the world where the Constitution specifically mentions a fundamental right to water including South Africa, ‘everyone has the right to have access to sufficient water’ and Ecuador, ‘the human right to water is fundamental and irrenounceable’, amongst others.

12 Say 40 lpcd—same as the Rajiv Gandhi National Drinking Water Mission rate to provide safe drinking water to the ‘problem villages’ and to the rural population—is a minimum requirement. On this specific point see Upadhyay (2003a).
area. A categorical carving out of a fundamental right to water in the Constitution of India has the potential to mobilize the people, the media, and ultimately the decision-makers. Besides, it can serve to underline the fact that ensuring a certain quantity of water to every person in the country is a non-negotiable and mandatory legal requirement. This is important given that the new national guideline for drinking water known as the National Rural Drinking Water Programme (NRDWP) states that it is necessary to ‘move ahead from the conventional norms of litres per capita per day (lpcd) to ensure drinking water security for all in the community’. The basic unit now considered is the household, and as noted in Chapter 10 of this Report the key concern with the new framework is that ‘the focus on the individual makes way for a focus on the household.’13 A fundamental right to water to every person in the country making it explicit, categorical, and non-negotiable shall help to bring back the focus on every individual and will set the right legal route towards securing water security for all.

It is also often argued that given the limited financial resources of water utilities how can the incorporation of a right help work in such a scenario? In keeping with the tone and scope of the present chapter, a quick, legal, rights based answer is proffered here. As the author has noted in the past, the argument of realizing social and economic rights ‘progressively’ cannot be used by the government to say that its hands are tied when it comes to giving effect to its ‘minimum core obligation’ in respect of these rights. The fundamental rights under the Constitution of India can only be seen as representing these core obligations. Further, the rights language alone can enforce a cash-strapped, unwilling government to divert money to a cause that it never seriously paid attention to. The point here is not whether we have the resources to honour a right but whether we can shake the modest resource basket that we have, to the prioritize funding of areas more fundamental to our existence. We cannot wait for more resources to provide those conditions that honour the irreducible minimum ‘right to be human’.14 A fundamental right of access to safe drinking water squarely falls in this domain.

Water Supply and Local Self Governance in a Rights—Obligation Framework

In addition to the Constitutional space for a fundamental right of water, the other spaces relevant for water rights and management are Parts IX and IXA of the Constitution incorporated by the now famous 73rd and 74th Amendments to the Constitution of India that were brought into effect in 1993. The 73rd Amendment of the Constitution had cast a Constitutional imperative on all the state governments to come up with an appropriate Panchayat Raj Act detailing meaningful democratic devolution of functions, functionaries, and funds. Specifically, it empowers states to endow panchayats with such powers and authority to enable them to function as institutions of self-government and goes on to list ‘Drinking Water’, ‘Water Management’, ‘Minor Irrigation’, and Watershed Development as subjects under the jurisdiction of panchayats.15 In a similar vein, the 74th Amendment to the Constitution of India recognizes local self governance as an enforceable ideal and obliges the state governments to constitute urban local bodies (‘ULBs’).16 The 74th Amendment also requires that ‘the Legislature of a State may, by law, endow the Municipalities with such powers and authority as may be necessary to enable them to function as institutions of self-government’.17 The ‘matters that may be entrusted’ to the Municipalities

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15 The list can be seen under the Eleventh Schedule to the Constitution of India.
16 The 73rd and the 74th constitutional amendments which provide for local elected bodies to ‘function as institutions of self-government’ in rural and urban areas, respectively are thus important landmarks in the history of Constitutional law in India.
17 See Article 243W of the Constitution of India, relating to powers, authority, and responsibilities of municipalities. It adds that such a law may contain provisions for the devolution of powers and responsibilities upon municipalities with respect to: (i) the preparation of plans for economic development and social justice; (ii) the performance of functions and the implementation of schemes as may be entrusted to them including those in relation to the matters listed in the Twelfth Schedule.
include ‘Water supply for domestic, industrial and commercial purposes’, amongst others.18

Both the 73rd and 74th Amendments to the Constitution inspired changes in the existing state level panchayats, municipal corporation and municipal council laws so as to bring them in line with the mandate under the Constitutional Amendments. It is important to understand these refurbished state laws in a rights–obligation framework. To take one example from a state law, note the provisions of the Hyderabad Municipal Corporation Act, 1955 which provides that ‘The Corporation shall make adequate provision for … the management and maintenance of all municipal water works and the construction and acquisition of new works necessary for a sufficient supply of water for public and private purposes’ [Section 112 (17)] This provision is under the head titled ‘Matters to be provided by the Corporation’ as distinguished from ‘Matters which may be provided by Corporation at its discretion’ (Section 115) and thus it is an ‘obligatory duty’ of the Corporation. Interpreting this obligatory duty of a Municipal Corporation in a similarly worded ‘parallel section’ in the Bombay Provincial Municipal Corporation Act, 1949 the Gujarat High Court had said:

