

## The law holds no water

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The state holds water resources in trust; it exercises proprietary rights over them

-- The consumerism of post-industrial societies has put natural resources under acute pressure. The worst hit has been water. India is no exception to this crisis. Here, governments have responded by framing laws to manage and conserve this scarce resource. On the face of it, this seems quite a good way to deal with the problem. After all, there should be some measure to arrest unbridled water exploitation.

But our legal framework is ill-equipped to deal with the crisis. For one, the government should realise that a uniform set of rules to regulate water usage throughout the country is neither applicable nor functional. Even common sense dictates that the rules governing water usage in arid Jaisalmer should be very different from those in wet Cherrapunji.

Then, the state continues to regard water as an appendage to private property. This is, in fact, a development of the modern era. Under the Roman legal system, water was never regarded as a resource to be owned: it was categorised as *res extra commercium* (outside the ambit of commerce) and was a part of the commons, *res communes*. But the English legal system departs radically from the Roman one. So, in colonial times, the state became the owner of every single resource in its territory -- from minerals and oil to air and water. Independent India has merely copied the rules made by our erstwhile masters.

A lapsed commitment But how can the state own water, when it does not have any control over its production, usage or its sustainability? It is the general public which has ownership interests over this scarce resource. Water is actually an unassigned natural resource, and should be distributed in a manner that safeguards rights of all claimants. The claims should be based on the principle of equality.

It is here that the much-celebrated Public Trust Doctrine comes into play. The state claims that it holds rights over water -- as well as other natural resources -- as a custodian for its citizens. It draws inspiration from the North India Canal and Drainage Act, 1873, which stipulates that the state should be merely the custodian of all flowing and standing water. But there is a thin line between holding rights over natural resources as a trustee of the people and breaching this trust through rampant

misappropriation. Unfortunately, the Indian state has always behaved as the high-handed misappropriator.

Moreover, government often comes in the way of communities who show enthusiasm in managing water. This is exactly what happened in Lahu ka Bass in Rajasthan. Here, villagers -- with the assistance of a non-governmental organisation (ngo), Tarun Bharat Sangh -- constructed a stop dam/percolation tank upon a tributary of the river Ruparel. But the irrigation department decreed that the structure was illegal and ordered its demolition.

No power for *panchayats* After the 73rd amendment to the Constitution, *panchayati raj* institutions (pris ) were empowered to implement schemes for economic development of their constituencies. As per article 243 (g) of the Constitution, management of water resource is under the purview of *panchayats* . However, the powers of these local institutions very often overlap with that of state and central institutions, bedevilling community management of water. Moreover, part xii of the Constitution -- that deals with finance, property and contracts -- does not have any provision to empower pris. The problem does not end here. Central and state administrative agencies, ngos and pris very often have varying goals when it comes to managing and conserving water resources.

The tussle for power and authority between these agencies bedevil all lofty goals of social justice. Constant bickering among different agencies and contradictory policies has made water conservation a distant reality. Consequently, law as a means to protect natural resources has utterly failed.

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