It is therefore clear that it is an obligatory duty of the Corporation to take adequate steps for sufficient supply of water for public and private purposes within the municipal area. In other words the Corporation cannot deny the citizen … the basic amenity of supply of water which is provided to all other inhabitants(s) according to its plans. The obligatory duty is directed towards the management, maintenance and acquisition of water works to ensure a sufficient supply of water.19

Another aspect of the 74th Amendment to the Constitution of India is that while establishment of the ULBs is mandatory, the exact scope and extent of powers to be devolved to the ULBs is left to the discretion of the state governments. However, as the 74th Amendment was enacted with a clear view to strengthening local self governance in cities and towns, any weakening of the jurisdiction or control of the ULBs in terms of vesting of their functions to outside bodies can be seen as violation of the letter and spirit of the Constitution. This requirement should not be interpreted to mean that there can be no unbundling of municipal services, so long as they are accountable to ULBs. This aspect has been made specifically clear by the Memoranda of Agreement (MoAs) entered into by municipal corporations across the country under the Jawaharlal Nehru National Urban Renewal Mission (JNNURM) of the Ministry of Urban Development, Government of India. The JNNURM reform primers also make clear that it is possible for a municipality to arrange to provide water supply services through any agency so long as the responsibility and accountability for the service remains with the municipality. However, in a recent mid-term official appraisal of the Mission, it was found that in many states the water supply function is being carried out by parastatal agencies and mostly by State Water Supply and Sewerage Boards. Even in states showing progress on this aspect there are qualifiers. For example, in West Bengal large projects are designed and implemented by the parastatal agencies but are handed over for operation and maintenance (O&M) to the ULBs. In the same way in Ludhiana ‘major’ water supply and sewerage schemes vest with the Punjab Water Supply and Sewerage Board whereas ‘minor’ O&M projects vest with the Ludhiana Municipal Corporation under the Punjab Municipal Corporation Act, 1976. This is problematic as under the Statute no distinction exists between the major and minor works, thus making the classification of a project as ‘major’ or ‘minor’ arbitrary.

From the discussion so far it is critical to reconcile the fundamental right to water with the mandate for water supply and management with the rural and urban local bodies. First, both the fundamental right and the creation of rural and urban local bodies are non-negotiable, mandatory, and enforceable under

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18 See the Twelfth Schedule of the Constitution of India. Other related matters that may be entrusted to the municipalities include urban planning including town planning, planning for economic and social development; public health, sanitation conservancy, and solid waste management; safeguarding the interests of weaker sections of society, including the handicapped and mentally retarded; slum improvement and up-gradation and urban poverty alleviation.

19 See Gujarat High Court’s decision in National Consumer’s Protection Samiti and Anr v. State of Gujarat & Ors. 1994 (2) GLR 1043.
the Constitution. Second, how and how much of the water supply function are taken out of parastatal agencies/water boards and how the accountability for the service remains with the panchayats/municipalities is to be worked out by the state governments. Third, in any event both the water supply and sewerage boards as well as municipal corporations/councils are ‘State’ within the meaning of the Constitution of India and are as of today duty-bearers obliged to honour the fundamental right to water of every person.

Towards a Group Rights Regime in Water

From the foregoing discussion another important notable aspect is that what has been recognized by the higher courts as a fundamental right is a right to each individual and not to a group. In the context of the fact that all the recent ‘decentralizing’ initiatives of the central and state governments have sought to vest powers to formal village groups and associations, this becomes an important point. In this context, the author feels that ‘The water rights regime needs to evolve conditions under which a group entity can become a right holder so that an entity like a legally constituted village water supply committee (VWSC) or a water users’ association (WUA) can exercise such rights to its advantage. … Apart from developing an understanding on the external water rights of the group, which it can use to its advantage against everyone outside the group, there is a need for better appreciation for internal water rights laying down the right of the group members vis-à-vis each other. A more mature regime on group rights in the water management sector is critical to resolving existing and potential conflicts surrounding access to and control over water resources.’

Even while a more mature group rights regime in water is imperative, given the state of water laws today we are still some distance away from it. The point can be seen most clearly with respect to WUAs that have been created through a series of specific laws passed by various state governments in recent years. The next section begins with a discussion of these laws before noting down some inferences from a rights based perspective.

The New Water Laws of India in A Rights Based Perspective

Three areas within the ‘water sector’ where there has been maximum legislative activity across India since the dawn of the new century are laws creating WUAs, laws creating Water Resources Regulatory Authorities and state laws on groundwater management. This part makes some critical points from a rights based perspective on these set of laws before ending with a discussion about a new law creating an important right for victims of water pollution. Let us first consider the laws creating WUAs.

New State Laws Creating WUAs

Over the last two decades significant attempts have been made to involve the farmers—the beneficiaries of the irrigation canals—in O&M of the irrigation systems in India, as is the case in many parts of the developing world. Farmers’ direct involvement in irrigation system management through WUAs is now almost universally seen as a lasting response to systemic inadequacies in irrigation. It is believed that where the state had failed in the past the farmers will not, and that O&M of the irrigation system by the farmers themselves can change things around. The result has been that state after state in India, and at last count 15 states, have specifically enacted new laws during the period 1997–2010, creating WUAs and supporting ‘Participatory Irrigation Management (PIM)’

A few of these state level laws include: The Andhra Pradesh Farmers’ Management of Irrigation Systems Act, 1997; Madhya Pradesh Sinchai Prabandhan Me Krishkon Ki Bhagidari Adhiniyam, 1999; The Tamil Nadu Farmers’ Management of Irrigation System Act, 2000; Kerala Irrigation and Water Conservation Act, 2003; Orissa Pani Panchayat Act, 2002; Karnataka Irrigation Amendment Act, 2003; Maharashtra Management of Irrigation System by Farmers Act 2005; The Chhattisgarh Sinchai Prabandhan Me Krishkon Ki Bhagidari Adhiniyam, 2006; and The Uttar Pradesh Participatory Irrigation Management Act, 2009. Typically, all these laws empower the ‘project authority’

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20 Upadhyay (2009).

21 PIM refers to the programmes that seek to increase farmers’ direct involvement in system management, either as a compliment or as a substitute for the state role.
to delineate every command area under each of the irrigation systems ‘on a hydraulic basis which may be administratively viable’ and declare it as water users’ area. Every water users’ area is to be divided into territorial constituencies. The laws then provide for establishing a democratically elected WUA for every water users’ area. Every WUA is to consist of all water users who are landowners and members in such a water users’ area.22

Notwithstanding the range of state laws empowering farmers’ participation in the management of irrigation systems, it has been observed that a striking aspect of India’s PIM programme is the little attention that is given to water rights. This has meant that the governments’ rights to water are unchallenged, while its obligations to deliver water to WUAs are rarely legally binding.23 The point needs some explanation here. Almost all of these laws make clear that the WUA has: (i) right to obtain information in time about water availability, opening/closing of the main canal, periods of supply and quantity of supply, closure of canals etc.; (ii) right to receive water in bulk from the irrigation department for distribution among the water users on agreed terms of equity and social justice; and also (iii) right to receive water according to an approved time schedule. However, all these laws do not make it clear what remedies might lay with the WUA if the right to receive water in bulk from the irrigation department is not honoured. In other words, whilst there is a generally worded right, there is no accountability of the department that has been established through these provisions. For this reason it has been argued above that group rights, like those of WUAs under state level laws supporting PIM, need to be strengthened and state level laws need to be revisited from this standpoint.

The other significant point from a rights based perspective is that the rights need to be located in the system. Thus, merely saying that rights exist with WUAs will not be enough if the irrigation systems are not properly rehabilitated to be in such a condition where minimum water flow can be maintained. In a recent study the author opined that given the state of irrigation systems there are at least two minimum conditions that need to be specifically put down as essential first steps in the laws as the way ahead.24 First, with the existing legally empowered WUAs the irrigation departments across states need to carry out time-bound joint inspection of the irrigation canals followed by identification and execution of priority works for rehabilitation of the existing canal systems. This needs to be put down as an essential non-negotiable right of the WUAs because without these talking about their water rights is really putting the cart before the horse. Second, to ensure that a fully functioning turned-over system maintains the water flow in it, the minimum water entitlement of the WUA needs to be built into the laws so that a total volume of water is guaranteed to be supplied to a WUA at agreed points of supply. In other words, before talking about the water rights of the WUAs and the water users their right to water needs to be honoured. The state of Maharashtra has already taken a lead in this regard in the recently enacted Maharashtra Management of Irrigation System by Farmers Act 2005 by building in such water entitlements in the Act.

Even though the laws creating WUAs have come up one after another, there has been no systematic study on how farmer irrigation rights could have been perhaps better informed and defined under these new laws by learning from previous efforts at empowering farmers under the policy and legal regimes in the first five decades of Independent India. In this sense one feels that the new laws have at best responded to a management history of irrigation in India and not to the legislative history. While the states have aimed

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22 These farmer bodies have typical functions like: (i) preparing and implementing a warabandi schedule for each irrigation season, (ii) preparing a plan for the maintenance, extension, improvement, renovation, and modernization of irrigation system, (iii) regulating the use of water among the various outlets under its area of operation, (iv) maintaining a register of landowners as published by the revenue department, (v) monitoring the flow of water for irrigation, (vi) resolving the disputes if any, between its members and water users in its area of operation.

23 Mosse (2003). The author adds: The result (of this position on rights) has been that the government may have lost little control over irrigation resources, and arguably, in establishing registered WUAs has retained its rights and also acquired a new mechanism to extend its influence in rural society.

24 Upadhyay (2010).
at creating legislative intent for PIM they have not yet decided on how to deal with existing legislative intents that run contrary to the spirit of PIM and that still continue to be part of the law of the land.²⁵

**State Water Resources Regulatory Authority and ‘Water Entitlements’**

Laws creating Water Resources Regulatory Authority Acts have been discussed in detail in this volume (see Chapter 21) and are thus not discussed in any detail in this chapter. Suffice it to say that a pioneer and precursor of these laws has been the *Maharashtra Water Resources Regulatory Authority Act*, 2005 (MWRRA). Since then Arunachal Pradesh in 2006 and Uttar Pradesh in 2008 have enacted similar laws. The MWRRA, like the other state laws, defines roles, responsibilities, and powers of the Water Resources Regulatory Authority which is to be set up under the Act. It empowers the Authority *inter alia to make a state water-use plan, assign priority for use of water, determine water allocations to various users, prevent people not allotted water allocations from using it, regulate owners of lift irrigation equipments (after five years from the date of coming in force); it also requires all drilling contractors to register, and requires prior permission before drilling new tube wells.*

A popular claim that MWRRA is creating a water entitlement regime merits closer scrutiny for the present purpose. True, the Act creates a high powered State Water Resource Regulatory Authority which is to oversee the issuance and distribution of water entitlements by designated river basin agencies and, among other things, is also responsible for fixing the criteria for trading of water entitlements or quotas on annual or seasonal basis by a water entitlement holder. However, having explicitly equated entitlements with quotas the Act makes sure that neither the Authority nor the river basin agencies can ever be questioned on the extent of distribution of these entitlements, creating a strange fiction—a system where ‘entitlements’ exist without corresponding obligations to ensure that one receives them! Legally speaking, an entitlement is something that one ‘has a title to’, and more importantly, has this title as a matter of right, that is, a *right to demand and receive*. The new legislations in the water and irrigation sectors never as a rule create any enforceable right to water for farmers or other water users.

**The Evolving Groundwater Law Regime for the Twenty-first Century**

The third legislatively active area in the last decade has been groundwater.²⁶ Before these last ten years or so, only a few states in India had enacted specific groundwater legislation. These laws apply in restricted areas, have limited purposes and generally suffer from a low level of implementation. Most tend to include: (i) restriction of the depth of wells/bore wells/tube wells and (ii) declaration of groundwater conservation and protection zones, especially around sources of drinking water. The implementation of those provisions, including all actions to be taken under these Acts, generally rested with the district collector with no specific role therein for village/community level institutions. The ‘new’ laws of the decade retain all these basic features. These include *The Karnataka Ground Water (Regulation for protection of sources of drinking water) Act, 1999; The Kerala Ground Water (Control and Regulation) Act, 2002; The Andhra Pradesh Water, Land and Trees Act, 2002; The West Bengal Ground Water Resources (Management, Control and Regulation) Act, 2005; The Himachal Pradesh Ground Water (Regulation and Control) Act, 2005;* and *The Uttar Pradesh Ground Water (Regulation and Protection) Act, 2005.*

²⁵ The empowering visions under the best of new legislations seeking to vest powers with the WUAs can be given legal effect only if specific pre-existing laws relating to the subject recognize the space and the mandate of these associations. This is because the new laws make clear that they are to be read in conjunction with the State Irrigation Acts and shall not ‘override’ them.

²⁶ It is pertinent to point out that in pursuance of a specific order of the Supreme Court of India, the Ministry of Environment and Forest, Government of India constituted the Central Ground Water Authority (CGWA) as an authority under the Environment (Protection) Act, 1986 to regulate over-exploitation of underground water in the country. (The Order of the Supreme Court was in *M.C. Mehta vs. Union of India 1997* (11 SCC 312). Specifically, the CGWA is required to regulate indiscriminate boring and withdrawal of groundwater and to issue necessary regulatory directions in this regard. The authority functions under the administrative control of the Union Ministry of Water Resources and has jurisdiction over the whole of India. In addition, the Government of India had formulated a draft model bill in the year 1970 for regulation of groundwater which was revised thrice in 1992, 1996, and in 2005. However, the proposed groundwater bill has not become law for various reasons.
Control of Development and Management) Act, 2005. One essential feature of these laws is that they create a groundwater authority at the state level.

The Himachal Pradesh Ground Water (Regulation and Control of Development and Management) Act, 2005 has some useful additional provisions as well. For example, the Act says that every user of groundwater in a notified area shall pay to the state government a royalty for extraction of groundwater at such rates and in such manner as may be prescribed. However, a user of groundwater who irrigates less than one hectare of land, whether owned or leased or both, shall be exempted from payment of royalties. Further, the Authority may, in order to improve the groundwater situation, identify the areas of groundwater recharge and issue guidelines for adoption of rain-water harvesting for groundwater recharge in such areas.

Two critical cross-cutting points from the various state groundwater laws deserve close appreciation. First, as Philippe Cullet points out, ‘…most of these acts avoid altogether the thorniest question which is the legal status of groundwater itself.’ Historically and legally, groundwater is considered an easement connected to the land. Thus traditionally the owner of land had an unrestricted right to use the groundwater beneath it. However, that position has changed substantially in recent years. In fact, the Andhra High Court has made expressly clear in 2002 that ‘Deep Underground Water’ is the property of the state under the doctrine of Public Trust. The holder of land has only a user right towards the drawing of water in tube wells. Thus neither his action nor his activity can in any way harm his neighbours and any ‘such act would violate Article 21 of the Constitution.’ This legal premise can be seen as the implicit basis for all the recent state groundwater laws setting up institutions that can regulate groundwater use. Thus notwithstanding the failure of the new laws to explicitly make clear the legal status of groundwater, the nature of these laws itself seems to make it clear that Deep Underground Water is the property of the State under the doctrine of Public Trust. This alone provides the explanation behind the power of the state in Himachal Pradesh to extract royalty from every user of groundwater in a notified area.

The second obvious point from these laws is that, notwithstanding the mandate under the 73rd and the 74th Amendment to the Constitution of India (discussed above), virtually no effort has been made to vest any power—even limited management or monitoring powers—to the local rural and urban local bodies. West Bengal has a limited policy like provision requiring the State Level Authority to organise people’s participation and involvement in planning and actual management of ground water resources’ but there is nothing beyond this in the state laws. This is contrary to the buzz around ‘demand orientation’ and ‘people orientation’ more obvious in areas like rural water supply and irrigation management. In fact, in 1999 a Working Group on Legal, Institutional, and Financing Aspects constituted by the Union Ministry of Water Resources, Government of India in the context of widespread alienation with the ‘Command and Control’ mechanism under the Central Model Groundwater law had suggested that the best option is to introduce participatory processes in groundwater management in which the role of the state could be that of a facilitator and the role of the user organization/panchayat as that of an implementing regulatory agency. In this context a famous test case on a village panchayat’s efforts to regulate groundwater withdrawal that is pending today with the Supreme Court for final hearing is discussed in Box 5.1.

27 Cullet (2009: 130).
28 Section 4 of the Indian Easement Act, 1882 defines an easement as ‘A right which the owner of occupier of certain land possesses, as such, for the beneficial enjoyment of that land, to do and continue to do something, or to prevent and continue to prevent something being done, in or upon, or in respect of certain other land not his own.’
29 M.P. Rambabu v. District Forest Officer, AIR 2002 A.P. 256.
30 In this context, the Working Group specifically suggests that in ‘dark’ and ‘over-exploited areas’ the gram sabha as a whole may decide on groundwater management; where villages are large, the sabha could be formed for smaller areas; the use of groundwater for irrigation and sale of groundwater should be approved by the village community; the central and state groundwater officials may be required to extend full cooperation, rendering technical service and advice to the village communities.
Green Tribunal to Introduce ‘New’ Legal Approach to Prevent Water Pollution

We now discuss a recently enacted law, that for the first time recognizes the right of the victims of environmental damage and pollution, including water pollution, to claim damages and compensation. The National Green Tribunal Act, 2010 that came into being as a law in June 2010 for the first time vests the power in a Tribunal to provide for ‘relief and compensation to the victims of pollution and other environmental damage’, ‘for restitution of property damaged’ and ‘restitution of environment’ (Section 15). The Schedule appended to the Act makes it clear that the National Green Tribunal shall have jurisdiction over cases and violations under the Water (Prevention and Control of Pollution) Act, 1974. Thus the Act creates an enforceable right to claim damages and compensation for all victims of water pollution. This is a sharp departure from the provisions under the existing Water (Prevention and Control of Pollution) Act, 1974 where apart from closing down a polluting industry, cutting its water and power supply, and criminal punishment for those responsible for running it there was simply no right available to the victims of water pollution. The National Green Tribunal Act, 2010 introduces such an enforceable right. The Tribunal is likely to become functional later this year and the way it shapes law and jurisprudence in this area remains to be seen.

Conclusion

To conclude, some of the points made in the chapter may be recapitulated. The judicial creation of a fundamental right to water in India has been significant but in specific cases the judicial approach can be adhoc and with fault lines embedded in it. This, and other good reasons outlined in the first part of the chapter, suggest as to why an explicitly recognized and well-defined right to water needs to find a direct entry into the Constitution of India. We need to put behind us a certain judicial ambivalence that threatens to reduce a rights regime to a right without remedies regime. The minimum core obligation of the state flowing from the

Box 5.1
Legal Battle over Groundwater between a Panchayat and a Soft Drink Major: Intriguing Issues in Water and Democracy

The relentless battle of a Kerala panchayat to stop a soft drink major from drawing huge quantity of local groundwater for its bottling plant reached the Supreme Court in 2005 with the court issuing notice to Coca Cola on the panchayat’s plea. The panchayat appealed a decision of the Kerala High Court where the High Court had ruled that the panchayat’s rejection of Coca Cola’s application for renewal of license to extract groundwater was untenable in law (April 2005). While basing its verdict on scientific data provided by the court appointed multi-agency expert committee, the court concluded that the findings of the committee that the factory could safely be permitted to withdraw 5 lakh litres of water a day appears ‘fair, authentic, mature and therefore acceptable’. Notably, in pronouncing the verdict, the Division Bench of the High Court overturned a single bench ruling of the same high court on the case 14 months earlier (16 December 2003). The judge had then held that the government, holding public property of groundwater in trust, had no right to allow a private party to overexploit the resources to the detriment of the people.

The April 2005 judgement of the Division Bench of the High Court stated: The industry has the right to receive water ‘without inconveniencing others’; ‘We hold that ordinarily a person has the right to draw water in reasonable limits’; ‘There is a need to do balancing of ecological rhythm with aspirations of the people in the locality; and finally, the findings of the single judge ‘might not be practical’. In the era of a categorical Constitutional commitment to genuine local self-governance, the moot question is who should decide what is convenient in villages, what is reasonable, what popular aspirations are, and what is practical? Further, if higher courts overrule an elected panchayat’s decision, does it suggest that democratic decisions are not just? The case is an interesting intersection of democracy, justice, and environment and it is clear that the Supreme Court verdict, as and when it comes, has the potential to refine and settle the law on groundwater in India.

right to water of every person has not yet been defined and specified in India either by the legislature or by the courts. It is felt that the time to do that is here and now.

It is also critical to reconcile the fundamental right to water with the mandate for water supply and management with the rural and urban local bodies. Amongst other things, this should make obvious the fact that municipal corporations/councils are duty-bearers who are obliged to honour the fundamental right to water of every person. Also, in the context of the fact that all the recent decentralizing’ government initiatives have sought to vest powers informal village groups/associations, the water rights regime needs to evolve conditions under which a group entity can become a true right holder so that an entity like a legally constituted VWSC or a WUA can enforce such rights. Even while a more mature group rights regime in water is imperative one feels that given the state of water laws we are still some distance and time away from it and a lot of work needs to be done. The critical emerging issues to be addressed on the way ahead (in their specific contexts) have already been explained through a review of new water laws of the last ten years or so and thus need not be restated here.

References

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